State of Florida

Public Service Commission

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-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

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Abbreviations and Acronyms

Act	Telecommunications Act of 1996
ADSL	Asymmetric Digital Subscriber Line
AICPA	American Institute of Certified Public Accountants
ARMIS	Automated Reporting Management Information System
ASR	Access Service Request
BOC	Bell Operating Company
BR	Brief
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CMRS	Commercial Mobile Radio Service
CNL	Carrier Notification Letter
CO	Central Office
DACS	Digital Access Cross-Connect System
d/b/a	Doing Business As
DLC	Digital Loop Carrier
DN	Docket Number
DS0	Digital Signal, level Zero. DS0 is 64,000 bits per second.
DS1	Digital Signal, level One. A 1.544 million bits per second digital signal carried on a T-1 transmission facility. A DS1 is the equivalent of 24 DS0s.
DS3	Digital Signal, level Three. A DS3 is the equivalent of 28 DS1s.
DSL	Digital Subscriber Line
DSLAM	Digital Subscriber Line Access Multiplexer
EEL	Enhanced Extended Link
ESF	Extended SuperFrame
EXH	Exhibit
FCC	Federal Communications Commission
FDN	Florida Digital Network, Inc. d/b/a FDN Communications
FPSC	Florida Public Service Commission
FTTC	Fiber to the Curb
FTTH	Fiber to the Home
FTTP	Fiber to the Premises
HDSL	High-bit-rate Digital Subscriber Line
HFPL	High Frequency Portion of the (Copper) Loop
ICA	Interconnection Agreement
IDLC	Integrated Digital Loop Carrier

IDT	Integrated Digital Terminal
ILEC	Incumbent Local Exchange Company
ISDN	Integrated Services Digital Network
Kbps	Kilobits per second
LATA	Local Access and Transport Area
LEC	Local Exchange Carrier
LMU	Loop Make-Up
MCI	MCIMetro Access Transmission Services, LLC
MDF	Main Distribution Frame
MDU	Multiple Dwelling Unit
MPOE	Minimum Point of Entry
NDA	Nondisclosure Agreement
NID	Network Interface Device
Telecom Dictionary	*Newton's Telecom Dictionary: The Official Dictionary of Telecommunications & the Internet, 15th Updated, Expanded and Much Improved Edition*. (New York: Miller Freeman, Inc. 1999)
NGDLC	Next Generation Digital Loop Carrier
NRC	Nonrecurring Charge
OCn	Optical Carrier level N. An optical interface designed to work with a Synchronous Optical Network (SONET). OCn transmission facilities are deployed as SONET channels having a bandwidth of typically 155.52 Mbps (OC3 or the equivalent capacity of 3 DS3s) and higher, e.g., OC12 (622.08 Mbps); OC48 (2.488 Gbps); etc.
OCD	Optical Concentration Device
PAP	Performance Assessment Plan
PCM	Pulse Code Modulation
PON	Passive Optical Networking
POTS	Plain Old Telephone Service
RADSL	Rate-Adaptive Digital Subscriber Line
RDT	Remote Digital Terminal
RNM	Routine Network Modification
RT	Remote Terminal
SEEM	Self Effectuating Enforcement Mechanism
SGAT	Statement of Generally Available Terms
SPOI	Single Point of Interconnection
Sprint	Sprint Communications Company Limited Partnership
SQM	Service Quality Measurement
T1	Trunk Level 1
TDM	Time Division Multiplexing

TELRIC	Total Element Long-Run Incremental Cost
TR	Transcript
TSI	Time Slot Interchange
UDLC	Universal Digital Loop Carrier
ULM	Unbundled Loop Modification
UNE	Unbundled Network Element
UNE-L	Unbundled Network Element-Loop
UNE-P	Unbundled Network Element-Platform
USC	United States Code
VG	Voice Grade
xDSL	"x" distinguishes various types of DSL

Legal Citations

Reference Used in Recommendation	Full Citation
Court Decisions	
8th Circuit 1997	Iowa Utilities Board v. FCC, decided July 18, 1997, 120 F.3d 753.
8th Circuit 2000	Iowa Utilities Board v. FCC, decided July 18, 2000, 219 F.3d 744.
USTA I	United States Telecom Association v. FCC, decided May 24, 2002, 290 F. 3d 415 (D.C. Cir. 2002).
USTA II	United States Telecom Association v. FCC, decided March 2, 2004, 359 F. 3d 554 (D.C. Cir. 2004).
FCC Orders	
Local Competition Order	Order No. FCC 96-325, released August 8, 1996, CC Docket Nos. 96-98 and 95-185, In Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order.
UNE Remand Order	Order No. FCC 99-238, released November 5, 1999, CC Docket No. 96-98, In Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking.
Supplemental Order	Order No. FCC 99-370, released November 24, 1999, CC Docket No. 96-98, In Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order.
Line Sharing Order	Order No. FCC 99-355, released December 9, 1999, CC Docket Nos. 98-147 and 96-98, In Re: 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 in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98.
MDU Order	Order No. FCC 04-191, released August 9, 2004, CC Docket Nos. CC Docket No. 01-338, CC Docket No. 96-98, In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers
Supplemental Order Clarification	Order No. FCC 00-183, released June 2, 2000, CC Docket No. 96-98, In Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification.
ISP Remand Core Forbearance Order	Order No. FCC 04-241, released October 18, 2004, WC Docket No. 03-171, In Re: Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. 160(c) from Application of the ISP Remand Order.
TRO	Order No. FCC 03-36, released August 21, 2003, CC Docket Nos. 01-338, 96-98, and 98-147, In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking.

Reference Used in Recommendation	Full Citation
TRO Errata	Order No. FCC 03-227, released September 17, 2003, CC Docket Nos. 01-338, 96-98, and 98-147, In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability, Errata.
Interim Order	Order No. FCC 04-179, released August 20, 2004, WC Docket No. 04-313 and CC Docket No. 01-338, In Re: Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order and Notice of Proposed Rulemaking.
FTTC Recon Order	Order No. FCC 04-248, released October 18, 2004, CC Docket Nos. 01-338, 96-98, and 98-147, In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Reconsideration.
TRRO	Order No. FCC 04-290, released February 4, 2005, WC Docket No. 04-313 and CC Docket No. 01-338, In Re: Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand.
Florida Public Service Commission Orders	
Prehearing Order	Order No. PSC-05-1054-PHO-TP, issued October 31, 2005, in Docket No. 041269-TP, In Re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.
No-New-Adds Order	Order No. PSC-05-0492-FOF-TP, issued May 5, 2005, in Docket No. 041269-TP, In Re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.; Docket No. 050171-TP, In Re: Emergency petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. for Commission order directing BellSouth Telecommunications, Inc. to continue to accept new unbundled network element orders pending completion of negotiations required by "change of law" provisions of interconnection agreement in order to address the FCC's recent Triennial Review Remand Order (TRRO); Docket No. 050172-TP, In Re: Emergency petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. for Commission order directing Verizon Florida Inc. to continue to accept new unbundled network element orders pending completion of negotiations required by "change of law" provisions of interconnection agreement in order to address the FCC's recent Triennial Review Remand Order (TRRO). This order has been appealed.

Reference Used in Recommendation	Full Citation
Joint Petitioner's Order	Order No. PSC-05-0975-FOF-TP, issued October 11, 2005, in Docket No. 040130-TP, In Re: Joint petition by NewSouth Communications Corp., NuVox Communications, Inc., and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecommunications. Inc.
Verizon Arbitration Order[1]	Order No. PSC-05-1200-FOF-TP, issued December 5, 2005, in Docket No. 040156-TP, In Re: Petition for arbitration of amendment to interconnection agreements with certain competitive local exchange carriers and commercial mobile radio service providers in Florida by Verizon Florida Inc.
Embedded Base Order	Order No. PSC-05-1127-FOF-TP, issued November 8, 2005, in Docket No. 041269-TP, In Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, By BellSouth Telecommunications, Inc.
BellSouth UNE Order	Order No. PSC-01-2051-FOF-TP, issued October 18, 2001, in Docket No. 990649-TP, In Re: Investigation into Pricing of Unbundled Network Elements
Other Commission Orders	
Texas Arbitration Award	Arbitration Award – Track II Issues, issued June 20, 2005, in Texas Public Utility Commission, Docket No. 28821, Arbitration of Non-Costing Issues for Successor Agreements to the Texas 271 Agreement

[1]On December 20, 2005, four separate Motions were filed seeking Reconsideration or Clarification of Order No. PSC-05-1200-FOF-TP. The Commission addressed these Motions at the January 24, 2006, Agenda Conference, although the order setting forth the Commission's decision is pending as of the filing date of this Recommendation.

Case Background

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

On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in 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 (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 the 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 Orders, 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 the Commission determine what changes are required in existing, approved interconnection agreements between BellSouth and CLECs in Florida as a result of changes in law. Pursuant to Order No. PSC-05-0736-PCO-TP, Order Establishing Procedure, issued on July 11, 2005, 31 issues were identified.

On May 5, 2005, the Commission issued the No-New-Adds Order, finding that the TRRO is specific, as is the revised FCC rule, that CLECs are prohibited from adding new local switching as a UNE, effective March 11, 2005.

On July 15, 2005, BellSouth filed a Motion for Summary Final Order or, in the alternative, Motion for Declaratory Ruling. On July 22, 2005, CompSouth responded to the Motion and filed a Cross Motion For Summary Final Order or Declaratory Ruling.

On August 22, 2005, Supra Telecommunications and Information Systems, Inc. filed its Emergency Motion to Require BellSouth to Effectuate Orders for Supra's Embedded Customer Base. On November 8, 2005, the Commission issued its Embedded Base Order, which denied Supra's motion and found that the TRO prohibits CLECs from adding any new local switching UNE arrangements.

On September 29, 2005, parties filed prehearing statements. The administrative hearing was conducted on November 2-4, 2005. At the commencement of the administrative hearing, the Commission denied BellSouth's Motion for Summary Final Order or, in the alternative, Motion for Declaratory Ruling and CompSouth's Cross-Motion or Declaratory Ruling. Post-

hearing briefs were filed on November 30, 2005. Six issues were resolved via negotiation, and this recommendation addresses the 25 issues that remain in dispute.

Overview

In response to various court decisions and FCC orders, BellSouth filed its Petition to establish this docket to consider amendments to interconnection agreements resulting from significant changes in law. The changes in law impact many of the obligations BellSouth has with interconnecting CLECs, including the provision of unbundled elements and services. The Commission is tasked with rendering an array of generic policy decisions, and unique to this proceeding, the Commission is also ordering contract language to implement its policy decisions for some issues.

BellSouth and CompSouth presented comprehensive language proposals for staff to evaluate. Sprint also presented a language proposal, although only for a limited number of issues. Staff evaluated each proposal and either recommends the approval of one of the parties' proposed language without changes, or with certain changes, or blends aspects of the proposals under consideration. Staff's recommended language is provided in Appendix A. The first page of Appendix A (Page A-1) presents an issue-specific matrix that shows into which general category staff's recommended language falls. The subsequent pages provide staff's recommended language, if applicable.

Issues 1 and 10 address the appropriate language to implement certain aspects of the FCC's transition plan detailed in the TRRO. Issue 1 specifically examines the transition plan for switching, high-capacity loops, and dedicated transport. This issue also addresses new rates for conversions. A point of contention is the definition of the term "embedded base." The application of transitional rates is another topic of dispute, in addition to certain timing considerations of conversion orders. BellSouth contends that the TRRO is clear in many respects, and proposes language that mirrors the text therein. However, BellSouth proposes an arbitrary deadline for the CLECs to submit conversions orders, and argues that the transitional prices are only applicable until conversions are effected, which the Joint CLECs disagree with. The Joint CLECs argue that the transitional prices should be effective for the entire transitional period, either 12 or 18 months from March 11, 2005, depending upon the specific element. Staff's recommended decision and language blends various aspects of BellSouth's and CompSouth's interpretation of the TRRO. The argument and analysis for Issue 10 were addressed in Issue 1, and as such, staff believes Issue 10 is moot if the Commission approves staff's recommendations in Issue 1.

Issues 2 and 31 are closely-related legal issues. Issue 2 considers how ICAs should be modified to address BellSouth's obligations to provide network elements that are no longer §251(c)(3) obligations. Additionally, this issue addresses whether all Florida CLECs having ICAs with BellSouth will be bound by the decisions rendered in this proceeding. Issue 31 expands upon this consideration - whether non-parties to this proceeding should be bound by the Commission's findings in this docket. For Issue 2, staff is recommending that all Florida CLECs having ICAs with BellSouth should prepare amendments to ICAs to acknowledge BellSouth's current obligations as a result of the TRO and TRRO. For Issue 31, staff recommends that non-parties also should be bound by the Commission's findings in this proceeding, with the caveat that the resulting amendments should be limited to the disputed issues in this proceeding. Finally, staff recommends that parties should file their respective amendments or agreements

within 20 days of the decisions in this proceeding. Recommended language for Issues 2 and 31 is not necessary.

Issues 3 and 4 are multi-part issues that address BellSouth's obligation to provide unbundled access to high-capacity loops and dedicated transport. Issue 3 specifically asks that the Commission define the following terms: business lines, fiber-based collocator, building, and route. These definitions are significant because the FCC-established impairment thresholds are based in part on certain line counts, and these line counts impact where BellSouth is obligated to provision unbundled access to high-capacity loops and dedicated transport. Staff recommends that the definition of business line should include all UNE-P and UNE-L lines, as well as digital access and 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. A multi-tenant building with multiple telecom entry points will be considered multiple buildings for purposes of the DS1/DS3 caps, and the FCC's definition of a route is appropriate. Staff's recommended language blends various aspects of BellSouth's and CompSouth's proposed language. Part (A) of Issue 4 considers whether the Commission has authority to determine if BellSouth's application of the FCC's §251 non-impairment criteria for high-capacity loops and transport is appropriate. Staff recommends that this Commission has the authority to address disputes over the availability of UNEs as outlined in the TRRO. Parts (B) and (C) address the FCC's §251 non-impairment criteria. The implementing language for Issues 4(B) and 4(C) includes an initial list of wire centers meeting the FCC's §251 non-impairment criteria for high-capacity loops and transport.

Issue 5 addresses whether HDSL-capable copper loops should be considered as the equivalent of DS1 loops for the purpose of evaluating impairment. The primary debate in this issue is whether HDSL-capable loops should be counted on a unit basis, or as a voice-grade equivalent. BellSouth asserts that HDSL-capable loops should be counted as voice-grade equivalents, and CLEC parties disagree. Staff believes that BellSouth's HDSL-Compatible Loop offering should be considered as the equivalent of a DS1 loop for the purpose of evaluating impairment. Additionally, staff recommends that BellSouth is obligated to provide CLECs with access to copper loops and to condition copper loops upon request, noting, however, that BellSouth is not obligated to offer pre-conditioned 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's recommended language provides a definition of HDSL-capable copper loops that clarifies that such loops should be considered as the equivalent of DS1 loops for the purpose of evaluating impairment, and includes the other components of staff's recommendation.

Issue 7 is a multi-part legal issue that addresses the Commission's authority regarding specific aspects of §§251, 252, and 271 of the Act. Issue 7(A) asks whether the Commission has the authority to require BellSouth to include §271 elements, or any elements not required by §251, in agreements approved pursuant to §252. The Joint CLECs assert that the Commission has such authority, contending that both §251 and §271 point to the state commission approval process found in §252. BellSouth states that the Commission does not have the authority to

require the inclusion of non-§251 elements in a §252 agreement; staff agrees. Issue 7(B) is a fall-out issue that depends on the outcome of Issue 7(A). If the Commission approves staff's recommendation for Issue 7(A), then Issue 7(B) will be rendered moot. Issue 7(C) is also a fall-out issue that depends on the outcome of either Issue 7(A) or Issue 7(B). If the Commission approves staff's recommendations for either Issue 7(A) or Issue 7(B), then Issue 7(C) will be rendered moot. Staff is not recommending language for Issues 7(A), 7(B), or 7(C).

Issue 8 asks 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. A point of contention is how the FCC's use of the term "UNE arrangement" should be interpreted for purposes of the transition period. BellSouth contends that CLECs cannot add new UNE arrangements that have been delisted. The Joint CLECs assert that moves, adds, or changes are permissible. Staff consulted the No-New-Adds Order and the Embedded Base Order in recommending that moves and adds are not permissible, but that certain changes are permissible during the transitional period. Staff recommends that no language is needed to effect this policy.

Issue 9(A) addresses what rates, terms, and conditions should govern TRO de-listed UNEs, and the proper treatment of such elements post-transition. BellSouth proposes to provide a 30-day written notice to CLECs to encourage them to submit the appropriate orders, or face disconnection or involuntary conversion. The Joint CLECs believe that BellSouth should not be permitted to move services to higher-priced arrangements during the transition period. After the effective date of the change of law amendment and absent a CLEC disconnection or conversion order, staff recommends that BellSouth should be permitted to disconnect, or transition such circuits to equivalent BellSouth tariffed services. Issue 9(B) addresses the transition period, and 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. BellSouth states that to the extent that additional wire centers are found to meet the FCC's non-impairment criteria, it proposes contract language that CLECs will be notified by carrier notification letter posted to its website, and that 10 days from the issuance of the letter, BellSouth should be permitted to cease offering new unbundled high-capacity loops and dedicated transport. The Joint CLECs oppose BellSouth's proposal to post on its website the carrier notification letters; rather, the Joint CLECs believe the notice provision in ICAs should be used to ensure that the CLECs are aware of the potential loss of UNEs in a wire center. Staff's recommendation for Issue 9(B) is multi-faceted, and provides detailed information on what is referred to as the "Subsequent Transition Period."

Issue 12 addresses whether de-listed UNEs should be removed from certain BellSouth performance reporting mechanisms (i.e., SQM/PMAP/SEEM). BellSouth argues that services similar to de-listed UNEs are available from sources other than BellSouth, and such providers are not held to a performance plan. The Joint CLECs contend that this issue is closely aligned with BellSouth's obligations subject to §271 of the Act. The Joint CLECs believe the performance plans are in place to prevent "backsliding." Staff recommends that de-listed UNEs should be removed from these plans.

Issue 13 addresses the scope of commingling allowed under the FCC's rules. The principal disagreement in this issue is whether §271 checklist items should be considered "wholesale services" that are to be commingled with the §251 UNEs. BellSouth believes it has no obligation to commingle §251 unbundled network elements with §271 checklist items. The Joint CLECs assert the opposite view. Staff's recommendation has three aspects: (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's recommended language for this issue is modeled after BellSouth's language proposal, with certain changes.

Issue 14 addresses whether BellSouth is required to provide conversion of special access circuits to UNE pricing, and if so, what rate, terms, and conditions are applicable. BellSouth asserts a willingness to perform such conversions, and proposed rates for what is termed a "switch-as-is" conversion. The Joint CLECs oppose BellSouth's proposed rates, but fail to affirmatively propose comparable rates for the Commission to consider. Staff acknowledges BellSouth's willingness to perform "switch-as-is" conversions, although the rates for such conversions were presented in Issue 1. Staff recommends the adoption of BellSouth's proposed language.

Issue 15 addresses the rates, terms, and conditions for conversion requests that were pending on the effective date of the TRO. The undisputed effective date of the TRO is October 2, 2003. BellSouth submits that the individual contract terms at the time of the TRO should be followed; such terms will be CLEC-specific. The Joint CLECs contend that conversions pending on the effective date of the TRO should be processed using the conversion policies that emerge from this proceeding. Staff recommends that such conversions should be effective with the date of the amendment or agreement that incorporates terms and conditions from the TRO for conversions. Staff's recommended language is modeled after BellSouth's position.

Issues 16 and 17 address BellSouth's obligations regarding line sharing. BellSouth asserts that after October 1, 2004, it is not obligated to provide new line sharing arrangements. BellSouth's language proposal states that any line sharing arrangement placed in service on or after October 2, 2004, if not terminated before October 2, 2006, shall be terminated on the latter date. The Joint CLECs contend that BellSouth is obligated pursuant to §271 of the Act to continue to offer line sharing. Staff recommends that BellSouth is not obligated pursuant to §271 of the Act to offer line sharing, and notes that line sharing was found to be anti-competitive. For Issues 16 and 17, staff recommends that BellSouth is under no ongoing obligation to provide line sharing to CLECs. Staff's recommended language for this issue is modeled after BellSouth's language proposal, with certain changes.

Line splitting is the subject of Issue 18. BellSouth acknowledges that line splitting remains an obligation, although the purchasing CLEC must procure the whole loop and provide its own splitter before dividing the frequency spectrum of the loop with a second CLEC. Staff

agrees. The Joint CLECs again raise commingling concerns addressed in Issue 13, and also assert that BellSouth has a legal obligation to upgrade access to its Operational Support Systems to accommodate the unique needs of the two CLECs in a line splitting arrangement. Staff rejects this notion, and recommends specific parameters necessary to support line splitting, using existing state commission collaboratives and change management processes to define those parameters. The parties also disagreed concerning the extent to which indemnification should be provided. Staff recommends that BellSouth should be indemnified from any or all claims arising in connection with the third party CLEC, except in cases of BellSouth's gross negligence or willful misconduct. Staff's recommended language was modeled after BellSouth's language proposal, with changes and additional language regarding indemnification, providing protection to both parties.

Issue 21 addresses what BellSouth's obligations are with respect to provisioning call-related databases to CLECs. Most of BellSouth's current §251 unbundling obligations associated with databases expire at the end of the transition period, although not the obligation to offer 911 and E911 call-related databases. BellSouth's proposed contract language excludes all other call-related databases. The Joint CLECs contend that BellSouth is obligated pursuant to §271 to continue to offer call-related databases to CLECs on an unbundled basis. Staff's recommended language specifies that BellSouth's obligation to offer 911 and E911 call-related databases on an unbundled basis is ongoing in §252 agreements for all CLECs.

Issue 22 is a two-part issue, although only Issue 22(B) remains in dispute. Issue 22(B) addresses access to newly-deployed ("greenfield") fiber loops, including such loops deployed to multiple dwelling unit (MDU) buildings that are predominantly residential. A point of contention in this issue is whether the loop impairment analysis in the TRO should apply equally between "enterprise" and "mass market" customer segments. BellSouth asserts that it is under no obligation to unbundle its "greenfield" fiber loops. The Joint CLECs believe the FCC's rulings on "greenfield" loops are subject to interpretation. Staff recommends that there are limited unbundling obligations in "greenfield" areas where fiber loops have been deployed to the end users premises or the curb. Staff's recommended language was based upon a combination of the language proposals, with changes and additional language regarding the "greenfield" obligations for DS1 and DS3 applications.

Issue 23 addresses unbundled access to hybrid loops. The FCC defines hybrid loops as composed of both fiber optic and copper twisted wire. BellSouth asserts that it will only provide access to the time division multiplexing features of a hybrid loop. The Joint CLECs contend that BellSouth is obligated under §271 to offer hybrid loops on an unbundled basis. Issue 7 addresses the concern about §271 obligations with respect to the interconnection agreement being arbitrated here. Staff recommends that BellSouth is obligated pursuant to §251 to provide nondiscriminatory and unbundled access only to the time division multiplexing features, functions, and capabilities of hybrid loops. Staff recommends approval of BellSouth's language proposal.

Issues 25 and 26 address routine network modifications (RNMs). Issue 25 concerns BellSouth's obligation to provide RNMs. BellSouth regards this issue as a "parity" issue, and posits that it will perform for CLECs any and all of the RNMs it performs for itself. The Joint

CLECs contend that the debate in this issue concerns whether line conditioning is a RNM; they believe it is not, but is an independent requirement. Staff recommends that BellSouth should provide RNMs and line conditioning to CLECs at parity with what it provides for its own customers. Issue 26 addresses the appropriate process for establishing a rate, if any, for RNMs that are not recovered through any other charge or mechanism. BellSouth states that rates for "routine" items should be priced at TELRIC, while "nonroutine" items should be rated at special construction or special assembly tariffed charges. The Joint CLECs believe all RNMs should be priced at TELRIC, and that BellSouth would need to prove it has unrecovered costs before it could assess new charges. Staff recommends that BellSouth should use the rates approved by this Commission from the UNE Order, or petition the Commission to establish rates for any such RNMs not addressed in the above-referenced order. Staff's recommended language for Issues 25 and 26 was based upon a combination of the language proposals.

Issue 27 addresses overbuilt ("brownfield") fiber deployments, and whether BellSouth has an obligation to provide CLECs access to the new fiber. BellSouth asserts that it will provide unbundled access either to in place copper cable, if available, or will provide a 64 Kilobits-per-second transmission path over the brownfield fiber. The Joint CLECs acknowledge as much, but are concerned about BellSouth's practices in regard to retiring copper facilities. Staff recommends that in brownfield fiber deployments, BellSouth's language proposal be adopted with minor modifications.

Issue 28 addresses BellSouth's enhanced extended link (EEL) audit rights. BellSouth asserts that the TRO sets forth parameters for EEL audits, including the right to conduct such an audit on an annual basis. The Joint CLECs believe that BellSouth should be required to demonstrate "cause" before commencing an EEL audit. Staff's recommendation has four components: a) 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; b) the audit should be performed by an independent, third-party auditor selected by BellSouth; c) the audit should be performed according to the standards of the American Institute of Certified Public Accountants (AICPA); and d) the parties may dispute any portion of the audit following the dispute resolution procedures contained in the interconnection agreement after the audit is complete. Staff's recommended language for this issue is modeled after BellSouth's language proposal, with certain changes.

Issue 30 is a legal issue that asks what language should be used to incorporate the FCC's ISP Remand Core Forbearance Order into interconnection agreements. The FCC's ISP Remand Core Forbearance Order granted forbearance with respect to the FCC's new markets and growth caps provisions originally contained in the ISP Remand Order. Staff notes, however, that the parties in this proceeding have not proposed language for this issue, but instead proposed different approaches for implementing the above-referenced order. BellSouth believes this issue should be addressed on a case-by-case basis. The Joint CLECs express that all references to "new markets" and "growth caps" should be removed from existing agreements. 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, staff is not recommending language for this issue.

Discussion of Issues

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.

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 staff analysis. Staff's recommended language is found in Appendix A. **(P. Lee)**

Position of the Parties

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

GRUCom: GRUCom is unaffected by the FCC's transition plan, since the Gainesville wire centers are currently impaired for DS1 loops. However, the language appropriate to address how DS1 loops will be transitioned for Central offices that become non-impaired later is that set forth by Mr. Maples.

JOINT CLECS: CompSouth's proposed contract language implements changes in BellSouth's obligations to provide UNEs pursuant to Section 251(c)(3), and provides for availability of Section 271 checklist elements that must remain available when Section 251(c)(3) UNEs have been "de-listed." This ensures TRRO transition rates for "de-listed" UNEs apply until March 10, 2006.

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

Staff Analysis: The parties recognize that Issue 1, Issue 8, part of Issue 9(a), and Issue 10 overlap somewhat because they all address implementation of the transition plans for the TRRO de-listed UNEs. For this reason, staff will address all TRRO transition issues in Issue 1.

In the TRRO, the FCC revised its rules applicable to ILECs' unbundling obligations with regard to mass market local circuit switching, high-capacity loops, and dedicated interoffice transport. (TRRO ¶2 fn. 4) Specifically, the FCC concluded that:

- CLECs are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. (TRRO ¶¶5, 66)
- CLECs are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business access lines. (TRRO ¶¶5, 66)
- CLECs are not impaired without access to entrance facilities.[2]

[2] Entrance facilities are dedicated transport that do not connect a pair of BellSouth wire centers. (Tipton TR 553)

- CLECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators. (TRRO ¶5)
- CLECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators. (TRRO ¶5)
- CLECs are not impaired without access to dark fiber loops.[3] (TRRO ¶5)
- CLECs are not impaired without access to unbundled mass market local circuit switching (DS0 level switching).[4] (TRRO ¶5)

Concerned with possible service disruptions to customers, as well as to CLECs' business plans if unbundled access were eliminated on a flash-cut basis, the FCC adopted transition plans. The FCC established a 12-month transition period for the embedded base of local circuit switching, and DS1 and DS3 loops and transport, beginning on March 11, 2005, and ending on March 10, 2006. An 18-month transition period was established for dark fiber loops and transport, beginning on March 11, 2005, and ending on September 10, 2006. (TRRO ¶¶5, 142, 195, 199, and 227) The FCC noted that these transition plans apply only to the embedded bases of arrangements, and do not permit CLECs to add new de-listed UNE arrangements. (TRRO ¶142) Moreover, during the transition periods, CLECs will retain access to unbundled loop and transport facilities at a rate equal to the higher of (1) 115 percent of the unbundled network element rates in effect on June 15, 2004, or (2) 115 percent of any UNE rates established by a state commission between June 16, 2004, and March 10, 2005; for local circuit switching, the transition rate is equal to the higher of (1) the rate at which the CLEC leased the combination of elements on June 15, 2004, plus one dollar, or (2) the rate established by a state commission between June 16, 2004, and March 10, 2005, plus one dollar. (TRRO ¶¶5, 145, 198, 199, and 228)

The disputes between the parties relate primarily to (1) the definition of the "embedded base" of customers; (2) transition period pricing; (3) application of the transition rates; (4) the transition period; and (5) the provision of parallel §271 elements as alternative services for the affected de-listed UNEs. With regard to §271 checklist items, this is addressed in connection with Issue 7. (BellSouth BR at 58; Gillan TR 393)

PARTIES' ARGUMENTS

Definition of the "Embedded Base" of Customers

Witness Blake believes that BellSouth's definition of the "embedded base" follows the UNE service arrangement or carrier requesting service guidelines of the TRRO. In contrast, asserts the BellSouth witness, CompSouth witness Gillan defines the "embedded base" to mean the CLEC's customers. (TR 236; EXH 23, pp. 26-27) This difference, contends witness Blake,

[3] Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optronics.
[4] The FCC concluded in the TRO that CLECs were not impaired with respect to enterprise switching, but allowed states to petition the FCC in cases in which the general national finding did not apply. The FCC also found that CLECs were not impaired without unbundled access to packet switching. The enterprise switching rules ordered in the TRO were upheld in USTA II, and the finding regarding packet switching was not challenged in the D.C. Circuit Court.

impacts whether a CLEC can order new UNE service arrangements for an existing customer (whether at the same or a new location) during the transition period. (TR 236-237)

CompSouth witness Gillan recommends ICA language to address the definition of "embedded base" and the related restrictions imposed by the TRRO. (EXH 23, p. 23) Specifically, witness Gillan defines the "embedded base" in terms of CLEC customers existing as of March 10, 2005. The witness' suggested language provides that CLECs are entitled to order local switching and UNE-P, and DS1 and DS3 loops for the purpose of serving the CLEC's embedded customer base during the transition period. For DS1 and DS3 loops, CLECs will self-certify, if requested by BellSouth, that the CLEC orders will be used to serve the embedded customer base. BellSouth has the right to dispute the self-certification; the dispute is governed by the ICA dispute resolution process. With regard to local circuit switching and UNE-P, CompSouth's proposed language provides that additions to the CLEC embedded customer base include "any additional elements that are required to be provided in conjunction therewith." (EXH 23, pp. 26-27)

Transition Pricing

BellSouth asserts in its brief that the transitional rates contained in the TRRO revised unbundling rules should be included in the ICAs. (BR at 60) BellSouth witness Tipton believes that the revised rules are clear that the transition rate for local circuit switching is the higher of the rate the CLEC paid for the element or combination of elements on June 15, 2004, plus one dollar, or the rate the Commission established, if any, between June 16, 2004, and March 10, 2005, the effective date of the TRRO, for that combination of network elements, plus one dollar. For high-capacity loops and transport, the transition rate is the higher of 115 percent of the rate the CLEC paid on June 15, 2004, or 115 percent of the rate the Commission established between June 16, 2004, and March 10, 2005, for that element. (TR 608-610; TRRO Appendix B, p. 148) Additionally, contends witness Tipton, the TRRO clearly indicates that transition period pricing will be effective with the amendment to the ICA and is subject to true-up to March 11, 2005. (TRRO fn 408, fn 524, fn 630; Tipton TR 611-613)

For UNE-P, the BellSouth witness contends that transitional pricing also applies to those circuits priced at market rates for the FCC's four or more line carve-out established in the UNE Remand Order and affirmed in the TRO. (TRO fn 1376; TR 607) To the extent that existing ICAs include a market based rate for switching for "enterprise" customers served by DS0 level switching that met the FCC's four or more line carve-out, witness Tipton asserts that these terms and rates were in effect on June 15, 2004. (Tipton TR 607; BellSouth BR at 60-61) Therefore, these rates plus the TRRO additive is the appropriate transition rate to apply. However, witness Tipton qualifies that BellSouth does not advocate adding the transitional additive to the market rate; BellSouth is simply charging CLECs the market rate they were already paying on June 15, 2004. (TR 709-710)

CompSouth witness Gillan asserts that the TRRO makes clear that the term "mass market" includes all lines used to serve customers that use less than a DS1 capacity and that the transitional rules apply. The witness believes that footnote 625 of the TRRO clearly provides that CLECs are entitled to pay TELRIC rates plus one dollar for all analog customers, including any DS0 level enterprise switching customers that previously met the four or more line carve-

out. (TR 399; EXH 4, p. 167) Witness Gillan asserts that if the FCC modified ICAs to provide higher transitional rates, one of the transitional rates is for customers being served at less than DS1 capacity level. (EXH 9, pp. 32-33)

CompSouth witness Gillan agrees that transitional rates become effective through the amended ICA and are to be applied retroactively to March 11, 2005. However, the witness contends that the new unbundling requirements adopted in the TRO nearly three years ago, such as provisions incorporating revised EEL eligibility, commingling, and conversions should likewise be effective retroactively to March 11, 2005. (TR 400, 449, 487) To do otherwise, argues the witness, would mean that only those portions of the FCC's unbundling framework that enable BellSouth to charge higher rates would be effective, while the options CLECs need to adjust to the new unbundling regime would not be in place. (TR 488-490)

Application of Transition Rates

BellSouth witness Tipton believes that the TRRO is clear that transitional rates only apply until the de-listed UNEs are converted to alternative arrangements. (TR 613) Therefore, contends the witness, transition rates apply until the earlier of March 10, 2006, or September 10, 2006, for dark fiber, or the date the de-listed UNEs are converted to alternative arrangements. (TR 613; TRRO ¶¶145, 198, and 228) The witness acknowledges that in the Verizon Arbitration Order, the Commission concluded that transitional rates apply until the end of the transition period. (TR 687)

The Joint CLECs affirm their willingness to work cooperatively with BellSouth to ensure an orderly transition to alternative arrangements. However, argue the Joint CLECs, BellSouth's proposals feature a premature end to the transition pricing mandated in the TRRO. (BR at 5) The Joint CLECs believe that the TRRO clearly entitles CLECs to transition rates for de-listed UNEs until March 10, 2006, for local circuit switching and high-capacity loops and transport, and until September 10, 2006, for dark fiber. (BR at 4) CompSouth witness Gillan and the Joint CLECs believe that the TRRO is clear that CLECs are only required to submit their conversion orders "within twelve months of the effective date of this Order." (EXH 23, pp. 3, 5, 6, 8, 11, 14; EXH 4, p. 167; Joint CLECs BR at 4; TRRO ¶¶227, 143, 196) While CLECs have a strong interest in an orderly transition to alternative arrangements, the Joint CLECs believe that this should not be at the expense of being forced to pay higher rates than the TRRO authorized. (BR at 5)

Transition Period

BellSouth witness Tipton affirms that the parties agree, either through testimony or proposed contract language, that the transition period began March 11, 2005, and will end on March 10, 2006, for local circuit switching and DS1 and DS3 loops and transport, and September 10, 2006, for dark fiber. (TR 613; EXH 23, pp. 1, 4-5, 7, 9, and 12; Maples[5] TR 100; Montano TR 83) The issue between the parties, asserts the BellSouth witness, is what activity should occur during the transition period. The witness believes that the transition process must begin and end within the transition period. (TR 613-614) Indeed, opines the witness, the TRRO revised unbundling rules are clear that the deadline of March 10, 2006, (September 10, 2006, for

[5] Staff notes that only issue remaining in dispute between Sprint and BellSouth is Issue 5. (Sprint BR at 1)

dark fiber) is a fixed date; CLECs are not entitled to maintain their embedded bases beyond this date. (TR 536; TRRO Appendix B, p. 148; TRRO ¶¶142, 195)

The BellSouth witness contends that the TRRO is clear that the purpose of the transition period is so the transitioning of de-listed UNEs will be completed by the end of the 12- or 18-month period, not simply for CLECs to submit conversion orders. (TR 615-616; TRRO ¶227) The witness opines that the FCC held that the transition period is to provide time to perform "the tasks necessary to an orderly transition," and "the time necessary to migrate to alternative fiber arrangements." (Tipton TR 533, 615-616; BellSouth BR at 59; TRRO ¶¶143-144, 196, 198, and 227) To this end, asserts the witness, the CLECs' position is contrary to the FCC's specific directives and is an attempt to generate additional time for access to de-listed UNEs at TELRIC rates. (TR 533, 616) Moreover, claims the witness, from an operational standpoint and to ensure continuity of service, BellSouth is not physically capable of converting all of the embedded base on the last day of the transition period. (TR 687-688) Witness Tipton opines that BellSouth is committed to working with CLECs to make the transition as seamless as possible for the CLECs' end-users, but this can only be accomplished if the CLECs are willing to communicate and work cooperatively with BellSouth to complete the necessary work before the expiration of the transition period. (TR 533-534)

In order to ensure that an orderly transition is completed by March 10, 2006, BellSouth witness Tipton proposes procedures for each de-listed element. (TR 534) The witness proposes that CLECs be required to identify their embedded base of UNE-P and stand-alone local switching via spreadsheets and submit conversion or disconnect orders "as soon as possible."[6] (TR 534-537, 619) For high-capacity loops and dedicated transport, BellSouth witness Tipton explains that there are two categories that must be addressed: the embedded base and "excess" DS1 and DS3 loops and transport. The embedded base consists of high capacity loops and transport that were in service on March 11, 2005, in non-impaired wire centers.[7] Excess DS1 and DS3 loops are those in excess of the cap of ten DS1 circuits and one DS3 loop per building. The parties have agreed that Excess DS1 and DS3 transport are those in excess of 12 DS3 circuits on each route where DS3 transport is available as a UNE, and in excess of 10 DS1 circuits on each route where there is no unbundling obligation for DS3 transport but for which impairment exists for DS1 transport. These excess DS1 or DS3 loops and transport are also subject to the 12-month transition period. (TR 537; EXH 35, p. 57) BellSouth witness Tipton proposes that CLECs be required to submit spreadsheets as soon as possible,[8] identifying the embedded base and excess DS1 and DS3 loops and transport and the embedded base of entrance facilities[9] to be disconnected or converted to other BellSouth services. (TR 537-538) Regarding dark fiber transport and dark fiber entrance facilities, BellSouth witness Tipton proposes that CLECs be required to submit spreadsheets that identify their embedded base of dark fiber to be either disconnected or converted to other services by June 10, 2006. (TR 540)

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[6] BellSouth initially proposed that such orders be issued by October 1, 2005. BellSouth's alternative date is December 1, 2005. (EXH 4, p. 147)

[7] Non-impaired wire centers are addressed in Issue 4.

[8] BellSouth initially proposed that such orders be issued by December 9, 2005. BellSouth's alternative date is January 15, 2006. (EXH 4, p. 147)

[9] While the TRRO did not require a transition period for entrance facilities, BellSouth has proposed to transition the applicable embedded base over the same transition period applicable to high-capacity loops and transport, rather than effectuating a flash-cut. (EXH 46)

To incent CLECs to work with BellSouth rather than waiting until the end of the transition period, witness Tipton proposes that if the CLECs submit their spreadsheets identifying the respective embedded bases and excess DS1 and DS3 loops and transport in a timely manner, BellSouth will charge CLECs its proposed "switch-as-is" conversion rates and will forego disconnect charges. (TR 692) On the other hand, if CLECs do not submit their orders and spreadsheets in a timeframe that allows the orders to be completed by March 10, 2006 (September 10, 2006 for dark fiber transport and entrance facilities), witness Tipton proposes that BellSouth be permitted to convert a CLEC's remaining de-listed arrangements itself, and charge CLECs disconnection charges as well as full nonrecurring charges as approved by the Commission in the BellSouth UNE Order for the conversions. (EXH 47) Accordingly, witness Tipton proposes that BellSouth be permitted to convert UNE-P lines to the resale equivalent and disconnect remaining stand-alone switch ports no later than March 11, 2006. The witness explains that BellSouth offers no tariffed or wholesale alternative to stand-alone switch ports, but CLECs may obtain the switching capability through a commercial agreement, use of their own switches, or the switches of other CLECs. (TR 534-537) For the remaining embedded or excess high capacity loops and interoffice transport or dark fiber transport, BellSouth proposes to convert these arrangements to the corresponding tariffed service offerings. (Tipton TR 537-538) Witness Tipton asserts that although the language proposed by BellSouth and CompSouth is similar, BellSouth will not agree to the CompSouth proposed language. The witness opines that CompSouth's proposed language allows more time to transition these de-listed UNEs and puts the onus on BellSouth to absorb the nonrecurring charges associated with converting these services to equivalent BellSouth tariffed services in the event that BellSouth has to initiate the conversion process. (TR 640-641)

BellSouth witness Tipton proposes "switch-as-is" rates to apply on UNE circuits to special access services conversions. In a "switch-as-is" arrangement, explains the witness, no physical changes to the circuit are required. Where a conversion involves physical changes to the circuit, BellSouth proposes that the full nonrecurring disconnect and installation charges should apply. Additionally, witness Tipton asserts that "conversions should be considered termination for purposes of any applicable volume and term discount plan or grandfathered arrangements." (TR 584-585) The proposed "switch-as-is" rates are shown below in Table 1-1.

Table 1-1: BellSouth's Proposed "Switch-As-Is" Nonrecurring Conversion Rates

Element	Description	First Single	Additional
R2.1	DS1 loop, single LSR*	$24.97	$3.52
R2.2	DS1 loop, LSR generated via spreadsheet	$26.46	$5.01
R.1	DS3 or higher loop, single LSR	$40.28	$13.52
R.2	DS3 or higher loop, LSR generated via spreadsheet	$64.09	$25.64
R.1.1	SNESAI**, per circuit	$36.82	$16.12
R.1.2	SNESAI with 15 or more circuits, per circuit additive	$1.49	$1.49

* Local Service Request.
**Single Network Element Special Access circuit conversion from UNE.
Source: EXH 4, p. 13

BellSouth witness Tipton acknowledges that the Commission previously ordered in the BellSouth UNE Order an EEL conversion[10] rate of $8.98. (TR 585) The rate for converting a UNE to special access is no different than the rate for converting from special access to a UNE for the same type of circuit. (EXH 4, p. 12) For "switch-as-is" rates for converting de-listed UNEs to a wholesale service, BellSouth utilized studies that developed costs for special access to UNE conversions (SPA-to-UNE) as a surrogate. BellSouth asserts that while there may be differences between the work groups that perform the two conversions, the activities and thus the cost should generally be similar. (EXH 4, p. 77)

Witness Tipton states that the BellSouth proposed rates in Table 1-1 are TELRIC-based rates supported by a cost study that was provided in response to staff discovery. (TR 699; EXH 4, p. 16) BellSouth is simply asking the Commission to establish a switch-as-is rate for a single element conversion. Witness Tipton asserts that when BellSouth performed its cost study in the last UNE proceeding, it did not have experience with switch-as-is conversions and consequently understated the associated activities and work groups involved, and the percentage of fall-out circuits. (TR 699-700) The witness acknowledges that BellSouth did not provide a cost witness nor did it sponsor any testimony concerning the cost study submitted here. The witness also acknowledges that the cost study was provided only one week prior to the hearing in this case. (TR 714)

Witness Tipton opines that the proposed deadlines for CLECs to submit their spreadsheets are reasonable for BellSouth to have time to work with each CLEC to ensure all embedded base circuits are identified, negotiate project timelines, issue and process service orders, update billing records, and perform the necessary conversions by the end of the transition period. (TR 534-537) The alternative is for BellSouth to attempt to identify the embedded base, and then have the CLECs, in turn, decide what they want to do and notify BellSouth of their decision. Witness Tipton asserts that this is not very efficient when each individual CLEC can use its own resources to identify its own embedded base. (TR 619)

Contrary to BellSouth witness Tipton's assertion that the TRRO requires CLECs to complete all transitions by March 10, 2006, (September 10, 2006, for dark fiber transport), CompSouth witness Gillan believes the TRRO is clear that CLECs may submit their conversion orders at any time prior to the end of the transition period. The TRRO does not require that the conversions must be completed by the end of the transition period. (TR 396, 485-486; EXH 9, pp. 29-30) The Joint CLECs note in their brief that ¶227 of the TRRO states that "[w]e require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of this Order." (BR at 4; TRRO ¶227) Further, assert the Joint CLECs, the FCC held in the TRRO that CLECs are required to transition all affected de-listed UNEs at the end of the transition period. (BR at 4; TRRO ¶¶143, 196, and 227) CompSouth witness Gillan contends that the general expectation of the TRRO is that CLECs have a year to determine alternative arrangements for de-listed UNEs. (TR 395)

[10] An EEL conversion is a "switch-as-is" from special access to UNE or UNE to special access of a loop/transport arrangement. (Tipton TR 698)

Witness Gillan asserts that there is no provision in the TRRO permitting BellSouth to require dates in advance of March 10, 2006, for submission of CLEC orders. With respect to loop and transport arrangements, witness Gillan contends that until CLECs have a final listing of the non-impaired wire centers and transport routes, and without knowledge as to the alternative §271 offerings, specific plans to transition facilities cannot be developed. (TR 397-398, 486) Regardless, contends witness Gillan, once a CLEC has placed an order with BellSouth to migrate an arrangement, it is then up to BellSouth to effectuate that order. Witness Gillan believes that CLECs should not be penalized by paying higher prices for orders that BellSouth has not filled. (TR 398) Moreover, states the witness, BellSouth's proposal to unilaterally convert all remaining UNE-P lines to resale on March 11, 2006, makes it hard to conclude that it would be unable to handle other orders in a reasonable manner. (TR 487)

Witness Gillan asserts that because BellSouth is the party withdrawing the service, it should identify the circuits no longer being offered as UNEs, and allow CLECs to review the identification and inform BellSouth of disagreements. (TR 490; EXH 9, p. 73) Furthermore, contends witness Gillan, CLECs should not be required to pay other charges associated with a conversion to or establishment of an alternative service arrangement. (TR 446) The witness asserts that CLECs will pay higher costs with the alternative service arrangements; "they should not also be required to pay order placement charges, disconnect charges or nonrecurring charges associated with a conversion to or establishment of an alternative service arrangement." (TR 446)

Section 271 Checklist Items

BellSouth witness Tipton contends that only elements under §251 should be included in ICAs. (TR 569) BellSouth argues in its brief that there is no legal basis for including contract language in a §252 agreement that would allow CLECs to transition from UNEs to state regulated §271 services. Furthermore, argues BellSouth, the Commission has no authority to dictate the rates, terms, and conditions of BellSouth's §271 obligations. Moreover, the TRRO makes no mention of transitioning to state-regulated §271 elements. (BellSouth BR at 59; TRRO ¶¶142, 195, and 227)

CompSouth witness Gillan believes that the withdrawal of §251 network elements must be accompanied by the introduction of replacement offerings, such as §271 alternatives. (TR 392) CompSouth witness Gillan believes that BellSouth has a separate obligation under §271 to offer checklist items (switching, high-capacity loops, and transport) in the ICA, even where these items are not required under §251. (TR 392, 423-430) The witness contends that the most important alternative arrangement to CLECs for transitioning de-listed UNEs will be a commercially viable BellSouth §271 offering that parallels the §251 offering being withdrawn, albeit at a higher price. (TR 392, 397, 422) Witness Gillan recommends that the Commission establish interim prices for the §271 alternative offerings based on the TRRO transition rates. These interim rates, contends the witness, represent a reasonable first approximation of the §201 and §202 "just and reasonable" pricing standard and should remain in effect until a permanent cost proceeding is conducted. (TR 398, 425, 431, 480-484; TRRO ¶663)

ANALYSIS

Definition of the "Embedded Base" of Customers

In the TRRO, the FCC concluded that the 12-month transition period applies to the embedded base of end-user customers and that CLECs may not obtain any new de-listed switching, high-capacity loops and transport UNEs (no-new-adds), effective March 11, 2005. (TRRO ¶227) In the Embedded Base Order, issued November 8, 2005, in the instant docket, the Commission explicitly specified that the embedded customer base relates to arrangements, not just to customers. Specifically, the Commission found that the embedded customer base referenced in the TRRO means customers being served on March 11, 2005. The Commission concluded that:

> While CLECs retain access to unbundled local circuit switching during the 12-month transition period for their embedded end-user customers, that access is limited to the arrangements existing on March 11, 2005. Orders requiring a new UNE-P arrangement, such as a customer move to another location or an additional line, are not permitted pursuant to the FCC's *TRRO*. (Embedded Base Order, p. 6)

Based on the above, staff believes that BellSouth's proposed definition of embedded base recognizes that the embedded base as used in the TRRO relates to arrangements. Staff therefore recommends the adoption of the BellSouth language that effectuates this policy.

BellSouth measures the embedded bases of the de-listed UNEs as of March 11, 2005; CompSouth measures the embedded bases as of the effective date of the ICA. Staff observes that the effective date of the TRRO is March 11, 2005. (TRRO ¶235) Additionally, staff notes that the TRRO specifically states that carriers have 12 months to transition from local circuit switching and high-capacity loops and transport, and 18 months from dark fiber, "from the effective date of this Order." (TRRO ¶¶142, 195, and 227) Staff therefore agrees with BellSouth that the embedded base of de-listed UNEs relates to those arrangements existing on March 11, 2005, the effective date of the TRRO.

Transition Pricing

The parties disagree with how the transition rates should be determined. CompSouth proposes language that bases transition rates on the "TELRIC" rate the CLEC paid on June 15, 2004, plus an additive. (EXH 4, p. 172) CompSouth believes this is appropriate, asserting that the FCC explained in ¶228 of the TRRO that:

> We believe that the moderate price increases help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while at the same time, these price increases, and the limited duration of the transition, provide some protection of the interests of incumbent LECs in those situations where unbundling is not required. (TRRO ¶228; EXH 4, p. 172)

In contrast, BellSouth believes that the TRRO and the attached revised unbundling rules are clear that transition pricing is to be determined based on the higher of the rate the CLEC paid on June 15, 2004, or the rate the state commission ordered for that element or combination of elements between June 16, 2004, and March 11, 2005, plus the applicable additive. (Tipton TR 606) For example, the rule regarding DS1 loops specifically states that that the transition rate:

> . . . shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the loops element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004, and the effective date of the Triennial Review Remand Order, for that loop element. (emphasis in original) (TR 608-609; TRRO Appendix B, p. 147)

The witness notes that the TRRO revised unbundling rules prescribes similar language for all de-listed UNEs, except the additive for local circuit switching is different. (TR 609-610; TRRO Appendix B, pp. 147-148, and 150-152)

Staff observes that while the text of the TRRO uses the term "TELRIC" when addressing transition pricing, the revised unbundling rules implementing the TRRO do not reference the term at all. Staff believes that the language in the TRRO and the language in the revised unbundling rules can lead to different conclusions regarding the determination of the transition rates. However, staff believes that the Commission must look to the rule for guidance. If the parties believe the TRRO is not clear on this matter, they should seek clarification from the FCC. Therefore, for purposes of the ICA, staff believes the transition rates must be determined as stated in the rules, not in the text of the TRRO. Staff believes that the ICA should specifically state that transitional rates are to 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 this commission ordered for that element or combination of elements between June 16, 2004, and March 11, 2005. (TRRO Appendix B, pp. 147-148, and 150-152)

Staff observes that the TRO distinguished local circuit switching based on mass market and enterprise market differences. Mass market customers were defined as analog voice customers being served at the DS0 capacity level; enterprise market customers were defined as customers served at the DS1 capacity and above. (TRO ¶¶7, 451, 459, and, 497) The FCC concluded in the TRO that CLECs were not impaired with respect to enterprise switching, but allowed states to petition the FCC in cases in which the general national finding did not apply. (TRO ¶¶17, and 451-458) Further, the TRO retained the four or more line carve-out[11] from the unbundled local circuit switching obligation on an interim basis. (TRO ¶525)

In the TRRO, the FCC concludes there is no impairment with respect to local circuit switching arrangements and adopts a transition period that "applies to all unbundled local circuit switching arrangements used to serve customers at less than the DS1 capacity level as of the effective date of this Order." (TRRO ¶226 fn 625) Staff believes the TRRO is clear with regard

[11] In the UNE Remand Order, the FCC determined that ILECs were not obligated to provide unbundled local circuit switching to CLECs for serving customers with four or more DS0 loops in density zone one of the top fifty Metropolitan Statistical Areas (MSAs).

to how the transitional rate for DS0 level switching is to be determined. The FCC concludes that the applicable transition rate is the higher of the rate existing as of June 15, 2004, or the state commission rate established between June 16, 2004, and March 11, 2005, plus the additive. (TRRO ¶228) While ¶199 of the TRRO states that CLECs will continue to have access to UNE-P priced at TELRIC plus one dollar, the fact is that TELRIC rates were not in effect on June 15, 2004, for BellSouth's DS0 level capacity switching for customers subject to the four or more line carve-out. Moreover, staff agrees with BellSouth that there is no suggestion in the TRRO that the rates included in ICAs should be restated before the transition period additive is applied. (Tipton TR 610) Staff therefore agrees with BellSouth that 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 plus the TRRO additive, although BellSouth is proposing only charging the market rate without the additive. (TR 710)

Staff notes that there is also a dispute regarding the effective date of the TRRO transitional rates. BellSouth believes the rates are effective upon the signing of the ICA with a retroactive true-up to March 11, 2005. BellSouth asserts that the TRRO specifically held that the transition rates would involve a retroactive true-up. CompSouth witness Gillan believes that if there is a retroactive true-up for the TRRO transition rates, then the TRO new unbundling obligations regarding revised EEL eligibility, commingling and conversions should likewise be effective retroactively to March 11, 2005. (TR 400, 449, and 487) To do otherwise, argues the witness, would mean that only those portions of the FCC's unbundling framework that enable BellSouth to charge higher rates would be effective, while the options CLECs need to adjust to the new unbundling regime would not be in place. (TR 488)

Staff observes that footnotes 408, 524, and 630 of the TRRO state that switching, high-capacity loops and transport arrangements "no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon amendment of the relevant interconnection agreements, including any applicable change of law processes." (TRRO fn 408, fn 524, and fn 630) Staff therefore believes the TRRO is clear that, once parties have amended their ICAs, a true-up of transition pricing to March 11, 2005, is required. In contrast, staff notes that the TRO effectuated changes in its requirements through the change-of-law process in existing ICAs; the FCC specifically declined overriding that process and unilaterally changing ICAs. (TRO ¶¶700-701) Staff observes that there is nothing in the TRRO that indicates the required true-up for switching, and high-capacity loops and transport, also applies to the new requirements of the TRO. Therefore, staff agrees with BellSouth that the new unbundling obligations required in the TRO should be effective with the ICA amendment and not retroactive to March 11, 2005. The TRRO-established transition rates, however, are effective at the time of the ICA amendment and are subject to true-up back to March 11, 2005.

Application of Transitional Rates

BellSouth witness Tipton contends that transition pricing ends the earlier of March 10, 2006, for local circuit switching and affected high-capacity loops and transport (September 10, 2006, for dark fiber loops and transport), or when the de-listed UNE is converted. (TR 613) The Joint CLECs contend that the TRRO entitles CLECs to transition rates for the de-listed UNEs until the end of the applicable transition period. (BR at 4)

Paragraph 199 of the TRRO appears to support BellSouth's interpretation that transitional rates are only applicable until the CLEC submits a conversion request. Specifically, the paragraph establishes a 12-month transition period in which CLECs ". . . will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers." (TRRO ¶199) Notwithstanding the requirement for CLECs to migrate their embedded base of customers away from unbundled local circuit switching to an alternative arrangement by March 10, 2006, staff notes that the TRRO revised rule specifically states that, "for a 12-month period from the effective date of the Triennial Review Remand Order, an incumbent LEC shall provide access to local circuit switching on an unbundled basis for a requesting carrier to serve its embedded base of end-user customers." (TRRO Appendix B, p. 148) Staff also observes that ¶145 and ¶198 of the TRRO state that transition rates for high-capacity loops and transport apply "during the relevant transition period." The relevant transition periods are March 11, 2005, through March 10, 2006, for affected DS1 and DS3 loops and transport and through September 10, 2006, for dark fiber loops and transport.

Based on the above and consistent with the Commission's finding in the Verizon Arbitration Order, staff believes that regardless of when CLECs submit their conversion orders during the transition period, the TRRO rule entitles them to receive the transitional rates for the entire applicable transition period (March 11, 2005 – March 10, 2006 for local circuit switching and high-capacity loops and transport, and March 11, 2005 – September 10, 2006, for dark fiber loops and transport).[12] (Verizon Arbitration Order at p. 23) Staff believes this policy will provide the orderly and smooth transition from de-listed UNEs to alternative arrangements as intended by the FCC in the TRRO by incenting CLECs to submit conversion requests over the applicable 12- and 18-month transition periods rather than submitting them all at one time at the end. To do otherwise would incent CLECs to wait until the end of the applicable transition periods[13] to submit their conversion orders for the de-listed UNEs, and thus not provide the orderly and smooth transition the TRRO contemplates. Notwithstanding this, staff believes that access at transitional rates ends on March 10, 2006, or September 10, 2006, as applicable, whether or not the circuits have been converted. Thereafter, BellSouth's applicable resale or tariffed rate applies. Additionally, staff believes that BellSouth should be permitted to disconnect any stand-alone switching ports remaining on March 11, 2006. There should be no reason why CLECs cannot identify their embedded base and notify BellSouth whether to disconnect or convert to an alternative service or provider.

Staff notes that BellSouth has agreed to treat the embedded base of entrance facilities to the 12-month transition period applicable to high-capacity loops and transport, although not required to by the TRO or TRRO. BellSouth cites to Exhibit A as the source of the transition rates for entrance facilities; staff presumes the rates in the exhibit are those that would be apply throughout the transition period.

[12] Staff additionally notes that BellSouth witness Tipton agreed that there is nothing in the revised TRRO rules that requires transition rates to only apply until a conversion has occurred. (TR 711)
[13] March 10, 2006, is the end of the transition period for local circuit switching and affected high-capacity loops and transport; September 10, 2006, is the end of the transition period for dark fiber.

Transition Period

Staff observes that there are two central disputes between the parties with regard to the transition period process: (1) whether conversions are required to be completed by the end of the applicable transition period; and (2) whether there should be a required date for identification of the respective embedded bases of the de-listed UNE. Staff believes that resolution of the first dispute is dependent on the meaning of the phrase "to transition." Staff observes that nowhere in the TRRO does the FCC equate "to transition" to "complete conversions," as BellSouth contends. The text of the TRRO only requires CLECs to submit orders within the applicable transition period. (TRRO ¶¶216 and 227) Staff also notes that ¶¶143 and 196 state that "[a]t the end of the end of the transition period, requesting carriers must transition . . ." the affected de-listed UNEs to alternative facilities or arrangements. The revised unbundling rules state that the applicable transition period begins on the effective date of the TRRO, March 11, 2005. (TRRO Appendix B, pp. 147-148, and 150-152) Therefore, staff believes that CLECs are given the entire transition period, March 11, 2005, through March 10, 2006, (September 10, 2006, for dark fiber) to submit conversion or disconnect orders. There is no requirement that conversions must be completed by the end of the applicable transition period. However, staff notes that absent receipt of a conversion order by the end of the applicable transition period, BellSouth has no obligation to provide the de-listed services. In fact, staff observes that BellSouth does not offer stand-alone switching ports except through a commercial agreement. Staff believes that BellSouth should be allowed to disconnect any such arrangements once the transition period ends, absent a CLEC conversion order. Staff believes that BellSouth's proposal to convert the de-listed high-capacity loops and transport and dark fiber to its resale or tariffed products is beneficial to the CLECs who, for whatever reason, have not made alternative arrangements for the de-listed services.

Staff observes there is also a dispute between the parties regarding who should identify the specific arrangements to be converted or disconnected. BellSouth witness Tipton believes that CLECs should be required to submit spreadsheets by a date certain that identify the embedded base of de-listed UNEs that are subject to being converted or disconnected. If CLECs identify and submit spreadsheets in accord with BellSouth's deadlines, witness Tipton proposes that CLECs be charged the BellSouth proposed "switch-as-is" conversion rates without any disconnect charges. The witness proposes that if CLECs do not submit orders "in a timely manner" in accord with BellSouth's deadlines so conversions can be made by March 10, 2006, then BellSouth should be permitted to identify the affected UNE arrangements and convert them to the equivalent wholesale service. (TR 534-541, 573-577, 692; EXH 47)

In contrast, CompSouth disputes BellSouth's claim that the CLEC has the first responsibility to identify any de-listed circuits. (Gillan TR 446 and 490; EXH 9, p. 73; EXH 4, p. 171) CompSouth proposes language that requires BellSouth, not the CLEC, to provide written notice that identifies the de-listed arrangements that are to be required to be transitioned to other facilities. (EXH 23, pp. 3, 5, 6-7, 8, 11, and 14) CompSouth witness Gillan asserts that there is nothing in the TRRO that requires the identification of the embedded base that is subject to conversion or disconnection, by a date certain. (TR 486) CompSouth also believes that regardless of when conversion orders are submitted, no nonrecurring charges should apply. (Gillan TR 446; EXH 23, pp. 3, 7, 12, 14) Furthermore, the Joint CLECs and CompSouth

contend that de-listed arrangements not converted by March 10, 2006, should be converted to the parallel §271 arrangements priced at the TRRO transitional rates until a rate proceeding is held. (Gillan TR 431; Joint CLECs BR at 3-4, 37-40; EXH 23, p. 3)

Staff believes that CLECs, not BellSouth, should identify the embedded base of de-listed UNEs and submit the conversion orders. Staff believes the TRRO is clear that at the end of the transition period, CLECs are required to transition the affected de-listed UNEs to alternative arrangements. (TRRO ¶¶143, 196, 227) Staff notes that for local circuit switching, the FCC specifically held that "[w]e require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within 12 months of the effective date of this Order." (TRRO ¶227) While similar language is not found in the TRRO for high-capacity loops and transport, staff agrees with BellSouth that the CLECs are in the best position to identify their respective embedded bases. Moreover, staff disagrees with CompSouth witness Gillan that BellSouth is the party withdrawing the service, and therefore it should identify the circuits no longer being offered as UNEs, and allow CLECs to review the identification and inform BellSouth of disagreements. (TR 490) Contrary to witness Gillan's claim, staff posits that it is the FCC, not BellSouth, that has required these offerings to be withdrawn.

However, staff observes that there is nothing in the TRRO that permits BellSouth to establish deadlines for CLECs to submit spreadsheets identifying the de-listed UNEs subject to the transition period. The only requirement is that the transition period ends after 12 months or eighteen months, and de-listed arrangements must be transitioned to alternative services at that time. Indeed, BellSouth witness Tipton recognized that the deadlines cannot be an absolute cutoff and it is "certainly within the Commission's discretion to establish alternative dates." (TR 684) Because staff believes that the TRRO-established transition pricing is applicable throughout the transition period, there should be no reason why CLECs would not work cooperatively with BellSouth and identify the embedded base of circuits as soon as possible. Nonetheless, if CLECs do not identify the respective embedded bases by the end of the applicable transition period, staff agrees that BellSouth should be permitted to (1) identify the arrangements itself, (2) charge CLECs the applicable UNE disconnect charges and full installation charges, and (3) charge CLECs the resale or wholesale tariffed rate thereafter, regardless of when the conversion is completed. Strictly speaking, staff believes that BellSouth is entitled to assess Commission-approved UNE disconnect charges and, e.g., special access nonrecurring charges before the end of the transition period. BellSouth's offer to not assess these charges serves as an incentive for early conversion.

Regarding BellSouth's proposed "switch-as-is" conversion rates (Table 1-1), staff observes that BellSouth witness Tipton acknowledged that the cost study supporting the proposed rates was provided one week prior to the hearing in response to staff discovery; BellSouth did not sponsor any testimony concerning the cost study or its assumptions; and BellSouth did not offer any witness that parties could have deposed or questioned at the hearing concerning the cost study. (TR 701) These facts make it difficult for staff to recommend approval of BellSouth's proposed "switch-as-is" rates. Staff believes BellSouth has not provided sufficient evidence to support the appropriateness of its proposed rates. Notwithstanding this,

staff believes that nothing precludes BellSouth from initiating a cost proceeding where "switch-as-is" conversion rates can be appropriately addressed.

Section 271 Checklist Items

BellSouth asserts that it offers §271 switching via a commercial agreement and §271 loops and transport via special access tariffs. (EXH 3, p. 2; Tipton TR 704) CompSouth witness Gillan disputes BellSouth's assertion that de-listed circuits remaining on March 11, 2006, should be moved to interstate special access service, BellSouth's claim that interstate special access is sufficient to satisfy §271 obligations, and that BellSouth's interstate special access rates meet the "just and reasonable" standard of §201 and §202. (EXH 4, pp. 164, 171) The witness believes that a parallel §271 service should be offered as a viable alternative arrangement for CLECs to transition from de-listed UNEs, and that the Commission should set interim rates at the TRRO transition rates until a cost proceeding is held to address the appropriate rates for the §271 services.

As discussed in more detail in Issue 7, staff believes that the Commission does not have authority to require BellSouth to include §271 elements in §252 interconnection agreements. Staff notes that in the TRO, the FCC explicitly stated that whether a particular §271 element's rate satisfies the just and reasonable pricing standard of §201 and §202 is a fact-specific inquiry that the FCC will undertake, whether in an application for §271 authority or an enforcement proceeding brought pursuant to §271(d)(6). Based on the recommendation in Issue 7, staff believes that §252 ICAs should not include §271 elements and that any dispute that BellSouth's special access rates are not "just and reasonable" should be filed as a complaint with the FCC, not this Commission.

CONCLUSION

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.

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 staff analysis. Staff's recommended language is found in Appendix A.

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. **(Scott)**

Position of the Parties

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

GRUCOM: a) GRUCom takes no position, but reserves the right to incorporate into its existing ICA with BellSouth language adopted by the Commission in this proceeding. b) GRUCom takes no position.

JOINT CLECs: a) Existing ICAs should only be modified regarding disputed issues that are within the scope of this proceeding. b) If the issue resolved in this case is an unresolved issue in a pending arbitration, the rulings here should govern. If the issue is not an unresolved issue in a pending arbitration, and the parties to the arbitration agreed to abide by a negotiated resolution, the negotiated resolutions should govern.

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

Staff Analysis:

PARTIES' ARGUMENTS

BellSouth contends that carriers must implement amendments to their interconnection agreements consistent with the TRRO.[14] (BellSouth BR at 64) Accordingly, BellSouth argues that carriers must remove the availability of de-listed UNEs from their existing interconnection

[14] TRRO at ¶ 233.

agreements. Id. BellSouth further contends that all remaining[15] CLECs should be required to execute an amendment with Commission-approved contract language subsequent to issuance of the Commission's order in this Docket. Id.

The Joint CLECs contend that amendments to the ICAs should be based on the Commission's decisions in this proceeding. (Joint CLECs BR at 7) Furthermore, the Joint CLECs state that the amendments should be implemented in a timely[16] manner subsequent to this proceeding, unless the parties have specifically agreed otherwise. Id. The Joint CLECs also contend that modifications to existing ICAs should be limited to disputed issues that are within the scope of this proceeding. Id.

The Joint CLECs argue that the way in which implementation should occur depends on whether the issue resolved in this proceeding is an unresolved disputed issue in a pending arbitration or if the issue resolved in this proceeding is not an unresolved disputed issue in a pending arbitration, and the parties to the arbitration have made agreements notwithstanding the outcome in this proceeding. Id. The former would require that the Commission's decision in this proceeding govern the resolution of the arbitration, and the latter would require that the agreements stand. Without an agreement either party may invoke the change of law provisions of the ICA upon Commission approval of the agreement. Id.

ANALYSIS

The FCC ruled that ILECs and CLECs must implement amendments to their ICAs consistent with the findings in the TRRO.[17] Staff believes that the TRRO is clear, in that the FCC ruled that any existing ICAs are to be modified during the established transition periods and implemented via the §252 process. Id. Accordingly, staff believes that the availability of de-listed UNEs should be removed from ICAs. The TRRO has changed BellSouth's unbundling obligations under §251(c)(3). As such, staff recommends that amendments to existing ICAs should reflect those changes to BellSouth's unbundling obligations. Both BellSouth and the Joint CLECs appear to agree in their post-hearing briefs that the Commission's decisions, as to contract language, in this proceeding will form the basis for amendments to ICAs, unless the parties have agreed otherwise. (BellSouth BR at 80; Joint CLECs BR at 6) Also, there is no clear dispute regarding whether non-parties should be bound by the decisions in this proceeding. BellSouth contends that the amendments to ICAs will apply to ICAs that are currently being arbitrated as well as those yet to be arbitrated, while the Joint CLECs take no position. (BellSouth BR at 64; Joint CLECs BR at 99) Commission Order No. PSC-05-0639-PCO-TP, which established the scope of this proceeding, made it clear that all Florida CLECs in BellSouth's territory will be bound by the findings in this proceeding.[18] Accordingly, staff

[15] More than 130 CLECS in Florida have amended or entered into new ICAs in order to implement the changes in law as a result of the TRRO. (BellSouth BR at 64); See also (TR 244)
[16] The Joint CLECs state that the parties should have a reasonable period of time to implement the amendments to accurately reflect the Commission's decisions.
[17] TRRO at ¶233.
[18] *Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law by BellSouth Telecommunications, Inc.,* Docket 041269-TP, FPSC Order No. PSC-05-0639-PCO-TP at 1, Issued June 14, 2005.

believes that all Florida CLECs having ICAs with BellSouth will be bound by the decisions in this proceeding effective upon issuance of the final order.

CONCLUSION

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.

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. **(Marsh)**

Position of the Parties

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

GRUCom: BellSouth is obligated to continue to provide GRUCom UNE DS1 services. However, that will change when the main Gainesville wire center becomes non-impaired. ICAs should be modified only to address matters at issue in this proceeding, including a fair process for determining wire center impairment status and post impairment conversions.

(i) "Business Line" should be defined as in 47 C.F.R. §51.5. The dispute with BellSouth focuses on how the definition is interpreted. BellSouth's initial mathematical error and continuing business line count overstatement show the need for a reasonable review and transition process. Mr. Gillan's business line count method should be incorporated into ICAs.

(ii) "Fiber-Based Collocation" should be defined in the same manner as it is in 47 C.F.R. §51.5. Collocation and business line data should be subject to an exhaustive due diligence procedure and potential challenges by CLECs before any Central Office is declared to be non-impaired.

(iii) No position.

(iv) No position.

JOINT CLECs:

(i) The FCC's business line definition requires that all four sentences be read together and applied in a manner that is internally consistent. The principal difference between BellSouth and the Joint CLECs is that the Joint CLECs believe a line must satisfy each of the FCC's requirements before it may be counted, while BellSouth counts any line that satisfies a single requirement even if it violates others.

(ii) BellSouth counts SBC and AT&T as separate "fiber based collators," even though the companies are one. There is nothing in the FCC's rules that require the Commission to look backwards at past conditions in determining the number of fiber-based collocators.

(iii) The Joint CLECs' "building" definition is based on BellSouth's "reasonable person" standard, but applied to a "reasonable telecom person" by defining each individual building by its entrance point for telecommunication facilities.

(iv) A route is defined by its end-points, not by the resources BellSouth uses to ultimately provide transport between the points. Even where BellSouth chooses to partially supply a requested route using facilities between two non-impaired offices, that decision should have no impact on the classification of the requested route.

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

Staff Analysis: Under § 251(c)(3) of the Act, ILECs are required to provide nondiscriminatory access to unbundled network elements to any requesting carrier. However, the TRO and the TRRO modified certain requirements with regard to high capacity loops and dedicated transport. The FCC rules provide that requesting telecommunications carriers may continue to obtain access to the following:

- Unbundled DS1 loops to any building not served by a wire center with at least 60,000 business lines and 4 or more fiber-based collocators. (TRRO Appendix B, p. 147)
- Unbundled DS3 loops to any building not served by a wire center with at least 38,000 business lines and 4 or more fiber-based collocators. (Ibid., p. 147)
- A maximum of ten unbundled DS1 loops or one DS3 loop to any single building in which such loops are still subject to unbundling requirements. (Ibid., p. 147)
- DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. (Ibid., p. 152)
- DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. (Ibid., p. 152)

In addition:

- Dark fiber loops are no longer subject to unbundling requirements. (Ibid., p. 148)

- CLECs are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance. (Ibid., p. 150)

There appears to be no dispute of these portions of the rules. Rather, the disagreements center on several points with regard to the definitions:

- The interpretation of the manner in which business lines should be counted (TR 407);
- Whether fiber-based collocators should include companies that are discussing a merger (TR 471); and
- Whether a "building" includes separate premises in certain multi-tenant buildings. (TR 491)

PARTIES' ARGUMENTS

BellSouth

DS1/DS3 and Dark Fiber Loops

Witness Tipton advises that BellSouth provided a list of wire centers that meet the threshold non-impairment criteria in its Carrier Notification Letter (CNL) dated April 15, 2005, which is posted on BellSouth's website. (TR 548) She states that BellSouth initially based its non-impairment determination on 2003 data, but updated the wire center list using December 2004 data. (TR 548-549) She notes that for Florida, wire centers meeting the DS1 loop threshold criteria did not change as a result of the update. (TR 549) Witness Tipton asserts that BellSouth is no longer required to provide unbundled access to new dark fiber loops in accordance with the CFR. (TR 550)

Witness Tipton states that it appears BellSouth can agree with the language proposed by CompSouth witness Gillan regarding the caps on DS1 and DS3 loops. (TR 626) She explains that the caps apply even where the test requires DS3 loop unbundling. (TR 626, citing TRRO ¶177, ¶ 181) She advises that no rates, terms, or conditions are proposed for dark fiber loops for new interconnection agreements. (TR 555)

DS1/DS3 Dedicated Transport and Dark Fiber Transport

Witness Tipton notes that wire centers listed in BellSouth's April 15, 2005 CNL as "Tier 1" meet the non-impairment thresholds for DS1 dedicated interoffice transport. (TR 551) She states that BellSouth is no longer obligated to provide DS3 dedicated transport on an unbundled basis on routes for which at least one end-point of the route is in a wire center with at least 24,000 business lines or at least three fiber-based collocators. (TR 551) Witness Tipton explains that once a wire center meets the threshold criteria, dedicated transport to or from that wire center will no longer be unbundled when the route originates from or terminates to a wire center also meeting the non-impairment thresholds. (TR 551) Witness Tipton explains that "[t]hose wire centers designated as either 'Tier 1' or 'Tier 2' in [EXH 20] meet the thresholds for DS3 dedicated interoffice transport and unbundling is no longer required between Tier 1 wire centers,

between Tier 2 wire centers, or between a Tier 1 wire center and a Tier 2 wire center." (TR 552) Witness Tipton states that BellSouth is no longer obligated to provide dark fiber dedicated transport on an unbundled basis on routes for which at least one end-point of the route is in a wire center with at least 24,000 business lines or at least three fiber-based collocators. (TR 561)

Witness Tipton explains that the business line count and collocation data was merged into a single list with wire centers listed by the proper Tier. (TR 564) She notes that the FCC defines Tiers in 47 CFR 51.319(e)(3) as follows:

- Tier 1 wire centers are those ILEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.

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

- Tier 3 wire centers are those ILEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers. (TR 565)

Witness Tipton states that the issue with regard to the DS1 transport cap has been resolved. (TR 627) She adds that, where still available, CLECs may only obtain twelve (12) unbundled DS3 dedicated transport circuits per route. (TR 551-552) No further information was provided and BellSouth did not address the caps in its brief.

Entrance Facilities

Witness Tipton explains that an entrance facility is dedicated transport that does not connect a pair of BellSouth wire centers. (TR 553) She advises that BellSouth is no longer obligated to provide entrance facilities. (TR 553)

EELs

Witness Tipton opines that the principles that apply to loops and dedicated interoffice transport also apply to EELs, because these are the elements that make up EELs. (TR 553-554) She notes that the route for an EEL is determined by the end points of the dedicated transport portion of the EEL. She explains that, once the non-impairment threshold for the wire center serving the loop location or transport route is met, BellSouth no longer has an obligation to provision the non-impaired portion of the EEL as a UNE. (TR 554) She continues that if the thresholds for both the dedicated transport and loop portions of the EEL have been met, EELs need no longer be provided. (TR 554)

Joint CLECs

US LEC witness Montano argues that "BellSouth's language focuses solely on the embedded base and the transition period and does not affirmatively state when it must provide access to the unbundled high capacity loops and transport." (TR 74-75) She states that US LEC is willing to agree to BellSouth's language "so long as BellSouth compromised on the language addressing the date on which orders for the 'embedded base' transition was required to be submitted as well as the length of any subsequent transition periods and the process by which the parties would agree on the identification of non-impaired wire centers." (TR 75) She complains that "the parties have reached an impasse on the wire center identification issue." (TR 75)

Definitions

BellSouth

BellSouth witness Tipton notes that the FCC set non-impairment thresholds for high capacity loops and dedicated transport. (TR 542) She adds that references to business lines and fiber-based collocation are contained in the specifics for each type of threshold. (TR 542) She advises that the non-impairment rules for loops also include the term "building," while the rules for dedicated transport non-impairment contain the term "route." (TR 542-543) She opines that the definitions of these terms are important because they impact the conclusion as to the wire centers where CLECs are not impaired with regard to high capacity loops or transport. (TR 543)

(i) Business Line

Witness Tipton states that the FCC defined a business line in 47 CFR 51.5 as:

> . . . an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines." (TR 543)

Witness Tipton states that a number of points are at issue with regard to the types of loops that should be included in the count. (TR 544) She asserts, for example, that the FCC's definition requires that BellSouth include all UNE loops, even those that are not switched, like DSL lines. (TR 544) She contends that the FCC's rule does not exclude any particular type of unbundled loop for the business line count. (TR 543-544) She also notes that BellSouth counted retail lines used to serve business customers with switched voice lines, including lines or trunks provided over high capacity transport links. (TR 544)

Witness Tipton states that the ARMIS reports do not count all of the lines that the FCC included in its definition of business lines. (TR 560) She explains that unbundled loops, whether stand-alone or provisioned in combination with other network elements, are not included in BellSouth's switched access line counts in ARMIS. (TR 560) She advises that BellSouth included all UNE loops connected to a wire center, including those provisioned in combination with other unbundled elements, as well as business UNE-P arrangements. (TR 560) She also notes that BellSouth did not include UNE-P residential lines in the business line count. (TR 633) She opines that this represents a more conservative view of business access lines, since these types of lines were not adjusted to full capacity. (TR 562)

Witness Tipton asserts that the FCC's definition of a business line includes UNE-L and UNE-P data not captured in ARMIS. (TR 559) She explains that the FCC's Policy Division Staff instructed ILECs to include UNE-P used to serve business customers as well as all UNE-L. (EXH 2, p. 8) She advises that the FCC acknowledged in ¶150 of the TRRO the inclusion of UNE-L, stating, "'We adopt this definition of business lines because it fairly represents the business opportunities in a wire center, including through the use of UNEs.'" (EXH 2, p. 8) She contends that the inclusion of all UNE loops is in keeping with the FCC's goal to determine where there is sufficient competition to justify a finding of no impairment. (EXH 2, p. 8) She avers that the presence of UNE-L in a wire center demonstrates the existence of competition in a wire center. (EXH 2, p. 8) She adds that the FCC rules also specify that all UNE loops connected to a wire center should be included in the business line count.[19] (EXH 2, p. 8)

Witness Tipton explains that BellSouth identified all 64 Kbps equivalents that were associated with voice equivalent channels, but excluded those that were used for data services. (TR 544) She advises that a business line on which both a voice and a data service were provided was counted as one line. (TR 545) She notes that BellSouth did not count UNE-P residential lines in its business line count. (TR 633) She adds that BellSouth did not count any residential retail or resold lines, if a CLEC was providing a data service over the same line, such as in a line-sharing arrangement. (TR 545)

Witness Tipton explains that to identify the retail and resale high capacity circuits to be counted in the business line analysis, BellSouth used only those which had a USOC with a designation that indicated the circuit was used to provide voice service. She notes that BellSouth excluded from its analysis those USOCs indicating that a high capacity circuit was used for data or for an integrated voice and data offering. (EXH 2, p. 9)

Witness Tipton asserts that the definition of business line proposed by the Joint CLECs goes beyond the FCC's definition. She explains that the Joint CLECs' proposed modifications exclude non-switched UNE loop facilities from the business line count, which would potentially exclude some UNE loops. She notes that the proposal also excludes unused capacity on channelized high capacity loops, even though the FCC's definition specifies that digital access lines should be counted with each 64 kbps-equivalent as one line. (TR 628)

Witness Tipton states that certain arguments of CompSouth witness Gillan "conflict with the FCC's instructions as to how BellSouth should count business lines." (TR 631) She notes

[19] 47 CFR 51.5.

that the FCC did not impose a requirement to determine which UNE-L lines are used to provide switched services. (TR 631) She cites the FCC's rule which states

> The number of business lines in a wire center shall equal the sum of all incumbent LEC switched access lines, *plus the sum of all UNE loops connected to that wire center,* including UNE loops provisioned in combination with other unbundled elements. (TR 631-632, citing 47 CFR 51.5) (emphasis by witness)

Witness Tipton opines that this definition makes sense because "the objective here is to determine where the CLECs are not impaired without access to BellSouth's facilities as UNEs." (TR 632) She states that the fact that a CLEC has purchased UNE loops in a particular wire center, regardless of the service provided over those loops, is an indication that the CLECs are not impaired in that wire center. (TR 632) She opines that the FCC recognized that the ILECs would not be able to determine what UNE loops are used for, and as a result, set a requirement that all UNE loops be included in the business line count. (TR 633)

Joint CLECs

CompSouth witness Gillan states that the number of business lines in a wire center is based on the summation of three values: 1) the number of business switched access lines; 2) the number of UNE loops (including loops used with other unbundled elements); and 3) the number of business UNE-P. (TR 403-404) He explains that there are certain directives that must be followed in performing the calculation. (TR 404) He advises that the business line count includes only those access lines that connect end-user customers with ILEC end-offices for switched services, that does not include non-switched special access lines, and that includes ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. (TR 404) He notes that these additional requirements apply only to UNE lines. (TR 405) He asserts that BellSouth has an incentive to incorrectly assign wire centers to reduce its unbundling obligations. (TR 402)

Witness Gillan argues that the ARMIS 43-08 Business Switched Access Lines already conform to the FCC's requirements. (TR 406) He provides the FCC definition for calculating ARMIS business lines, which is comprised of total voice-grade equivalent analog or digital switched access lines to business customers, including single business access lines, the total of analog and digital multiline business access lines, and payphone lines. (TR 406)

Witness Gillan notes the FCC's definition of a business line in the CFR includes the statement "[t]he number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." (TR 461-462, citing 47 CFR 51.5) He asserts that BellSouth interprets the second sentence of the rule as a waiver of the first sentence, thus allowing BellSouth to count the maximum potential capacity of every UNE-L circuit regardless of the way in which the circuit is actually used. (TR 462) Witness Gillan emphasizes that the business line tallies should only include those access lines that connect end-user customers with ILEC end-offices for use in the provision of switched

services. (TR 463) He asserts that BellSouth manipulated its own ARMIS data to make it consistent with BellSouth's UNE-L assumption. (TR 467, citing Tipton Direct p. 34)

Witness Gillan contends that there is no reason for BellSouth to modify the number of business lines included in the ARMIS report. (TR 407) He states that UNE-L and business UNE-P lines should be added to the ARMIS figure to arrive at the business line count necessary to determine whether a wire center meets the non-impairment criteria. (TR 407) Witness Gillan asserts that UNE-P is a switched service, and thus falls under the ARMIS requirements for calculation. (TR 408) However, he explains that the FCC did not provide guidance for the determination of UNE-L lines. (TR 408)

Witness Gillan notes that BellSouth's treatment of UNE-L accounts for 20 percent of the total business lines claimed by BellSouth. (TR 465) He notes that BellSouth is asking for substantially more wire centers to be considered non-impaired than what it originally advised the FCC would be the case. (TR 465-466) He notes that BellSouth now claims its wire centers have 20 percent more business lines than it claimed in December 2004. (TR 465-466) Witness Gillan concedes that "the FCC did not provide specific guidance as to the best way to ensure that UNE-L counts appropriately include only those access lines used to provide switched services to business customers." (TR 468) Nevertheless, he argues that BellSouth's approach is unreasonable and "dramatically overstates" the line count at each wire center. (TR 468) He states that "[a]ll that the Commission needs to do is to accept the simple and straightforward assumption that the average utilization for the CLECs is equal to the average utilization for BellSouth." (TR 469)

Witness Gillan states that nothing in the TRRO justifies treatment of HDSL-capable loops as if they were DS1 loops, with conversion to 24 business lines. (TR 409) He contends that only digital access lines are to be converted to voice-grade equivalents, citing 47 CFR 51.5. (TR 409) He asserts that "[a]n HDSL-*capable* loop is exactly that—a dry copper line that is not a digital facility without the addition of CLEC equipment." (TR 409) (emphasis by witness) He advises that the additional capacity constitutes a CLEC-created loop. (TR 410) He asserts that the FCC rejected any approach that would be the equivalent of counting CLEC capacity. (TR 410)

Witness Gillan contends that the provision in the rule requiring that digital access lines should be counted with each 64 kbps-equivalent does not override the rest of the rule. He asserts that when the rule is read in its entirety, it is clear that a circuit must satisfy all requirements in the rule in order to be counted; that is, it must be a LEC-owned switched access line and it must be ILEC-owned that is used to serve a business customer. (TR 464) He avers that the provision that each 64 kbps channel used to provide switched service to a business customer should be counted as one line does not permit BellSouth "to count unused capacity or capacity that is not used to provide switched services to a business customer merely because it is part of a digital circuit." (TR 464)

Witness Gillan provides a revised business line count in which he eliminates BellSouth's adjustments to its ARMIS business line count in which BellSouth increased actual business lines to include the maximum potential capacity. He also changes UNE-L assumptions to reflect the

average utilization of CLEC digital UNE-L used to provide switched access service to business customers, thus effectively eliminating residential utilization. (TR 469; EXH 26) He contends that it is reasonable to assume that CLECs use approximately the same percentage of their potential digital capacity to provide switched access line services to business customers as BellSouth uses. (TR 469-470) He explains the percentage he applied is the average over the wire centers that BellSouth claims satisfy one or more criteria for non-impairment. (TR 469)

The Joint CLECs argue in their brief that BellSouth misreads the FCC's definition of business lines to include UNE-L used by CLECs to provide residential services. (Joint CLECs BR at 10-11) They state that BellSouth downplays the first sentence of the definition to support its position. (Joint CLECs BR at 11) The first sentence states that "[a] business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC." (47 CFR 51.5) The Joint CLECs assert that this is the core requirement of the rule, requiring that only business lines be counted. (Joint CLECs BR at 11)

Sprint

Sprint witness Maples notes that the FCC defines 'business lines' in 47 CFR 51.5. (TR 111) He asserts that the term should be included in the agreement, due to its importance in determining which wire centers meet the FCC criteria for non-impairment. (TR 113) He states that the definitions can either be incorporated verbatim from the FCC's rules or can be incorporated by reference. (TR 113)

(ii) Fiber-Based Collocation

BellSouth

Witness Tipton notes that the TRRO specifies in 47 CFR 51.5 that fiber-based collocation means:

> . . . any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliated is defined by 47 U.S.C. § 153(l) and any relevant interpretation of the Title. (TR 545-546)

Witness Tipton states that the definition of fiber-based collocator should not go beyond what is stated in the FCC rules. (TR 628) She complains that the Joint CLECs' proposed definition combines two firms who have discussed a merger into one fiber-based collocator

instead of two. (TR 628-629) She asserts that non-impairment determinations must be based upon the facts as of a certain date. (TR 629) She opines that "[t]he key factor is what companies are actually merged or affiliated on the date in which the non-impairment determination is made, whether that is the TRRO effective date or a future date when BellSouth designates additional unimpaired wire centers." (emphasis by witness) (TR 629)

Witness Tipton avers that BellSouth counted the number of collocators that have fiber-fed arrangements, rather than the number of fiber 'providers' who supply fiber to a given wire center. She contends that this is consistent with the FCC's approach to determining how many arrangements are fiber-based. (TR 546) She states that CompSouth witness Gillan attempts to exclude arrangements where one collocated carrier obtains fiber capacity from another collocated carrier. (TR 629) She explains that where a carrier has fiber that it obtained from another collocated carrier connected to terminating equipment in its collocation arrangement, both collocated carriers, if actively powered, qualify as fiber-based collocators. (TR 629) She adds that BellSouth only included in its count of fiber-based collocators those arrangements served by fiber, even though the FCC's definition of a business line allows the inclusion of a comparable transmission facility. (TR 629-630)

Witness Tipton states that BellSouth made a physical check of the collocation arrangements in each wire center that it believed had at least three fiber-based collocation arrangements. (TR 563) She explains that BellSouth did not count those arrangements that were not fed by competitive fiber or contained equipment that was not actively powered. (TR 563) She advises that BellSouth also did not count affiliated carriers' collocation arrangements as multiple fiber-based collocation arrangements in a given wire center. (TR 563-564) She adds that BellSouth manually checked its records to determine if affiliated carriers had fiber-based collocations in any wire center, and counted any that were found as one fiber-based collocation arrangement. (TR 564) Witness Tipton asserts that BellSouth did not alter, to serve its own interests, the findings of its visits to wire centers to verify the presence of fiber-based collocators reflected in its billing records. (TR 630)

Witness Tipton states that she does not object to referring to the FCC's definition of fiber-based collocator in the ICAs as suggested by Sprint witness Maples. (TR 629) She expresses unwillingness to include the language proposed by CompSouth. (TR 629)

Joint CLECs

Witness Gillan states that he validated BellSouth's claims regarding the number of fiber-based collocators which would be provided in a revised exhibit JPG-5. (TR 470-471) He contends that the key is to assure that the fiber-based collocators meet the definition of 47 CFR 51.5. (TR 470) He advises that the pending AT&T-SBC merger must be recognized, such that their fiber-based collocations are counted as one entrant, and not two. (TR 471-472)

Sprint

Sprint witness Maples notes that the FCC defines 'fiber based collocator' in 47 CFR 51.5. (TR 112) As with the definition of 'business line,' he asserts that the term should be included in

the agreement, due to its importance in determining which wire centers meet the FCC criteria for non-impairment, and can be incorporated verbatim or by reference. (TR 113)

(iii) Building

The term 'building' is not defined by the FCC.

BellSouth

Witness Tipton states that BellSouth has not proposed a definition for the word "building." (TR 546) She asserts that a 'reasonable person' standard should be applied in case of a dispute. (TR 546) She explains by way of example that this means an office complex of a number of buildings is not a single building; however, one building with multiple tenants is a single building, regardless of the number of tenants in it. (TR 546)

Witness Tipton states that the definition of a building proposed by CompSouth witness Gillan is unreasonable. (TR 627) She complains that "[b]y attempting to define individual tenant space in a multi-tenant building as its own 'building,' a CLEC would have virtually unlimited access to UNE DS1 loops and DS3 loops to the one building housing all of these tenants in clear violation of the caps imposed by the FCC for these elements." (TR 627)

Joint CLECs

CompSouth witness Gillan notes that he has revised his proposed definition of a building, starting with BellSouth's "reasonable person" concept. (TR 491) He advises that the primary difference between his definition and BellSouth's is the concept of a "reasonable *telecom* person." (TR 491) (Emphasis by witness) He states the definition of a building should be based on an area served by a single point of entry for telecom services. (TR 491) He explains by way of example that "a high-rise building with a general telecommunications equipment room would be considered a single building, while a strip mall with separate telecom-service points for each individual business in the mall would not." (TR 491) He argues that such a configuration should qualify as individual premises, even though businesses may share a common wall. (TR 491)

(iv) Route

The term 'route' is defined within the FCC's rule for dedicated transport:

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

> irrespective of whether they pass through the same intermediate wire centers or switches, if any. (47 CFR 51.319(3))

BellSouth

Witness Tipton explains that the term "route" is defined in 47 CFR 51.319(e). (TR 545) She provides no further testimony on this definition.

Joint CLECs

XO witness Shulman contends that the definition of a route should not limit access to high-capacity transport UNEs on routes where the FCC has determined that CLECs are impaired without such UNEs. (TR 178) She states that "CLECs need to be able to collocate in a Tier 2 or Tier 3 wire center and obtain unbundled transport connecting that collocation to multiple Tier 1 or Tier 2 centers." (TR 178) She explains that although a CLEC can use a cross-connect in an existing collocation arrangement to take the place of a route, a CLEC should nevertheless not be precluded from obtaining the route if it otherwise would be available. (TR 179)

Sprint

Sprint witness Maples asserts that there are no exceptions to one end of the route having to be an ILEC wire center or switch. (TR 114) He states that "the FCC includes non-ILEC locations where an ILEC has collocated switching equipment in its definition of what constitutes a wire center. This is called 'reverse collocation.'" (TR 114) Witness Maples opines that this is in keeping with the TRRO where it states that the definition of wire center "also includes any incumbent LEC switches with line-side functionality that terminate loops that are 'reverse collocated' in non-incumbent LEC collocation hotels." (TR 114, citing TRRO ¶87 fn 251)

ANALYSIS

Loops/Transport

There is no disagreement on the specific part of the language pertaining to the availability of unbundled loops and transport and the non-impairment thresholds. Although initially there was disagreement over the DS1 caps, the parties indicate that it has now been resolved. BellSouth states that it can agree with the language proposed by CompSouth witness Gillan regarding the caps on DS1 and DS3 loops. (Tipton TR 626) The language is included under Issue 1.

Business Line

In its discussion of business line counts in the TRRO, the FCC specified that

> . . . [t]he BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops. We adopt this

> definition of business lines because it fairly represents the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs. . . . (TRRO ¶105, fns omitted)

BellSouth states in its brief that this text requires BellSouth to include business UNE-P in its line counts. BellSouth notes that the CLECs have not suggested BellSouth should have included residential UNE-P. However, BellSouth contends that the CLECs take issue with BellSouth including all UNE loops. (BellSouth BR at 69-70) BellSouth argues that "[t]he FCC intentionally required all UNE loops (excluding only residential UNE-P) to be included as business lines, because it gauges 'the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs.'" (BellSouth BR at 70)

Staff notes that the CFR specifies that "the number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to the wire center, including UNE loops provisioned in combination with other unbundled elements." (47 CFR 51.5) Staff notes that the rule refers to ILEC "business" switched access lines, but does not specify any particular UNE loops; rather, it says "all" UNE loops connected to the wire center, including UNE loops provisioned in combination with other unbundled elements. This is consistent with the language from the text of the TRRO, cited above. Staff believes that this distinction is significant and indicates that ILEC switched business access lines and UNE loops should be treated differently. Accordingly, staff disagrees with CompSouth witness Gillan's adjustment to UNE-L, which is based upon his assumption that UNE-L should include only those lines used to provision business service, rather than being counted at full capacity as done by BellSouth.

Staff also agrees with BellSouth that unused capacity on channelized high capacity loops should be counted in the business lines. (TR 628) As noted by BellSouth witness Tipton, the FCC rules specifically state that "the business line tallies . . . shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line." (47 CFR 51.5) The FCC rule further explains by way of example that a DS1 line should be counted as 24 business lines because it corresponds to 24 64 kbps-equivalents.

The rule does not specifically use the term "UNE-P." Staff believes it is encompassed in ILEC business switched access lines. BellSouth has taken a conservative approach in counting only business UNE-P, excluding residential, which appears to be in accord with the FCC's intent. Accordingly, staff believes this approach should be accepted.

A further disagreement between the parties arises over the inclusion of HDSL-capable loops at full capacity for purposes of determining impairment. The CFR states that the business line count includes "ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'" (47 CFR 51.5) CompSouth witness Gillan objects to this treatment; however, staff agrees with BellSouth's treatment. As discussed in Issue 5, HDSL-capable loops (i.e., 2-wire or 4-wire High Bit Rate Digital Subscriber (HDSL) Compatible Loops) are the equivalent

of DS1 loops for the purpose of evaluating impairment and should be counted as 24 voice grade equivalents.

BellSouth proposed a modification to the language provided by CompSouth witness Gillan. Staff believes that language, as modified, is appropriate.

Fiber-Based Collocation

Staff agrees with BellSouth that the number of fiber-based collocators in a given wire center should be counted as of a specific date. Staff recognizes that once a wire center is considered non-impaired, it will not revert to an impaired designation. Thus, CLECs will not be able to obtain the particular element in the future at TELRIC rates. The transition period for non-impaired loops and transport began on March 11, 2005, and staff believes that is the date that the initial measurement should be taken for purposes of those wire centers that met the non-impairment criteria on that date for a specific service.

Because high capacity loop non-impairment is based on *both* business lines and fiber-based collocations, this approach impacts certain wire centers differently than for purposes of transport non-impairment. (emphasis added) The de-listing of unbundled DS1 and DS3 transport is based on an either/or condition, and thus is not impacted in the same way. At such time as these or any wire centers meet the non-impairment criteria in the future, staff believes the count should be made based on current information at that time.

For purposes of the current interconnection agreements staff believes, the fiber-based collocator count should be based on the conditions present at the beginning of the transition period. Accordingly, AT&T and SBC should be counted as two separate collocators.

BellSouth proposed a modification to the language provided by CompSouth witness Gillan. Staff believes that language, as modified, is appropriate.

Building

The key to the dispute over the term "building" is the loop cap that restricts the number of DS1 or DS3 loops that a CLEC may obtain per building. A more liberal definition of "building" would allow a CLEC to obtain more unbundled loops. While the parties have reached an agreement on the caps themselves, as previously discussed, the issue remains with regard to the building definition. There is no definition in the CFR.

The parties suggest two different approaches. BellSouth advocates a "reasonable person" definition, while CompSouth modifies it to a "reasonable telecom person." BellSouth's definition would treat all multi-tenant buildings as a single building. The CompSouth definition would be based on the area served by a single point of entry for telecom services. In other words, a structure with a single point of entry, e.g., a single telephone equipment room, would be considered one building, while a building with multiple entry points would be considered multiple buildings.

There is no guidance for this definition in the TRO or the TRRO. While both definitions rely on a "reasonable person" approach, staff believes the modification provided by CompSouth is the better approach, because staff believes it contemplates the manner in which services would be provided to a customer. A location in which each customer location has its own telecom facilities should not be denied additional service just because the particular premises is attached to another customer location. Accordingly, staff believes the language provided by CompSouth witness Gillan is the appropriate definition of a "building."

Route

The Joint CLECs noted in their brief that there is no dispute among the parties with the definition of a route as contained in 47 CFR 51.319(e). CompSouth clarified that "[a] route is defined by its end-points, not by whatever decision BellSouth employs as to how it will ultimately provide transport between those points." (Joint CLECs BR at 24)

BellSouth proposed language that is essentially the definition contained in the CFR. Sprint provided one change to the language, by adding the statement, "For purposes of determining routes wire centers include non-BellSouth locations where BellSouth has reverse collocated switches with line side functionality that terminate loops." (TR 147) While Sprint has reached agreement with BellSouth on this issue, as indicated in its position above, staff notes the language it provided is useful for the remaining parties' agreements. Staff believes the appropriate language to include is that proposed by BellSouth with the clarification provided by Sprint.

CONCLUSION

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.

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. **(Marsh, Teitzman)**

Position of the Parties

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

GRUCOM: a) Yes. BellSouth conceded as much in (a) requesting that the Commission approve ICA terms in this proceeding that address this issue and (b) acknowledging in its testimony that the Commission has authority to approve ICA terms. The evidence shows the Commission needs to act to protect competition.

b) A reasonable Central Office non-impairment and subsequent period transition process should be implemented. CLECs should be allowed to review, analyze, and challenge BellSouth information. BellSouth's process imposes unreasonable notice (website only) and time limits on CLECs and is discredited by Gillan's and Maple's testimony.

(c) GRUCom recommends adoption of the language provided by Mr. Maples at Pages 42 to 44 of his Testimony for subsequent transition periods, and by Mr. Gillan in Ex. 23, First Revised Gillan Exhibit JPG-1, pages 20, 21 of 67, for determining future wire center non-impairment.

JOINT CLECs: Although the Commission could rely on multiple dispute resolution proceedings to investigate future changes to the "wire center list," a more efficient method would resolve all challenges on the "front end" in an orderly process. BellSouth has never offered any criticism of the process recommended by the Joint CLECs and it should be adopted.

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

Staff Analysis: The primary area of contention concerns the future procedures to be used to identify non-impaired wire centers, and the manner in which parties will be notified.

PARTIES' ARGUMENTS

a) Commission Authority

BellSouth

BellSouth witness Tipton states that the FCC is the appropriate agency to determine whether BellSouth has properly applied the impairment criteria in the TRRO. Nevertheless, she concedes that this Commission may need to decide which wire centers satisfy the FCC's rules so that the contract language can be approved. (TR 556)

Witness Tipton states that "[a]s a practical matter, this Commission must verify BellSouth's application of the FCC's non-impairment criteria in order for de-listed UNEs to be transitioned to alternative arrangements by the end of the transition period." (EXH 2, p. 10) She adds that although dispute resolution can occur before a state commission, in accordance with ¶234 of the TRRO, disputes with individual CLECs may be eliminated by validating the wire center threshold criteria in this proceeding. (EXH 2, p. 44)

Joint CLECs

Witness Montano asserts that if the parties are unable to agree to the wire centers that meet the threshold non-impairment criteria, this Commission must make the determination through the arbitration process. (TR 80) She disagrees with BellSouth's position that this Commission does not have the authority to make the determination. (TR 81) She states that US LEC has withdrawn its agreement to BellSouth's proposed language that would place jurisdiction over disputes on the wire center lists with the FCC because BellSouth will not agree that CLECs have a right to reach agreement on the list before it is incorporated into the ICA. (TR 81) She opines that by allowing CLECs to verify the data used in compiling the wire center lists, fewer disputes will arise. (TR 82) Witness Montano avers that state commissions need not make a determination of non-impairment, but rather, must simply ascertain the ILECs have met the requirements set out by the FCC. (TR 82)

b) Procedures

BellSouth

Witness Tipton states that the FCC has established guidelines and procedures to determine where there is no impairment in wire centers. (TR 557) She notes that under ¶234 of the TRRO a CLEC must make a reasonably diligent inquiry and self-certify based on that inquiry that, to the best of its knowledge it is entitled to order high-capacity loops and/or transport as

UNEs out of the subject wire center. (EXH 2, p.11) She explains that this requires, at a minimum, that CLECs review BellSouth's line count and fiber-based collocation data. (EXH 2, p.11) She asserts that "[i]f a CLEC does not meet its due diligence requirements, BellSouth may seek recourse through the dispute resolution process in the CLEC's interconnection agreement if the CLEC does not meet these requirements." (EXH 2, p.11) She contends that BellSouth is entitled to recover "1) any costs it incurred unnecessarily provisioning UNEs to a CLEC, and 2) the difference between the rate for that element in the CLEC's agreement and the tariffed rate for the corresponding service for any de-listed UNE that was provisioned at UNE rates in error." (EXH 2, p. 11)

Witness Tipton explains that BellSouth started its business line count with the Automated Reporting Measurement Information System (ARMIS) reports that it files with the FCC. (TR 559) She advises that BellSouth updated the line counts in February 2005, following the release of the TRRO. (TR 559) She adds that BellSouth recently updated its wire center results to include the December 2004 ARMIS data and the December 2004 UNE loop and UNE-P data. (TR 559-560) She asserts that the data was "used to provide a consistent view of line counts and to meet the FCC's intent to use line counts that were publicly available, at least at a summary level." (TR 559) She notes that the ARMIS data was restated on a wire center basis. (TR 560-561) Witness Tipton explains that BellSouth "retained an independent third-party, Deloitte & Touche ('Deloitte') to confirm that BellSouth performed the analysis as stated and to confirm the conclusions that BellSouth reached in implementing the non-impairment thresholds set for the TRRO and to identify the specific wire centers where those thresholds have been met. " (TR 562)

Witness Tipton advises that business high-capacity digital switched access lines in each wire center, as well as high-capacity UNE loops, are included at full system capacity. (TR 561) She explains by way of example that, for TRRO purposes, a DS1 Carrier System would have a full system capacity of 24 business lines, even if the full capacity was not in use. (TR 561) She clarifies that certain other UNE loops, such as HDSL, ADSL, and IDSL, are counted on a one-for-one basis. (TR 562, 633) She adds that only in-service DS1 and UNE HDSL loops were included. (TR 633)

Witness Tipton states that CLECs should use the April 15, 2005 Carrier Notification Letter (CNL) provided by BellSouth to determine where alternative arrangements for service need to be made. (TR 635) She asserts that BellSouth took precautions to ensure that the current wire center list in the CNL was correctly compiled before posting it on BellSouth's website. (TR 635) She pledges that BellSouth will make any necessary revisions to incorporate the results of discovery. (TR 635) She also states that "BellSouth is prepared to make CLECs whole in the event a CLEC timely reacts to BellSouth's posted wire center list, and at a later date, the list is found to be incorrect." (TR 635-636)

Witness Tipton proposes that BellSouth notify CLECs of additional wire centers that are found to meet the FCC's non-impairment criteria by additional CNLs. (TR 637) She states that ten business days after posting the CNL, BellSouth would no longer be obligated to offer high cap loops and dedicated transport as UNEs in such wire centers, except pursuant to the self-certification process. (TR 637) She explains that high cap loop and transport UNEs that were

already in service will remain available as UNEs for 90 days after the tenth business day following posting of the CNL, or 104 days in total; CLECs must identify UNEs to be converted to alternative services within 40 days from the date of the CNL. (TR 637-638)

Witness Tipton disagrees with both methods proposed by US LEC witness Montano regarding the determination of wire centers that meet the FCC's impairment thresholds. (TR 636) She states that the proposed method that would require parties to mutually agree on facts to identify the wire centers that meet the FCC's criteria is not feasible since BellSouth could not go through that process with every CLEC in the state. (TR 636) Witness Tipton also disagrees that the wire center list should be approved through the arbitration process, although she notes that this would be acceptable for the initial list. (TR 636) She contends that it would not be an efficient use of the Commission's or BellSouth's resources to arbitrate modifications to the list with each CLEC. (TR 636) She asserts that a more expedited approach should be taken. (TR 636)

BellSouth states in its brief that it is "unwilling to agree to a process that limits its right to designate future wire centers on an annual basis. Nothing in the federal rules supports this limitation." (BellSouth BR at 75)

Joint CLECs

Witness Gillan states that the Deloitte analysis merely confirms "that BellSouth's spreadsheets were free of mathematical error." (TR 460) However, he explains that the report does not validate the definition of business lines or methodology used by BellSouth or verify the accuracy of the source data and the systems used to obtain it. (TR 460)

Witness Gillan recommends that this Commission establish the appropriate wire center designations, subject to an annual-update process. (TR 415) He states that the update should be based on BellSouth's annual ARMIS filing on made April 1. (TR 415) He contends that any adjustments to be made should be proposed at the same time the ARMIS filing is made. (TR 415-416) He asserts that all supporting documentation for any wire center to be added to the non-impairment list be included. (TR 416) He asserts that CLECs should have until May 1 to challenge any added wire center. (TR 416) He advises that this "Commission should have a standing hearing date reserved (by June 1) to take evidence on any disputed wire center, and issue a decision by June 15." (TR 416) He proposes that the new wire center list should become effective on July 1 of each year. (TR 416)

US LEC witness Montano asserts that her company must have an opportunity to review the data on which BellSouth based its determination that each wire center met the non-impairment threshold. (TR 77) She notes that this includes the number of fiber-based collocators at each wire center, as well as business lines, with the manner in which high-capacity lines are counted and how business lines are differentiated from residential lines. (TR 77) She adds that it is important to make sure the numbers are correct so that lengthy and costly disputes can be avoided. (TR 77)

Witness Montano disputes that BellSouth can incorporate its list of non-impaired wire centers into the ICA by reference, without the agreement of the CLECs as to its accuracy. (TR

79) She opines that the list of wire centers requested by the FCC was "to assist the CLECs in gathering the factual information from the RBOCs, and to ensure that an expeditious implementation of the 'fact-dependent rules' into a revised interconnection agreements [sic] was completed." (TR 79) She contends that non-impairment determinations must be mutual, and incorporated into the agreement by reference to paragraphs 233 and 234 of the TRRO. (TR 79-80)

XO

XO witness Shulman states that she agrees with CompSouth witness Gillan's proposal for an annual proceeding to review business line counts. (TR 174) She concurs with his opinion that BellSouth has an incentive to overstate business line counts in order to minimize its unbundling obligations. (TR 174) She emphasizes the importance of a thorough review by this Commission of the line count data before BellSouth is relieved of any unbundling obligations. (TR 174-175) She notes that the ARMIS data that is used as a basis for the line counts is filed annually. (TR 175)

Witness Shulman also expresses concern with the notice procedures proposed by BellSouth. (TR 175) She contends that with only two weeks' notice that the loop or transport circuit required to serve a particular prospective customer will not be available at TELRIC rates, CLECs will not be able to properly market their services. (TR 175) She states that XO supports the proposal of CompSouth witness Gillan. (TR 175)

Witness Shulman contends that while updates of line count data may only be feasible once per year, new fiber-based collocations could be addressed through a notice on BellSouth's web site whenever BellSouth receives an order for new or modified collocation space that might result in a wire center exceeding the non-impairment threshold. (TR 176) She admits that BellSouth would not necessarily know whether the collocation would meet the FCC's definition of a fiber-based collocation. (TR 176) She asserts, however, that early notification would allow CLECs to better adjust their business plans if necessary. (TR 176) She states that a follow-up notice from BellSouth should be provided as soon as it has the information necessary to determine whether the new or modified collocation will impact the availability of UNEs in a particular wire center. (TR 176)

c) Language

BellSouth

Witness Tipton states that BellSouth does not oppose the inclusion of the initial wire center list in the ICAs. (TR 634) However, she argues that the inclusion of any subsequent lists "would require unnecessary administrative work when the same result can be achieved more efficiently." (TR 634) She opines that a reference in the ICAs to BellSouth's website makes more sense for the latest wire center lists. (TR 634) She advises that this is the manner in which other notifications are provided, such as CLEC guides, collocation space exhaust lists and other

instruction guides that impact the availability, ordering and provisioning of services offered pursuant to the interconnection agreement. (TR 634)

Joint CLECs

Witness Montano states that the language proposed by US LEC includes a provision that US LEC is certifying that it has used due diligence in determining the status of a wire center and the availability of UNEs in that wire center. (TR 78) She adds that the section also requires that BellSouth must provision the requested UNEs, then dispute the non-impairment status of the wire center. (TR 78) She asserts that the proposed language is consistent with the FCC's provisions in the TRRO. (TR 77-78)

CompSouth witness Gillan provided language that incorporates his recommended procedures. (EXH 23, pp. 20-21)

ANALYSIS

Authority

The only specific state role provided in the TRRO is resolution of an ILEC's challenges to a CLEC self-certification, under an ICA's dispute resolution process. (TRRO ¶234) There is no other specific authority stated in the TRRO for this Commission to determine whether BellSouth has properly applied the non-impairment criteria to its wire centers outside of the dispute process. It is clear that the parties are not in agreement over the application of the criteria for the de-listing of UNEs, as discussed in Issue 3. However, the parties do appear to agree in general that Commission approval of the initial list in this proceeding would reduce the number of later disputes. (Tipton TR 634; Montano TR 82) Thus, regulatory economy may be achieved by the Commission approving the initial list.

Procedures

Staff agrees with BellSouth that neither the federal rules nor the TRRO limits future designations of non-impaired wire centers to only once per year, as advocated by the Joint CLECs. The procedures have been fully outlined in the TRRO for the initial determinations, but it is essentially silent about the procedures to follow for determining non-impairment after the initial transition period. While BellSouth may update its non-impaired wire center lists more than once per year, reasonable notice should be provided. The only steps outlined by the FCC for disputing a non-impaired wire center designation include:

- Before submitting an order for a high-capacity loop or transport UNE, the CLEC must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements of the TRRO and that it is therefore entitled to unbundled access to the particular UNE sought pursuant to § 251(c)(3);

- The ILEC must immediately process the request upon receipt;

- The ILEC may subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority. (TRRO ¶234)

Staff believes this is the appropriate procedure. Continually amending the ICA to incorporate future changes to the wire center list would be a moving target that would serve no purpose. As discussed in Issue 3, staff agrees with the initial wire center designations proposed by BellSouth. Those designations are shown in the table included as part of the language for Issue 4 in Appendix A. BellSouth has placed a CNL containing its wire center list on its website and proposes to update the website ten days before any UNE is de-listed. (Tipton TR 635, 637) The record shows that the BellSouth website is routinely used by BellSouth to notify carriers of other changes and procedures that would be of concern to them. (Tipton TR 634) Thus, it is a method already in place and with which CLECs are familiar.

As discussed further in issue 9(b), staff believes this is the appropriate procedure. Effective thirty calendar days following issuance of the CNL, CLECs are not permitted to add new DS1 and DS3 loops or transport or dark fiber UNEs in the impacted wire centers. A projected transition period for circuits to be converted to other services or disconnected is also discussed in Issue 9(b).

Language

BellSouth has agreed to the inclusion of the initial wire center list in the agreement. (Tipton TR 634) Thus, it may be included as shown in the language of appendix A. The agreement should incorporate by reference future updates to the wire center list posted on BellSouth's website. The language in the agreement should reflect the dispute resolution process of the TRRO.

CONCLUSION

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 the Joint CLECs is totally appropriate to implement this recommended decision. Instead, staff believes that parts of the language proposed by BellSouth and the Joint CLECs should be combined and adopted as discussed in the staff analysis. Staff's recommended language is found in Appendix A.

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 staff analysis, should be adopted. Staff's recommended language is found in Appendix A. **(Moss)**

Position of the Parties

BELLSOUTH: For wire centers in which BellSouth is not required to provide UNE DS1 loops, BellSouth is also relieved of any obligation to provide CLECs with a UNE HDSL loop. Also, UNE HDSL loops can and should be counted as 24 business lines for the purpose of evaluating impairment.

GRUCom: No, as implicitly conceded by BellSouth's count of business lines to determine impairment. HDSL loops are conditioned copper loops without associated electronics. DS1 loops include associated electronics. The FCC did not include restrictions on the use of conditioned copper loops nor did they make a finding of non-impairment of them.

JOINT CLECs: No. BellSouth claims that it is not required to provide HDSL-capable loops wherever it does not offer DS1 loops, even though the FCC specifically stated that CLECs *could* use HDSL-capable loops in such circumstances. BellSouth's position would improperly deny CLECs the ability to create alternative high-capacity services.

SPRINT: HDSL Capable Loops and DS1 loops are not equivalent for impairment purposes. BellSouth cannot refuse to provide HDSL Loops in wire centers where DS1 loop impairment criteria are met. HDSL Loops are conditioned copper loops. The FCC has neither restricted the use of nor made a non-impairment finding for such loops.

Staff Analysis:

PARTIES' ARGUMENTS

BellSouth acknowledges two (2) overall disagreements:

- How to count UNE High-bit rate Digital Subscriber Line (HDSL)-capable copper loops for the purpose of evaluating impairment, and
- Whether continued access to UNE HDSL-capable loops in wire centers in which CLECs are not impaired is appropriate. (Fogle TR 323-324)

BellSouth witness Fogle acknowledges that it would be appropriate to count deployed UNE HDSL-capable loops as 24 voice-grade equivalents. (TR 324) However, witness Fogle highlights that BellSouth counted UNE HDSL-capable loops on a one-for-one basis. (Id.) Witness Fogle bases his conclusion of the appropriateness of counting HDSL-capable loops as 24 business lines based on footnote 634 of the TRO and rule 47 CFR 51.319(a)(4), which state:

> Carriers frequently use a form of DSL service, i.e. High-bit rate DSL (HDSL), both two-wire and four-wire HDSL, as means for delivering T1 services to customers. We will use DS1 for consistency but note a DS1 loop and a T1 are equivalent in speed and capacity, both representing the North American standard for symmetric digital transmission link of 1.544 Mbps. (TRO fn. 634)
>
> A DS1 loop is a digital loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services. (47 CFR 51.319 (a)(4)(i); BellSouth BR at 89)

BellSouth believes that the "clear and unambiguous language contained in the rules" supports its position. (BellSouth BR at 90) Witness Fogle conveys that counting UNE HDSL-capable loops as 24 voice-grade equivalents would have had no impact to the Florida wire center list. (TR 324)

The Joint CLECs believe that "HDSL-capable loops are not the equivalent of DS1 loops for the purpose of counting Business Lines." (Joint CLEC BR at 26) This position is also held by GRUCom and Sprint. (GRUCom BR at 3; Sprint BR at 1) The basis of this position is that a HDSL-capable copper loop "is nothing more than a copper loop facility that is less than 12,000 feet long and is clear of equipment that could block provision of high-bit rate digital subscriber line ("HDSL") services." (Joint CLECs BR at 26; Gillan TR 409) Such a facility is void of any electronics required to deliver DS1 service over the loop which, according to the CLECs, makes the facility not capable of delivering a DS1; therefore, it should not be counted. (Joint CLECs BR at 27; Sprint BR at 4; Maples TR 118) According to CompSouth witness Gillan, a business line count includes "digital access lines" and a HDSL-capable line is not digitally capable without the addition of CLEC equipment. (TR 409; emphasis in original)

Additionally, CompSouth witness Gillan does not believe that a HDSL-capable line should be counted as 24 voice-grade equivalents. (TR 464) His position is that BellSouth may not count unused capacity of a digital circuit and that it is unreasonable to assume that the

maximum potential capacity is being used to provide service. (Id.; EXH 2, p. 52) Sprint witness Maples believes that a HDSL-Compatible Loop "should be counted as 1 or 2 voice grade equivalents (1 for 2-wire and 2 for 4-wire), just as any other copper loop, when evaluating the number of business lines and not as 24 voice grade equivalents." (TR 117-118)

ANALYSIS

Although this issue as originally stated involved determining if HDSL-capable copper loops are equivalent to DS1 loops for the purpose of evaluating impairment, it has expanded to include an additional question involving the unbundling requirements, if any, of HDSL-capable loops in wire centers deemed non-impaired absent access to DS1 loops. No party presented an objection to the inclusion of this additional aspect, and both BellSouth and the CLECs offered testimony addressing this concern. Therefore, staff believes it is appropriate to address this additional matter here.

In the TRRO, the FCC adopted an approach that relies on inferences to derive the prospects for competitive entry. (TRRO ¶43) Specifically, the FCC relied on correlations between business line counts and/or fiber collocations in a particular wire center as one basis for making a determination of impairment. (Id.) It found a

> correlation between the number of business lines and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served via that wire center. In light of these correlations, [it drew] inferences, based on competitive deployment in certain markets, regarding the likelihood of competitive entry in other markets exhibiting similar characteristics. (Id.)

Thus, in lieu of an approach measuring actual deployment, which would require fact-intensive, market-by-market analyses, it adopted a regime that accounts for actual and potential deployment by inference. (Id.) The FCC determined that the use of reasonable inferences rather than fact-specific determinations produced a workable standard, and recognized that such an approach would "give rise to some over- and under-inclusion." (TRRO ¶44; TRRO fn. 457)

For its impairment analysis, the FCC determined that "requesting carriers are not impaired without access to DS1-capacity loops at any location within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators." (TRRO ¶146)

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched

> services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines." (47 CFR 51.5)
>
> A DS1 loop is a digital loop having a total digital signal speed of 1.544 megabytes per second. DS1 loops include, but are not limited to, two-wire and four-wire copper loops capable of providing high-bit rate digital subscriber line services, including T1 services. (47 CFR 51.319 (a)(4)(i))

High-bit rate digital subscriber line (HDSL) services have the same total digital signal speed of 1.544 megabytes per second (Mbps) as a DS1 and are discussed in the TRO and the TRRO as equivalent. (TRO fn. 634) DS1 is the lowest threshold for consideration of high-speed services. (TRO ¶45)

Staff believes that all parties agree that HDSL technology, which includes both the loop facility and any attached electronics, is equivalent to DS1 and should be counted as 24 voice grade equivalents. (Maples TR 124; Fogle TR 325; Gillan TR 409-411) The disagreement arises in the consideration of HDSL-capable loops. Although BellSouth refers to the clear reading of the rule, the rule is not clear at all but hinges on the meaning of the word "capable." Sprint and CompSouth have suggested that "HDSL-capable" means only HDSL-equipped (i.e., copper loops with the attached electronics which enable the loop to transmit a 1.544 Mbs signal); therefore, only equipped loops should be counted because only they meet the FCC's definition of a DS1 (having a total digital signal speed of 1.544 Mbps). (Joint CLECs BR at 26; Maples TR 119) Conversely, loops that are not equipped are unable to support the transmission of a DS1 signal. On the other hand, BellSouth views "HDSL-capable" as a loop that is conditioned (i.e., having the appropriate length with load coils and excessive bridge tap removed) and ready to be put to use as a HDSL, "such as 2-wire and 4-wire HDSL Compatible Loops." (Fogle TR 325) The FCC defined capability as "the quality or state of being capable; potential ability; the capacity to be used, treated, or developed for a particular purpose." (TRO fn. 194). Using the FCC's definition, staff believes that "copper loops capable of providing high-bit rate digital subscriber line service" are copper loops meeting the technical criteria to be used, treated, or developed for HDSL (i.e., loops pre-conditioned for HDSL service).

Staff further notes that CLECs are able to order a HDSL-capable loop and equip it themselves. (Fogle TR 326; Maples TR 120) The record does not indicate how BellSouth can determine whether a HDSL-capable loop requested by a CLEC is actually being deployed by the CLEC for HDSL service. In addition, neither does the record indicate how BellSouth can know the portion of the capacity of the digital circuit being used by the CLEC to provide service to the CLEC's customers.

CompSouth presented a counting methodology that would assess a percentage of a facility's capacity used similar to what BellSouth experiences. (Gillan TR 408) BellSouth assumes that for purposes of evaluating impairment, if a CLEC has ordered a HDSL-capable loop not equipped by BellSouth with associated electronics, that loop should be counted as a potential DS1, presumed to be equipped by the CLEC and, as such, should be counted as 24 voice-grade equivalents. (BellSouth BR at 90) BellSouth witness Fogle testifies that if HDSL-capable loops were counted as 24 voice-grade equivalents, the wire centers identified as non-impaired for DS1 in Florida would not change at this time. (TR 324) Staff notes that the FCC

used the number of business lines and/or fiber collocations in a wire center as a proxy for revenue opportunity. The "reasonably efficient competitor" standard employed by the FCC "expect[s] that that competitor will seek all possible revenue opportunities available." (TRRO ¶173) Staff believes that CompSouth's proposal fails to include potential deployment, whereas BellSouth's version of counting "HDSL-capable" lines is more consistent with the concept of capturing revenue opportunity.

Sprint points out that BellSouth offers a HDSL-capable product referred to as HDSL-Compatible Loop and states that this loop remains a copper loop and further notes that copper loops remain impaired and are required to be unbundled. (Maples TR 120; Sprint BR at 3) Sprint believes that once a wire center is deemed non-impaired, then BellSouth will withdraw its HDSL-Compatible Loop product offering in that wire center. (Maples TR 117) BellSouth witness Fogle confirms this and states, "there is no reason to compel BellSouth to continue to provide a loop product that is simply an indicator of a pre-defined set of conditions suitable for supporting HDSL technology, as the CLECs can provide this capability on their own." (TR 325-326)

BellSouth witness Fogle testifies that a CLEC can obtain the equivalent of the HDSL-Compatible Loop by requesting an Unbundled Copper Loop Non-Designed along with any necessary line conditioning. (Id.) Witness Fogle states that the withdrawal of the HDSL-Compatible Loop offering in non-impaired wire centers would cause minimal impact to the CLECs and would enable BellSouth to simplify its ordering systems. (TR 327) Staff notes that a similar HDSL-Compatible Loop product is not offered by Sprint or Verizon in Florida.[20] However, both Sprint and Verizon offer 2-wire and 4-wire loops or 2-wire and 4-wire HDSL-capable loops, where an HDSL-capable loop is "any loop that [C]LEC qualifies for themselves as being capable of supporting xDSL [in this case, HDSL]."[21] Any necessary line conditioning is requested by the CLEC at an additional charge.[22] This structure used by Verizon and Sprint is what is proposed by BellSouth.

Staff agrees with Sprint that the FCC "require[s] the ILECs to condition copper loops so that the CLECs can provide subscriber line services, such as HDSL, over them." (Sprint BR at 3; Maples TR 121) However, staff notes that the FCC does not require that the ILECs offer a pre-conditioned product. The line conditioning rule states, "The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop." (47 CFR 51.319(a)(1)(iii)) BellSouth's proposal to allow CLECs to access copper loops via its Unbundled Copper Loop Non-Designed product offering and then to request conditioning of the loop is compliant with the FCC's line conditioning rule. As such, BellSouth has not refused to provide a HDSL-capable loop as Sprint has suggested in its position statement, since the service remains available via BellSouth's Unbundled Copper Loop Non-Designed product offering along with any line conditioning requested by the carrier. (Fogle TR 326)

The CLECs' request that BellSouth continue to provide a copper loop without associated electronics so the CLECs are still able to obtain "access at TELRIC rates to a copper loop, to which the CLEC may add its own electronics and provide DS1 service to a customer." (Joint

[20] See PSC-03-0058-FOF-TP (Final Order on Rates for UNEs Provided by Sprint-Florida, Inc). and PSC-02-1574-FOF-TP (Final Order on Rates for UNEs Provided by Verizon-Florida, Inc.).
[21] Final Order on Rates for UNEs Provided by Verizon-Florida, Inc., p.29.
[22] Final Order on Rates for UNEs Provided by Sprint-Florida, Inc., p. 31.

CLECs BR at 27) By means of BellSouth's Unbundled Copper Loop Non-Designed product offering, along with any needed line conditioning requested by the carrier, staff observes that BellSouth continues to provide access at TELRIC rates to a copper loop, to which the CLEC may add its own electronics and provide DS1 service to a customer.

Sprint states that "**The FCC has never restricted access to copper loops**." (Sprint BR at 3; emphasis in original; Maples TR 124-126) Staff notes that if BellSouth's HDSL-Compatible Loop product were withdrawn, access to copper loops is still available. (Fogle TR 326) BellSouth's withdrawal of its HDSL-Compatible Loop product in wire centers found nonimpaired for DS1, only removes the identity "HDSL-Compatible" from the copper loop. (Id.) The same copper loops would be available via its Unbundled Copper Loop Non-Designed product offering, and the CLEC is able to request and obtain any conditioning of the loop if required. (Id.) CLECs have access to all loop makeup (LMU) information and are able to determine for themselves if a loop meets the requirements for HDSL or if conditioning of the loop is required. (Id.)

The FCC noted that "in urban wire centers where high-capacity unbundling is not required, competing carriers will be able to use their own facilities, or facilities deployed by other competitors, potentially complemented, as a gap-filler, by services using an incumbent LEC's tariffed alternatives." (TRRO ¶163) Using the record before it, the FCC concluded that "competitive LECs might be able to serve customers' needs by combining other elements that remain available as UNEs." (TRRO fn. 454) In making its impairment rules for DS1, the FCC noted that it had considered an *Ex Parte* Letter by BellSouth which stated that

> competitive LECs can use the following types of copper loops to provide DS1 service to customers: (1) 2-wire or 4-wire High Bit Rate Digital Subscriber (HDSL) Compatible Loops; (2) Asymmetrical Digital Subscriber Compatible Loops; (3) 2-wire Unbundled Copper Loop Non-Designed. (Id.)

Considering these available alternatives, the FCC included 2-wire or 4-wire HDSL-capable loops in the definition of DS1. Staff believes this inclusion eliminated the first option, BellSouth's HDSL-Compatible Loop product, as an UNE in wire centers where DS1 service is not impaired. However, the third option presented by BellSouth, the Unbundled Copper Loop Non-Designed, remains an available option. (BellSouth BR at 90)

Joint CLECs state that "The definition does not, however, convert every copper loop that meets the characteristics of being 'HDSL-capable' into a 'DS1 loop.'" (Joint CLECs BR at 26; emphasis in original) Staff agrees. Even BellSouth states that it is not trying to interpret the FCC's "ruling to literally mean that every loop that is capable of being provisioned using HDSL is counted as 24 business lines for purposes of the impairment test." (Fogle TR 296) Unbundled Copper Loop Non-Designed are loops that have not been designed for any specific purpose. Those loops may or may not meet the conditions to provide HDSL, a determination made by reviewing the LMU. Even if such a loop did meet the parameters for HDSL (i.e., being less than 12,000 feet and without load coils or excessive bridge taps), since it was not requested to be designed for any particular service, it should not be counted as a DS1.

Additionally, should a CLEC request an Unbundled Copper Loop Non-Designed, the ILEC is unable to determine the type of service for which the loop is to be deployed. In this case, the ILEC must assume that the loop is being used for voice service and count each 2-wire

loop as one voice grade equivalent. However, if a CLEC has ordered BellSouth's HDSL-Compatible Loop offering, the ILEC has provided a pre-conditioned, pre-packaged, off-the-shelf product designed for and ready to be deployed as and for the express purpose of being used for HDSL. (Fogle TR 326) Therefore, staff believes that BellSouth's 2-wire or 4-wire HDSL-Compatible Loop product should be counted as a DS1 and counted as 24 voice grade equivalents. Staff concludes that although BellSouth is obligated to provide the CLEC with access to a copper loop and to condition the loop to meet certain parameters upon request, it is not obligated to offer a pre-conditioned/pre-packaged loop offering and this particular service offering can be withdrawn at any time.

CONCLUSION

Staff recommends that

- 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 staff analysis, should be adopted. Staff's recommended language is found in Appendix A.

Issue 7(a): Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, 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. (**Teitzman**)

Position of the Parties

BELLSOUTH:

(a) State commissions do not have authority to require BellSouth to include in §252 interconnection agreements any element not required by §251.

GRUCom: No position.

JOINT CLECs: Yes. Section 251 and Section 271 both point to Section 252 state commission approval process as the vehicle for establishing contract terms for unbundling. Section 271 network elements should be reflected in ICAs approved pursuant to Section 252, as should "just and reasonable" rates for Section 271 checklist items.

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

Staff Analysis:

PARTIES' ARGUMENTS

In its brief, BellSouth argues that §252 of the Act explicitly limits the rate-setting and arbitration powers of state commissions to §251 elements and thus precludes the Commission from requiring BellSouth to include §271 elements in a §252 agreement. BellSouth asserts the CLECs are asking the Commission to impermissibly read one portion of the statute but ignore the fact that §252 never refers to §271, although it contains express references to §251. (BellSouth BR at 6)

BellSouth's position is based on three contentions:

(1) There is no legal basis for a state commission to force BellSouth to include §271 network elements in a §252 interconnection agreement;

(2) Section 252 limits state commission rate-setting authority to §251 elements; and

(3) The FCC has exclusive authority over the enforcement of §271 elements.

There is no legal basis for a state commission to force BellSouth to include §271 network elements in a §252 interconnection agreement.

BellSouth argues in its brief that a state commission's authority to arbitrate §252 agreements is limited to ensuring the contracts comply with §251. BellSouth asserts that the Act provides that when BellSouth receives "a request for interconnection, services, or network elements pursuant to §251," it is obligated to "negotiate in good faith in accordance with §252 the particular terms and conditions" of agreements that address those §251 obligations and therefore, interconnection agreements address §251 obligations, and those obligations are the only topics that are required to be included in a §252 interconnection agreement. BellSouth contends that a state commission's authority is limited to those agreements entered into "pursuant to §251" and, when arbitration occurs, state commissions must ensure that agreements "meet the requirements of §251." (BellSouth BR at 9)

BellSouth argues that an ILEC is not required to negotiate, in the context of a §252 agreement, any and all issues CLECs may wish to discuss, such as access to elements ILECs may be required to provide under §271. BellSouth acknowledges that an ILEC may voluntarily agree to negotiate things that would normally be outside the purview of §251 obligations and when it does, such matters may be considered by state commissions under prevailing law. With regard to the inclusion of §271 elements in §252 agreements, BellSouth asserts it has steadfastly refused to negotiate inclusion of these elements, and there is nothing contained in the record to suggest otherwise. (BellSouth BR at 9-10)

In support of its assertions BellSouth cites the Eleventh Circuit which stated that, "The scheme and text of [the Act] . . . lists only a limited number of issues on which incumbents are mandated to negotiate"[23] and the Fifth Circuit, which stated that "[a]n ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §251 and 252."[24] (BellSouth BR at 10)

§252 limits state commission rate-setting authority to §251 elements

BellSouth asserts that the bottom line on all of the 271-related arguments is the common-sense reality that if the CLECs were to prevail, the CLECs will have effectively used the Commission to override the FCC's decision about market-based, real competition. BellSouth argues that it is clear state commissions do not have the authority to set rates for §271 elements because the language in §252 limits state commission rate-setting authority to §251 elements. BellSouth cites §252(d)(1) which provides that state commissions may set rates for network elements only "for purposes of subsection (c)(3) of such § [251]." BellSouth points out that in the TRO the FCC further clarified that §252(d)(1) "is quite specific in that it only applies for the purposes of implementation of §251(c)(3)" and does not, by its terms grant the states any authority as to "network elements that are required under §271."[25] (Bellsouth BR at 10-11)

[23] MCI Telecom. Corp. et al. v. BellSouth Telecommunications, Inc. et al., 298 F.3d 1269, 1274 (11th Cir. 2002)
[24] Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co., 350 F.3d 482, 488 (5th Cir. 2003).
[25] TRO at ¶ 657.

BellSouth contends that even if there could be a legitimate question about how to interpret these statutes, the FCC has already answered the question when it stated that the §251 pricing standards do not apply to checklist elements under §271 and furthermore, whether or not the applicable pricing standards are met will be decided by the FCC either in the context of a §271 application for long distance authority or, thereafter, in an enforcement proceeding.[26] BellSouth asserts that the FCC has further held that rates for §271 elements are subject to the standards set forth in §§201 and 202 which are applied and enforced by the FCC.[27] In support of this assertion BellSouth cites the D.C. Circuit which has noted that §§201(b) and 202(a) "authorized the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory."[28] (BellSouth BR at 11-12)

BellSouth argues that contrary to the CLECs' assertions, a provider sets its rates in accordance with the just and reasonable standard, and the FCC resolves any disputes that arise surrounding those rates. BellSouth asserts that in a competitive market, regulators should not step in until there is a need. BellSouth argues that in the context of regulation of §271 elements, this makes sense because §§251(b) and (c) set forth the provisions that Congress deemed essential to the development of local competition and without such a CLEC is legally "impaired" within the meaning of §251(c)(1). On the other hand, the FCC has determined that CLECs are not impaired without access to §271 elements that no longer meet the §251 test. BellSouth asserts the FCC has reached these conclusions based on an evidentiary finding that competitive alternatives for such elements are readily available in the marketplace. (BellSouth BR at 13 -14)

BellSouth disputes witness Gillan's suggestion that §271(c)(1) means that "checklist items [must] be offered through interconnection agreements approved under §252 of the Act." BellSouth contends to the contrary that §271(c)(1) provides that to comply with §271, a BOC must meet the requirements of either subparagraph (A) or (B), which require that a BOC has entered into one or more §252 agreements or provide an SGAT. BellSouth asserts §271(c)(1) does not require that §271 elements are to be incorporated into §252 agreements. (BellSouth BR at 16)

The FCC has exclusive authority over the enforcement of §271 elements.

BellSouth asserts that once a BOC obtains §271 authority, continuing enforcement of §271 obligations rests solely with the FCC under §271(d)(6)(A) of the Act. BellSouth notes that in the TRO the FCC was clear that the prices, terms, and conditions of §271 checklist item access, and a BOC's compliance with them, are within the FCC's exclusive purview in the context of a BOC's application for 271 authority or in an enforcement proceeding brought pursuant to §271(d)(6).[29] BellSouth contends that Congress only granted states a consultative role in the §271 approval process. In support, BellSouth cites the D.C. Circuit which held that Congress "has clearly charged the FCC, and not the State commissions," with assessing BOC compliance with §271.[30] (BellSouth BR at 16-17)

[26] TRO at ¶¶ 662, 664.
[27] TRO at ¶¶ 656; 664
[28] C*ompetitive Telecommunications Association v. FCC*, 87 F.3d 522 (D.C. Cir. 1996).
[29] TRO at ¶664
[30] *SBC Communications Inc. v. FCC*, 138 F. 3d 410, 416-17 (D.C. Cir. 1998).

The Joint CLECs argue that the establishment of §271 alternatives for the loop, switching and transport elements de-listed under §251 is a key component of determining the terms and timing of the transition from §251 elements to other unbundling offerings. The Joint CLECs argue that they do not contest that UNE-P as it currently exists under §251 may not continue unchanged pursuant to §271. However, they assert that this does not mean that BellSouth's obligation to provide unbundled switching under §271 should not be included in the parties' interconnection agreements. The Joint CLECs contend that the Commission has the authority to require BellSouth to include in its §252 ICAs the availability and price of network elements under §271. (Joint CLECs BR at 29-30)

The Joint CLECs support their position with four contentions:

(1) §271 explicitly states that the checklist items the BOCs are required to unbundle must be included in §252 interconnection agreements;

(2) Approval of rates, terms, and conditions for §271 checklist elements does not constitute "enforcement" of BellSouth's §271 obligations by the Commission;

(3) The interim §271 rates proposed in the CompSouth contract language meet the "just and reasonable" standard applicable to §271 checklist elements; and

(4) BellSouth's claims that it "satisfies" its §271 obligations for loops, transport, and switching should be rejected.

§271 explicitly states that the checklist items the BOCs are required to unbundle must be included in §252 interconnection agreements

In their brief, the Joint CLECs contend that §271 requires the BOCs to provide the local loop, local transport, and local switching as part of the competitive checklist. The Joint CLECs assert the FCC has found that the BOC's obligation to make §271 checklist items available to CLECs is independent of the obligation to provide access to network elements under §251.[31] The Joint CLECs argue that Congress required that the checklist items be incorporated into the interconnection agreements that result from the §252 negotiation and arbitration process. In support of this assertion the Joint CLECs cite §271(c)(2)(A) which they assert links the duty of a BOC to satisfy its obligations under the competitive checklist to the BOC providing that access through an interconnection agreement or a SGAT approved by a state commission pursuant to §252:

> (A) AGREEMENT REQUIRED – A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought:

[31] TRO at ¶ 659

> (i) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [interconnection agreement], or
>
> (ii) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [a SGAT], and such access and interconnection meets the requirements of subparagraph (B) of this paragraph [the competitive checklist].

The Joint CLECs contend that by directly referencing §271(c)(1)(A) and (B), the Act ties compliance with the competitive checklist to the review process described in §252, a review process that is by definition conducted by state commissions. (Joint CLECs BR at 31-32)

In furtherance of their assertion, the Joint CLECs cite §271(c)(1) which states:

> (1) AGREEMENT OR STATEMENT – A Bell operating company meets the requirements of this subparagraph 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 §252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in §3(47)(A), but excluding exchange access) to residential and business subscribers.

The Joint CLECs argue that this establishes that the terms and conditions for the checklist items in §271 must be in an approved interconnection agreement. The Joint CLECs note that the statute is explicit that the agreements must be "approved under §252" which is granted exclusively by state commissions as part of the statutory negotiation and arbitration process. The Joint CLECs argue that §271 refers back to the §252 state commission review and approval process, and it invokes that process when it describes how the competitive checklist is to be implemented. The Joint CLECs assert it is difficult to understand what else Congress could have meant by §271's reference to "agreements approved under §252" as the place where checklist compliance is to be memorialized. (Joint CLECs BR at 32-33)

The Joint CLECs argue that BellSouth's arguments seek to read out of §271 the explicit references back to §252. The Joint CLECs assert that the statutory language contemplates a

linkage between agreements over which state commission have authority under §252 and the terms and conditions for competitive checklist items in §271. (Joint CLECs BR at 33-34)

The Joint CLECs argue further that this linkage comports with how the FCC has treated §271 checklist items. The Joint CLECs assert that in the TRO the FCC held that §271 checklist network elements that BOCs no longer are required to provide under §251 do not have to be priced at TELRIC rates but rather are to be priced at "just and reasonable" rates. The Joint CLECS contend that much like TELRIC rates for §251 network elements that have been determined in §252 proceedings and incorporated into §252 agreements, rates for §271 checklist items should be established using the state commission §252 negotiation and arbitration process. (Joint CLECs BR at 34)

Approval of rates, terms, and conditions for §271 checklist elements does not constitute "enforcement" of BellSouth's §271 obligations by the Commission.

The thrust of the Joint CLECs' argument is that state commission authority to resolve disputes regarding rates, terms, and conditions for §271 checklist elements derives directly from the statutory interplay between §§271 and 252. The Joint CLECs maintain that requiring inclusion of the rates, terms, and conditions for §271 checklist items in agreements approved under §252 does not constitute enforcement of §271. The Joint CLECs assert they are not suggesting the Commission take steps to enforce §271 obligations, but rather to use the authority expressly provided for in §§271 and 252 to approve ICAs that include §271 checklist items. (Joint CLECs BR at 34-35)

The Joint CLECs agree with BellSouth that the FCC has the exclusive jurisdiction to address whether or not a §271 checklist element's rate comports with the "just and reasonable" standard. The Joint CLECs argue that the fact that the FCC could review a §271 checklist rate in the context of §271(d)(6) enforcement does not impact whether the statute requires the rate to be set initially by a state commission under §252. In support of its contention the Joint CLECs cite the Tennessee Regulatory Authority which recently explained that:

> The FCC recognized [in the TRO] that the pricing standards of §271 elements must be the same as the pricing standards used before the Federal Act such as those standards in §201 and 202 . Nevertheless, it is significant that the FCC did not change the division of pricing responsibility defined in the Federal Act. While the FCC will continue to set the pricing standards, it continues to be incumbent upon state commissions to apply those standards in the process of establishing rates. The FCC did not change the process utilized to resolve pricing disputes of §271 elements. There is no indication that the FCC intended to remove §271 elements from state arbitrations or from approval of interconnection agreements consistent with §252. (Joint CLECs BR at 35-36)

The Joint CLECs assert that along with §271(d)(6) enforcement authority, the FCC also retains the authority to grant the BOCs "forbearance" from their §271 obligations. The Joint CLECs argue further that inclusion of §271 checklist items in §252 interconnection agreements would not limit or negate federal forbearance authority. The Joint CLECs assert that the

Commission's establishment of a "just and reasonable" rate for §271 checklist elements merely implements the requirement in §271 that rates, terms, and conditions for §271 checklist items be included in interconnection agreements approved under §252. (Joint CLECs BR at 36-37)

The interim §271 rates proposed in the CompSouth contract language meet the "just and reasonable" standard applicable to §271 checklist elements.

The Joint CLECs propose interim rates for high-capacity loop and transport elements and for unbundled local switching that are patterned after the transitional rates adopted by the FCC in the TRRO. The Joint CLECs proposed rates permit CLEC access to high-capacity loops and transport at a price equal to 115% of the existing TELRIC rate, and access to UNE-P at one dollar above the TELRIC rate paid on June 15, 2004.[32] (Joint CLECs BR at 37-38)

The Joint CLECs assert that the TRRO transition rates provide a reasonable basis for interim rates for three reasons. First, the Joint CLECs assert the FCC presumably would not have adopted these rates unless it considered them "just and reasonable." Next, the Joint CLECs contend the transition rates exceed TELRIC levels applicable to UNEs available under §251. And finally, the Joint CLECs assert that the evidence demonstrates that BellSouth has filed testimony in the past arguing that TELRIC rates for unbundled switching and transport set by this Commission recover BellSouth's costs and provide a reasonable proxy for "just and reasonable" rates. (Joint CLECs BR at 38)

The Joint CLECs argue that although the TRRO transition rates are not appropriate permanent rates, they urge the Commission to approve their proposed rates on an interim basis until the Commission can fully review the parties' arguments over what a permanent just and reasonable rate should be. (Joint CLECs BR at 39-40)

BellSouth's claims that it "satisfies" its §271 obligations for loops, transport, and switching should be rejected.

As discussed in detail above, the Joint CLECs argue that BellSouth does not satisfy its §271 obligations unless those obligations are reflected in an "agreement approved under §252." The Joint CLECs assert further that the rates, terms and conditions under which BellSouth purports to offer §271 checklist elements do not satisfy "just and reasonable" standards. The Joint CLECs note that when the FCC discussed how a §271 "just and reasonable" standard could be met, it stated that a BOC "might satisfy the standard" by demonstrating that its §271 rate is "at or below" its similar tariffed offering, or that the BOC has entered into "arms-length agreements" for the elements at particular rates.[33] The Joint CLECs argue that the FCC did not state that tariffed alternatives or arms-length agreements provide conclusive evidence that the rate offered by the BOC is just and reasonable, rather than points of reference. (Joint CLECs BR at 40-41)

[32] TRRO at ¶ 5.
[33] TRRO at ¶ 664.

The Joint CLECs assert that they disagree with BellSouth's position that even though there is an independent obligation to offer loops, transport, and switching under §271, that it can satisfy those obligations simply offering what it would have offered if such obligations did not exist. The Joint CLECs assert that BellSouth's position renders the §271 checklist meaningless and could not be what the FCC meant when it found in the TRO that §271 unbundling obligations exist even when §251 unbundling is no longer required. (Joint CLECs BR at 42)

The Joint CLECs argue that BellSouth's interstate special access tariffed rates are between two and three times higher than the current UNE rates and imposition of interstate special access tariffed rates would dramatically increase CLECs' cost of serving customers who need DS1 or DS3 level services. The Joint CLECs contend that the prices offered by BellSouth as 271-compliant simply do not meet the "just and reasonable" standard, and the Commission should thoroughly review what constitutes a "just and reasonable" rate in a subsequent generic proceeding on §271 rates. (Joint CLECs BR at 42-43)

ANALYSIS

Upon thorough analysis of FCC orders, the Act, case law, and the record in this proceeding, staff believes that the Commission does not have authority to require BellSouth to include in §252 interconnection agreements §271 elements. Staff acknowledges that this is a complex issue, the resolution of which is burdened by the lack of a clear declaration by the FCC and the existence of a significant, yet inconsistent body of law.[34] However, staff believes that the regulatory framework set forth by the FCC in both the TRO and the TRRO lead reasonably to the conclusion that jurisdiction over §271 matters lies with the FCC rather than the Commission.

The Joint CLECs' argument is based on their contention that the Act contemplates a link between agreements over which state commissions have authority under §252 and the terms and conditions for competitive checklist items in §271. Staff disagrees with this assertion. Rather staff agrees with BellSouth that §271(c)(1) only provides that to comply with §271, a BOC must meet the requirements of either subparagraph (A) or (B), which require that a BOC has entered into one or more §252 agreements or provide an SGAT. Contrary to the Joint CLECs' assertions, staff does read from this a requirement that §271 elements are to be included in §252 agreements.

Staff believes it is material that in setting forth the standards for arbitration, §252(c) makes no reference to §271. Rather, §252(c) only requires that a State commission ensure that "resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251."

Staff notes that it is not disputed by the Joint CLECs that the FCC has exclusive authority over the enforcement of §271 elements. However, the Joint CLECs assert that there is a

[34] In their briefs, both parties cite several federal court and state commission decisions which purportedly support their position. Staff has thoroughly reviewed these decisions and believes that due to their significantly inconsistent holdings, little guidance can be taken from these prior decisions.

distinction between implementation of §271 and enforcement of §271. To the contrary, staff believes this is a distinction without a difference. Under the CLECs' interpretation, upon setting forth rates, terms, and conditions for §271 elements, the Commission would be rendered powerless to enforce its rulings. The FCC explicitly stated in the TRO that whether a particular §271 element's rate satisfies the just and reasonable pricing standard of §201 and 202 is a fact-specific inquiry that the FCC will undertake whether in an application for 271 authority or an enforcement proceeding brought pursuant to §271(d)(6).[35]

BellSouth maintains that the CLECs' proposed contract language and positions addressing §271 contravene the FCC's ultimate decisions on impairment and competition. In both the TRO and the TRRO, the FCC set forth a national policy encouraging facilities-based competition in order to foster increased investment and innovation.[36] This policy has been previously acknowledged by the Commission in the No New Adds Order. Staff believes continued regulation of network elements, which were or may be delisted under §251, would run contrary to the FCC's goals of encouraging facilities-based competition.

In the TRO, the FCC concluded that the state authority preserved by §251(d)(3) is limited to state unbundling actions that are consistent with the requirements of §251 and do not "substantially prevent" the implementation of the federal regulatory regime.[37] Staff notes that § 271 obligations are not referenced in §251. Therefore, it appears from this finding that the FCC did not envision state regulation of §271 elements or their inclusion in interconnection agreements. This is further supported by the FCC consistently holding that it is the regulatory body with sole enforcement authority over §271 and §271(d)(2)'s express language that states are limited to a consultative role in the §271 approval process. Accordingly, staff believes that if the Commission were to require the inclusion of §271 elements in a §252 interconnection agreement, it would contravene the regulatory regime set forth by the FCC in the TRO and the TRRO and by Congress in the Act.

Staff notes that CLECs are not without remedy if they believe BellSouth is not meeting the requirements of §271. Section 271(d)(6) permits CLECs to file complaints with the FCC concerning failures by Bell operating companies to meet conditions required for §271 approval. Pursuant to §271(d)(6)(b), the FCC shall act on such complaints within 90 days.

In conclusion, staff believes that 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. Although such a finding by this Commission may arguably have a negative impact on CLECs business plans in the short term, staff firmly believes that in the long term, a Commission finding that BellSouth is not required to include §271 elements in §252 agreements, will further bolster the FCC's stated policy of encouraging strong facility-based competitors.

[35] TRRO at ¶ 664.
[36] In the No New Adds Order, the Commission acknowledged that the FCC had set forth a policy of encouraging facilities-based competition in the TRRO.
[37] TRO at ¶193.

CONCLUSION

Staff believes that the Commission does not have authority to require BellSouth to include in §252 interconnection agreements §271 elements. Staff believes that 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.

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. (**Teitzman**)

Position of the Parties

BELLSOUTH:

(b) State commissions have no authority to require BellSouth to include in §252 interconnection agreements any element not required by §251; this Commission has no authority to set rates, or impose terms or conditions for network elements offered pursuant to section 271.

GRUCom: No position.

JOINT CLECs: Yes. Section 251 and Section 271 both point to the Section 252 state commission approval process as the vehicle for establishing contract terms for unbundling. Section 271 network elements be reflected in ICAs approved pursuant to Section 252, as should "just and reasonable" rates for Section 271 checklist items.

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

Staff Analysis: If the Commission approves staff's recommendation in Issue 7(a), staff believes this issue is moot. If the Commission denies staff's recommendation in Issue 7(a) and finds that BellSouth is required to include in §252 interconnection agreements §271 elements, staff recommends that the Commission approve the Joint CLECs' proposed interim rates for high-capacity loop and transport elements and for unbundled local switching, which are patterned after the transitional rates adopted by the FCC in the TRRO, pending a further proceeding to determine permanent rates which meet the standards set forth in §§201 and 202.

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. (**Teitzman**)

Position of the Parties

BELLSOUTH:

(c) This Commission has no authority to set rates, or impose terms or conditions for network elements offered pursuant to section 271; nor may the Commission require the inclusion of such elements in §252 agreements.

GRUCom: No position.

JOINT CLECs: Yes. Section 251 and Section 271 both point to the Section 252 state commission approval process as the vehicle for establishing contract terms for unbundling. Section 271 network elements be reflected in ICAs approved pursuant to Section 252, as should "just and reasonable" rates for Section 271 checklist items.

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

Staff Analysis: If the Commission approves staff's recommendation in Issue(s) 7(a) and/or (b), staff believes 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.

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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. **(P. Lee)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECS: The TRRO included detailed provisions for identifying a CLECs' embedded base. In addition, the Eleventh Circuit has recently spoken on the conditions under which CLECs may move, add, or change services to the embedded base. ICA language should track FCC requirements and the Eleventh Circuit's decision.

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

Staff Analysis:

PARTIES' ARGUMENTS

BellSouth witness Blake asserts that CLECs should neither be allowed to add new UNE arrangements that have been de-listed nor should they be allowed to move an existing customer's service to another location. (TR 220) With respect to local circuit switching, the witness notes that this Commission concluded in the No-New-Adds Order that the TRRO precluded the addition of new local circuit switching as a UNE after March 11, 2005. (TR 138; TR 220) Therefore, asserts the witness, the addition of any new UNE-P arrangements to serve an embedded customer is prohibited. Likewise, explains witness Blake, when a CLEC moves their service, the old service is disconnected and the new service is considered a "new" order. A new order, contends the witness, represents a new arrangement that is precluded by the "no-new-adds" policy in the TRRO. However, the witness states that BellSouth will process orders during the transition period for changes to an existing customer's service, i.e., adding or removing vertical features, because these do not constitute an order for new service. (TR 221)

BellSouth witness Tipton believes that CompSouth's assertion that CLECs may order new DS1 and DS3 loops, and DS1, DS3, and dark fiber dedicated transport to serve their embedded base during the applicable transition period is inconsistent both with the language of

the TRRO and its accompanying rules. (TR 603; TRRO ¶146; TRRO ¶182; TRRO ¶234) BellSouth witness Blake explains that the TRRO permits CLECs to self-certify in wire centers if a CLEC believes that, after a "reasonably diligent inquiry," it is entitled to unbundled dedicated transport or dark fiber transport between particular wire centers. (Blake TR 221; TRRO ¶234) Once a "self-certifying" order has been provisioned, BellSouth is entitled, under the TRRO, to challenge the self-certification pursuant to the dispute resolution provisions in parties' ICAs.

Witness Tipton asserts that CompSouth does not include self-certification requirement language in its proposal, but simply claims it is entitled to add loops and transport during the transition period. (TR 616-617) Nonetheless, BellSouth argues that once the Commission affirms the list of non-impaired wire centers (Issue 4), CLECs have no basis to self-certify orders for high-capacity loops and dedicated transport in the confirmed wire centers. (BR at 77)

Regarding entrance facilities, BellSouth witness Tipton explains that the FCC concluded in the TRO that CLECs were not impaired without unbundled access to entrance facilities, and that finding was affirmed in the TRRO. (TR 617; TRO ¶366, fn. 1116; TRRO ¶66) While not required by either the TRO or the TRRO, witness Tipton asserts that BellSouth is offering to allow the embedded base of UNE entrance facilities to transition to alternative arrangements over a 12-month period to help effectuate an orderly transition process. However, contends the witness, CLECs have no right to order new UNE entrance facilities as CompSouth proposes. (TR 617)

Witness Tipton also believes that the TRRO and its revised rules are clear that CLECs may not add new UNE switch ports for UNE-P lines during the 12-month transition period as CompSouth witness Gillan suggests. (TR 618) At ¶199 of the TRRO, asserts the witness, the FCC specifically states that the transition period applies only to the embedded customer base. Moreover, the revised rules attached to the TRRO regarding switching are clear that CLECs are not permitted to add new local switching as a UNE during the transition period. (TRRO Appendix B, p. 148; Tipton TR 618) Thus, claims the witness, CompSouth's proposed language is not appropriate. CompSouth's proposal that CLECs should be permitted to order new local switching for the purpose of serving their embedded customer base is in conflict with the TRRO and its revised rules. (Tipton TR 618)

The Joint CLECs argue in their brief that the dispute is whether a "move" of a de-listed UNE loop or dedicated transport on behalf of a customer that was served by the CLEC as of March 11, 2005 should be permitted. (BR at 51-52) The Joint CLECs believe that the TRRO is clear that the transition plans apply to the base of embedded customers, rather than to embedded lines or circuits. (BR at 52; TRRO ¶¶142, 195) Therefore, surmise the Joint CLECs, modifications or changes to the customer's service should be processed during the transition period. The Joint CLECs assert that where the embedded customer is moving to a location within the same non-impaired wire center, and no disconnect order or new install order is issued, then there has been no addition and the move should be permitted. (BR at 52)

The Joint CLECs assert that the ICA amendments should clarify that the definition of "embedded base" permits adds, moves, or changes to be made by a CLEC at the request of a customer that was served by the CLEC's network on or before March 11, 2005. CompSouth witness Gillan recommends ICA language provisions to address the definition of "embedded

base" and the related restrictions imposed by the TRRO. (EXH 23, pp. 26-27) Specifically, witness Gillan defines the "embedded base" in terms of CLEC customers existing as of March 10, 2005. The witness' proposed language provides that CLECs are entitled to order local switching and UNE-P, and DS1 and DS3 loops for the purpose of serving the CLEC's embedded customer base during the transition period. For DS1 and DS3 loops, CLECs will self-certify, if requested by BellSouth, that the CLEC orders will be used to serve the embedded customer base. BellSouth has the right to dispute the self-certification; the dispute is governed by the ICA dispute resolution process. With regards to local circuit switching and UNE-P, CompSouth's proposed language provides that additions to the CLEC embedded customer base include "any additional elements that are required to be provided in conjunction therewith." (EXH 23, pp. 26-27)

ANALYSIS

While discovery responses would seem to indicate that this issue has been resolved, the parties continue to propose competing language, and therefore staff presumes a dispute continues to exist. (EXH 2, p. 67)

In the TRRO, the FCC concluded that the 12-month transition period applies to the embedded base of end-user customers and that CLECs may not obtain any new local switching (no-new-adds) as an unbundled network element, effective March 11, 2005. (TRRO ¶227) In the No-New-Adds Order, the Commission found that the TRRO is specific, as is the revised FCC rule, that CLECs are prohibited from adding new local switching arrangements as an UNE, effective March 11, 2005. (No-New-Adds Order, p. 6) As such, no amendment to existing ICAs is needed before ILECs can cease providing new unbundled local circuit switching. Furthermore, in the Embedded Base Order, in the instant docket, the Commission explicitly specified that the no-new-adds directive applies to the embedded customer base, not just to new customers. Specifically, the Commission found that the embedded customer base referenced in the TRRO means unbundled local circuit switching arrangements existing on March 11, 2005. The Commission concluded that:

> While CLECs retain access to unbundled local circuit switching during the 12-month transition period for their embedded end-user customers, that access is limited to the arrangements existing on March 11, 2005. Orders requiring a new UNE-P arrangement, such as a customer move to another location or an additional line, are not permitted pursuant to the FCC's *TRRO*. (Embedded Base Order, p. 6)

Moreover, in the Verizon Arbitration Order, the Commission reached a similar conclusion that additions, moves or changes are not allowed within the CLEC's embedded customer base either for switching or high-capacity loops and transport because they constitute a new arrangement. (Verizon Arbitration Order, p. 22) Staff believes that CompSouth has presented no compelling evidence why the Commission should render a different decision now. For this reason, staff believes that CompSouth's definition of "embedded base" in terms of customers is inappropriate. BellSouth's definition in terms of arrangements is more in line with the TRRO, and staff believes more appropriate.

In their brief, the Joint CLECs argue that the Eleventh Circuit recently addressed conditions under which CLECs may move, add, or change services for the embedded base. (BR at 51) The Eleventh Circuit upheld the district court's decision granting a preliminary injunction that barred enforcement of an order of the Georgia Public Service Commission requiring BellSouth to negotiate the terms of the TRRO. This decision indicates nothing addressing conditions alleged by the Joint CLECs.

Therefore, while staff agrees that CLECs retain access to unbundled local circuit switching and DS1 and DS3 high-capacity loops and transport during the applicable transition period for their embedded end-user customers, staff believes that access is limited to the arrangements existing on March 11, 2005. When a CLEC seeks to move a customer's service to a different location, BellSouth witness Blake explains that there is a disconnection at the original location and the placement of a new order at a new location. (TR 221) A new order constitutes a new arrangement. On the other hand, changes to an existing service do not constitute an order for new service. BellSouth agrees to process orders to modify an existing customer's service by, for example, adding or removing vertical features, during the transition period. (EXH 2, p. 67; BR at 76) Staff agrees with BellSouth that anything requiring a new arrangement, such as a customer move to another location or an additional line, is not permitted under the TRRO.

As for high-capacity loops and dedicated transport, the Commission found in the No-New-Adds Order that a:

> . . . requesting CLEC shall self-certify its order for high-capacity loops or dedicated transport. Thereafter, the ILEC shall provision the high capacity loops or dedicated transport pursuant to the CLEC's certification. The ILEC may subsequently dispute whether the CLEC is entitled to such loop or transport, pursuant to the parties' existing dispute resolution provisions. This process, as delineated in Paragraph 234 of the *TRRO*, shall remain in place pending any appeals by BellSouth or Verizon of the FCC's decision on this aspect of the *TRRO*. (No-New-Adds Order at p. 6)

BellSouth witness Tipton asserts that BellSouth has been accepting and processing CLEC orders for new high-capacity loops and dedicated transport even in wire centers and for those routes that BellSouth has identified as not being impaired pursuant to the threshold criteria set forth in the TRRO. (TR 557) However, asserts BellSouth, at the conclusion of this instant proceeding, the Commission should validate and confirm the Florida wire centers that satisfy the FCC's impairment thresholds. At that time, BellSouth believes that CLECs should no longer be able to self-certify in the confirmed non-impaired wire centers. (BellSouth BR at 77)

All the parties in this proceeding desire the Commission to validate and confirm a list of wire centers that currently meet the impairment criteria set forth in the TRRO. (See Issue 4) Given this, staff believes that the instant proceeding represents the dispute resolution process where challenges to BellSouth's wire center list are addressed and resolved. For this reason, staff agrees with BellSouth that once this proceeding concludes, CLECs should be foreclosed from self-certifying in the wire centers recommended in Issue 4. Also, staff believes that CLECs should no longer be permitted to submit new orders for high-capacity loops and transport in these non-impaired wire centers.

CONCLUSION

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.

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.

(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.
- 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.
- 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.
(P. Lee)

Position of the Parties

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

GRUCom: BellSouth's ICA language addressing prospective transitions when wire centers become non-impaired is facially unreasonable: (1) website notice rather than actual notice, (2) 10 days after constructive notice to contest and self-certify, and (3) 104 days to make a transition that the FCC afforded a year to make.

(a) At the end of transition, if the CLEC has not transitioned off, the remaining loops should be priced at the lowest available rate.

(b) The subsequent transition period for high capacity loops should be 12 months. During transition, BellSouth should be allowed to increase the price up to 15%. At the end of transition, if the CLEC has not transitioned off, the remaining loops should be priced at the lowest available rate. (Maples)

JOINT CLECS: CompSouth's contract language includes provisions for ordering different arrangements (including Section 271 checklist network elements) that will replace de-listed UNEs. CLECs should not be forced onto higher-priced arrangements before the completion of the TRRO transition period. The Joint CLECs propose a reasonable process BellSouth may utilize to identify "non-impaired" wire centers.

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

Staff Analysis:

The rates, terms, and conditions for elements de-listed by the TRRO and which have a designated transition period are addressed in Issue 1. (BellSouth BR at 77; Joint CLECs BR at 52) Therefore, subpart (a) of this issue will only address implementation of the unbundling relief of the TRO. Subpart (b) of this issue relates to the appropriate transition provisions for UNEs that may be de-listed in the future as wire centers become non-impaired.

PARTIES' ARGUMENTS

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

BellSouth witness Tipton notes that the TRO eliminated ILEC unbundling obligations with respect to entrance facilities, enterprise or DS1 level switching, OCN loops and transport, fiber to the home, fiber sub–loop feeder, "greenfield" fiber build, and packet switching almost two years ago. With the exception of entrance facilities,[38] witness Tipton believes that no transition obligation for the affected elements de-listed in the TRO should be imposed since the TRO did not require any. Furthermore, any rates, terms, and conditions in CLEC ICAs regarding these specific elements should be removed. (TR 571)

If a CLEC has any de-listed TRO elements or arrangements in place after the effective date of the change of law amendment, asserts witness Tipton, then BellSouth should be authorized to disconnect or convert such services, after a 30-day written notice and absent a

[38] BellSouth proposes that the embedded base of entrance facilities be subject to a 12-month transition period, as addressed in Issue 1.

CLEC disconnection or conversion order. If CLECs do not submit the requisite orders during the 30-day period, witness Tipton opines 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 and UNE disconnect charges. (TR 571)

BellSouth witness Tipton asserts that although the language proposed by BellSouth and CompSouth is similar, CompSouth's proposed language gives more time to transition the TRO de-listed UNEs. Furthermore, CompSouth's proposal puts the onus on BellSouth to absorb the nonrecurring charges associated with converting these services to equivalent BellSouth tariffed services in the event that BellSouth has to initiate the conversion process. (TR 641)

The Joint CLECs acknowledge that there are certain UNEs that were de-listed by the TRO for which the FCC provided no specific transition plan or the transition plan has expired, and which would not be governed by the transition plan addressed in Issue 1. The Joint CLECs believe that BellSouth should provide at least 30 days' notice to CLECs before it disconnects any of the service arrangements or services identified in its notice. In any event, assert the Joint CLECs, BellSouth should not be permitted to disconnect the service arrangements or services if the CLEC has notified BellSouth of a dispute regarding the identification of a specific service arrangement or service that BellSouth claims it is not required to provide pursuant to §251. Additionally, the Joint CLECs believe there should be no service order, labor, disconnection, project management or other nonrecurring charges associated with a conversion of the TRO de-listed elements. (Joint CLECs BR at 53)

(b) Subsequent Transition Period

BellSouth witness Tipton asserts that to the extent additional wire centers are found to meet the FCC's non-impairment criteria for de-listing a high-capacity loop or transport UNE, BellSouth's proposed standard contract language provides that CLECs will be notified of the "Subsequent Wire Center List" via a Carrier Notification Letter (CNL). Ten business days (which equates to 14 calendar days) after posting the CNL to its website, BellSouth should be permitted to cease offering new unbundled high-capacity loops and dedicated transport in the affected wire centers, except in a wire center where CLECs have "self-certified" they are entitled to unbundled access. (Tipton TR 637)

BellSouth's proposed language requires that a CLEC undertake a reasonably diligent inquiry to determine whether the CLEC is entitled to unbundled access to the affected network element, prior to submitting an order for high-capacity loops or dedicated transport in a wire center on the Subsequent Wire Center List. By submitting an order, contends BellSouth, the CLEC self-certifies that to the best of its knowledge, it is entitled to the UNE. BellSouth will process the CLEC request and if it believes the request does not comply with the TRRO provisions, it will pursue the dispute resolution process provided in the ICA. If the Commission resolves the dispute in BellSouth's favor, BellSouth proposes that the CLEC be billed the difference between the applicable UNE rates and the nonrecurring and recurring charges for the equivalent tariffed service from the date the ordered circuit is installed to the date the circuit is transitioned to the equivalent tariffed service. Further, within 30 days following the Commission's decision, the CLEC is required to submit a spreadsheet identifying those non-compliant circuits to be transitioned to tariffed services or disconnected. (EXH 17, pp. 3-4)

Witness Tipton explains that the Subsequent Transition Period for high-capacity loops and transport UNEs in service when the subsequent wire center determination is made will begin ten business days following posting of the CNL. The Subsequent Transition Period will last 90 days, during which the same transition rates as the TRRO established for the Initial Transition Period will apply.[39] BellSouth believes that 90 days is sufficient for CLECs to transition de-listed UNEs in subsequent non-impaired wire centers because the number of wire centers will be fewer than those identified during the original transition period. Also, CLECs should have already performed some of the tasks necessary to transition de-listed UNEs to alternative arrangements, for example, modifying their customer contracts to anticipate such de-listing, and modifying ICAs in anticipation of the non-impairment determination. (EXH 3, p. 22) However, asserts witness Tipton, CLECs will be obligated to submit spreadsheets identifying the embedded base of UNEs to be converted or disconnected no later than 40 days after the date of the CNL. A project conversion timeline will then be negotiated, with completion of the transition activities by the end of the subsequent transition period. (TR 637-638) Absent a mutually agreeable compromise, witness Tipton opines that BellSouth's proposed standard terms should apply. (TR 638)

CompSouth is not opposed to a web-based notification of wire centers for the Subsequent Wire Center List assuming its proposed annual process for approving future non-impaired wire centers is adopted. However, CompSouth asserts that it is critical for CLECs to have the opportunity to efficiently review and challenge BellSouth's classifications. (EXH 4, p. 168) CompSouth witness Gillan proposes a standard procedure whereby BellSouth's Subsequent Wire Center List would be filed with the Commission on April 1 of each year, and CLECs would have until May 1 to file a challenge to any new wire center on that list. The Commission would issue a decision regarding any disputed non-impaired wire center by June 15; the effective date of the Subsequent Wire Center List would be July 1. (TR 415-417)

XO witness Shulman believes that the Subsequent Transition Period needs to give CLECs sufficient time to change their business processes to adjust from unbundling in a subsequently affected wire center; BellSouth's proposed ten business days is not sufficient. (TR 175) Recognizing that CLECs would have less advance notice of de-listing in the future than they did for the initial de-listing, witness Shulman believes it is arguable that the length of Subsequent Transition Periods should be at least as long as the 12 and 18-month initial transition periods adopted in the TRRO. (TR 177; Joint CLECs BR at 54) The witness also believes that the transition rates for the Subsequent Transition Period should apply from the beginning to the end of the transition period, regardless of when conversion orders are placed or completed. Finally, the witness opines that the only rates BellSouth should assess CLECs for converting the de-listed arrangements are Commission-approved switch-as-is conversion charges. (TR 173-174)

As a compromise between the initial transition period and BellSouth's proposal, SEECA witness Montano proposes a Subsequent Transition Period of 180 days. The witness contends that CLECs would likely be unable to ensure an orderly transition of any affected circuits in less than 180 days. The witness asserts that many CLECs don't have the resources to continue

[39] The transition rates for DS1 and DS3 loops and dedicated transport are equal to the higher of 115 percent of the rate paid for that element on June 15, 2004, or 115 percent of the rate the Commission established, if any, between June 16, 2004, and March 11, 2005.

business provisioning and also provision future unknown transition orders in 40 days following the CNL. Additionally, asserts witness Montano, CLECs need to review BellSouth's wire center information during the transition period; conduct a reasonable due diligence to determine whether or not the wire center is non-impaired; and inventory the circuits required to be transitioned and determine the appropriate alternative services to which to transition the circuits. (TR 87; Joint CLECs BR at 54) Moreover, opines the witness, 180 days gives CLECs needed time to coordinate the conversions to alternative services, and allows CLECs to use competitive providers rather than BellSouth's special access pricing. (TR 87; Joint CLECs BR at 54)

Sprint witness Maples believes that the transition process for future declassification events should mirror the one adopted in the TRRO for the initial transition, absent new findings or evidence.[40] (TR 129, 131) The witness asserts that BellSouth should notify each CLEC directly, not simply via a CNL posted to its website. Also, there should be a minimum of 30 days from the receipt of the notification from BellSouth for the CLEC to determine if it will self-certify and if not, modify its process to stop ordering the impacted UNE. During the 30-day period, opines the witness, the CLEC should be permitted to continue ordering the affected UNE at TELRIC rates. (TR 129) If a CLEC disputes BellSouth's non-impaired wire center claim, it should be allowed to continue ordering the impacted UNE during the dispute process, with no increase in price; the CLEC should not be required to transition off the affected UNE until resolution of the dispute. (TR 129) If a CLEC does not self-certify, the same transition period applies; the rate during the transition period should increase consistent with the TRRO transition procedure, absent any new finding. (TR 129, 131)

Sprint witness Maples contends that BellSouth's proposal to cease providing de-listed high-capacity loop and transport UNEs in subsequent non-impaired wire centers ten days following issuance of the CNL does not provide sufficient time to review the BellSouth wire center claim and to determine whether or not to self-certify or stop placing orders. The witness asserts that CLECs will need to request the detailed data from BellSouth to review its claim of non-impairment. Moreover, opines the witness, the fact that a CLEC knows that BellSouth could change the status of a wire center in the future does not provide the type of advance notice that a CLEC needs to be ready to transition to alternate ILEC services, alternative providers, or self-provided services. (TR 131) With only a notice via a CNL and an abbreviated period of ten days for filing disputes, witness Maples asserts that CLECs may end up filing needless disputes based on incomplete information in an effort to preserve their rights. (TR 130)

Rather than requiring CLECs to provide a list of impacted UNEs within 40 days of receiving notice regarding the status of a wire center, Sprint witness Maples proposes that the timeline be modified to nine months for DS1 and DS3 loops and dedicated transport and 15 months for dark fiber dedicated transport. The witness asserts that the nine months is consistent with the December date requested by BellSouth for the embedded base of DS1 and DS3 loops identified in the initial transition period, and the longer period for dark fiber dedicated transport recognizes the FCC's 18-month transition period. (TR 132)

[40] Staff notes that Sprint no longer has a dispute with BellSouth regarding any issue in this proceeding except for Issue 5. (Sprint BR at 1)

The Joint CLECs believe that BellSouth's proposed 90-day Subsequent Transition Period is inadequate and propose in their brief a Subsequent Transition Period of a maximum of 12 months and no less than 180 days. (BR at 54) The Joint CLECs submit that since the FCC did not impose the TRRO transitional rates to the Subsequent Transition Period, existing UNE rates should apply until the conversion of the affected de-listed UNEs is completed. (BR at 54-55) The Joint CLECs also argue in their brief that the notice provision of the parties' ICAs be used to ensure that the CLECs are aware of the potential loss of UNEs in a wire center, rather than a website CNL posting. The Joint CLECs assert that posting a notice on the website is insufficient and contrary to the general terms and conditions of the ICA. (BR at 55)

ANALYSIS

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

In comparing the positions of BellSouth and the Joint CLECs for this issue, staff observes some distinct differences and areas of dispute.[41] If BellSouth determines that a CLEC has any arrangements de-listed by the TRO, with the exception of entrance facilities, it proposes to provide a 30-day written notice to CLECs for them to submit disconnect or conversion orders. (EXH 21, p. 31) On the other hand, CompSouth would have BellSouth identify, by circuit identification number, the specific CLEC arrangements that need to be disconnected or converted. Additionally, CompSouth's proposed language provides that CLECs could dispute the BellSouth identified de-listed arrangements within 30 days. (EXH 23, p. 28) Staff observes that the TRO was released August 21, 2003; the Order became effective on October 2, 2003. Thus, CLECs have known of the TRO de-listings for more than two years, while continuing to receive the de-listed UNEs during the subsequent litigation proceedings and change-of-law proceedings. Staff therefore believes that if BellSouth determines, after the effective date of the change-of-law amendment, it is provisioning TRO de-listed UNEs, it is sufficient that it provide CLECs with a 30-day written notice in which to submit disconnection or conversion orders for such arrangements.

CompSouth proposes that absent a CLEC disconnection or conversion order, BellSouth should transition such circuits to the equivalent tariffed BellSouth service (or §271 equivalent service). (EXH 23, p. 28) BellSouth disagrees with the §271 reference. Based on the staff recommendation in Issue 7 that the Commission does not have authority to require §271 checklist items that are not required by §251 to be included in §252 ICAs, staff believes the CompSouth proposed language is not appropriate.

Under BellSouth's proposed language, whether the CLEC submits conversion or disconnection orders within the 30-day notice period or BellSouth identifies and transitions the affected de-listed arrangements, the CLEC will be charged applicable UNE disconnect charges and the full nonrecurring charges for installation of the equivalent BellSouth service. Unlike the proposed language for the TRRO de-listings, BellSouth is not proposing switch-as-is conversion charges for the TRO-related de-listed arrangements if the CLEC submits conversion orders

[41] Staff notes there are also disputes regarding the specific arrangements de-listed by the TRO. These disputes are addressed in other issues. This issue specifically addresses the rates, terms, and conditions that should govern the de-listed UNEs.

within the specified 30-day period. Moreover, the applicable recurring charges will apply to each circuit retroactive to the effective date of the ICA amendment. (EXH 21, p. 31) The Joint CLECs recommend that the parties absorb their own costs associated with transitioning the circuits de-listed by the TRO, and that CLECs should not be charged any service order, labor, disconnection, project management or other nonrecurring charges associated with the transition of UNEs to other services or arrangements. (EXH 23, p. 28) Staff observes that BellSouth offers no explanation why switch-as-is charges should not apply if the CLEC submits its conversion and disconnection orders within the 30-day notice period and it seems reasonable to treat TRO and TRRO de-listings the same in this regard. Accordingly, staff believes that Commission-approved switch-as-is charges should apply if the CLEC submits its orders within the designated period. However, if CLECs do not submit their orders, then they should be charged applicable UNE disconnect charges and the full nonrecurring charges for installation. CLECs can avoid these charges if they submit their orders within 30 days of the BellSouth CNL.

Finally, CompSouth witness Gillan proposes language to apply to bulk migrations of lines from one service platform to another associated with the transition off certain §251(c)(3) UNEs. The CompSouth proposed language requires that BellSouth provide a bulk migration process in which a CLEC may request to migrate BellSouth retail customers to the CLEC using UNE-L or EELs and migrate another CLEC's customer base to the CLEC using UNE-L. (EXH 23, p. 29) Staff observes that Docket No. 041338-TP is a generic docket addressing bulk migration and hot cut issues for BellSouth. Staff also observes that in response to staff discovery, CompSouth affirmatively states that it does not oppose addressing bulk migration and hot cut performance issues in the generic docket rather than in this instant proceeding. (EXH 3, p. 44) Nevertheless, the parties' positions regarding bulk migrations are very similar, and BellSouth has no objection to the CompSouth proposed bulk migration language with the slight modification that a CLEC may request to migrate another CLEC's embedded base of port/loop combinations or UNE-L to the CLEC using UNE-L and that the CLEC's customer base is the CLEC's embedded base. However, BellSouth believes that since hot cut performance is not an issue in this proceeding, the CompSouth language should not be adopted. (EXH 21, p. 29). Staff agrees.

(b) Subsequent Transition Period

Staff believes the issue of modifications and updates to the initial non-impaired list of wire centers and subsequent transition periods involves the following:

- how CLECs should be notified of subsequent wire centers that meet the non-impairment criteria set forth in the TRRO;
- how long CLECs should continue to be able to order de-listed high-capacity loops or transport or dark fiber transport in subsequent non-impaired wire centers;
- the period for transitioning the embedded de-listed elements to alternative arrangements;
- the rates to apply during the subsequent transition period;
- when orders should be submitted to transition the embedded de-listed elements;
- applicable rates for converting the de-listed elements identified by the specified deadline; and,

- applicable rates for converting de-listed elements for which orders are not submitted by a specified deadline.

BellSouth proposes that subsequent wire centers it determines meets the TRRO non-impairment criteria be posted in a CNL on its website. CompSouth does not oppose the website posting of a Subsequent Wire Center List as long as its proposed annual procedure for determining new non-impaired wire centers is adopted. Staff notes that CompSouth's procedure is addressed in Issue 4. Consistent with the staff recommendation in Issue 4, staff believes a CNL website posting of a Subsequent Wire Center List is sufficient.

Staff agrees with XO witness Shulman and Sprint witness Maples that CLECs should be allowed sufficient time to change their business processes to adjust from unbundling in a wire center that becomes non-impaired. Staff observes that BellSouth and the Joint CLECs believe that CLECs should be allowed to self-certify in wire centers on the Subsequent Wire Center List. Under BellSouth's proposed language, CLECs have ten days following the CNL to self-certify. When a CLEC submits an order for a UNE in a subsequent non-impaired wire center, BellSouth contends it is self-certifying that it is entitled to the UNE based on a reasonably diligent inquiry. On the other hand, CompSouth proposes that a CLEC's identification of disputed circuits constitutes self-certification and that a CLEC be given the entire transition period to dispute a BellSouth non-impaired wire center claim. Staff is concerned that BellSouth's proposed ten business days may not provide CLECs sufficient time to obtain and review the BellSouth wire center claim and determine whether or not to dispute the claim or stop placing orders. Additionally, staff notes that CLECs will become aware of a wire center status change when the CNL is posted; there is no advance notice. Staff believes this makes it difficult for CLECs to be ready to transition to alternate ILEC services, alternative providers, or self-provided services as fast as BellSouth proposes.

BellSouth proposes a shorter Subsequent Transition Period of 90 calendar days for Subsequent Embedded Bases of de-listed arrangements than the 12- and 18-month transition periods established in the TRRO. The 90-day transition period begins 10 business days following the website posting of the CNL. In contrast, CompSouth, SEECA, and the Joint CLECs assert that the uncertainty of when a wire center may become non-impaired necessitates the Subsequent Transition Period be the same 12- and 18-month timelines as set forth for the initial transition period in the TRRO, or a minimum of no less than 180 days.

While staff agrees with BellSouth that Subsequent Transition Periods need not necessitate ICA amendments because the non-impaired wire center list will be incorporated by reference in the ICAs, staff observes that BellSouth provided no evidence supporting its contention that significant increases in the number of future unimpaired wire centers are not expected. Staff observes that the TRRO did not establish a default transition process for UNEs in wire centers that are subsequently determined to meet the non-impairment criteria. Rather, the FCC expected parties to negotiate the appropriate transition mechanisms for such facilities through the §252 process. (TRRO ¶142, fn 399, ¶196, fn 519) That said, staff believes that if the FCC had intended Subsequent Transition Periods to exceed those initially established in the TRRO, it would have said so explicitly. Staff therefore believes that, at a maximum, the Subsequent Transition Period should be 12 months (18 months for dark fiber transport) from the

time CLECs are notified that the given wire center is non-impaired. Staff believes that a Subsequent Transition Period of 180 days for the de-listed high-capacity loops or transport UNEs (270 days for the de-listed dark fiber transport UNEs) in wire centers on the Subsequent Wire Center List is a reasonable compromise between the BellSouth and other parties' proposals.

BellSouth proposes that rates to apply to the de-listed UNEs in the Subsequent Wire Center List should be the same transition rates set forth by the FCC in the TRRO for the Initial Transition Period -- the higher of 115 percent of the rate paid for that element on June 15, 2004, or 115 percent of the rate the Commission established, if any, between June 16, 2004, and March 11, 2005. As with the initial transition period, BellSouth proposes that the transition rates for the Subsequent Transition Period should apply until the earlier of when the Subsequent Embedded Base circuits are converted to other arrangements or the end of the Subsequent Transition Period. The Joint CLECs assert in their brief that applicable transition rates should be existing UNE rates and should apply until the conversion of the UNEs is completed. Staff believes that neither the BellSouth proposed transition rates nor the Joint CLECs' proposed rates are appropriate. Staff believes that the transition rates for the Subsequent Transition Period should be those applicable UNE rates existing at the time the Subsequent Wire Center List is posted, plus a 15 percent additive. Staff believes that such transition rates are consistent with the FCC-established rates for the initial transition period and simply reflect an update to those rates to recognize changes in existing UNE rates that could occur prior to a Subsequent Wire Center List. Regarding the application of transition rates during the Subsequent Transition Period, staff believes that consistent with the recommendation in Issue 1, the transition rates should apply throughout the Subsequent Transition Period.

BellSouth proposes that CLECs submit spreadsheets identifying the Subsequent Embedded Base of circuits to be disconnected or converted to other services no later than 40 days from the CNL posting. CompSouth and the Joint CLECs propose that CLECs submit spreadsheets by the end of the applicable Subsequent Transition Period. Staff believes that, consistent with the recommendation in Issue 1 regarding the similar dispute for the initial transition period, CLECs should be required to submit spreadsheets identifying the Subsequent Embedded Base of circuits to be disconnected or converted to other services no later than the end of the Subsequent Transition Period.

Unlike BellSouth's proposal for the initial transition period, staff observes that BellSouth does not propose to charge CLECs "switch-as-is" conversion rates and forego disconnect charges if CLEC orders and spreadsheets are submitted by the BellSouth proposed deadline. BellSouth offers no explanation why the subsequent transition period should be different than the initial transition period in this respect. CompSouth proposes that no nonrecurring charges should apply when converting the subsequent embedded base circuits to alternative arrangements. As discussed in more detail in Issue 1, Staff believes that BellSouth should assess CLECs Commission-approved switch-as-is nonrecurring conversion charges and forego disconnect charges if CLECs submit orders and spreadsheets no later than the end of the Subsequent Transition Period. However, if CLECs do not submit orders and spreadsheets accordingly, staff believes that full UNE disconnect charges and tariffed installation charges should apply.

Staff believes that concerns with possible service disruptions to customers, as well as to CLECs' business plans if unbundled access were eliminated on a flash-cut basis, remain when additional wire centers meet the non-impairment criteria of the TRRO in the future. If the FCC no longer considered this a concern, staff believes it would not have expected parties to negotiate the appropriate transition mechanisms for such facilities through the §252 process. Accordingly, staff recommends a Subsequent Transition Period that represents a mix of the proposals proffered by the parties and follows similar transition pricing requirements and conversion requirements of the initial transition period. Staff believes its proposal for the Subsequent Transition Period reflects a reasonable balance of the parties' divergent interests. A summary of the staff proposed time-line is shown below in Table 9-1.

Table 9-1: Subsequent Transition Period for Future Non-Impaired Wire Centers

■ Day 0	• BellSouth Carrier Notification Letter (CNL) of Subsequent Wire Centers
■ Day 30	• Embedded Base Established for Subsequent Wire Centers • Subsequent Transition Period/Rates* Begin for Embedded Base • Further Unbundling Ends for Subsequent Wire Centers Unless CLEC Has Self-Certified
■ Day 210	• Subsequent Transition Period/Rates End for Embedded Base (Excludes Dark Fiber) • Disconnection/Conversion Spreadsheets Due from CLECs for Embedded Base (Excludes Dark Fiber)
■ Day 211	• CLEC-Identified Embedded Base (excludes dark fiber) Priced at Applicable Recurring Tariff Charges • BellSouth May Identify and Transition Any Remaining Embedded Base (Excludes Dark Fiber), Subject to Full Disconnection/Installation Charges
■ Day 300	• Subsequent Transition Period/Rates End for Embedded Dark Fiber • Disconnection/Conversion Spreadsheets Due from CLECs for Embedded Dark Fiber
■ Day 301	• CLEC-Identified Embedded Dark Fiber Priced at Applicable Recurring Tariff Charges • BellSouth May Identify and Transition Any Remaining Embedded Dark Fiber, Subject to Full Disconnection/Installation Charges

* Rates for the Subsequent Transition Period are the Commission-approved UNE rates existing at the time of the CNL, plus the 15 percent additive.

CONCLUSION

(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.

(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.
- 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.
- 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.

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. **(P. Lee)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECs: Until March 11, 2006, CLECs have a right to pay no more than the TRRO transition rates for UNEs subject to "de-listing." Joint CLECs desire an orderly transition for UNEs moving to new service arrangements. The process for such transitions should not include denial of transition pricing during the transition period.

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

Staff Analysis:

This issue relates to the same network elements as addressed in Issue 1; that is, de-listed UNEs subject to a transition period. Accordingly, staff addressed the parties' arguments and analysis regarding the elements of this issue in detail as part of Issue 1. Therefore, those arguments and analysis will not be repeated here.

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. **(Hallenstein)**

Position of the Parties

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

GRUCom: Agrees with Joint CLECs.

JOINT CLECS: No. SQM/PMAP/SEEM measure compliance with Section 271 obligations - including unbundling still required after a finding of "no impairment" under Section 251. Performance measurement plans were established to prevent "backsliding" by BOCs. The need to prevent backsliding does not change because unbundling is required under Section 271 rather than Section 251.

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

Staff Analysis:

BACKGROUND

By Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, in Docket No. 000121-TP, the Commission adopted BellSouth's Performance Assessment Plan (PAP). The purpose of the PAP is to monitor performance levels and ensure that BellSouth is meeting its obligation to provide unbundled access, interconnection and resale to CLECs in a nondiscriminatory manner. BellSouth's PAP is comprised of a Service Quality Measurement (SQM) Plan and a Self-Effectuating Enforcement Mechanism (SEEM) Administrative Plan to which BellSouth willingly volunteered to submit. The SQM is a comprehensive and detailed description of BellSouth's performance measurements. The SEEM Plan includes key measures to which remedy payments are applied if BellSouth fails to meet the performance standards agreed to by the parties and approved by the Commission.

Section 251(c)(3) of the Telecommunications Act places upon ILECs the duty to provide nondiscriminatory access to network elements on an unbundled basis. The FCC reasoned in §251(d)(2)(b) that the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer. Whether a network element is required to be offered pursuant to §251 depends in large part on whether the lack of this element would impair the CLEC's ability to do business.

Section 271 of the Act sets forth the conditions that a Bell Operating Company (BOC), such as BellSouth, must meet to enter the in-region interLATA long distance market. Section 271 checklist item two includes the obligation to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Stated differently, §251 UNE obligations are incorporated into §271. Accordingly, BellSouth's PAP was designed to prevent §271 checklist item two from backsliding.

This issue pertains to the interplay between §§271 and 251 of the Telecommunications Act. At issue is whether elements that are no longer required to be unbundled pursuant to §251(c)(3) ("de-listed elements") be required to be maintained in BellSouth's PAP pursuant to §271.

PARTIES' ARGUMENTS

BellSouth

BellSouth requests to cease reporting performance measurement data and making SEEM payments in accordance with a change-of-law that relieves BellSouth of its obligations to provide any UNE or UNE combinations pursuant to §251. (Blake TR 222) BellSouth asserts that the PAP is not required by any portion of the Telecommunications Act, although it acknowledges that it is a mechanism that can be used to ensure that BellSouth is meeting its obligations under §251, after granting of §271 authority. (EXH 5, p. 25) BellSouth witness Blake explains that the purpose of establishing and maintaining BellSouth's PAP is to ensure that BellSouth provides nondiscriminatory access to elements required to be unbundled under §251(c)(3). (TR 222-223) If BellSouth fails to meet such measurements, it must pay the CLEC or the state a monetary penalty. Accordingly, BellSouth believes that de-listed elements should not be subject to the measurements of BellSouth's PAP plan.[42] (TR 222-223) Witness Blake further contends that the issue of enforcement and prevention of backsliding relative to §271 obligations is a matter for the FCC to assess, determine, and monitor. (TR 263)

BellSouth witness Blake further observes that BellSouth has entered into over 150 commercial agreements that provide for non-251(c) replacement service arrangements similar to UNE-P. These commercial agreements provide for consequences if BellSouth fails to perform in accordance with its contractual obligations. Penalties are made available in these agreements. (TR 223-224) Because BellSouth provides these non-251(c) UNE replacements under a commercial agreement, performance data associated with these services are removed from the PAP. Witness Blake states that all such executed commercial agreements with BellSouth have a provision to exempt BellSouth from having to pay SEEM penalties, should BellSouth not perform in accordance with the parties' agreement. For those CLECs that have not entered into commercial agreements and continue to buy services (de-listed elements) from BellSouth, the

[42] BellSouth did not propose specific revisions to the current language in the interconnection agreement for this issue.

performance data for these services (de-listed elements) currently remain in BellSouth's PAP. (EXH 4, p. 37)

Joint CLECs

According to CompSouth witness Gillan, BellSouth's PAP should be enforced with regard to BellSouth's §271 obligations. (TR 438) In other words, BellSouth should not be allowed to unilaterally cease reporting data or making SEEM payments simply because there is a change-of-law that may relieve BellSouth of any of its obligations to provide UNEs or UNE combinations pursuant to §251. Separate from its obligations under §251, witness Gillan asserts that BellSouth should continue to be obligated by §271 of the Telecommunications Act of 1996 and Florida statutes. (TR 438)

Witness Gillan further contends that the "purpose" of establishing and maintaining BellSouth's PAP is to ensure that BellSouth will continue to meet its §271 obligations, which includes BellSouth's obligation under §251. Witness Gillan claims that BellSouth's requirements to comply with the existing PAP should be unaffected by any de-listing of §251 UNEs. In support of his position, witness Gillan references the FCC's Memorandum Opinion and Order of December 19, 2002 where it states:

> In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentives to continue to satisfy the requirements of section 271 after entering the long distance market. Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has found that the existence of a satisfactory performance monitoring and enforcement mechanism is probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority. (emphasis by witness)

Witness Gillan notes that the above is probative evidence that BellSouth must continue to meet its §271 obligations after a grant of authority. (TR 437-438)

ANALYSIS

Modifications to BellSouth's PAP are usually limited to the review process outlined in Commission Orders adopting changes to the PAP. The FCC's decision in the TRRO constitutes a change-of-law that BellSouth believes places network elements outside the framework of the PAP. Staff believes the authority to enforce §271 obligations resides with the FCC, and thus it is inappropriate to extend the PAP's scope to encompass §271 obligations. Staff agrees with BellSouth that the issue of enforcement and prevention of backsliding relative to BellSouth §271 obligations is a matter for the FCC to address.

This conclusion is also consistent with this Commission's May 19, 2004 Order on BellSouth's Amended Motion to modify its SEEM plan to remove Line Sharing.[43] In its Amended Motion, BellSouth requested to remove penalties relating to line sharing because the TRO removed the obligation of ILECs to provide line sharing as a UNE, pursuant to Section 251. Although the Commission found that it was premature to answer the argument over obligations under §§251 and 271 of the Telecommunications Act, the Commission did order BellSouth to report and pay line sharing penalties for specific measurement categories in BellSouth's PAP until the transitional period specified in the TRO ends in October 2006. In sum, the Commission decided that line sharing would remain in the Plan consistent with the transitional plan outlined in the TRO regarding the phasing out of line sharing under §251:

> In conclusion, we find that BellSouth shall continue to report and pay all line sharing penalties in the SEEM plan through October 2004 for the four ordering performance measurements . . . . In addition, we find that BellSouth shall continue to report and pay line sharing penalties for the five maintenance and repair performance categories until the three-year transitional period outlined by the FCC and the TRO end in October 2006. We note that these findings reflect the current status of the law and we recognize that the current law may change during the time frames outlined above.[44]

Since the FCC has ruled that certain network elements no longer meet the impairment test, and since this Commission relieved BellSouth from obligations to provide line sharing as a UNE, subject to a transitional period, staff recommends that these de-listed elements should not be subject to the measurements of BellSouth's PAP.

Staff would note that according to section 4.6.1 of BellSouth's SEEM Administrative Plan within BellSouth's Performance Assessment Plan, "If a change of law occurs which may relieve BellSouth's provisioning of a UNE or UNE combination, BellSouth shall petition the Commission within 30 days if it seeks to cease reporting data or paying remedies in accordance with the change of law."

In sum, staff believes that the language proposed by CompSouth is inappropriate because it refers to network elements provided pursuant to § 251 or 271. Staff believes that BellSouth's proposed language, with the phrase "pursuant to § 251" added for clarity, best implements staff's recommendation.

CONCLUSION

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.

[43] Order No. PSC-04-0511-PAA-TP, issued May 19, 2004, in Docket No. 000121A.
[44] Ibid, p. 13.

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. **(K. Kennedy)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECS: The FCC required that ILECs "permit commingling of UNEs and UNE combinations with other wholesale facilities and services." As written, the FCC's ruling permits Section 251 UNEs to be commingled with any "wholesale facilities and services," which includes elements unbundled pursuant to Section 271, tariffed services offered by BellSouth, and resold services.

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

Staff Analysis: The parties agree the definition of commingling is given in 47 CFR §51.5, where it states:

> Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements with one or more such facilities or services. (47 CFR 51.5; Tipton TR 579; Gillan TR 474)

The parties disagree on whether §271 checklist items should be included in the wholesale services that CLECs are permitted to commingle with §251 UNEs. The parties also disagree on whether BellSouth should be required to facilitate commingling with a third-party.

Finally, the parties disagree on the rate for multiplexing services that might be included in the circuit. Multiplexing is generally used, e.g., for concentrating multiple DS1 loops onto DS3 transport. The parties disagree on how this multiplexing should be charged.

PARTIES' ARGUMENTS

§271 Services

BellSouth argues in its brief that the "basic dispute between BellSouth and the CLECs concerning commingling involves Section 271, and whether a state commission can dictate the rates, terms, and conditions that apply to BellSouth's Section 271 obligations." (BellSouth BR at 37) According to BellSouth, CompSouth's proposal "improperly asserts state commission regulation over Section 271 obligations." (BellSouth BR at 38) BellSouth witness Tipton alleges that this Commission does not have "jurisdiction over decisions related to an ILEC's 271 obligations." (TR 581) She asserts that the FCC has exclusive jurisdiction. BellSouth alleges that the discussion in Issue 7, regarding the Commission's jurisdiction over BellSouth's §271 obligations, covers this issue, too. (BellSouth BR at 38)

Even if the Commission has the authority to require BellSouth to commingle §271 elements with §251 UNEs, BellSouth maintains that the FCC's rules, TRO, USTA II and TRRO do not require such. BellSouth witness Tipton contends the definition in the rules does not include §271 elements. She states, "The FCC describes these wholesale services in paragraph 579 of the TRO as 'switched and special access services offered pursuant to tariff.'" (TR 579) The witness testifies that by deletion of a phrase in the TRO Errata, "The FCC made clear . . . that ILECs are not obligated to combine UNEs and UNE combinations with Section 271 elements." (TR 580) She continues:

> In paragraph 27 of its Errata Order, the FCC revised the first sentence of paragraph 584 in Part VIII A of the TRO by removing the italicized portion below: "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including *any network elements unbundled pursuant to section 271 and* any services offered for resale pursuant to section 251(c)(4) of the Act." That deletion makes clear the FCC's intent that ILECs are not required to commingle UNE and UNE combinations with Section 271 elements. (emphasis by witness) (TR 580)

Additionally, BellSouth argues that the FCC clearly intended the term "commingling" to refer to "combining loops or loop-transport combinations with ***tariffed special access services***." (emphasis in original) (BellSouth BR at 38) In the Supplemental Order Clarification, the FCC first used the term commingling and in its description of commingling used the abbreviation "i.e.," meaning "that is." (Id.) BellSouth argues, "Consequently, the FCC understood commingling in the *SOC* to refer to the combination or connection of UNEs and tariffed access services. . . Ultimately the commingling discussion in the *TRO* was consistent with the *SOC*." (Id.) BellSouth concludes that the Errata which deleted portions of the TRO, two of which are significantly relevant here, brought the definition of commingling provided in the TRO into accord with the previous definition given in the Supplemental Order Clarification. (Id.)

The first deletion to which BellSouth refers is explained above. The second deletion is to part of footnote 1990.[45] The FCC deleted the following sentence from the footnote: "We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items." (TRO ¶656, fn 1990) BellSouth contends that "the CLECs make a 'double-strike' argument about commingling that cannot withstand scrutiny." (BellSouth BR at 40)

> The CLECs claim that, read together, these two deletions simply eliminated any potential conflict. That argument fails – had the FCC desired to impose some type of commingling, or combining obligation on BellSouth it would have only needed to delete the language at footnote 1990, yet retain its original language in paragraph 584, which, as originally issued, appeared to impose an obligation to commingle UNEs with Section 271 network elements. That was not the course the FCC took – it made two deletions, one of which clearly removed any commingling of Section 251 UNEs with Section 271 network elements. That deletion has meaning and cannot be ignored as though it never happened. (BellSouth BR at 41)

BellSouth emphasizes that with these deletions, "the federal commingling rule . . . became consistent with the definition of commingling in the SOC." (Id.) BellSouth also illustrates that the FCC "repeatedly referred to [wholesale services] as tariffed access services," thereby limiting the types of wholesale services that are subject to commingling. (Id.)

BellSouth stresses that the TRRO is also consistent with this interpretation. BellSouth argues that "the FCC explicitly limited its discussion to the conversion of *tariffed services* to UNEs," since the FCC notes, "We determined in the *Triennial Review Order* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations . . ." (emphasis in original) (BellSouth BR at 43; TRRO ¶229) BellSouth concludes that "the FCC narrowly interprets 'wholesale services' and it does not expect or require BellSouth to combine or commingle Section 271 network elements with Section 251 network elements." (BellSouth BR at 43)

BellSouth also defends its position against CompSouth witness Gillan's contention that it is discriminatory. BellSouth claims that the FCC resolved this by ensuring that ILECs would commingle UNEs with resold services. Moreover, BellSouth contends that the FCC referred to §201 and §202, over which the FCC retains complete control, in discussing discrimination concerns. (Id.)

Finally, BellSouth maintains that commingling §251 UNEs with §271 elements would be a resurrection of UNE-P, as it would be required to commingle a §251 UNE loop with §271 switching. "The FCC made clear in the *TRRO* . . . that there is 'no section 251 unbundling requirement for mass market local circuit switching nationwide.'" (Id.) BellSouth submits decisions and orders from other commissions and courts that support its position, including the

[45] Footnote 1990 of the TRO became footnote 1989 after the Errata.

New York Public Service Commission, the Mississippi Federal District Court, the North Carolina Utilities Commission, the Kansas Corporation Commission and the Ohio Public Utility Commission. (BellSouth BR at 43-46). BellSouth concludes, "These rulings were and are correct, and this Commission should confirm [that] its holding in the *Joint Arbitration Order* applies throughout Florida." (BellSouth BR at 46)

The Joint CLECs agree that this issue is "one of the most competitively sensitive issues." (Joint CLECs BR at 58) The Joint CLECs highlight the differences in the FCC's rules regarding combining and commingling. They assert that if network elements are provided only under §251, the FCC's rules for combinations apply. (Id.)

> When one of the connected network elements is no longer available under Section 251 . . . the connecting of the network elements is known as 'commingling.' As more network elements become unavailable under Section 251, commingling rights become extremely important to CLECs in the small business market. (Id.)

They emphasize that the difference is not a physical difference, but a legal difference. They argue that the physical connections are the same, but the FCC's explanations for each differ. (Joint CLECs BR at 60)

The Joint CLECs acknowledge the recent decision made by the Commission in Docket No. 040130-TP, wherein the Commission found that BellSouth is not required to commingle §251 UNEs with §271 network elements. (Joint Petitioners' Order, p. 19)

> The Joint CLECs respectfully suggest, however, that the reasoning supporting the decision in the Joint Petitioners' Order did not fully consider the entirety of the FCC's treatment of commingling in the TRO. Moreover, the decision in that Order ignores the need for facilities-based carriers to utilize commingled arrangements to replace (most likely at a higher price) the Enhanced Extended Link (EEL) service arrangements they now have in place. The Joint CLECs request that, given the industry-wide nature of this proceeding, the Commission carefully review the law and facts presented in this record and reconsider the conclusions reached in the Joint Petitioners' Order. (Joint CLECs BR at 59)

The Joint CLECs maintain that the CompSouth proposed language should be adopted. They contend that "BellSouth claims it will provide such commingled arrangements, but resists putting such commitments directly into the ICA." (Id.) They object to BellSouth controlling when and how these arrangements will be made available. "It is vitally important to the Joint CLECs that the basic, non-controversial commingled arrangements be immediately available from the day the amended ICAs are effective." (Id.)

The Joint CLECs argue that a prohibition on commingling §271 elements with §251 UNEs would be discriminatory. (Joint CLECs BR at 60) They quote ¶581 of the TRO:

> Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and

> unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3). (TRO ¶581)

They contend that since §251 and §202 both prohibit discriminatory behavior, "BellSouth must not discriminate by refusing to combine wholesale offerings, whether such offerings are entirely comprised of Section 251 elements (combinations), or comprised of Section 251 elements with other offerings such as Section 271 checklist items (commingling)." (Joint CLECs BR at 61)

The Joint CLECs counter BellSouth's arguments, claiming that a "complete reading of the FCC's TRO Errata demonstrates that the FCC held that commingling is available for the connection of Section 251 UNEs with any 'wholesale facilities and services' provided by BellSouth." (Id.) The dispute regarding the phrase deleted from ¶584, which BellSouth argues fully endorses its position, is resolved, the Joint CLECs contend, by a full reading of the TRO post-Errata. "One would expect that if the FCC had decided to eliminate an entire category of wholesale offerings specifically adopted by Congress (namely, the Section 271 checklist items), they would have done so expressly and not through the rather subtle method of issuing text in error and correcting it." (Joint CLECs BR at 62) They contend that ¶584 still requires commingling with §271 checklist items, since it requires commingling "with other wholesale facilities and services." (Id.; TRO ¶584)

Moreover, the Joint CLECs point to the deletion in footnote 1990[46] where the FCC deleted a sentence that previously declined to require commingling of §271 network elements with §251 UNEs. They suggest, "Viewed in their entirety, the Errata edits support the view that the FCC's TRO commingling rules apply to Section 271 checklist items." (emphasis in original) (Joint CLECs BR at 63)

> CompSouth suggests that the decision in the Joint Petitioners' arbitration did not consider the "whole story" of the FCC's edits in the Errata. Any analysis that focuses on the deleted text in paragraph 584 without also considering the import of the deletion at footnote 1989 (a companion deletion that "cancels out" the other edit) fails to examine the whole picture of the FCC's actions. Most importantly, however, it fails to focus on the substance of the text the FCC kept in the TRO that requires commingling with any "wholesale facilities and services." (Joint CLECs BR at 63, fn 124)

Thus, the Joint CLECs conclude, "BellSouth reaches this position only by a willful misreading of the applicable FCC orders." (Joint CLECs BR at 63) CompSouth witness Gillan testifies, "Importantly, neither of the parentheticals that mention 'switched and special access services' includes any discussion that *limits* the FCC's commingling decision to only these services." (emphasis in original) (TR 476) On the contrary, the witness notes that the FCC's discussion in the TRO uses the abbreviation "'e.g.,' defined by Black's Law Dictionary as *exemplia gratia*, 'for the sake of example.' Thus the FCC was *illustrating* its commingling rules, not *limiting* their application." (emphasis in original) (Gillan TR 476)

[46] Footnote 1990 of the TRO became footnote 1989 after the Errata.

The impact of this decision, argues the Joint CLECs, will have detrimental, real world effects for CLECs. They argue that BellSouth's proposed language would "force the CLEC to disconnect the existing circuit and re-terminate it at the CLEC collocation." (Joint CLECs BR at 64) This change would normally be a simple records change, but without the commingling requirement, "that simple records conversion process [turns] into a potentially disruptive 'hot cut' for every EEL where a CLEC wants to use Section 271 checklist elements approved by the Commission." (Id.)

The Joint CLECs rebut BellSouth's arguments that allowing commingling will be resurrecting UNE-P. "Any commingled arrangement would be priced significantly different than existing UNE-P, because the switching component no longer must be available at TELRIC rates under Section 251." (Id.) They conclude, "Unduly restricting commingling would, on the other hand, detrimentally impact all CLECs, including those relying on their own facilities to provide EEL-based services to small business customers." (Joint CLECs BR at 64-65)

Finally, the Joint CLECs proffer their own list of state commission decisions and orders. In particular, the Joint CLECs list the Kentucky Public Service Commission, the Utah Public Service Commission, the Washington State Utilities and Transportation Commission, the Illinois Commerce Commission and the Texas Public Utility Commission as having found in their favor. (Joint CLECs BR at 65-66)

> Notably, one of the state commissions BellSouth cites as endorsing its position on Section 271 issues approved commingling of Section 251 and Section 271 elements, even though it declined to set Section 271 checklist rates. The Texas Public Utility Commission ruled that SBC Texas "must connect (i.e., do the work itself) any 251(c)(3) UNE to any non-251(c)(3) network element, including §271 network elements and any other wholesale facility or services, obtained from SBC Texas." (Joint CLECs BR at 66)

Commingling with Another Carrier

The Joint CLECs' proposed language adds the following section to BellSouth's proposed language:

> Unless expressly prohibited by the terms of this Attachment, BellSouth shall permit CLEC to Commingle an unbundled Network Element or Combinations of unbundled Network Elements with wholesale (i) services obtained from BellSouth, (ii) services obtained from third parties or (iii) facilities provided by CLEC. For purposes of example only, CLEC may Commingle unbundled Network Elements or Combinations of unbundled Network Elements with other services and facilities including, but not limited to, switched and special access services, or services purchased under resale arrangements with BellSouth. (EXH 23, p. 34, §1.11.3)

BellSouth witness Tipton contends that ILECs have no obligation "to permit CLECs to commingle either their service, or a third party's service, with an ILEC UNE or tariffed service." (TR 582) The witness refers to ¶579 in the TRO and the definition of commingling. She notes that the FCC used the phrase "*from an incumbent LEC*" and therefore, "did not require ILECs to permit commingling of their services with any random service offered by another carrier." (emphasis by witness) (TR 582; TRO ¶579)

Rate for Multiplexing (Market-Based or TELRIC)

The parties' proposed language in §1.11.4 has only a few differences. (EXH 35, p. 34; EXH 17, p. 6; EXH 18, p.6) Significantly, this language differs in how the multiplexing portion of the circuit should be priced. BellSouth proposes that the multiplexing be "billed from the same agreement or tariff as the higher bandwidth circuit." (EXH 17, p. 6; EXH 18, p. 6) Conversely, CompSouth in its proposed language states, "the multiplexing equipment will be billed at the cost based rate contained herein." (EXH 35, p. 34)

BellSouth witness Tipton opposes CompSouth's proposed language, because "the multiplexing equipment is always associated with the higher bandwidth service that is being broken down into smaller channel increments." (TR 642) Witness Tipton testifies, "the FCC provided an example [in footnote 1796 of the TRO] of a CLEC combining a UNE loop to special access interoffice transport, and stated that the CLEC would 'pay UNE rates for the unbundled loops and tariffed rates for the special access circuit.'" (TR 583) She concludes that BellSouth should only be expected to charge the TELRIC rate for the UNE portion of the circuit, and the remainder of the circuit would be charged at the applicable market-based rate. (TR 583) Similarly, the witness provides this example:

> For example, if a UNE DS1 loop is attached to a special access DS3 via a 3/1 multiplexer, the multiplexing function is necessarily associated with the DS3 – because it is the DS3 44 Mbps signal that is being "split", or multiplexed, in to 28 individual 1.[5]44 Mbps channels. (Tipton TR 642)

ANALYSIS

§271 Services

Staff will begin with background that is not disputed by the parties. The FCC defined commingling in 47 CFR §51.5 which came from ¶579 of the TRO:

> By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services. (TRO ¶579)

The TRO continues to explain how commingling should be applied:

> Thus, an incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act. In addition, upon request, an incumbent LEC shall perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act. As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services. (TRO ¶579)

In its Errata to the TRO, the FCC deleted portions that might have added clarification but instead these two deletions have complicated the discussion. The sentence below shows one portion that was deleted:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including ~~any network elements unbundled pursuant to section 271 and~~ any services offered for resale pursuant to section 251(c)(4) of the Act. (TRO ¶584; TRO Errata ¶27)

BellSouth's position is that the deletion of this phrase in the TRO is a determination by the FCC that a previous requirement has been rescinded. (TR 586) The Joint CLECs argue that "the editorial deletion cited by BellSouth does not result in a sentence that limits BellSouth's commingling obligations;" rather, the resulting sentence still includes §271 checklist items. (Joint CLECs BR at 62) Staff believes that the phrase could have been deleted due to an inconsistency with the remainder of the paragraph. The paragraph discusses resold services and the deleted phrase could have been inappropriate.

The Joint CLECs instead call attention to footnote 1990:[47]

> We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). ~~We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items.~~ (TRO ¶656, fn 1990; TRO Errata, ¶31)

[47] Footnote 1990 of the TRO became footnote 1989 after the Errata.

Here, the FCC deleted a sentence that previously had declined to require commingling of §251 and §271 services. The Joint CLECs emphasize, "The FCC did delete language that would have explicitly permitted Section 271 commingling (in ¶ 584) – but it also deleted language that would have explicitly prohibited Section 271 commingling." (Joint CLECs BR at 63)

BellSouth maintains that ¶584, prior to the TRO Errata, constituted an affirmative obligation that required ILECs to commingle UNEs with §271 elements. Under this view, the TRO Errata eliminated this language and thus the obligation. Unlike the errata to ¶584, the change to footnote 1990 did not remove language that imposed an obligation; rather, the deleted language amounted to a waiver of commingling of UNEs and §271 elements. Thus, commingling of UNEs and §271 elements is not explicitly prohibited, nor expressly permitted. Since the dueling TRO errata effectively eliminated all mentions of §271 elements within the context of commingling, some may question whether there is an adequate basis in the TRO to conclude that commingling includes §271 elements.

The parties discuss concerns over whether a restriction on commingling with §271 checklist items would be discriminatory. Section 251(c)(4) pertains to the conditions under which an ILEC must allow the resale of its retail telecommunications services. Section 251(c)(4)(b) provides in part that an ILEC may ". . . not prohibit, and not impose unreasonable or discriminatory conditions or limitations on, resale of such telecommunications service, . . ." At ¶584, the FCC concluded that imposing a restriction on commingling of UNEs with resold services would constitute such an unreasonable condition or limitation. Accordingly, the FCC explicitly required commingling of UNEs with resold services. BellSouth argues that the FCC included resold services in order to resolve the concern over discrimination. (BellSouth BR at 43) However, CompSouth witness Gillan testifies that "the fact that commingled arrangements include both §251 and non-§251 elements does not grant BellSouth a license to discriminate, for more than just §251 of the federal Act prohibits discriminatory and anticompetitive conduct." (TR 434) Both BellSouth and the Joint CLECs refer to ¶581 of the TRO which discusses discrimination:

> Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3). Incumbent LECs place no such restrictions on themselves for providing service to any customers by requiring, for example, two circuits to accommodate telecommunications traffic from a single customer or intermediate connections to network equipment in a collocation space. (TRO ¶581)

However, as BellSouth maintains, the FCC has exclusive jurisdiction over non-§251 elements. (BellSouth BR at 43) Therefore, any discrimination concerns regarding these non-§251 elements should be resolved by that governing body. Nonetheless, staff does not believe that mere absence of discrimination is sufficient to support a restriction against commingling §271 elements with §251 UNEs.

Staff observes the definition in the rules requires commingling of "facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC." (47 CFR 51.5) Although this does not specifically include §271 services, it does not specifically exclude them either. This discussion is complicated by several factors; staff understands that a simple reading of the rules may not be enough. Unfortunately, the definition of a "wholesale service" is not provided. At a minimum the "wholesale services" which must be commingled are interstate switched and special access, and resold services. (TRO ¶579, ¶584) However, these are the only wholesale services that are clearly prescribed. The question thus becomes whether there are other "wholesale services" to which commingling applies – and whether this commission has the authority to order that commingling applies to them. Other states have ruled on this issue, but the decisions have been mixed – five appear to agree with BellSouth, and five appear to agree with the Joint CLECs. (BellSouth BR at 43-46; Joint CLECs BR at 65-66)

Staff notes that the FCC's initial use of the term "commingling" appeared in the Supplemental Order Clarification. In this order, the FCC specifically refers to "'co-mingling' (*i.e.* combining loops or loop-transport combinations with tariffed special access services)." (¶28) As BellSouth has stressed, the FCC makes a similar reference in the same paragraph where it defined commingling in the TRO. It states, "wholesale services (e.g., switched and special access services offered pursuant to tariff)." (TRO ¶579) Furthermore, BellSouth finds several other references in the TRO where it is indicated that switched and special access services are wholesale services that are to be commingled with UNEs. (BellSouth BR at 41-42) Staff observes that nowhere in the TRO does the FCC affirmatively state that §271 services are wholesale services that are to be commingled.

The FCC refers to interstate access services in requiring the ILECs to modify "their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations" in order to effectuate commingling. (TRO ¶581) BellSouth argues, "This command shows the FCC's intention." (BellSouth BR at 41)

In Docket No. 040130-TP, the Commission recently decided that the wholesale offerings that are to be commingled "do not include offerings made available only under Section 271." (Joint Petitioners' Order, p. 19) The Commission determined that the FCC's deletion of the phrase originally in ¶584 in the TRO, as discussed above, was evidence of the FCC's intention not to require commingling with §271 services. Additionally, the Commission found that §271 switching connected to a §251 UNE loop was essentially resurrecting UNE-P, "contrary to the FCC's goal of furthering competition through the development of facilities-based competition." (Id.) Nonetheless, staff notes that Commission arbitration decisions are not precedential. In addition, staff believes the Joint CLECs have brought forth different arguments before the Commission in this docket that should be considered on their own merit. In particular, the Joint CLECs argue that CLECs who are relying on their own facilities to provide EEL-based services would be "detrimentally impact[ed]." (Joint CLECs BR at 65) Staff presumes that the Joint CLECs are referring to commingled EELs, an arrangement that includes a loop and transport.

A restriction on commingling of §271 services with §251 UNEs presumably would also exclude commingled EELs, since §271 checklist items also include unbundled loops and transport. Restricting the availability of commingled EELs was not addressed in the prior

arbitration decision. Currently, BellSouth is choosing to meet its §271 unbundling obligation for loops and transport via its special access tariffs. Therefore, since the TRO explicitly requires commingling of UNEs with tariffed special access, BellSouth has agreed to commingle §271 loops and transport with any §251 UNEs. (TRO ¶579) Nevertheless, a constraint on commingling with §271 elements could allow BellSouth to have unfettered control over how those §271 services are offered, in that BellSouth has the option of limiting offerings it includes in its special access tariffs. If BellSouth were to choose, albeit unlikely, to withdraw portions of its tariffs for loops or transport, the CLECs' only recourse for commingled EELs would be commingling §251 UNE Loops with §271 Transport. However, if the Commission decides that commingling §251 UNEs with §271 checklist items is not required, the CLECs' options would be severely limited. Furthermore, in 47 CFR 51.318, the FCC specifies the different circuit types that are to be commingled. In particular, it specifies the different permutations of DS1 loops and DS3 loops that can be combined or commingled with DS1 transport and DS3 transport.[48] (47 CFR 51.318(b)) Although this rule does not clarify whether wholesale services are to include §271 checklist items, staff believes that as the FCC went to great lengths to specify eligibility criteria and detail circuits explicitly, they never intended for commingled EELs to be eliminated. Accordingly, staff agrees with the Joint CLECs that "Unduly restricting commingling would . . . detrimentally impact all CLECs, including those relying on their own facilities to provide EEL-based services to small business customers." (Joint CLECs BR at 64-65)

BellSouth argues that since commingling of §271 elements involves §271, then the state commissions have no jurisdiction. However, as the Texas Public Utility Commission[49] concluded, exercising jurisdiction over commingling is not exercising jurisdiction over §271 network elements. (Texas Arbitration Award, p. 19) Staff believes that it is simply ensuring the

[48] The rules require that: "An incumbent LEC need not provide access to an unbundled DS1 loop in combination, or commingled, with a dedicated DS1 transport or dedicated DS3 transport facility or service, or to an unbundled DS3 loop in combination, or commingled, with a dedicated DS3 transport facility or service, or an unbundled dedicated DS1 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled dedicated DS3 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled DS3 loop or a DS3 channel termination service, unless the requesting telecommunications carrier certifies that all of the following conditions are met." (47 CFR 51.318(b)) The FCC then specifies the eligibility criteria that must be met in order for the CLEC to obtain the circuit.

[49] The Texas Commission concluded:

> . . . [T]he Commission has determined that it does not have direct oversight over section 271 network elements. Section 271 network elements are network elements that are either declassified UNEs, or services the ILEC offers as wholesale services, e.g., access services. However, the Commission notes that not including section 271 network elements in the successor ICA in no way relieves the ILEC of its obligations under §251(c)(3) or §271. In particular, as noted below, the Commission has crafted language in the ICA that facilitates the ordering, provisioning and connecting of each part of the network required by a CLEC to provide services to its end user customers, notwithstanding each network element's status as either a section 251(c)(3) UNE or a section 271 network element. . . [T]he Commission clarifies that SBC Texas must connect (i.e., do the work itself) any 251(c)(3) UNE to any non-251(c)(3) network element, including §271 network elements and any other wholesale facility or services, obtained from SBC Texas. (Texas Arbitration Award, pp. 19-21)

Staff notes that since this Texas order was released after the briefs were filed in Docket No. 040130-TP, the parties were not able to discuss it in their briefs. Therefore, this order was not considered by the Commission in its previous decision.

connection between §251 UNEs and §271 checklist items is maintained. In staff's opinion, a counter-argument shows BellSouth's argument to be invalid. BellSouth agrees that the CLECs have the right to commingle §251 UNEs with tariffed interstate special access services and has agreed that this requirement should be included in the interconnection agreement. If including the requirement to commingle §271 services is asserting the state's jurisdiction over §271 services, then including the requirement for BellSouth to commingle interstate special access services would be asserting the state's jurisdiction over interstate special access services. Certainly, this is not the case. By requiring commingling with §271 checklist items, the Commission is not specifying how or even when those checklist items would be available. The Commission would only be ensuring that when they are available, the CLECs may connect UNEs to them.

Staff notes that in Issue 7 staff has concluded that rates, terms and conditions associated with §271 elements should not be included in a §252 agreement; only matters pertaining to §251 obligations belong in §252 agreements. Matters involving §271 elements are the exclusive purview of the FCC. Staff understands that it could be viewed as disingenuous to conclude that inclusion of language in a §252 agreement that requires an ILEC to commingle §271 elements with §251 UNEs does not conflict with staff's recommendation in Issue 7. The courts have held that state commissions have the authority to enforce §252 agreements they have approved (whether negotiated or arbitrated). Assuming arguendo that language were included in the parties' §252 agreement pertaining to commingling of §251 UNEs with §271 elements, one view is that this Commission could be in the awkward position of being unable to enforce this requirement – because there is no question the FCC has reserved for itself the authority to enforce the provisions of §271. However, staff is only recommending that for those §271 elements that are provided in some other manner, whether by commercial agreement, tariff or some other wholesale arrangement, that BellSouth is required to commingle them with §251 UNEs. In this way, the Commission would not be exercising authority over the §271 elements, but simply ensuring that they remain available to be connected to the §251 UNEs.

BellSouth notes several references in the TRO to tariffed access services as the type of wholesale services that are to be commingled. Staff admits that the TRO does have several references that might suggest the FCC was considering tariffed services when it required commingling. However, staff believes the greater weight should be attributed to the paragraph in which the term "commingling" is defined in the TRO. In this paragraph, the FCC specifically states that ILECs are to commingle §251 UNEs with any wholesale service other than §251(c)(3) UNEs. Moreover, staff believes the FCC was focusing on these tariffed access services in the TRO docket, since as CompSouth witness Gillan suggests, "One consequence of its decision would be that the FCC's new commingling rules would supersede the 'commingling restriction that the [FCC] adopted as part of the temporary constraints in the *Supplemental Order Clarification*.'" (TR 477; TRO ¶579) During the course of the TRO docket, the FCC received several filings from CLECs discussing interstate access traffic. Certainly, the CLECs had brought a concern to the attention of the FCC, and the FCC was addressing their concerns through lifting the previous restriction on commingling. (TRO ¶581, fn 1787)

Staff notes that the FCC stated three times that ILECs were to commingle UNEs with non-§251(c)(3) wholesale services. Staff believes that ¶579 of the TRO implicitly includes §271

checklist items in the definition of commingling, since §271 elements are not §251(c)(3) elements. However, in this same paragraph the FCC explicitly provides examples of wholesale services, that being "switched and special access services offered pursuant to tariff." (TRO ¶579) Staff believes that while the FCC wanted to ensure that switched and special access services were included, they were not defining the universe of wholesale services with this example. (Id.) Since the TRO reiterates that commingling includes "facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to *any method other than unbundling* under section 251(c)(3) of the Act," staff believes that the TRO does require commingling of §271 services. (emphasis added) (Id.)

Accordingly, staff recommends that 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.

Commingling with Another Carrier

Staff notes that the record is sparse on this portion of this issue. Staff agrees with BellSouth that neither the TRO nor the rules specifically require commingling with another carrier's services. (TRO ¶579; 47 CFR 51.5) Staff notes that permitting commingling would appear to be different than assisting or performing functions necessary to allow commingling.

Staff is unclear whether permitting commingling with another carrier would include any type of interconnection not contemplated by a collocation permitted under §251(c)(6) of the Act or whether such commingling would require BellSouth to somehow connect a UNE Loop with a third party's transport with whom BellSouth has no working relationship. If the former is the case, staff believes no extra requirement is necessary, as such is already permitted. If the latter is the case, then staff notes that the Commission recently determined that "the ILEC is obligated only to the telecommunications carrier that has obtained the unbundled loop from the ILEC, which is the CLEC that has a business relationship with the ILEC." (Verizon Arbitration Order, p. 63) Finally, the record is silent as to how the Joint CLECs envision the interconnection to occur. Thus, staff recommends that no language regarding commingling with another carrier be included in the Interconnection Agreement.

Rate for Multiplexing

The dispute is not what the charge should be, but how the charge should be determined. Multiplexing is used, for example, to concentrate up to 28 DS1 signals onto one DS3 line.[50] None of the CLECs offer testimony or arguments specifically related to this dispute. BellSouth witness Tipton testifies that "the multiplexing equipment is always associated with the higher bandwidth service." (TR 642) In the case of commingled EELs, the higher bandwidth service

[50] Multiplexing is the process of encoding two or more digital signals or channels onto one through timesharing the media (wire, air, fiber, etc.). The group of signals are then sampled at a rate of speed faster than the combined speed of all of the channels being grouped (multiplexed). (Clayton, Jade, McGraw-Hill Illustrated Telecom Dictionary Fourth Edition. (New York: McGraw-Hill, 2001) pp. 583-584).

would be the transport. Notably, the CLECs do not provide testimony or argue in their briefs on this subject. Thus, consistent with BellSouth witness Tipton's testimony, staff recommends that the rate for multiplexing should be associated with the higher bandwidth service. Thus, BellSouth's language would be appropriate.

Staff notes a few minor differences exist between the language proposed by the parties. First, BellSouth uses the word "circuit" and the Joint CLECs use the word "arrangement." To the extent that staff must choose which word is more appropriate, staff believes that the word "circuit" is more descriptive and therefore should be used. Second, the Joint CLECs have proposed additional language that does not appear in BellSouth's proposal. However, staff notes that neither party has addressed these additional paragraphs. Staff believes that these additional paragraphs add obligations to BellSouth that are not necessarily required by the law. In particular, in §1.11.5 of CompSouth witness Gillan's First Revised Exhibit JPG-1, the Joint CLECs have included a paragraph that would forbid BellSouth from changing "its wholesale or access tariffs in any fashion, or add new access tariffs, that would restrict or negatively impact the availability or provision of Commingling under this Attachment or the Agreement, unless BellSouth and *CLEC* have amended this Agreement in advance to address BellSouth proposed tariff changes or additions." (EXH 23, p. 35) Staff notes that this Commission recently found that Verizon was not bound by similar requirements.

> We find nothing in the TRO or any other order or rule that requires Verizon to renegotiate its current agreements based on changes to its tariffs. We believe that any current procedures, including objections to tariff filings and dispute resolution procedures included in the agreement, should be the prevailing methods for handling such concerns. (Verizon Arbitration Order, p. 59)

CONCLUSION

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.

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. **(K. Kennedy)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECS: Yes. The FCC required that ILECs provide straightforward procedures for conversion of wholesale services to equivalent UNEs. CompSouth's proposed contract language provides that BellSouth will charge only nonrecurring "switch-as-is" rates for conversions under existing rates. BellSouth did not provide sufficient justification for changes in existing "switch-as-is" rates.

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

Staff Analysis:

PARTIES' ARGUMENTS

BellSouth

BellSouth witness Tipton agrees that BellSouth "is required to convert special access services to UNE pricing, subject to the FCC's limitations on high-capacity EELs, and to convert UNE circuits to special access services, provided that the requesting CLEC's contract has these terms incorporated in its contract." (TR 584) BellSouth proposes the following rates for these conversions.

Table 14- 1: BellSouth's Proposed Rates for Switch-As-Is Conversions		
	First Single	Additional Per Loop
DS1 (less than 15 circuits)	$24.97	$3.52
DS1 Projects (15+ circuits on LSR)	$26.46	$5.01
DS3 (less than 15 circuits)	$40.28	$13.52
DS3 Projects (15+ circuits on LSR)	$64.09	$25.64

(Tipton TR 585)

The witness admits that these rates are higher than those previously ordered in the BellSouth UNE docket (DN 990649A-TP). The Commission-ordered rate for EEL conversions is $8.98. (Tipton TR 585) However, witness Tipton contends that the lower rate was determined prior to experience with performing the conversions and now that BellSouth has more knowledge of the actual work involved, it has determined that the rates proposed in Table 14-1 are more appropriate. (TR 699-701) Finally, witness Tipton testifies that if physical changes to the circuit are required, the "switch-as-is" rate should not apply; rather, full non-recurring charges for disconnection and installation would be appropriate. (TR 584) For purposes of any applicable volume and term discount plan or grandfathered arrangements, conversions are still considered disconnections. (Tipton TR 584-585) "BellSouth is generally in agreement with CompSouth's proposed language and has made minor modifications to it as reflected in Exhibit PAT-5." (Tipton TR 643; EXH 21, p. 40)

Joint CLECs

CompSouth witness Gillan's proposed contract language tracks almost identically with BellSouth's proposed language regarding this issue. (EXH 23, p. 38; EXH 35, pp. 3-4, §1.6) Neither he nor any other CLEC witness offers testimony on this issue. The Joint CLECs oppose BellSouth's proposed new "switch-as-is" rates. They claim, "BellSouth and the Joint CLECs agree that, to avoid the 'wasteful and unnecessary charges' prohibited by the FCC, conversions should be priced based on a 'switch-as-is' basis." (Joint CLECs BR at 67) However, since BellSouth proposes rates that are much more than that which was approved by the Commission previously, the Joint CLECs assert, "The Commission should not approve any new conversion rate until the parties have had an opportunity to review and question BellSouth cost studies supporting such rates and present their arguments regarding those studies to the Commission." (Joint CLECs BR at 68)

ANALYSIS

Staff notes that no CLEC addressed this issue in testimony. Other than the rates, staff believes the parties are generally in agreement. BellSouth witness Tipton indicates, "BellSouth is generally in agreement with CompSouth's proposed language and has made minor modifications to it as reflected in Exhibit PAT-5." (TR 643) The modification includes the additional phrase: "pursuant to Section 251 of the Act" in two places in the paragraph on conversions. (EXH 21, p. 40) The entire sentence reads as follows:

> Upon request, BellSouth shall convert a wholesale service, or group of wholesale services, to the equivalent Network Element or Combination that is

> available to CLEC pursuant to Section 251 of the Act and under this Agreement, or convert a Network Element or Combination that is available to CLEC pursuant to Section 251 of the Act and under this Agreement to an equivalent wholesale service or group of wholesale services offered by BellSouth (collectively "Conversion"). (EXH 21, p. 40)

Staff notes that this sentence tracks closely with the applicable rule which requires an ILEC to "convert a wholesale service, or group of wholesale services, to the equivalent unbundled network element, or combination of unbundled network elements, that is available to the requesting telecommunications carrier under section 251(c)(3) of the Act and this part [51]." (47 CFR 51.316(a)) Clearly, the FCC was requiring the ILEC to convert wholesale services to or from §251 elements; therefore, including the phrase: "pursuant to Section 251 of the Act" is appropriate.

BellSouth witness Tipton also comments that CompSouth's proposed language includes a reference to "rates found in 'Exhibit A.'" (TR 643) She notes that this exhibit is "not attached to CompSouth's proposed language." (Id.) The witness maintains that the "switch-as-is" rates that she proposes should be adopted by this Commission. Staff observes that BellSouth also included the language referencing Exhibit A in its proposed language regarding conversions. (EXH 35, pp. 3-4) Finally, staff notes that Issue 1 addresses the rates to be adopted for the interconnection agreement, including "switch-as-is" rates for conversions. Staff defers discussion and recommendations regarding specific rates to that issue for consideration, including recommended language incorporating such rates into the interconnection agreement.

CONCLUSION

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.

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. **(K. Kennedy)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECs: Conversions pending on the effective date of the TRO should be handled using conversion provisions in the amended ICAs. This approach gives CLECs the benefit of conversion policies that were adopted by the FCC back in 2003, but were not implemented by BellSouth until after this proceeding.

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

Staff Analysis:

PARTIES' ARGUMENTS

BellSouth

BellSouth witness Tipton testifies that the "terms of interconnection agreements in effect on the effective date of the TRO are the appropriate rates, terms, conditions, and effective dates for EEL conversion requests that were pending on that date." (TR 586) The TRO was the first time that the FCC held that ILECs had an obligation to convert special access to stand-alone UNEs at TELRIC rates. (Tipton TR 587; TRO ¶¶586-587) Witness Tipton claims that because the FCC used the word "establish" in ¶585 and "conclude" in ¶586 of the TRO, it "makes clear that this was a new requirement, and not a modification of any previous requirement." (Tipton TR 587) In contrast, the witness also notes that the FCC uses "reaffirm," "reiterate," and "currently require" in referring to conversions of combinations. (Tipton TR 587; TRO ¶¶573-575)

Witness Tipton argues that although the CLECs often point to ¶589 of the TRO, nothing in that paragraph "addresses the conversion or requested conversion of individual elements." (Tipton TR 588) Moreover, the "FCC expressly stated that the change in law procedures set forth in the interconnection agreements were the appropriate means to implement the obligations set forth in the TRO." (Tipton TR 588; TRO ¶701)

BellSouth witness Tipton contends, "any conversions pending on the effective date of the TRO should be guided by whether the CLEC had the appropriate conversion language in its interconnection agreement at the time the TRO became effective." (TR 643) She claims that the FCC's rules do not "indicate that these conversion provisions should be applied retroactively." (Id.)

Joint CLECs

CompSouth witness Gillan suggests that conversions that were "pending on the effective date of the TRO should be handled using conversion provisions set forth in the amended ICAs." (EXH 35, p. 39) The Joint CLECs argue, "The FCC tied pricing provisions regarding conversions to the effective date of the TRO. CLECs have been waiting for over two years for BellSouth to implement the portions of the TRO that improved pricing, terms, and conditions for conversions." (Joint CLECs BR at 69) They contend that all conversion requests that were pending on the effective date of the TRO should be retroactively priced back to that effective date as explained by ¶589 in the TRO:

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

ANALYSIS

Staff notes that no CLEC offered testimony on this issue; likewise, neither party specifies language that should be included or excluded as part of this issue. In fact, BellSouth is "generally in agreement" with CompSouth's position, but only if pending conversions are effective with the effective date of the agreement being arbitrated here. (EXH 21, p. 41) However, the Joint CLECs claim that "rates, terms and conditions for conversions pending on the effective date of the TRO should be those that reflect the FCC's decisions in the TRO." (Joint CLECs BR at 69)

Since the parties do appear to disagree on the effective date of pending conversions, staff refers to the TRO ¶701, which states, "to the extent our decision in this Order changes carriers' obligations under section 251, we decline . . . [to] override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions." (TRO ¶701) Staff notes that ¶589 of the TRO does conclude that CLECs "are entitled to the appropriate pricing up to the effective date of this Order." (TRO ¶589) However, staff believes that this sentence refers to EEL conversions, not all conversions, as the entire paragraph discusses EELs and the previous "safe harbor" requirements instituted by the Supplemental Order Clarification. Thus, staff submits that conversions to stand-alone UNEs should be effective with the effective date of an amendment or interconnection agreement that incorporates the language regarding such conversions.

CONCLUSION

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.

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 forborne 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

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.

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. **(Moss)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECS: The joint CLECs' proposal provides that if the Commission finds line sharing is not required under the Section 271 competitive checklist (checklist item 4), then line sharing arrangements in services as of October 1, 2003, under prior ICAs will be grandfathered until the end user customer discontinues or moves xDSL service.

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

Staff Analysis:

PARTIES' ARGUMENTS

BellSouth witness Fogle states that the disagreement between the parties centers around the fact that BellSouth's proposed language includes the following two items:

1. The FCC's transition plan
2. A requirement that CLECs that have ordered line sharing arrangements after October 1, 2004 pay the full loop rate for those arrangements. (TR 301)

The Joint CLECs omit such language and argue that line sharing should continue as a § 271 obligation. (BellSouth TR 328-329; Joint CLECs BR at 73) This position is discussed in Issue 16.

ANALYSIS

As recommended in Issue 16, 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. Staff agrees with BellSouth that the FCC's transition plan as summarized in paragraph 265 of the TRO should be incorporated in the language of the agreement. This transition plan states:

> The three-year transition period for new line sharing arrangements will work as follows. During the first year, which begins on the effective date of this Order, competitive LECs may continue to obtain new line sharing customers through the

> use of the HFPL at 25 percent of the state-approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for stand-alone copper loops for that particular location. During the second year, the recurring charge for such access for those customers will increase to 50 percent of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. Finally, in the last year of the transition period, the competitive LECs' recurring charge for access to the HFPL for those customers obtained during the first year after release of this Order will increase to 75 percent of the state-approved recurring rate or the agreed-upon recurring rate for a standalone loop for that location. After the transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing. We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary. (TRO ¶265)

Concerning line sharing customers added after October 1, 2004, BellSouth believes that the FCC provides a CLEC three options: 1) transition to a line splitting arrangement with another party, 2) negotiate an arrangement with BellSouth to replace the line sharing arrangement, or 3) pay stand-alone copper loop rates. (BellSouth BR at 56) Staff agrees. The Joint CLECs concede that, in the event that the Commission determines that BellSouth is not obligated to provide continued access to line sharing, the language proposed by BellSouth would appropriately reflect its remaining obligations. (Joint CLECs BR at 75)

Staff reviewed the language proposed by BellSouth in Exhibit 12 and recommends the following modifications:

- Because the recommendation reflects that BellSouth is not obligated to provide line sharing on or after October 2, 2004, staff believes the discussion of Line Sharing arrangements placed on or after October 2, 2004 should be separated from those placed in service between October 2, 2003, and October 1, 2004.
- Staff believes the paragraph dealing with conversion of line sharing to a line splitting arrangement should be modified to reflect that line splitting is an arrangement between BellSouth and the CLEC purchasing the whole loop as discussed in Issue 18. If the CLEC who is a party to the ICA is in a line splitting arrangement, then that CLEC will be the party purchasing the whole loop and providing any needed equipment.

CONCLUSION

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.

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. **(Moss)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECS: BellSouth's legal obligations include the provision of line splitting to the UNE-P "embedded base"; compatible splitter functionality (when BellSouth retains control of a splitter); and an obligation [to] make OSS modifications to facilitate line splitting. BellSouth's position is inconsistent with its legal obligations under the TRO and TRRO.

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

Staff Analysis:

> The FCC defines line splitting as:
>
> the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop. (47 CFR 51.319(a)(1)(ii))

PARTIES' ARGUMENTS

BellSouth

BellSouth witness Fogle testifies that the parties' disagreement regarding line splitting centers on the following two items:

1. the types of loops that should be included with line splitting, and
2. who should provide the splitter. (TR 329)

Concerning the first point of contention, witness Fogle notes that CompSouth's language attempts to require line splitting on a commingled arrangement of a loop and unbundled local switching pursuant to § 271. (TR 330) BellSouth witness Fogle states that "the loop described by CompSouth does not exist, is not required by the FCC, and, therefore, should not be included in the section of the ICA that addresses line splitting." (Id.) Regarding the second point, witness Fogle expresses that the CLECs' proposal obligates BellSouth to provide splitters for the data and voice CLECs that are splitting a UNE-L. (Id.) He testifies that "splitter functionality can easily be provided by either an inexpensive stand-alone splitter or by utilizing the integrated splitter in all Asynchronous Digital Subscriber Line ("ADSL") platforms," a function the CLECs can readily provide for themselves. (Id.)

Joint CLECs

> The Joint CLECs acknowledge three areas of disagreement regarding line splitting:
>
> (1) whether line splitting can involve the commingling of [§] 251 and [§] 271 elements;
> (2) whether a CLEC should indemnify BellSouth for "claims" or "claims and actions" arising out of actions by the other CLEC involved in the line splitting arrangement; and
> (3) whether BellSouth must upgrade its Operational Support Systems (OSS) to facilitate line splitting. (Joint CLEC BR at 76)

Concerning the first point of contention, in page 43 of Exhibit JPG-1, CompSouth presented language concerning line splitting commingled with switching as a § 271 obligation; however, no CLEC offered testimony in support of this position. Concerning the second point, the Joint CLECs oppose BellSouth's inclusion of the words "actions, causes of actions" and "suits" in its proposed language. (Id.) The Joint CLECs are concerned that such language could obligate them to indemnify BellSouth against entire "actions" or "suits" rather than specific claims made against BellSouth not involving willful misconduct or gross negligence. (Id.; EXH 4, pp. 162-163) Regarding the third point, CompSouth witness Gillan states that the line splitting rule requires that the ILEC make all necessary network modifications to their OSS in such a manner as to facilitate line splitting. (EXH 3, pp. 41-42) He believes that the ILEC is obligated to make changes which are "unique to the needs of the CLEC," including providing electronic ordering for all data services to the CLECs at parity with what BellSouth provides itself. (Id.)

ANALYSIS

Whether BellSouth is obligated to commingle, including potentially line splitting is addressed in Issue 13 and § 271 concerns are addressed in Issue 7. (Joint CLEC BR at 76) No testimony was presented by any party as to whether line splitting is specifically included in the

FCC's definition of UNE, UNE combination or wholesale service as it relates to the FCC's commingling rules; therefore, staff makes no recommendation concerning this point.

Concerning BellSouth's second point regarding provision of the splitter, staff observes that the FCC's rule for line splitting states:

> (ii) *Line splitting.* An incumbent LEC shall provide a requesting telecommunications carrier that obtains an unbundled copper loop from the incumbent LEC with the ability to engage in line splitting arrangements with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. (47 CFR 51.319(a)(1)(ii))

CompSouth witness Gillan states that the FCC rules and orders do not require the voice CLEC to provide the splitter as BellSouth's proposed language implies. (EXH 4, pp. 158-159) Staff notes that the FCC reaffirmed in the TRO existing rules which "require incumbent LECs to permit competing carriers to engage in line splitting where a competing carrier purchases the whole loop and provides its own splitter to be collocated in the central office." (TRO ¶251) CompSouth agrees that if a scenario does not meet the definition of line splitting provided by the FCC, then that scenario is not bound by the FCC's rules for line splitting. (EXH 4, p. 157) Therefore, staff believes that the requesting telecommunications carrier that obtains an unbundled copper loop from the ILEC, with the ability to engage in line splitting arrangements with another CLEC, must provide its own splitter collocated in the central office. (TRO ¶251) The TRO nor the FCC's rules addressed splitter ownership; therefore, staff believes that it is not necessary that the requesting carrier own the splitter, and staff presumes that the splitter can be owned by another party with whom the requesting carrier has a separate agreement to procure the splitter. However, the ILEC's business relationship is only with the requesting carrier that obtains an unbundled copper loop from the ILEC. (47 CFR 51.319(a)(1)(ii)) It is that carrier that purchases the whole loop and provides the ILEC with all information regarding the line splitting arrangement, including provision of the equipment required (e.g., the splitter). (TRO ¶251) Any other arrangement is outside of the scope of what the FCC refers to as line splitting and should be included in a separate section of the ICA or under a commercial agreement and have rates, terms and conditions agreed upon by the parties. (EXH 4, p. 158)

BellSouth's proposed language under the line splitting section discusses a scenario where one CLEC purchases the whole loop and provides voice or data service without an arrangement with another CLEC. (EXH 12) The CLECs presented no opposition to this language. However, staff notes that this scenario is not line splitting as the FCC described, since line splitting requires an agreement between two CLEC parties. Further, staff believes that BellSouth's language regarding indemnification by the voice CLEC for claims arising by the data CLEC would not apply if the two CLECs were not in a contractual arrangement with one another. Should BellSouth and the CLECs decide to include this line division alternative, staff recommends that it should be included in a separate section with rates, terms and conditions agreed to by the parties or be negotiated under a separate commercial agreement. Therefore, staff deleted such language from its recommended language.

CompSouth's proposed language includes references to a third party providing the splitter. Staff believes that a third party to an agreement between two parties is an entity other than the two parties, in this case, someone other than BellSouth and the CLEC who is a party to

the ICA. However, CompSouth indicated that a third party is not defined in the ICA and understood that the third party would include BellSouth. (EXH 4, p. 158). Again, in a line splitting arrangement, BellSouth's obligations are with the party to the ICA who is purchasing the whole loop and requesting to enter into a line splitting arrangement with another party. According to the TRO, BellSouth has no obligations to the "third party," and vice-versa. Therefore, the ICA with the requesting carrier should not include provisions for or requirements of a "third party."

CompSouth agreed that rule 47 CFR 51.319(a)(1)(ii) does not allow for use of an ILEC splitter. (Id.) However, CompSouth noted that rule 47 CFR 51.319(a)(1)(v) does. (Id.) Rule 47 CFR 51.319(a)(1)(v) states:

> (v) Control of the loop and splitter functionality. In situations where a requesting telecommunications carrier is obtaining access to the high frequency portion of a copper loop either through a line sharing or line splitting arrangement, the incumbent LEC may maintain control over the loop and splitter equipment and functions, and shall provide to the requesting telecommunications carrier loop and splitter functionality that is compatible with any transmission technology that the requesting telecommunications carrier seeks to deploy using the high frequency portion of the loop, as defined in paragraph (a)(1)(i) of this section, provided that such transmission technology is presumed to be deployable pursuant to Sec. 51.230.

Staff notes that it is possible for the requesting carrier to obtain the splitter from BellSouth, and BellSouth may currently own the splitter in scenarios where it is providing line sharing. However, as those line sharing arrangements are transitioned to line splitting arrangements, as previously stated, it becomes the responsibility of the requesting carrier to secure the splitter. Staff believes the term "may" used in rule 47 CFR 51.319(a)(1)(v) stating "the incumbent LEC may maintain control over the loop and splitter equipment and functions," gives the ILEC an option to be a party to the arrangement to provide the splitter but not an obligation.

In addition to indemnification from claims, BellSouth proposes language to indemnify it from "actions," "causes of action," "suits," "injury" and "reasonable attorney fees." (EXH 12) CompSouth objects to the inclusion of these terms. (EXH 4, p. 162) BellSouth argues that the elimination of these terms could be interpreted to eliminate the obligation for the CLEC to defend BellSouth against a lawsuit or other action not expressly identified or once it has progressed past the claims stage. (EXH 4, p. 46; EXH 2, p.7) CompSouth states the term "claims" already appears in the language and the term "claims" includes an obligation to indemnify and defend against claims at every stage in a litigation, including past the claims stage. (EXH 4, p. 162) Staff believes that if these additional terms are already included in the general term "claims," then specifying those terms should not increase the CLECs' liability, while providing BellSouth greater peace of mind. CompSouth expressed concerns that it would be exposed to claims where it should have no obligation to indemnify BellSouth, such as in the case of BellSouth's gross negligence or willful misconduct, yet CompSouth found no satisfaction in BellSouth's inclusion of the phrase "except to the extent caused by BellSouth's gross negligence or willful misconduct." (EXH 4, p. 162)

BellSouth argues that it does not have a contractual obligation with the other CLEC party with whom the requesting CLEC has engaged in a line splitting arrangement or with the customers of either of these CLECs, and therefore BellSouth cannot limit its liability through an agreement with those customers. (EXH 4, pp. 44-45) Staff agrees. It is appropriate for BellSouth to limit its liability through its ICA with the requesting carrier because it lacks the ability to directly limit its liability to third- or fourth-party users. The carrier with a contractual relationship with its own customers is in the best position to limit its own liability against its customers in instances other than gross negligence and willful misconduct. Consistent with this Commission's decision in Joint Petitioner's Order, "if a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC should bear the resulting risk." (Joint Petitioner's Order, p.10) Staff believes that BellSouth should be indemnified, defended and held harmless against any and all claims, loss or damage, which arise out of actions related to the other service provider (i.e., CLEC party to the line splitting arrangement who is not the requesting carrier) brought against the requesting carrier, except where arising from or in connection with BellSouth's gross negligence or willful misconduct.

Regarding the Joint CLECs' third point regarding modifications to BellSouth's OSS, both parties appear to agree that the ILEC is obligated to provide nondiscriminatory access to OSS. The FCC's rule states:

> (B) An incumbent LEC must make all necessary network modifications, including providing nondiscriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements.(47 CFR 51.319(a)(1)(ii)(B); EXH 3, pp. 41-42)

Disagreement lies in determining what is "necessary." CompSouth's witness Gillan expressed in response to a staff interrogatory that he believes that electronic ordering for all data services is necessary. (EXH 3, pp. 41-42) Although CompSouth requests electronic processes for all service requests, it does have electronic processes to order some services and manual processes for others. (Id.) The question arises, if the CLEC has access to OSS through a manual process and is able to place orders and provide service to its customers, has BellSouth met its obligation to provide necessary access?

Witness Gillan states that because BellSouth provides to itself electronic ordering for all service requests, then the same quality of access should be afforded to the CLEC. (EXH 3, pp. 41-42) He claims that the CLEC is not being afforded nondiscriminatory access. (Id.) Staff notes that the FCC's rule for nondiscriminatory access provides:

> **§ 51.311 Nondiscriminatory access to unbundled network elements.**
> (a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element.
> (b) To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself.

Nowhere in the record does CompSouth indicate that BellSouth provides access to OSS any differently among telecommunications carriers requesting access to BellSouth's OSS. Therefore, staff presumes that the first condition cited under 47 CFR 51.311(a) is met. The record is sparse and does not indicate whether the electronic processes requested by CompSouth are technically feasible, the second condition required under 47 CFR 51.311(b). Further, the record also does not indicate whether any CLEC would be willing to compensate BellSouth for the cost to provide these additional electronic processes.

CompSouth also indicated that it had concerns other than electronic ordering. (EXH 4, p. 193) BellSouth noted that it has provided extensive language concerning access to its OSS in a separate attachment to the ICA, and that language is not being addressed in this issue. (EXH 2, p.6) CompSouth witness Gillan stated that he was not in receipt of BellSouth's OSS attachment. (EXH 4, p. 193)

Witness Gillan expresses that he believes that the ILEC is obligated to make modifications for pre-ordering, ordering, provisioning, maintenance and repair, and billing "which are unique to the needs of the CLECs." (EXH 3, pp. 41-42) Staff believes that nondiscriminatory access would be parity access and recognizes that needs unique to the CLEC may require access beyond parity and therefore, proceeds with caution.

Staff observes that the FCC noted that the CLEC remains entitled to nondiscriminatory access to OSS within the FCC's necessary guidelines. (TRO ¶568) Although parity is the standard for access, in the case of OSS access, there are limiting factors. For example, the ILEC has access to its own databases or internal records. The FCC required the ILECs to provide carriers with the same underlying information that it has without requiring direct access to those records. (TRO ¶567) The FCC recognized that a CLEC may request a wide range of information consistent with its view of network element access entitlements, however, the CLEC may not require all of the information it requests. (TRO ¶568) Therefore, staff recommends language concerning OSS modifications that tracks the line splitting rule. The FCC encouraged "us[ing] existing state commission collaboratives and change management processes to address OSS modifications that are necessary to support line splitting." (TRO ¶252) Staff supports this position.

CONCLUSION

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.

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. **(Barrett)**

Position of the Parties

BELLSOUTH: BellSouth's proposed language is appropriate and recognizes that unbundled access to call-related databases is tied to BellSouth's limited obligation to provide unbundled access to local switching. After March 10, 2006, CLECs may purchase access to call related databases pursuant to BellSouth's tariffs or a separate commercially negotiated agreement.

GRUCom: Agrees with Joint CLECs.

JOINT CLECs: Section 271 checklist item 10 requires BellSouth to provide "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion." BellSouth therefore must continue to make these databases available at just and reasonable rates, terms, and conditions, for all the reasons discussed above in relation to Issue 7.

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

Staff Analysis: The FCC has defined call related databases as "databases that are used in signaling networks for billing and collection or for the transmission, routing or provision of telecommunications services." (TRO ¶549) Prior to the TRO in separate proceedings, the FCC found that CLECs would be impaired without access to ILEC call-related databases. (TRO ¶551; UNE Remand Order ¶411) As a result, BellSouth and other ILECs offered their call-related databases to competitors on an unbundled basis, at TELRIC rates. However, with the TRO, the FCC's posture shifted dramatically in a manner that essentially reverses this prior finding for most call-related databases. (TRO ¶551)

PARTIES' ARGUMENTS

BellSouth

BellSouth witness Tipton lists the six specific call related databases the FCC identified in the TRO: 1) Line Information Data Base ("LIDB"); 2) Calling Name and Number (CNAM"); 3) Toll Free Calling; 4) Local Number Portability ("LNP"); 5) Advanced Intelligent Network ("AIN"); and 6) E911. (TR 589) The witness asserts that BellSouth's call related databases are

presently available on an unbundled basis, although the TRO relieved BellSouth and other ILECs of their obligation to continue to do so indefinitely. (Tipton TR 589) In its brief, BellSouth asserts that unbundled access to call-related databases is tied to BellSouth's limited obligation (until March 10, 2006) to provide unbundled access to local switching. (BellSouth BR at 56)

In addition to the TRO, witness Tipton states that the TRRO went further to remove the ILEC's obligation to provide DS0 level switching as well, which further reduces BellSouth's obligations. (TR 590) The TRRO also set forth the parameters for the 12-month transition period, which began on March 11, 2005, and will end on March 10, 2006. (Tipton TR 590) Witness Tipton acknowledges that call related databases as an unbundled offering will be available through the end of the 12-month transition period, although most of these databases will no longer be available on an unbundled basis pursuant to §251 after the transition period. (TR 590) The noted exception is for 911 and E911 databases; BellSouth cites to ¶ 551 of the TRO for support: "[w]e find that competitive carriers that deploy their own switches are not impaired in any market without access to incumbent LEC call-related databases, with the exception of 911 and E911 databases . . ." (BellSouth BR at 57) This point is reflected in both of BellSouth's language offerings as well.[52] (EXH 17, pp. 57-70; EXH 18, pp. 38-42)

BellSouth's proposed language addresses its obligation to CLECs that have existing agreements with BellSouth as of the effective date of the TRO, March 11, 2005, and for those that do not. (EXH 17, pp. 57-70; EXH 18, pp. 38-42) For CLECs that have an existing agreement, the language for call related databases is contained in Sections 7 and 8 of Attachment 2 of their draft agreement. (EXH 17, pp. 57-70) The bulk of all argument concerns the language for CLECs that have existing agreements with BellSouth as of March 11, 2005.

For CLECs that do not have existing agreements with BellSouth as of the effective date of the TRO, the so-called "new" CLECs, BellSouth's language provides unbundled access only to the 911 and E911 call related databases. (EXH 18, pp. 38-42; Tipton TR 591)

BellSouth witness Tipton states that BellSouth and CompSouth are reasonably close to reaching agreement on language to address call-related databases. (TR 644) However, in its brief, BellSouth firmly contends that this Commission has no §271 authority, and thus rebuffs the language from CompSouth that refers to this section, or any obligation thereunder. (BellSouth BR at 58) There is general agreement about BellSouth's obligations during the transition period, although in a red-line version of the proposed language offered by CompSouth, witness Tipton rejects two main components of the CompSouth language proposal.[53] (EXH 21, pp. 54-56)

First, witness Tipton rejects a proposal that could be interpreted as obligating BellSouth to offer a post-transition period product. Witness Tipton emphasizes that BellSouth will only offer call related databases on an unbundled basis during the transition period, and that

[52] Hearing Exhibit 17 is a draft of BellSouth's Attachment 2 for CLECs that had existing agreements with BellSouth as of March 10, 2005. Hearing Exhibit 18 is a similar document for CLECs that did not have existing agreements as of that date.

[53] CompSouth's original proposed language, JPG-1, was not entered into the record of this proceeding. A revised version was entered as Hearing Exhibit 23, although there were no changes to the applicable sections BellSouth witness Tipton previously evaluated. The version that witness Tipton red-lined was entered as Hearing Exhibit 21.

BellSouth's proposed language does not address the time period following the transition period. (TR 589-590) The specific text of the CompSouth language that witness Tipton rejects suggests that BellSouth will offer an "equivalent Section 271 offering" when the transition period ends. (EXH 21, p. 54) Nothing in witness Tipton's testimony or exhibits addresses a post-transition offering. (TR 589-591, 644; EXH 17, pp. 57-70) In its brief, BellSouth states that after March 10, 2006, CLECs may purchase access to call related databases pursuant to BellSouth's tariffs, or via a commercially negotiated agreement. (BellSouth BR at 57)

Second, witness Tipton rejects a multi-page proposal from CompSouth member MCI that addresses a directory assistance database, and BellSouth's obligation under "Sections 251(b)(3) of the Act and any other applicable laws." (TR 644; EXH 21, p. 54) In its brief, BellSouth notes only one exception requiring access to incumbent LEC call-related databases, and that exception is for the provision of 911 and E911 databases. (BellSouth BR at 57) Witness Tipton states that "the FCC rejected MCI's proposal in paragraph 558 of the TRO." (TR 644)

Joint CLECs

Not all of the CLECs who are parties to this proceeding are disputing this issue with BellSouth.[54] CompSouth witness Gillan does not directly testify on the limited subject of access to call-related databases per se, although he repeatedly submits that this and several other issues have §§251, 252, and 271 overtones. (TR 388-394, 398, 422-431, 472-474, 480-482, 495-496, 500-503, 509-510; EXH 23, p. 52; Joint CLEC BR at 76-77) In discovery responses, Covad, MCI and Supra make similar assertions. (EXH 2, p. 132; EXH 3, pp. 58, 75-77, 118) CompSouth's proposed language for call-related databases is:

> 4.4.3.1 BellSouth shall also make available the following elements relating to Local Switching, as such elements are defined at 47 C.F.R. §51.319(d)(4)(i), during the Transition Period: signaling networks, call-related databases, and shared transport. After the completion of the Transition Period, such elements may be transitioned to the equivalent BellSouth Section 271 offering, pursuant to the transition provisions herein applicable to Local Switching arrangements. (EXH 23, p. 52)

The language proposed by MCI includes a two-and-a-half page supplement to the CompSouth proposal that concerns access to a daily update of Directory Assistance Data. (EXH 23, pp. 52-54) In part, the supplement from MCI "requires BellSouth . . . to provide nondiscriminatory access to call-related databases under Sections 251(b)(3) of the Act and any other applicable law." (EXH 23, p. 52)

ANALYSIS

BellSouth and other parties refer to this issue as a "271 issue," which is a reference to BellSouth's obligations with respect to 47 U.S.C. § 271 of the Act. (BellSouth BR at 3; EXH 2, p. 132; EXH 3, pp. 58, 75-77, 118; Joint CLECs BR at 76-77) Although BellSouth states that "the [Florida] Commission has no Section 271 authority," the Joint CLECs contend that

[54] In its brief at page 2, Sprint asserts that it has no dispute with BellSouth. Although it withdrew from active participation, US LEC expresses a similar stance in a discovery response.

BellSouth's legal obligations under 47 U.S.C. § 271 of the Act remain despite the TRO, because call related databases are a "checklist" item. (BellSouth BR at 58; Joint CLEC BR at 77) Staff notes that Issue 7 addressed the Commission's authority under 47 U.S.C. § 271 and other sections of the Act.

In part, ¶551 of the TRO states that "competitive carriers that deploy their own switches are not impaired in any market without access to incumbent LEC call-related databases, with the exception of the 911 and E911 databases as discussed below." (TRO ¶551) Commenting parties to the TRO also point out two important considerations: the emergence of alternative suppliers, and evidence that some carriers are self-provisioning call-related databases. (TRO ¶553-554) Regarding alternatives to ILEC offerings, certain CLECs argue for impairment, claiming the alternative offerings are inferior to the ILECs' databases. (TRO ¶554) The FCC rejects this notion. (Id.)

Availability

The Joint CLECs did not specifically address "availability" in a direct manner, though staff believes the topic is broached indirectly. Even though the FCC found that a number of alternative suppliers of call-related databases "are actively providing such services to competitive LECs on a commercial basis," the Joint CLECs appear to present their case as though BellSouth was the sole supplier of call-related databases. (footnote omitted)(TRO ¶553) Although BellSouth witness Tipton stops short of stating that call-related databases will be unavailable after the transition period, the witness emphasizes that BellSouth's §251 unbundling obligation for all databases only lasts through the transition period, and thereafter only remains for the 911 and E911 offerings. (TR 589-590) Staff points out that BellSouth's brief touches on what options will be available post-transition. (BellSouth BR at 57) Importantly, staff believes the TRO is clear in carving out the exception that applies to the 911 and E911 call-related databases. (TRO ¶557) In part, ¶557 of the TRO states:

> [B]ecause of the unique nature of 911 and E911 services and the public safety issues inherent in ensuring nondiscriminatory access to such databases, we conclude that without evidence of alternative providers or the ability to self-deploy, competitive carriers must continue to obtain unbundled access to those databases to ensure that their customers have access to emergency services. (TRO ¶557)

Language Proposals

BellSouth witness Tipton thwarts the efforts of MCI to include for its own agreement with BellSouth language regarding a daily update of Directory Assistance Data. (TR 644) The witness states that the TRO is clear in addressing what MCI seeks, citing to ¶558, which states, in part:

> We reject competitive LECs' assertions that, we should require in this proceeding unbundled access to the incumbent LEC databases for bulk transfer of information for competitive carriers to maintain their own call-related databases . . . [and] there is persuasive evidence that competitive LECs have alternative

> sources available to obtain access to call-related databases generally, and the CNAM database specifically. (TRO ¶558; Tipton TR 644)

Staff believes BellSouth appropriately rejects MCI's proposed language. In ¶558 of the TRO, the FCC states that this matter is more appropriately addressed under section 251(b)(3) of the Act, rather than under the impairment analysis under section 251(d)(2). (TRO ¶558)

In considering the implementing language to address access to call-related databases, staff believes the parties are primarily at odds over the §271 obligations under the Act. The Joint CLEC brief argues extensively that this Commission should require BellSouth to offer an "equivalent BellSouth 271 offering." (Joint CLEC BR at 76-77) Staff disagrees. Staff believes the text of the TRO makes clear BellSouth's obligations, and these obligations do not include making an "equivalent 271 offering" available. (EXH 21, p. 54) Staff agrees with BellSouth that the CompSouth language could be interpreted in a manner that requires BellSouth to offer products it is not obligated to offer. Consistent with staff's recommendation in Issue 7 that only §251 obligations belong in §252 agreements, staff believes that any provisions relating to §271 should not be included in the parties' ICAs or amendments. For this reason, staff believes the CompSouth language should not adopted.

For the most part, staff believes BellSouth's language correctly reflects its TRO obligations. BellSouth's language indicates that BellSouth will continue to offer unbundled access to its 911 and E911 call-related databases to all CLECs. For CLECs with existing agreements with BellSouth as of March 11, 2005, the other databases will only remain available on an unbundled basis pursuant to §251 throughout the transition period. (EXH 17, pp. 57-70) Therefore, staff believes BellSouth's proposed language is the appropriate starting point, although staff recommends an additional sentence[55] be added that is only applicable for CLECs with existing agreements with BellSouth as of March 11, 2005. Staff believes the additional sentence adds clarity that was otherwise not present. Staff's recommended language is found in Appendix A.

CONCLUSION

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.

[55] Staff's recommended language for CLECs with existing agreements with BellSouth as of March 11, 2005, is based on BellSouth's proposed language, but adds the following sentence: "Such unbundled access is only available until March 10, 2006." (The sentence is not applicable or necessary for all other CLECs.)

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. **(Fogleman)**

Position of the Parties

BELLSOUTH: BellSouth has no obligation to provide CLECs with unbundled access to newly-deployed or "Greenfield" fiber loops.

GRUCom: No position.

JOINT CLECs: The Joint CLECs recognize the exclusions from unbundling granted in the FCC's "broadband" Orders. The FCC's broadband exclusions were limited, however, to circumstances where loops are used to serve mass market customers. CLECs are still permitted to order DS1 and DS3 loops in "greenfield" locations absent a finding of "no impairment."

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

Staff Analysis: Issue 22a addresses the definition of minimum point of entry ("MPOE"). While there does not appear to be any dispute between the parties regarding the definition, no party has proposed including a specific definition within its proposed contact language. Issue 22b addresses whether the FCC exemption from unbundling of fiber-to-the-home or fiber-to-the-curb (FTTH/FTCC) loops in greenfield areas is limited or not.

PARTIES' ARGUMENTS

BellSouth

Definition of MPOE

BellSouth witness Fogle asserts that the FCC has defined the MPOE as "either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings." (TR 307-309) Thus, in instances where the property owner has chosen the use of a MPOE, the MPOE is effectively the demarcation point between the inside wiring facilities at the multiple dwelling unit and the loop facilities of the carrier. Florida PSC Rule 25-4.0345 requires that the demarcation point be located at the customer's premises at a point easily accessed by the customer. If the property owner desires an MPOE arrangement, the incumbent LEC must obtain PSC approval before establishing the demarcation point at any location other than the end user's premise. No party has filed testimony disputing this definition. The proposed contact language does not specify a definition for a MPOE.

"Greenfield" Fiber Loops

The parties agree that Issue 22b and Issue 27 address similar matters but differ in their application. (Sprint TR 153; BellSouth TR 307; Joint CLECs BR at 78) While both pertain to the unbundling of fiber to the home (FTTH) and fiber to the curb (FTTC) loops, Issue 22b specifically addresses newly-deployed or "greenfield" fiber loops, while Issue 27 pertains to overbuild deployments or "brownfield" fiber loops. As the parties have discussed the primary dispute relating to both of these issues together, staff will as well. The parties do not dispute that BellSouth is not obligated to unbundle FTTH/FTTC loops to predominately residential multiple dwelling units (MDUs), but do in instances where the MDU is predominately business. The key unresolved matter relates to under what other circumstances, if any, does BellSouth have to unbundle FTTH/FTTC.

BellSouth witness Fogle defines "greenfield fiber loops" as part of newly constructed fiber optic cable facilities to residential or business areas that never had existing copper facilities. (TR 309) Witness Fogle argues that there is no time limiting factor that would affect the categorization of a building or premises as "greenfield." For example, under his interpretation, a building built in 2003 would be considered "greenfield" if the only facility deployed to that building was a fiber loop. (TR 359)

He asserts that TRO ¶ 273 makes clear that BellSouth is not obligated to "offer unbundled access to newly-deployed or "greenfield" fiber loops." (TR 310) The BellSouth witness believes the effects of the FCC's decision on "greenfield" areas are twofold. First, it maintains the incentive for a LEC to invest in network using the latest technology to provision advanced services to businesses and residential customers. Second, it paves the way for future services that will be deployed using even greater bandwidth than is common in the local loop today. (TR 311) According to BellSouth witness Fogle, the FCC was careful to explain that its loop unbundling rules "do not vary based on the customer to be served." (TR 335) (TRO ¶210)

The BellSouth witness argues that the same unbundling relief established by the FCC in the TRO for FTTH loops also applies to the FTTC loops. (TR 312, 352) He notes that the FCC also determined that the FTTH rules in the TRO apply to predominately residential MDUs, such as apartment buildings, condominium buildings, cooperatives, and planned unit developments. Witness Fogle observes the FCC stated that the existence of businesses in MDUs does not automatically exempt such buildings from the FTTH unbundling framework established in the TRO. For instance, the FCC stated that a "multi-level apartment that houses retail stores such as a dry cleaner and/or a mini-mart on the ground floor is predominately residential, while an office building that contains a floor of residential suites is not." (TR 313) (MDU Order ¶1)

BellSouth witness Fogle notes that in the TRO Errata, the FCC deleted the word "residential" from its rules defining FTTH loops, so that a fiber-to-the-home loop is a local loop serving an end user's customer premises. (TR 335) (TRO Errata ¶37) Further, in the TRO Errata, the FCC replaced the words "residential unit" with "end user's customer premises" in the rules defining new building, so that according to witness Fogle, an ILEC is not required to provide a fiber-to-the-home loop to an end user's customer premises. (TRO Errata ¶38) Finally, witness Fogle states that in the errata to the October 18, 2004 Order on Reconsideration addressing FTTC, the FCC replaces the words "a residential unit" in its rules addressing new builds with "an end user's customer premises." Based on these changes, the BellSouth witness argues that an ILEC is not required to provide a FTTH or FTTC loop on an unbundled basis when the ILEC deploys such a loop to an end user's customer premises that has not previously been served by any loop facility. (TR 336)

The BellSouth witness recognizes that some of the FCC's orders contain language which can be read to suggest that FTTH relief extends only to loops serving mass market customers. (TR 355) For example, as part of his testimony, BellSouth witness Fogle notes that the FCC determined in the TRO that ILECs have no obligation to unbundle FTTH mass market loops serving greenfield areas or areas of new construction. (TR 312; TRO ¶275) At the hearing, BellSouth witness Fogle agreed that the FCC did structure its discussion in the TRO regarding FTTH within the mass market section. He argues, however, that the FCC was not trying to limit its application only to the mass market. In support of this, the witness testified that the FCC frequently exchanged "fiber-to-the-home" and "fiber" in its order. It is his opinion that the FCC was attempting to group customer types together to help illustrate what the unbundling exemptions were, but in this case, he believes the FCC created more confusion than clarity. (TR 355)

BellSouth witness Fogle also addresses the FCC's opposition to Allegiance Telecom's motion for stay pending review (EXH 37) filed with the D.C. District Court of Appeals. The witness believes that the FCC is addressing two severable issues. The first issue addresses the impairment standard that applies to DS1s and DS3s, while the second issue addresses unbundling exemptions that apply to fiber, fiber to the home, and fiber to the curb loops. (TR 365)

Joint CLECs

Definition of MPOE

The testimony of CompSouth witness Gillan does not specifically address the definition of MPOE. Staff notes that the contract language proposed by CompSouth contains the same language regarding its use of MPOE as BellSouth. (EXH 23)

"Greenfield" Fiber Loops

CompSouth witness Gillan argues that BellSouth was not granted a total exemption from loop unbundling obligations for all fiber loops; rather, the FCC's broadband exclusions were specifically limited to circumstances where these loops are used to serve mass market customers. (TR 452) Witness Gillan cites TRO ¶¶221, 228, 272, 278, and 288, as well as the FTTC Recon Order ¶¶2, 6, 13, and 14 in support of this position. He contends that the FCC adopted a broadband policy intended to encourage broadband deployment in the mass market, principally to foster competition for the "triple play" services that combine voice, data and video. (TR 454) (FTTC Recon Order ¶¶10-11)

According to witness Gillan, when a CLEC requests a DS1 loop, by definition the customer it is seeking to serve is considered an enterprise (and not a mass market) customer. He points out that the FCC distinguished the enterprise market from the mass market, noting that enterprise customers typically uses high-capacity loops, such as DS1 and DS3 loops. (TR 455-456) Thus, whenever a CLEC requests a DS1 loop to serve a customer, that request means that the customer is (or is becoming) a member of the enterprise market, and BellSouth must comply with loop unbundling requirements as defined for the enterprise market. (TR 455) Witness Gillan also notes that the TRO explained that DS1 loops will be available to requesting carriers, without limitation, regardless of the technology used to provide such loops, such as fiber optics. (TR 456; TRO ¶325, fn 956)

In further support of his position, CompSouth witness Gillan points to the FCC's description of its unbundling findings contained in a filing made with the D.C. Circuit Court of Appeals. In its pleading, Allegiance Telecom expressed the fear that the FCC may have restricted access to DS1 loops. Allegiance was concerned that when the FCC changed "residence" to "end user" in the TRO Errata, it removed business customers served by DS1 loops from the unbundling obligation. The FCC in its response to the D.C. Circuit Court of Appeals indicated that this is incorrect. Rather, the FCC states that "The text, as well as the rules themselves, make it clear that DS1 and DS3 loops remain available as UNEs at TELRIC prices." (TR 457; EXH 37, p. 12)

To incorporate this interpretation, witness Gillan has proposed adding the specific type of loops to BellSouth's suggested contract language in section 2.1.2.1, from "Loops" to "FTTH and FTTC Loops" at the end of the first sentence and adding a new section 2.1.2.3. (EXH 23) This new section states:

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

BellSouth witness Fogle has indicated that BellSouth is willing to accept the CLEC's proposed language for section 2.1.2.1. That proposed language would specify the type of loops exempted by adding "such FTTH and FTTC" to the first sentence addressing greenfield areas. BellSouth does not, however, agree with the Joint CLECs' proposed language at section 2.1.2.3. (TR 333)

Sprint

Definition of MPOE

The testimony of Sprint witness Maples does not address the definition of MPOE.

"Greenfield" Fiber Loops

Sprint witness Maples agrees that the TRO eliminated an ILEC's obligation to unbundle fiber to the home in areas that had never been previously served by a loop facility. However, he argues that this exclusion does not apply to enterprise customers or predominately business multi-dwelling units. (TR 144) Witness Maples bases his position on several factors. First, witness Maples noted that the FCC originally defined FTTH loops in the TRO in its discussion of mass market loops and in one instance specifically referred to them as mass market FTTH loops. (TR 144) (TRO ¶¶214-220; 273-285) He notes that in footnote 956 of the TRO, the FCC included fiber optic facilities in its discussion of an ILEC's obligation to provide access to DS1 loops. (TR 144)

Witness Maples interprets the TRO Errata differently than BellSouth witness Fogle. Specifically, he interprets the initial definition incorporated in the FCC rules as restricting FTTH loops to only residential units. When the FCC changed the language from residential units to "end user customer premises," Sprint witness Maples asserts that the change was intended to be more inclusive (to include small businesses), but not all customers as BellSouth contends. (TR 145)

To incorporate this interpretation, witness Maples proposes amending section 2.1.2 of BellSouth's suggested contract language to include the following sentence: "FTTH/FTTC loops do not include local loops to enterprise customers or predominantly business MDUs." (TR 147) BellSouth witness Fogle indicates that BellSouth and Sprint have resolved their differences on this issue. (TR 334, 382) The language witness Fogle points to as being acceptable to both eliminates the phrase "enterprise customers or" from the language above. That is, it now reads: "FTTH/FTTC loops do not include local loops to predominantly business MDUs." (TR 334, 382)

Regarding the issue of MDUs, Sprint witness Maples states that the FCC further extended the fiber unbundling exemption to loops that serve predominately residential multi-dwelling units in the MDU Order. (TR 145) Sprint also notes that the converse is also true; that is, the exemption did not apply to predominately business MDUs since the ILECs did not need any incentive to build broadband facilities to those locations. (TR 146)

ANALYSIS

Definition of MPOE

Staff believes that the definition of MPOE stated by BellSouth witness Fogle in his testimony is consistent with Federal and State law. However, the proposed contact language does not specify a definition for a MPOE. No party has filed contradicting testimony regarding this sub-issue. Staff does not believe that a specific definition for MPOE is necessary within the contract.

"Greenfield" Fiber Loops

In the TRO, the FCC removed unbundling obligations to Fiber-To-The-Home (FTTH) loops. (TRO ¶200) The FCC defines a FTTH loop as "a local loop consisting entirely of fiber optic cable, whether dark or lit, serving an end user's customer premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the multiunit premises' minimum point of entry (MPOE)." 47 C.F.R. Part 51.319(a)(3)(i)(A) The FCC concluded that "An incumbent LEC is not required to provide non-discriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility." 47 C.F.R. Part 51.319(a)(3)(ii) The FCC expanded this exemption to include Fiber-to-the-Curb (FTTC) loops. (FTTC Recon Order ¶1) The FCC defines a FTTC loop as "a local loop consisting of fiber optic cable connecting to a copper distribution plant that is not more than 500 feet from the customer's premises or, in the case of predominantly residential MDUs, not more than 500 feet from the MDU's MPOE. The fiber optic cable in the fiber-to-the curb loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than 500 feet from the respective customer's premises." 47 C.F.R. Part 51.319(a)(3)(i)(B)

The primary unresolved issue relates to under what circumstances, if any, does BellSouth have to unbundle a FTTH/FTTC loop or if the exemption from unbundling is absolute. The FCC does make a distinction between "greenfield" areas (addressed in this issue), which are new deployments, and "brownfield" areas (addressed in Issue 27), which represents deployment of fiber overbuilds where copper loops exist.

In addressing loop impairment in the TRO, the FCC distinguishes between the mass market[56] and the enterprise market.[57] (TRO ¶209) The FCC, however, notes that its market classifications are not intended to prohibit the use of UNE loops by customers not typically associated with the respective market. The FCC adopted loop unbundling rules specific to each loop type, but the unbundling obligations and limitations for such loops do not vary based on the customer to be served. (TRO ¶210)

The FTTH discussion is located within the mass market loop section of the TRO. The FCC categorized what it considers to be the mass market loop types within the TRO. (TRO ¶¶ 214-221) FTTH is specifically identified. (TRO ¶219) In contrast, there is no specific discussion of FTTH loops within the enterprise market section of the TRO. Instead, the FCC categorized DS1 and DS3 loops as high-capacity loops within the enterprise market. (TRO ¶¶298, 325) Such loops are defined by capacity, not based on technology, and could include fiber-based loops. (TRO ¶325, footnote 956) The FCC also noted that while DS1 loops are typically used to serve small to medium-sized business customers associated with the enterprise market, they are also used to serve customers associated with the mass market. (TRO ¶326) Definitions for "mass market" and "enterprise market," however, do not appear within the FCC's rules.

The FCC summarizes its FTTH provisions in the rules provided in Appendix B to the TRO. "FTTH" initially was defined as a loop consisting entirely of fiber optic cable serving a *residential* end user's customer premises, and the FCC released the ILEC from unbundling obligations for newly built FTTH loops serving a *residential unit* that previously has not been served by any loop facility. (emphasis added) (TRO Appendix B, p. 13) However, in the TRO Errata, the term "residential" was deleted from the definition of "FTTH," leaving only "end user's customer premises." The FCC further replaced "residential unit" with "end user's customer premises," thereby changing the boundaries of the ILEC's release from unbundling obligations for newly built FTTH loops to extend beyond residential units to an end user's customer premises, which could be residential or business in nature. (TRO Errata ¶38)

Following the release of the TRO, Allegiance Telecom and others petitioned the D.C. Circuit Court of Appeals for a stay pending review of the FCC's FTTH rules. (EXH 37, p. 1) Allegiance claimed that the TRO Errata pertaining to FTTH removed the incumbent's unbundling obligations for business customers served by DS1 loops. Specifically, by changing "residential" to "end user's customer premises," Allegiance asserts the FCC was improperly changing the fiber rule to apply to all customers. (EXH 37, p.2) In its response to Allegiance's motion for stay, the FCC indicated that this reading of the erratum is incorrect. According to the FCC, the erratum makes the FTTH rule comport with the text of the TRO. The FCC explained that "the FTTH rule applies to customers who, in the absence of fiber, would be served by a low capacity loop." (EXH 37, p. 12) Furthermore, the FCC noted that ILECs must continue to unbundle DS1 and DS3 loops absent a finding of non-impairment. (EXH 37, pp. 1, 2, 12-13)

[56] The FCC described mass market loops as those provided to residential customers and very small business customers through either purchasing analog loops, DS0 loops, or loops using xDSL-based technologies. (TRO ¶ 209)

[57] The FCC described enterprise market loops as all other business customers, who typically purchase high-capacity loops, such as DS1, DS3, and OCn capacity loops. (TRO ¶ 209)

The FCC further modified its rules to address FTTH deployments to Multiple Dwelling Units (MDUs) and to Fiber-to-the-Curb architectures. In response to petitions for clarification and reconsideration, the FCC released the MDU Order. In the MDU Order, the FCC concluded that unbundling in predominately residential MDUs would not be required. Unbundling would, however, be required to predominately commercial MDUs. (MDU Order ¶¶4-8) The FCC found that it is administratively possible to differentiate between predominantly residential MDUs and other types of multiunit premises and provided the following example:

> . . . a multi-level apartment building that houses retail stores such as a drycleaner and/or a mini-mart on the ground floor is predominantly residential, while an office building that contains a floor of residential suites is not. (MDU Order ¶ 6)

Next, the FCC expanded its rules to include FTTC. FTTC is defined by the FCC as a local loop consisting of fiber optic cable connecting to copper distribution plant that is not more than 500 feet from the customer premises. (FTTC Recon Order, Appendix B) In the FTTC Recon Order, the FCC concluded that the record before it warranted treating FTTC loops the same as FTTH loops. (FTTC Recon Order, ¶ 9)

BellSouth witness Fogle asserts that the TRO Errata removes all unbundling obligations from FTTH/FTTC loops. This is one possible interpretation of the FCC's rules. This interpretation, however, results in further inconsistencies within the TRO. Staff notes that the FCC pointed this out in their brief to the D.C. Circuit Court of Appeals. (EXH 37, pp. 2, 12-13) Since the TRO Errata only affected the non-MDU unbundling obligations of FTTH/FTTC, staff believes that the contract language proposed by BellSouth is not sufficient.

CompSouth witness Gillan proposes language that is specific to the loop type. This appears to be consistent with the TRO. (TRO ¶ 210) However, this could be interpreted so that his proposed language would affect all FTTH/FTTC loops (i.e., greenfield/brownfield, MDU/non-MDU). Staff believes the language in the MDU Order is clear. Unbundling is only required if the MDU is predominately commercial. Thus, an individual loop type to a particular customer is not a determining factor when determining the unbundling requirements at a MDU. The unbundling exemption or obligation is inclusive of all customers within that building. While staff believes identifying specific loop types is consistent with the TRO, staff believes that the wholesale adoption of CompSouth's proposed language is inconsistent with the MDU Order.

Staff believes that the language proposed by Sprint witness Maples also is insufficient because it relies on the FCC's analytical tool to define the "enterprise market." The FCC, however, has pointed out that the references to these "markets" are just an analytical tool. The issue of whether a customer is in the mass market or enterprise market is not relevant because the FCC clearly stated that the unbundling of a particular customer loop would not be determined by that customer's market category. (TRO ¶210) Furthermore, the FCC noted before the D.C. Circuit Court of Appeals and within the TRO that:

> … the Commission expressly addressed "customers associated with the mass market" that use DS1 loops, and it decided that CLECs would be impaired

> without access to the DS1 loops even in the case of mass market usage. (EXH 37, pp12-13) (TRO ¶326)

The problem addressed within this issue is one of definition. The unbundling obligations referenced by CompSouth witness Gillan relate to DS1 and DS3 loops; the definitions of a DS1 or DS3 loop are not specific to the technology used to provision the loop. Thus, a FTTH/FTTC loop could be used to provide a DS1 or DS3 loop. Except in wire centers that satisfy certain criteria, the FCC concluded that CLECs are impaired absent access to DS1 and DS3 loops. This finding appears to conflict with the FCC's finding that an ILEC does not have to unbundle "greenfield" FTTH/FTTC loops. Hence, the issue is how to reconcile these two provisions.

Staff believes that the FCC resolved this apparent conflict in its Opposition to Allegiance Telecom's Motion for Stay Pending Review before the D.C. Circuit Court of Appeals. The FCC repeatedly indicates that DS1 and DS3 loops remain available.

> In the order on review, the FCC excused incumbent telephone companies from having to provide FTTH loops as unbundled network elements to competing telephone companies at forward-look[ing] "TELRIC" rates, *but it required incumbents to continue to make DS1 and DS3 loops available to competitors at such rates.* (emphasis added) (EXH 37, p. 1)

> . . . the Commission *expressly preserved CLEC access to DS1 and DS3 loops* at TELRIC rates. (emphasis added) (EXH 37, p. 2)

> The text, as well as the rules themselves, make it clear that *DS1 and DS3 loops remain available as UNEs* at TELRIC prices. (emphasis added) (EXH 37, p. 12)

Most telling of the FCC's intentions, however, is the FCC's own interpretation of ¶ 326 of the TRO. The FCC states in its filing before the D.C. Circuit Court of Appeals:

> In paragraph 326 of the *Order* [TRO] the Commission expressly addressed "customers associated with the mass market" that use DS1 loops, and it decided that *CLECs would be impaired without access to DS1 loops even in the case of mass market usage*. (emphasis added) (EXH 37, pp. 12-13)

The FCC acknowledged that DS1 and DS3 loops can be made of either copper or fiber. (EXH 37, p. 9) From this, staff believes that it is reasonable to interpret that continued access to DS1 and DS3 loops in impaired wire centers was intended to be exceptions to the FTTH unbundling exemption. Since this was made prior to the MDU Order, staff believes that this exception to the unbundling exemption is not applicable for MDUs. The FCC's MDU Order is clear that the criterion for determining unbundling in an MDU is whether that MDU is primarily residential or not. Based on the FCC's own interpretation of ¶326, staff believes the customer classification is not relevant when determining the unbundling obligations for DS1 or DS3 loops in a non-MDU setting. Thus, staff recommends adding language that would note that FTTH/FTTC loops do not include DS1 or DS3 loops or fiber loops deployed to predominately business MDUs. Staff notes that the TRRO only requires the unbundling of DS1 and DS3 loops

in wire centers where impairment exists. Thus, the obligation to unbundle fiber loops to provide a DS1 or DS3 loop would only be required in those same impaired wire centers.

CONCLUSION

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.

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. **(K. Kennedy)**

Position of the Parties

BELLSOUTH: BellSouth's sole obligation to provide access to hybrid loops is limited to a requirement to provide access to the time division multiplexing features of a hybrid loop, where continued access to existing copper is required by the FCC.

GRUCom: No position.

JOINT CLECs: The Joint CLECs recognize the exclusions from unbundling granted in the FCC's "broadband" Orders. The FCC's broadband exclusions were limited, however, to circumstances where loops are used to serve mass market customers. CLECs are still permitted to order DS1 and DS3 loops in "greenfield" locations absent a finding of "no impairment."

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

Staff Analysis:

The FCC has defined a hybrid loop as "a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant." (47 CFR 51.319 (a)(2)) The feeder plant is located between the central office and a remote terminal, while the distribution plant is the portion of the loop between the remote terminal and the end user customer premises. However, a hybrid loop includes any loop where part of the loop is composed of fiber and the other part is composed of copper, provided the copper/fiber transition is more than 500 feet from the end user customer premises. (FTTC Recon Order, ¶10)

PARTIES ARGUMENTS

BellSouth

BellSouth witness Fogle contends, "The basis for the FCC requirements for access to loop types is to ensure that CLECs continue to have access to currently existing last mile copper facilities, as long as those facilities continue to exist." (TR 307) He provides the definition of a hybrid loop from §2.1.3 of BellSouth's proposed language:

> A hybrid Loop is a local Loop, composed of both fiber optic cable, usually in the feeder plant, and copper twisted wire or cable, usually in the distribution plant. (Fogle TR 309; EXH 17, p. 8; EXH 18, p. 8; EXH 35, p. 9)

He references footnote 832 of the TRO and claims, "As is the case with all loops, the definition includes any of the associated electronics, such as DLC systems." (Fogle TR 309) He quotes ¶288 of the TRO and maintains, "the FCC ruled that hybrid loops should not be unbundled since they are part of the next-generation network." (Fogle TR 311) He asserts that access to hybrid loops is prohibited with one limited exception. "The sole exception is to provide access to the time division multiplexing features of a hybrid loop in an overbuild situation (where continued access to existing copper is required by the FCC)." (Fogle TR 312) The remaining language of §2.1.3 discusses the access obligations of BellSouth:

> BellSouth shall provide [CLEC] with nondiscriminatory access to the time division multiplexing features, functions and capabilities of such hybrid Loop, on an unbundled basis to establish a complete transmission path between BellSouth's central office and an End User's premises. (Fogle TR 312; EXH 35, p. 9, §2.1.3)

BellSouth suggests that the parties "do not appear to contest . . . includ[ing] the language contained in [the federal rules] in interconnection agreements." (BellSouth BR at 99) BellSouth objects to CompSouth's proposed language as it includes hybrid loops as a §271 obligation. (BellSouth BR at 99)

Joint CLECs

CompSouth witness Gillan suggests that BellSouth's obligations regarding hybrid loops for serving the mass market are different than for serving the enterprise market. (Gillan TR 452) He emphasizes that ¶288 of the TRO states: "We decline to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market." (emphasis by witness) (Gillan TR 452) The witness claims that this distinction is defined by the services provided to the end-user customer: "whenever a CLEC requests a DS1 loop to serve a customer, that request itself means that the customer is (or is becoming) a member of the enterprise market . . ." (Gillan TR 455-456)

Witness Gillan also testifies that BellSouth's relief of its hybrid loop unbundling obligations is only limited to the packet-based capability. He contends that this limitation "should not affect CLECs ability to obtain access to DS1 (and DS3) loops in any meaningful way." (TR 457)

> First, the FCC made clear that BellSouth must still provide DS1 and DS3 loops on such facilities. . . Second, the FCC's policies are premised on the understanding that, to the extent that an ILEC does deploy a packet-based architecture, the packet-architecture parallels its TDM-network, and would not isolate customers from access to CLEC DS1-based services. (Gillan TR 458-459)

Witness Gillan testifies that the FCC's narrow exception to BellSouth's hybrid loop unbundling obligations "should have little practical effect." (TR 459) The Joint CLECs also claim, "This limitation, however, should not affect CLECs' ability to obtain access to DS1 (and DS3) loops in any meaningful way." (Joint CLECs BR at 82)

ANALYSIS

CompSouth witness Gillan argues in great detail about whether a customer is considered an enterprise customer or a mass market customer. However, staff is unsure what specifically is in dispute. Therefore, staff will focus on the language proposed by the parties to resolve any disagreements. Staff believes the TRO and the rules are clear regarding unbundling of hybrid loops and, in fact, the parties appear to agree on most of these points.

The language shown below is CompSouth's proposed language. Staff notes that BellSouth's proposed language tracks almost identically with CompSouth's proposal, except for the underlined portion. (EXH 21, p. 59, §2.1.3)

> 2.1.3
> A hybrid Loop is a local Loop, composed of both fiber optic cable, usually in the feeder plant, and copper twisted wire or cable, usually in the distribution plant. BellSouth shall provide CLEC with nondiscriminatory access to the time division multiplexing features, functions and capabilities of such hybrid Loop, including DS1 and DS3 capacity under Section 251 where impairment exists, on an unbundled basis to establish a complete transmission path between BellSouth's central office and an End User's premises. Where impairment does not exist, BellSouth shall provide such hybrid loop at just and reasonable rates pursuant to Section 271 at the rates set forth in Exhibit B. This access shall include access to all features, functions, and capabilities of the hybrid loop that are not used to transmit packetized information.
>
> 2.1.3.1
> BellSouth shall not engineer the transmission capabilities of its network in a manner, or engage in any policy, practice, or procedure, that disrupts or degrades access to a local loop or subloop, including the time division multiplexing-based features, functions, and capabilities of a hybrid loop, for which a requesting telecommunications carrier may obtain or has obtained access pursuant to this Attachment. (EXH 23, p. 56)

Staff believes the disputed language relates to §271 and whether BellSouth's §271 obligations should be included in the agreement. Staff believes that question is addressed in Issue 7. Consistent with staff's recommendation in Issue 7, staff recommends not including the disputed language. To the extent that the Commission decides in the Joint CLECs' favor in Issue 7, BellSouth has agreed that the language proposed above would be acceptable. (EXH 4, p. 17)

CONCLUSION

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.

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. **(Marsh)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECs: BellSouth acknowledges its obligation to provide RNMs, but opposes Joint CLEC proposals that would ensure consistency with FCC decisions. CompSouth's contract language faithfully tracks the FCC's RNM rulings. In addition, CompSouth's proposed contract language properly treats RNMs as RNMs, but does not attempt to inappropriately subject line conditioning to RNM rules.

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

Staff Analysis: The key point to be determined in this issue is whether line conditioning is a Routine Network Modification (RNM). According to BellSouth witness Fogle:

> [t]he parties view Routine Network Modifications and line conditioning differently. BellSouth's position is that line conditioning is a subset of the Routine Network Modifications defined by the FCC in paragraphs 250 and 643 of the TRO. The CLECs' position is that the obligations for Routine Network Modifications and line conditioning are separate and independent. (TR 337-338)

CompSouth witness Gillan cites the FCC's line conditioning requirement:

> (iii) Line conditioning. The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop. If the incumbent LEC seeks compensation from the requesting telecommunications carrier for line conditioning, the requesting telecommunications carrier has the option of refusing, in whole or in part, to have the line conditioned; and a requesting telecommunications carrier's refusal of some or all aspects of line

> conditioning will not diminish any right it may have, under paragraphs (a) and (b) of this section, to access the copper loop, the high frequency portion of the copper loop, or the copper subloop.[58] (TR 441-442)

PARTIES' ARGUMENTS

BellSouth

BellSouth witness Fogle asserts that the FCC defines RNMs in ¶632 of the TRO, where it states that ILECs must perform those activities that they regularly undertake for their own customers. (TR 317) He explains that RNMs "are industry-recognized standard changes to outside plant infrastructure in order to provide standard services." (TR 317) He notes that BellSouth will routinely perform for CLECs those network modifications, including line conditioning, that it does for its own customers, including xDSL customers. (TR 317) He advises that BellSouth may also perform additional line conditioning functions pursuant to collaborative agreements with CLECs; however, he contends that line conditioning functions beyond those that BellSouth performs for its own customers are not required by the FCC. (TR 317)

Witness Fogle explains, by way of example, that if the industry standard for the provision of DS1 service requires repeaters to be installed, BellSouth will provide them. (TR 318) He contends that RNMs do not include non-standard changes, such as the removal of load coils that were placed to meet industry standards for the provision of voice service. (TR 318) He states that in 2004 BellSouth received a mere two requests from CLECs for removal of load coils on loops over 18,000 feet in length. He notes that BellSouth does not remove load coils on such loops to serve its own customers. (TR 318) He advises that BellSouth received only 55 requests from CLECs for removal of bridged taps during the same year. (TR 319)

Witness Fogle contends that the FCC considers line conditioning to be a subset of RNMs, as indicated by the language in the TRO. (TR 319) He agrees with CompSouth witness Gillan that the rules for RNMs and for line conditioning are in different subparts of the CFR. (TR 338) However, he contends that both subparts are included within the FCC's Specific Unbundling Requirements at 47 CFR 51.319. (TR 338) He explains that ¶250 of the TRO indicates that line conditioning "constitutes a form" of RNM, while ¶643 states that it is "properly" seen as a network modification. (TR 339) He asserts that this language shows the FCC's intent that line conditioning should be treated as a subset of RNMs. (TR 339)

Witness Fogle disagrees with witness Gillan that BellSouth must condition loop facilities for CLECs whether BellSouth performs a particular modification for its own customers or not. (TR 338) He asserts that because line conditioning is a subset of RNMs, "BellSouth's line conditioning obligation is based entirely on what it would do for its own customers." (TR 340) He clarifies that "BellSouth is not asserting that it needs to offer advanced services to a specific customer to have a routine network modification obligation." He explains that it is necessary,

[58] 47 CFR 51.319(a)(1)(iii).

however, for BellSouth to routinely perform a requested RNM to provide services itself in order to have an obligation to perform similar modifications for CLECs. (TR 338)

Witness Fogle contends that witness Gillan is incorrect in his claim that BellSouth has an advantage in its DSL offerings because they are provided from remote terminals, which are located closer to customers than CLEC offerings to customers that the CLECs serve using longer loops. (TR 339) He advises that there are many customers that neither BellSouth nor the CLECs can reach with DSL services. (TR 339) He explains that both BellSouth and CLECs may have to use Digital Subscriber Line Access Multiplexers (DSLAMs) in remote terminals to provide such services; thus, they are in the same situation. (TR 339)

Witness Fogle states that BellSouth can agree to some of CompSouth's proposed language as indicated in EXH 21. (TR 340)

Joint CLECs

CompSouth witness Gillan opines that BellSouth must perform RNMs where an UNE loop has already been constructed. (TR 439) He notes that the FCC has provided examples of RNMs which

> include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer. They also include activities needed to enable a requesting telecommunications carrier to obtain access to a dark fiber loop. Routine modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casing.[59] (TR 439)

He adds that the FCC also provided examples of what was not a RNM:

> Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a requesting telecommunications carrier.[60] (TR 439-440)

Witness Gillan states that the language in the agreements must closely track the FCC's language. (TR 440) He agrees with BellSouth that the key is to ensure that the provisions contain BellSouth's obligation to perform "the same routine network modifications for high capacity loop facilities used to serve CLEC customers as it does for itself." (TR 441)

Witness Gillan states that line conditioning is not the same as a Routine Network Modification. (TR 442) He asserts that RNMs are distinct from line conditioning as evidenced by the separate rules: 47 CFR 51.319(a)(8) for RNMs and 47 CFR 51.319(a)(1)(iii) for line

[59] 47 CFR 51.319(a)(8)(ii)(local loops); §51.319(e)(5)(ii)(dedicated transport).
[60] 47 CFR 51.319(a)(8)(ii)(local loops); §51.319(e)(5)(ii)(dedicated transport).

conditioning. (TR 442) He states that the FCC rule provisions make it clear that BellSouth must condition facilities regardless of whether the ILEC offers advanced services to the end-user customer on that copper loop or subloop. (TR 442) He contends that BellSouth need not routinely condition loop facilities for its own customers in order to be obligated to do so for CLECs. (TR 442)

Witness Gillan explains that while BellSouth houses its DSL offerings in remote terminals located closer to customers, CLECs must use longer loops because the CLECs are collocated in the central office. (TR 443) He contends that this difference could lead BellSouth to claim it does not have to provide line conditioning, because it does not do so to provide DSL to its own customers. (TR 443) He asserts that "because the FCC has specifically established Line Conditioning as an obligation that BellSouth must honor *whether or not it would do so for its own customers,* BellSouth must still condition facilities at the request of the CLEC at the TELRIC-compliant rates already approved by this Commission." (emphasis by witness) (TR 443)

Sprint

Sprint witness Maples agrees that the FCC defined a RNM as "'an activity that the incumbent LEC regularly undertakes for its own customer.'" (TR 149, citing 47 CFR 51.319(a)(7) and 51.319(e)(4)(ii)) He opines that "the FCC wanted to ensure non-discriminatory treatment and to prevent any undue restrictions for access to UNEs." TR 149) He notes that the FCC established principles and provided examples in the rule, but did not provide a detailed list of electronic components. (TR 149-159, citing TRO ¶634) As noted in its brief, Sprint has reached agreement on this issue. (Sprint BR at 3)

ANALYSIS

Staff agrees with BellSouth that line conditioning is specifically a subset of RNMs. The FCC stated in paragraph 635 of the TRO that

> . . . the routine modifications that we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules. Specifically, based on the record, high-capacity loop modifications and line conditioning require comparable personnel, can be provisioned within similar intervals; and do not require a geographic extension of the network. (TRO ¶635, fns omitted)

CompSouth witness Gillan correctly pointed out that the rules pertaining to each are separate and distinct. Nevertheless, as shown above, the FCC considers line conditioning to be substantially similar to RNMs. Further, the FCC treats line conditioning as a RNM, stating that

> incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves. Similarly, in order to provide xDSL services to their own customers,

> incumbent LECs condition the customer's local loop. Thus, line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations. (TRO ¶643)

While the FCC required that ILECs need only provide line conditioning at parity with what they provide for themselves, there is no requirement that they go beyond that standard in provisioning loops to competitors. As noted by BellSouth in its brief, this Commission also found in its Joint Petitioners' Order that RNMs and line conditioning are to be performed at parity. (BellSouth BR at 100)

The language to implement these provisions contains two sections: 1) Routine Network Modifications; and 2) Line Conditioning. In formulating its recommended language, staff began with BellSouth's redline of CompSouth's proposed language as contained in EXH 21. While Sprint has reached agreement with BellSouth on this issue, as indicated in its position above, staff notes the language it provided is useful for the remaining parties' agreements. Staff incorporated a modification proposed by Sprint to the section that addresses RNMs, with additional modification by staff, as discussed further in issue 26. Staff agrees with Sprint that the use of the term "anticipated the request" is vague and not required by the FCC.

CONCLUSION

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.

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. **(Marsh)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECS: The Joint CLECs' proposal provides that RNMs will be priced per the FCC's rules (*i.e.*, for no charge above the UNE rates), but if BellSouth demonstrates its costs are not being recovered, the Commission may institute a new charge. BellSouth's proposal inappropriately deletes contract language prohibiting double-recovery of RNM costs by BellSouth.

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

Staff Analysis: The parties are in agreement that TELRIC is the appropriate pricing standard for RNMs. At issue is whether TELRIC pricing should only apply when BellSouth has "anticipated" an RNM.

PARTIES' ARGUMENTS

BellSouth

BellSouth witness Fogle states that "this issue encompasses a basic disagreement between the parties on what functions constitute a routine network modification, since the source of the obligation leads to the process for establishing a rate." (TR 320) He contends that the methodology to determine the rate is based upon whether BellSouth is required to perform the modification. (TR 320) He explains that if the answer is yes, the rate is based on Total Element Long Run Incremental Cost (TELRIC), but if no, then the applicable rate will be contained in either a commercial agreement between BellSouth and the CLEC, or a tariff. (TR 320)

Witness Fogle opines that BellSouth's language is consistent with the language in the TRO. (TR 321) He advises that BellSouth has offered alternative solutions to the CLECs. (TR

320) He explains that special construction is required to make a non-standard loop, and then convert it back to industry and BellSouth standards if the CLEC no longer needs it. (TR 320) He avers that BellSouth will undertake such special construction upon request from a CLEC. (TR 321) He notes that certain functions, such as line conditioning on a loop longer than 18,000 feet, are "non-standard, non-routine." (TR 321) He states that the "costs are appropriately recovered under BellSouth's FCC No. 1 tariff." (TR 320) He contends that no language or rate is appropriate to be included in the amendment, since there is no FCC requirement to provide a non-standard modification. (TR 320) He asserts that "non-standard changes to loops are not routine network modifications." (TR 318)

Witness Fogle states that the language proposed by CompSouth would only allow BellSouth to receive TELRIC-based rates already approved by the Commission, even for requested changes that were not included in the calculation of the TELRIC rate. (TR 341) He explains that BellSouth will apply previously approved rates where appropriate. However, he advises that for RNMs that do not have previously approved TELRIC rates, such RNMs should be handled on an individual case basis until the Commission approves a rate. (TR 341)

Joint CLECs

CompSouth witness Gillan asserts that "because the FCC has specifically established Line Conditioning as an obligation that BellSouth must honor *whether or not it would do so for its own customers,* BellSouth must still condition facilities at the request of the CLEC at the TELRIC-compliant rates already approved by this Commission." (emphasis by witness) (TR 443) No further testimony was provided.

Sprint

Sprint witness Maples contends that ILECs must prove that additional charges for RNM are not already included in the UNE recurring and/or nonrecurring rates. (TR 150) He advises that the FCC warned against double recovery of such costs in the TRO. (TR 150) He asserts that any additional charges should be reviewed to determine which costs have already been included in the existing rates. (TR 150) He avers that the terms proposed by BellSouth accurately reflect this position except that BellSouth defines a modification as routine only if it was "anticipated." (TR 150) Witness Maples states that such a restriction is vague and that he could not find any mention of "anticipation" in the FCC's rules or orders. (TR 150-151) He opines that such language could be interpreted or used to "justify rejecting an UNE order or demanding additional charges." (TR 151) As noted in its brief, Sprint has reached agreement on this issue. (Sprint BR at 3)

ANALYSIS

While staff agrees with BellSouth witness Fogle that the driving factor in the pricing of an RNM is whether or not the RNM is required, staff notes that does not completely address the issue. The question to be answered is what the process should be to establish a rate to allow for

the cost of a routine network modification that is not already recovered in Commission-approved recurring or nonrecurring rates. Virtually no testimony was provided on this point.

Staff agrees with witness Maples that BellSouth's language "anticipated the request" is vague and not required by the FCC. Although staff believes witness Maples' modification of BellSouth's language is more reasonable, staff believes the use of the FCC's actual language would better accomplish Sprint's goal. BellSouth references "normal operations" which has been retained by Sprint. Staff believes this is also subject to interpretation as to what constitutes a normal operation. Therefore, staff proposes that the words "normally provides for its own customers" should be substituted such that the sentence will read:

> If BellSouth normally provides such RNM for its own customers and has recovered the costs for performing such modifications through the rates set forth in Exhibit A, then BellSouth will perform such RNM at no additional charge.

Staff believes this approach is in keeping with the UNE rates established by this Commission, where a nonrecurring rate of zero was established for unbundled loop modification of loops under 18,000 feet in length.[61] Rates were also established for other loop conditioning procedures, such as bridged tap removal and load coil removal from loops over 18,000 feet.[62]

As pointed out by BellSouth witness Fogle, non-standard procedures are not "routine." Staff agrees. The issue is how to determine rates for those procedures that do fall under the category of routine network modifications, but which do not already have an established rate. If a procedure is routine, it appears to staff that BellSouth could anticipate it. Thus, BellSouth should already have a TELRIC rate established by this Commission. Staff believes that it is appropriate for BellSouth to continue to use such rates, which it appears willing to do, until additional rates, if needed, can be established in a proceeding at this Commission. Staff believes this will not pose an undue hardship on either BellSouth or the parties. As testified to by BellSouth witness Fogle, requests from CLECs for certain modifications have been very limited. (TR 318-319)

The language staff recommends is included under Issue 25. As discussed there, BellSouth has agreed in part to the language provided by the Joint CLECs. Staff believes the change discussed above tracks the language of the FCC rules. While Sprint has reached agreement with BellSouth on this issue, as indicated in its position above, staff notes the language it provided is useful for the remaining parties' agreements.

CONCLUSION

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.

[61] Investigation into Pricing of Unbundled Network Elements, Order No. PSC-01-2051-FOF-TP, Docket No. 990649-TP, issued October 18, 2001, p. 49.
[62] Ibid.

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.

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. **(Fogleman)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECS: The Joint CLECs recognize the exclusions from unbundling granted in the FCC's "broadband" Orders. The FCC's broadband exclusions were limited, however, to circumstances where loops are used to serve mass market customers. CLECs are still permitted to order DS1 and DS3 loops in "greenfield" locations absent a finding of "no impairment."

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

Staff Analysis:

PARTIES' ARGUMENTS

BellSouth

BellSouth witness Fogle maintains that BellSouth has no obligation to unbundle FTTH loops in overbuild situations, except where the ILEC elects to retire existing copper loops. In this case, the ILEC has to provide unbundled access to a 64 Kbps transmission path over the FTTH loop. Where the copper loops have not been retired, the ILEC, at its option, may provide unbundled access to a spare copper loop. (TR 312) As part of its proposed contract language, witness Fogle notes in FTTH/FTTC overbuild areas where it has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper loops are capable of transmitting signals prior to receiving a request for access. He maintains that if a request is received, BellSouth will restore the copper loop to serviceable condition if technically feasible. BellSouth witness Fogle maintains that the time it will take to provide the copper loop will need to be negotiated.

Joint CLECs

In response to staff's third set of interrogatories, CompSouth agreed that in brownfield situations, BellSouth may either continue to offer access to copper loops that have not been retired, or unbundle a 64 Kbps channel on the fiber loop if the copper loop has been retired. CompSouth further notes, however, that this limitation would not exempt BellSouth from its obligations to continue to offer unbundled access to DS1 capacity loops. (EXH 4, p. 151) As

part of CompSouth's suggested contract language in Exhibit 23, witness Gillan proposes adding the following sentence to BellSouth's language regarding copper loop retirement:

> BellSouth's retirement of copper Loops must comply with Applicable Law. (EXH 23, pp. 55, 61)

Sprint

Sprint witness Maples agrees with BellSouth witness Fogle that an ILEC does not have to unbundle the FTTH/FTTC overbuild facilities as long as it maintains access to the existing copper loop facilities. (TR 152) Where Sprint witness Maples disagrees with BellSouth relates to the applicability of this obligation to enterprise customers. Sprint witness Maples argues that the overbuild exemption does not apply to enterprise customers for the same reasons as the greenfield restrictions do not apply, as noted in Issue 22. (TR 153)

To incorporate this interpretation, Sprint witness Maples has proposed amending section 2.1.2.2 of BellSouth's suggested contract language to include the following sentence: "FTTH/FTTC loops do not include local loops to enterprise customers or predominantly business MDUs.[63]" (TR 153) BellSouth witness Fogle asserts, however, BellSouth and Sprint have now resolved their difference on this issue. (EXH 2, p. 30) The language he points to as being acceptable to both eliminates the phrase "enterprise customers or" from the language above. (TR 382)

ANALYSIS

The testimony filed in the record of this proceeding specifically addressing the issue of overbuilt deployment of fiber is limited. As the parties have discussed the primary dispute relating to both Issues 22 and 27 together, staff addressed it within Issue 22.

In overbuild (or brownfield) deployments, an ILEC constructs fiber transmission facilities parallel to or in replacement of its existing copper plant. (TRO ¶ 276) The FCC concludes that in these brownfield areas, the ILEC must ensure continued access to unbundle a transmission path suitable for providing narrowband services to customers served by such FTTH loops. (TRO ¶ 277) In order to guarantee continued narrowband access, ILECs have the option either to:

> (1) Keep the existing copper loop connected to a particular customer premises after deploying FTTH; [64] or
> (2) In situations where the ILEC elects to retire the copper loop, it must provide unbundled access to a 64 Kbps transmission path over its FTTH loop.[65]

[63] Staff notes what appears to be a typographic error in the testimony of witness Maples. Witness Maples compares the unbundling requirements of brownfield areas (addressed in this issue) to greenfield areas (addressed in Issue 22). He mistakenly references Issue 23 instead of Issue 22.
[64] TRO ¶277; 47 C.F.R. Part 51.319(a)(3)(ii)(A).
[65] TRO ¶277; 47 C.F.R. Part 51.319(a)(3)(ii)(C).

The FCC declined to prohibit an ILEC from retiring copper loops they have replaced with FTTH loops. The FCC stressed that it was not preempting the ability of any state commission to evaluate an ILEC's retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements. However, the FCC was specific that it did not establish independent authority based on federal law for states to review ILEC copper loop retirement policies. (TRO ¶¶ 281-284)

Sprint witness Maples testified that the overbuild exemptions do not apply for the same reasons he identified in Issue 22. (TR 153) He believes the overbuild exclusions do not apply to enterprise customers. (TR 144) He proposes the same modifications with respect to this issue as he proposed in Issue 22. Staff does not believe that this language is supported by the TRO. Just as in Issue 22, the FCC notes that its market classifications are not intended to prohibit the use of UNE loops by customers not typically associated with a given customer market class. (TRO ¶210)

While the testimony of CompSouth witness Gillan does not directly address brownfield areas, staff believes that CompSouth's responses to staff's interrogatories make it clear that CompSouth believes ILECs are required to unbundle DS1 loops irrespective of an area's brownfield or greenfield designation. However, unlike Issue 22, the FCC's TRO Errata did not address brownfield areas. Further, Exhibit 37, the FCC's Opposition to Allegiance Telecom's Motion for Stay Pending Review, does not address brownfield deployment.

Staff believes that BellSouth's proposed contract language is, for the most part, consistent with the FCC's rules.[66] Unlike the FCC's greenfield FTTH/FTTC rules, staff believes the overbuild FTTH/FTTC rule is quite clear as to the limited circumstances where an ILEC is still obligated to unbundle. Staff believes that the language in the parties' ICA should closely track the FCC's rule. Staff recommends adding specific language that BellSouth's retirement of copper loops must comply with applicable law. Staff believes that this is consistent with the TRO. (TRO ¶ 284) Furthermore, BellSouth witness Fogle indicated that he did not object to the inclusion of this language. (TR 333)

CONCLUSION

The unbundling requirements of an incumbent carrier with respect to overbuilt FTTH/FTTC loops are limited to either unbundled access to a copper loop or (if the ILEC elects to retire the copper loop) a 64 Kbps transmission path over the FTTH/FTTC 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.

[66] 47 C.F.R. Part 51.319(a)(3)(ii).

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. **(K. Kennedy)**

Position of the Parties

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

GRUCom: No position.

JOINT CLECS: The FCC granted BellSouth a "limited right to audit" CLEC compliance with EELs eligibility criteria. Before initiating any audit, BellSouth must establish some basis that an audit is appropriate. The Joint CLECs' proposal reflects this "for cause" standard, as well as the FCC's other rulings on how EELs audits should be conducted.

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

Staff Analysis:

In the UNE Remand Order, the FCC required ILECs to provide unbundled access to enhanced extended links (UNE EELs), combinations of "unbundled loop, multiplexing/concentrating equipment, and dedicated transport." (¶476, ¶480) In the Supplemental Order, the FCC required CLECs to "provide a significant amount of local exchange service . . . to a particular customer" in order to be allowed access to an UNE EEL. (¶9) The FCC added safe harbor requirements in the Supplemental Order Clarification to define the phrase "a significant amount of local exchange service," in order to limit the availability and ensure CLECs are using the EEL for its intended purpose. (¶22) The FCC also allowed the ILECs "to conduct limited audits." (Supplemental Order Clarification ¶29)

In the TRO, the FCC allows CLECs to convert to UNE EELs, existing loop/transport combinations purchased originally as special access; conversions are addressed in Issue 14. (¶586) The TRO also allows commingling, addressed in Issue 13. (¶584) Both UNE EELs and commingled EELs, referred to here generally as EELs, must satisfy the revised EEL eligibility

criteria contained in the TRO, which includes 911/E911 capability, termination at a collocation arrangement, and local number assignment. (TRO ¶593, ¶597) Additionally, the FCC continues its policy of allowing ILECs to perform limited audits, setting "forth basic principles regarding carriers' rights to undertake and defend against audits." (TRO ¶625)

The parties do not dispute that BellSouth is obligated to provide access to certain EELs,[67] as required by the TRO and the TRRO, nor do they dispute that BellSouth is permitted to audit those circuits. (Gillan TR 444; Tipton TR 591) The dispute is how that audit should be conducted.

PARTIES' ARGUMENTS

BellSouth

BellSouth contends that its language should be accepted because it most closely follows the TRO's requirements. BellSouth witness Tipton argues, "the FCC was clear in stating the parameters of an EELs audit. The language in the interconnection agreements should reflect these parameters and need not go further." (Tipton TR 591) That language can be found in Exhibit PAT-1 at §5.3.4.3 or in Exhibit PAT-2 at §4.3.4.3 and it reads as follows:

> BellSouth may, on an annual basis, audit [CLEC]'s records in order to verify compliance with the qualifying service eligibility criteria. The audit shall be conducted by a third party independent auditor, and the audit must be performed in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA). To the extent the independent auditor's report concludes that [CLEC] failed to comply with the service eligibility criteria, [CLEC] must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis. In the event the auditor's report concludes that [CLEC] did not comply in any material respect with the service eligibility criteria, [CLEC] shall reimburse BellSouth for the cost of the independent auditor. To the extent the auditor's report concludes that [CLEC] did comply in all material respects with the service eligibility criteria, BellSouth will reimburse [CLEC] for its reasonable and demonstrable costs associated with the audit. [CLEC] will maintain appropriate documentation to support its certifications. (EXH 17, pp. 43-44; EXH 18, pp. 31-32)

Witness Tipton explains the reimbursement procedures set forth in the TRO and how the language indicated above comports with the TRO. She quotes the TRO in ¶627 and ¶628:

> [T]o the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor.

[67] EELs generally will refer to UNE EELs or commingled EELs.

. . .

> [T]o the extent the independent auditor's report concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit. (Tipton TR 593-594)

BellSouth witness Tipton explains why BellSouth has not proposed to use the phrase "in all material respects" in both reimbursement scenarios: whether the CLEC should reimburse the ILEC for the cost of the audit and whether the ILEC should reimburse the CLEC for its costs incurred in complying with the audit. She claims that during the discussions and negotiations of this interconnection agreement, "[s]ome CLECs indicated that they would argue that they were not responsible for the cost of the auditor unless the auditor found that they did not comply in any respect with the service eligibility criteria." She testifies that the CLECs were arguing that "the sentence means 'failed in all material respects.'" (Tipton TR 594) In order to clarify, "BellSouth's proposal includes 'any material respect' in the provision that governs when the CLEC is responsible for the cost of the auditor." (Tipton TR 595)

Witness Tipton also testifies that including a list of acceptable auditors in the interconnection agreement is unnecessary. She states, "Because the TRO and the ICA language proposed by BellSouth include the requirement that the AICPA standards be followed, any auditor who can meet those standards should be acceptable." (Tipton TR 592) She claims that such a list would lead to great expense to both parties and endless delays. She also claims that it would "provide a convenient means for CLECs to avoid an audit." (Tipton TR 593) Further, BellSouth responds in discovery that "any dispute or concern should be vetted at the conclusion of an audit." (EXH 4, p. 3)

Joint CLECs

CompSouth witness Gillan testifies, "Principles that the FCC established are that the ILEC should use an independent auditor and perform audits no more than once each year. To assure independence, the auditor should be mutually agreed upon by BellSouth and the CLEC." (TR 444) Witness Gillan proposes that BellSouth should provide proper notification that includes the basis for BellSouth's assertion that certain circuits are noncompliant. He suggests that the notification should identify the specific circuits that are noncompliant and include relevant documentation that will verify BellSouth's assertions. (Gillan TR 445) "This approach is necessary to give 'teeth' to the FCC's *for-cause* audit standard; undocumented cause is no cause at all." (emphasis in original) (Id.) CompSouth's proposal "would identify potential issues quickly, thus avoiding unnecessary disputes over whether BellSouth may or may not proceed with an audit." (Id.) The witness testifies that with this approach, "it is more likely that BellSouth and the target CLEC will be able to narrow and/or more quickly resolve disputes over whether or not BellSouth has the right to proceed with an EEL audit." (Id.) Quoting the TRO at ¶622, he asserts that "BellSouth has only a 'limited right to audit,' not an open invitation; in addition, the FCC's intention was to grant CLECs '. . . unimpeded UNE access based upon self-certification, subject to later verification based upon cause.'" (emphasis by witness) (TR 444-445) While witness Gillan admits that the TRO does not specifically require such a notice, he

maintains "this Commission may order such a requirement" referring to ¶625 in the TRO. (TR 445)

The Joint CLECs also point out, "Another disputed issue regarding EELs audits relates to which party selects the auditor." (Joint CLECs BR at 96) CompSouth's proposed language requires mutual agreement to the auditor prior to commencement of the audit. The Joint CLECs assert this is the "most simple and straightforward way to decide whether an auditor is truly independent." (Joint CLECs BR at 96) They are "unwilling to agree to a 'pre-approved' list of entities . . . unless such list also includes a mechanism for identifying conflicts and disqualifying particular auditors based on conflicts." (Id.)

ANALYSIS

In the TRO, the FCC allows CLECs access to certain EELs. (¶586) All EELs must satisfy the revised EEL eligibility criteria contained in the TRO, which include 911/E911 capability, termination into a collocation arrangement and local number assignment. (¶593) Similar to the Supplemental Order Clarification, the TRO allows a CLEC to self-certify that it is in compliance with the EEL eligibility criteria, and the ILEC to verify compliance through the auditing process. (TRO ¶623)

Self-certification, simply stated, is a CLEC attesting that the EEL in question meets the service eligibility criteria. Upon receipt of the self-certification, the FCC requires the ILEC to provide the facility to the requesting CLEC. Details of the self-certification process are not addressed by the FCC; in fact, it declined to specify the form of such certification, but found that a "letter sent to the incumbent LEC by a requesting carrier is a practical method." (TRO ¶624) In footnote 1900, the FCC explained its reasoning: "The success of facilities-based competition depends on the ability of competitors to obtain the unbundled facilities for which they are eligible in a timely fashion. Thus, an incumbent LEC that questions the competitor's certification may do so by initiating the audit procedures set forth below." (TRO ¶624 fn 1900) The audit procedures explained in the TRO are similar to those contained in the Supplemental Order Clarification.

Staff believes the Joint CLECs are asking the Commission to add steps to the auditing process which could hinder the process. One such step is the requirement that BellSouth identify the specific circuits that it wishes to audit and provide documentation to back up its claims. According to CompSouth witness Gillan, "This approach is necessary to give 'teeth' to the FCC's *for-cause* audit standard; undocumented cause is no cause at all." (emphasis in original) (TR 445) Staff understands the Joint CLECs' concern of unwarranted audits; however, the FCC addressed those concerns:

> [T]o the extent the independent auditor's report concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit. We expect that this reimbursement requirement *will eliminate the potential for abusive or unfounded audits*, so that incumbent LEC[s] will only rely on the audit mechanism in appropriate circumstances. (emphasis added) (TRO ¶628)

If an ILEC were allowed to audit any CLEC at any time with no repercussions, staff believes the scale is unfairly tipped toward the ILEC. On the other hand, the FCC requires the CLEC to reimburse the ILEC for the cost of the audit if the auditor found material *noncompliance*; in this way, the FCC hoped to ensure a CLEC only ordered EEL circuits when it was entitled to them. (TRO ¶627) If a CLEC is able to delay that process, the scale is tipped toward the CLEC. Staff believes the FCC's rules set out in the TRO achieve a reasonable balance, and that adding additional conditions is not appropriate and may upset this balance.

Staff agrees with BellSouth that requiring BellSouth to identify specific circuits and to provide documentation to support its belief of noncompliance, could unnecessarily delay the audit. (BellSouth BR at 87) BellSouth witness Tipton stresses, "BellSouth is under no obligation to provide the grounds to support its request for an audit. Doing so would serve no purpose other than to enable the audited CLEC to unreasonably dispute and, therefore, delay the audit." (TR 645) In order to ensure that the audit process is not hindered by such delays, staff believes that the notice need only include any information that BellSouth has agreed to provide. Moreover, BellSouth agrees that it will not audit without cause, since it must pay for the audit. (BellSouth BR at 87) Staff understands that an audit without cause would certainly be cost-prohibitive, as BellSouth is required to pay for the audit and reimburse the CLEC for its costs to comply with the audit, if the auditor finds the CLEC has materially complied. (TRO ¶628)

Staff notes that CompSouth witness Gillan does not discuss in detail the need to mutually agree to the auditor prior to the audit commencing. Yet, the language submitted by witness Gillan does indicate the desire on the part of the Joint CLECs to mutually agree to the auditor and the location prior to an audit taking place. (EXH 35, p. 57) Additionally, the Joint CLECs argue that mutual agreement is necessary to ensure true independence of the auditor. Staff notes that the TRO does not offer specific guidance on who should conduct the audit, but states, "we recognize that the details surrounding the implementation of these audits may be specific to related provisions of interconnection agreements . . . the states are in a better position to address that implementation." (TRO ¶625) The FCC even used the independent auditor as a specific example of a possible area of concern. (TRO ¶625)

Staff believes that the Joint CLECs' request that an auditor be chosen and agreed to in advance is, on the surface, equitable. The Joint CLECs do have a substantial interest in the outcome of the audit and the importance of the independence of the auditor is clear. However, BellSouth makes a strong argument that allowing the Joint CLECs to veto the selection of the auditor could delay the audit significantly. In addition, BellSouth states that the Commission should make a finding in this docket consistent with that made in the Verizon Arbitration Order. Specifically, BellSouth requests that it be allowed to obtain the auditor.[68] (TR 18; Tipton TR 660-661; BellSouth BR at 87; Verizon Arbitration Order pp. 115-119) As stated above, staff believes that disruption of the audit significantly undermines the FCC's TRO rules regarding the

[68] Staff notes that this issue was also recently address in Docket No. 040130-TP, an arbitration between BellSouth and several CLECs. In that docket the Commission concluded that " . . . the audit shall be performed by an independent, third-party auditor selected by BellSouth from a list of at least four auditors included in the interconnection agreement." (Joint Petitioners' Order, p. 49) However, the parties in this docket have stated that a list of auditors would be inappropriate. (EXH 2, p. 59; Tipton TR 592-593)

self-certification process and the audit process. Staff opines that these processes should be strictly adhered to as set forth in the TRO in order to ensure the balance is maintained between the ILEC's need for compliance and the CLEC's need for unimpeded access. If the audit process is hindered by postponement of an audit, the CLEC could continue to improperly obtain access to nonconforming facilities at unbundled rates. As such, staff recommends that BellSouth choose the auditor. However, as agreed to by the parties, either BellSouth or the CLEC being audited may petition the Commission for resolution of any disputes arising out of an audit; staff believes this would include selection of the auditor. (EXH 2, p. 58; EXH 4, p. 3) Therefore, staff believes that BellSouth will attempt to find an appropriate independent auditor to perform the audit, in order to avoid legal disputes after the audit is completed.

Finally, staff notes that BellSouth has changed the word "any" to "all" in its language with regard to materiality. Staff believes this change is significant. However, BellSouth has agreed that the auditor determines whether the CLEC has complied or failed to comply in all material respects. (EXH 2, p. 28) Also, if BellSouth believes the auditor incorrectly interprets the language, it may bring that dispute to the Commission for resolution. Therefore, staff believes this change is unnecessary.

CONCLUSION

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.

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. **(Scott)**

Position of the Parties

BELLSOUTH: This issue should be resolved on a carrier by carrier basis depending on the specific facts that apply to a particular carrier.

GRUCOM: No position.

JOINT CLECs: The contractual changes to implement the order may differ slightly among CLECs' ICAs, but the guiding principle is simple: all references to "new markets" and "growth caps" should be removed.

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

Staff Analysis:

In the ISP Remand Core Forbearance Order[69], the FCC addressed Core Communications, Inc.'s (Core) petition in which it requested that the FCC forbear from enforcing the rate caps, growth caps, "new markets" rule, and "mirroring" rule as set forth in the ISP Remand Order[70]. In its ISP Remand Order, the FCC affirmed its conclusions in the *Declaratory Ruling* that ISP-bound traffic is not subject to §251(b)(5) reciprocal compensation obligations.[71] Although the FCC stated that moving to a bill-and-keep compensation scheme may be more efficient, it did not adopt that approach.[72] Rather, the FCC adopted an interim intercarrier compensation regime pending completion of the *Intercarrier Compensation Notice of Proposed Rulemaking*[73] *(NPRM)* proceeding.[74]

The interim intercarrier compensation regime consisted of a gradually declining cap on intercarrier compensation for ISP-bound traffic, beginning at $.0015 per minute-of-use and

[69] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. 160(c) from Application of the ISP Remand Order*, WC Docket 03-171, Order, Released October 18, 2004.
[70] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98; CC Docket No. 99-68, Order on Remand and Report and Order, Released April 27, 2001.
[71] Id. at ¶1.
[72] ISP Remand Core Forbearance Order at ¶5.
[73] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 16 FCC Rcd 9610 (2001).
[74] ISP Remand Core Forbearance Order at ¶5.

declining to $.0007 per minute-of-use.[75] These rate caps only put limitations on the costs carriers could recover from other carriers not from their ISP customers.[76] The FCC also determined that rate caps for ISP-bound traffic should only apply if an ILEC offered to exchange all traffic subject to §251(b)(5) at the same rates.[77] If a carrier did not offer the rates set forth in the ISP Remand Order, then it was required to exchange traffic at the state-approved or state-arbitrated reciprocal compensation rates.[78] This "mirroring" rule was adopted by the FCC to ensure the ILECs paid the same rates for ISP-bound traffic that they received for §251(b)(5) traffic.[79] Additionally, the FCC imposed a growth cap on total ISP-bound minutes for which a LEC may receive this compensation equal to the total ISP-bound minutes for which the LEC was previously entitled to compensation, plus a 10 percent annual growth factor.[80] The "new markets" rule was also adopted in order to eliminate the opportunities for regulatory arbitrage.[81] The FCC concluded that different interim intercarrier compensation rules should apply if two carriers were not exchanging traffic pursuant to an interconnection agreement prior to the adoption on the ISP Remand Order.[82] For example, if an ILEC opted into the federal rate caps for ISP-bound traffic, the two carriers must exchange this traffic on a bill-and-keep basis during the interim period.[83] The rule applies when new carriers first enter the market or an existing carrier enters a market it had not previously served.[84]

The FCC granted Core's petition for forbearance with regard to growth caps and the "new markets" rule on the basis that both rules were no longer in the public interest.[85] However, the FCC found that the rate caps and "mirroring" rule remain necessary to prevent regulatory arbitrage and promote efficient investment in telecommunications services and facilities.[86]

The dispute in this proceeding is whether the FCC's findings in the ISP Remand Core Forbearance Order should be applied on a carrier-by carrier basis or universally.

PARTIES' ARGUMENTS

BellSouth states that the Commission should resolve this issue on a carrier-by-carrier basis depending on the specific facts. (BellSouth BR at 88) BellSouth contends that given the option for CLECs to choose different rate structures in the ISP Remand Core Forbearance Order, a "one-size-fits-all" approach is inappropriate. Id.

The Joint CLECs contend that the contractual changes to implement the ISP Remand Core Forbearance Order may differ among various CLECs' ICAs, but the underlying principle is

[75] Id. at ¶6.
[76] Id.
[77] Id. at ¶8.
[78] Id.
[79] Id.
[80] Id. at ¶7.
[81] Id. at ¶9.
[82] Id.
[83] Id.
[84] Id.
[85] Id. at ¶¶ 20-21.
[86] Id. at ¶19.

that all references to the "new markets" and "growth cap" restrictions should be deleted. (Joint CLECs BR at 97) The Joint CLECs argue that those restrictions no longer limit the CLECs' reciprocal compensation rights. Id. As such, the Joint CLECs argue that ICAs should be amended to remove the "new markets" and "growth caps" provisions. Id. at 98. The Joint CLECS further contend that the argument BellSouth makes to implement the ISP Remand Core Forbearance Order on an ad hoc basis is flawed, because the Order's provisions only impact those CLECs who have chosen reciprocal compensation rate plans that include the restrictions. Id. The Joint CLECs argue that the FCC ordered that those limitations should no longer be enforced and did not seek to limit CLEC or ILEC reciprocal compensation options. Id. The Joint CLECs suggest that the Commission implement the ISP Remand Core Forbearance Order by ordering that ICAs that include the restrictions may be amended on the same timeline and processes that apply to amendments related to changes in either the TRO or TRRO. Id.

ANALYSIS

In previous arbitration proceedings before the Commission, the parties file ICAs in which disputed language may be reviewed and considered. However, in this particular proceeding the Commission does not have the benefit of any such language concerning intercarrier compensation provisions. Instead, this proceeding is a generic proceeding in which the Commission is primarily setting language for parties and non-parties alike sufficient to implement the TRO and the TRRO. The parties in this proceeding have not proposed language for inclusion in existing and new ICAs; instead, BellSouth contends that implementation of the FCC's findings in the ISP Remand Core Forbearance Order should be done on a carrier by carrier basis, while the Joint CLECs apparently want the Commission to order that references in existing ICAs to growth caps or the "new markets" rule be stricken. There appears to be no dispute that the FCC granted forbearance with regard to growth caps and the "new markets" rule. Staff believes that the parties are (and have been) entitled to invoke their contractual change-of-law provisions to amend their ICAs as appropriate.[87] Moreover, staff believes that the FCC intended to lift the restrictions regarding "new markets" and "growth caps" and to apply its forbearance to "all telecommunications carriers." ISP Remand Core Forbearance Order at ¶27.

However, staff again notes that no language is before the Commission on this issue. Further, there is no evidence in this record as to what give and take may have occurred in arriving at the multitude of ICAs containing reciprocal compensation provisions, as well as whether there are interrelated provisions that may differ somewhat from the details in the ISP Remand Core Forbearance Order. For these reasons, staff is hesitant to recommend that the Commission unilaterally order that an unknown number of ICAs be amended to strike all references to growth caps and the "new markets" rule. Rather, staff believes 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.

[87] Staff notes that the ISP Remand Core Forbearance Order, granting Core's petition with regard to the growth caps and "new markets" rule provisions, was released on October 18, 2004.

CONCLUSION

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.

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. **(Scott)**

Position of the Parties:

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

GRUCOM: Agrees with the Joint CLECs' position.

JOINT CLECs: Unless the parties have specifically agreed otherwise, determinations made in this proceeding should be incorporated into amendments to BellSouth-CLEC ICAs. Such amendments should be completed and approved by the Commission on a timely basis, subject to any specific agreements or pending proceedings between BellSouth and a particular CLEC.

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

Staff Analysis:

PARTIES' ARGUMENTS

BellSouth contends that the Commission should approve specific contract language that resolves each disputed issue and can be promptly executed to meet the FCC's transitional deadlines. (BellSouth BR at 80) BellSouth requests that the Commission order that the parties execute amendments to their ICAs within a certain timeframe following issuance of the written order specifying the contract language. Id. BellSouth further requests that the Commission order that if an amendment is not executed within this certain timeframe, then the Commission-specified language will go into effect for all CLECs in the state of Florida, regardless of whether an amendment is signed. Id.

The Joint CLECs take no position on whether the order stemming from this proceeding can or should bind non-parties. (Joint CLECs BR at 99) Rather, the Joint CLECs argue that the Commission should take no action to affect existing agreements that address how such changes of law should be incorporated into existing and new §252 ICAs. Id. The Joint CLECs contend that the proposed UNE contract language submitted by BellSouth includes language on many issues that are not in dispute in this proceeding, and should not be approved by the Commission. Id. Furthermore, the Joint CLECs contend that they should not have to accept new contract language that is unrelated to the disputed issues in this proceeding. Id. The Joint CLECs suggest that CompSouth's contract language proposal[88] and BellSouth's redline[89] of the CompSouth proposal accurately set forth the disputed issues in this proceeding. Id.

ANALYSIS

BellSouth and the Joint CLECs appear to agree that the Commission's decisions in this proceeding should form the basis for amendments to the parties' ICAs, unless the parties have agreed otherwise. (BellSouth BR at 80; Joint CLECs BR at 99) BellSouth argues that amendments should be binding on non-parties to this proceeding, whereas the Joint CLECs refrain from taking a position on whether non-parties should be bound. By Order No. PSC-05-0639-PCO-TP, issued June 14, 2005, the Commission established the scope of this proceeding, ruling that "it is appropriate that all certificated CLECs operating in BellSouth's Florida territory be bound by the ultimate findings in this proceeding."[90] Accordingly, staff believes that non-parties should be bound by the amendments arising from the Commission's determinations in this proceeding. 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.

BellSouth requests that the Commission provide a timeframe in which amendments are to be executed, while the Joint Petitioners take the position that amendments should be executed within a reasonable time to allow for compliance with the Commission's decision in this proceeding. The Commission's common practice in previous arbitrations has been to issue a final order to incorporate the Commission's arbitrated decisions.[91] Generally, a signed amendment or agreement is filed thereafter, and the Commission subsequently issues an order to approve the signed amendment or agreement.[92] Staff notes, however, that the agreement is deemed approved pursuant to §252 (e)(4) of the Act if the Commission does not take action to approve or reject it within 30 days of filing.[93] The Commission upheld this practice in Docket 040156-TP, finding that the effective date of the amendment to the parties' agreements in that proceeding would be the date the Commission issues its final order approving the signed

[88] Revised Exhibit No. JPG-1 to Mr. Gillan's testimony.
[89] Exhibit No. PAT-5 to Ms. Tipton's rebuttal testimony.
[90] *Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law by BellSouth Telecommunications, Inc.*, Docket 041269-TP, FPSC Order No. PSC-05-0639-PCO-TP at 1.
[91] *Petition for arbitration of amendment to interconnection agreements with certain competitive local exchange carriers and commercial mobile radio service providers in Florida by Verizon Florida, Inc.*, Docket 040156-TP, FPSC Order No. PSC-05-1200-FOF-TP at 89, Issued December 5, 2005.
[92] Id.
[93] Id.

amendment.[94] However, in the instant docket, the window for implementing amendments and approving those amendments is closing as the FCC's transitional deadlines are fast-approaching.

Staff recommends that it may be appropriate given the FCC's transitional deadlines to order a reasonable timeframe in which the parties should execute agreements following the Commission's decisions in this proceeding. Staff recommends that the parties file amendments and executed agreements within 20 days after the Commission's decisions in this proceeding. Staff notes that since this a "generic proceeding" and the Commission is providing contract language for the parties to implement, there should be no delays often associated with arbitrations where the contract language may be disputed after the Commission's final order is issued. Staff would also make every effort to expedite issuance of the final order in this proceeding. Additionally, staff requests that in order to comply with the FCC's transitional deadline, the Commission grant staff administrative authority to approve any amendments and agreements filed in accordance with the Commission's decisions in this proceeding.

CONCLUSION

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.

[94] Id.

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. **(Scott)**

Staff Analysis: 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.

Index of Staff's Recommended Language

Issue (Page reference in Appendix)	BellSouth's Proposed Language		CompSouth's Proposed Language		Combination of BellSouth and Comp-South Language Proposals
	With No Changes	With Changes	With No Changes	With Changes	
Issues 1 and 10 (pp. A2-A12)					X
Issue 2[95]	N/A	N/A	N/A	N/A	N/A
Issue 3 (pp. A13-A14)					X
Issue 4 (pp. A15-A17)					X
Issue 5 (p. A18)		X			
Issues 7 and 8[95]	N/A	N/A	N/A	N/A	N/A
Issue 9 (pp. A19-22)		X			
Issue 12 (p. A23)		X			
Issue 13 (p. A24)		X			
Issue 14 (p. A25)	X				
Issue 15 (p. A26)		X			
Issue 16 (p. A27)		X			
Issue 17 (pp. A28-A30)		X			
Issue 18 (pp. A31-A34)		X			
Issue 21 (pp. A35-A46)		X			
Issue 22 (p. A47)					X
Issue 23 (p. A48)	X				
Issue 25 (p. A49-A50)					X
Issue 26 (p. A51)					X
Issue 27 (p. A52)		X			
Issue 28 (p. A53)		X			
Issues 30 and 31[96]	N/A	N/A	N/A	N/A	N/A

[95] Language is not needed for Issues 2, 7, and 8
[96] Staff is not recommending language for Issues 30 and 31

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?

Recommended Language: The recommended language below is applicable only to CLECs having existing ICAs with BellSouth.

Transition for DS1 and DS3 Loops

For purposes of this Section _, the Transition Period for the Embedded Base of DS1 and DS3 Loops and for the Excess DS1 and DS3 Loops is the twelve (12) month period beginning March 11, 2005 and ending March 10, 2006.

For purposes of this Section _, Embedded Base means DS1 and DS3 Loops that were in service for <<customer_short_name>> as of March 11, 2005, in those wire centers that, as of such date, met the criteria set forth in Section _. Subsequent disconnects or loss of End Users shall be removed from the Embedded Base.

Excess DS1 and DS3 Loops are those <<customer_short_name>> DS1 and DS3 Loops in service as of March 11, 2005, in excess of the caps set forth in Sections _ and _ below, respectively. Subsequent disconnects or loss of End Users shall be removed from Excess DS1 and DS3 Loops.

Notwithstanding anything to the contrary in this Agreement, and except as set forth in Section _, BellSouth shall make available DS1 and DS3 Loops only for <<customer_short_name>>'s Embedded Base during the Transition Period:

DS1 Loops to any Building served by a wire center containing 60,000 or more Business Lines and four (4) or more fiber-based collocators (DS1 Threshold).

DS3 Loops to any Building served by a wire center containing 38,000 or more Business Lines and four (4) or more fiber-based collocators (DS3 Threshold).

The initial list of wire centers (Initial Wire Center List) meeting the criteria set forth in Sections _ and _ above, is set forth in Exhibit _. As of the effective date of this Amendment, no self-certification in any wire center set forth in the Initial Wire Center List is permitted.

Transition Period Pricing. From March 11, 2005, through the completion of the Transition Period, BellSouth shall charge a rate for <<customer_short_name>>'s Embedded Base and <<customer_short_name>>'s Excess DS1 and DS3 Loops equal to the higher of:

115% of the rate paid for that element on June 15, 2004; or

115% of a new rate the Commission establishes, if any, between June 16, 2004 and March 11, 2005.

These rates shall be as set forth in Exhibit _.

The Transition Period shall apply only to (1) <<customer_short_name>>'s Embedded Base and (2) <<customer_short_name>>'s Excess DS1 and DS3 Loops. <<customer_short_name>> shall not add new DS1 or DS3 loops pursuant to this Agreement.

<<customer_short_name>> shall provide spreadsheets to BellSouth no later than March 10, 2006, identifying the specific DS1 and DS3 Loops, including the Embedded Base and Excess DS1 and DS3 Loops to be either (1) disconnected and transitioned to wholesale facilities obtained from other carriers or self-provisioned facilities; or (2) converted to other available UNE Loops or other wholesale facilities provided by BellSouth, including special access. For Conversions as defined in Section _, such spreadsheets shall take the place of an LSR or ASR. The Parties shall negotiate a project schedule for the Conversion of the Embedded Base and Excess DS1 and DS3 Loops. If a <<customer_short_name>> chooses to convert the DS1 and DS3 UNE Loops to special access circuits, BellSouth will include such DS1 and DS3 Loops once converted within <<customer_short_name>>'s total special access circuits and apply any discounts to which <<customer_short_name>> is entitled.

If <<customer_short_name>> submits the spreadsheet(s) for its Embedded Base and Excess DS1 and DS3 Loops on or before March 10, 2006, those identified circuits shall be subject to the Commission-approved switch-as-is conversion nonrecurring charges and no UNE disconnect charges.

If <<customer_short_name>> fails to submit the spreadsheet(s) for its Embedded Base and Excess DS1 and DS3 Loops on or before March 10, 2006, BellSouth will identify and transition such circuits to the equivalent wholesale services provided by BellSouth. Those circuits identified and transitioned by BellSouth pursuant to this Section shall be subject to all applicable UNE disconnect charges as set forth in this Agreement and the full nonrecurring charges for installation of the equivalent tariffed BellSouth service as set forth in BellSouth's tariffs.

For Embedded Base circuits and Excess DS1 and DS3 Loops converted, the applicable recurring tariff charge shall apply to each circuit as of March 11, 2006. The transition of the Embedded Base and Excess DS1 and DS3 Loops should be performed in a manner that avoids, or otherwise minimizes to the extent possible, disruption or degradation to <<customer_short_name>>'s customers' service.

Dark Fiber Loop

Dark Fiber Loop is an unused optical transmission facility, without attached signal regeneration, multiplexing, aggregation or other electronics, from the demarcation point at an End User's premises to the End User's serving wire center. Dark Fiber Loops may be strands of optical fiber existing in aerial or underground structure. BellSouth will not provide line terminating elements, regeneration or other electronics necessary for <<customer_short_name>> to utilize Dark Fiber Loops.

Transition for Dark Fiber Loop

For purposes of this Section _, the Transition Period for Dark Fiber Loops is the eighteen (18) month period beginning March 11, 2005 and ending September 10, 2006.

For purposes of this Section _, Embedded Base means Dark Fiber Loops that were in service for <<customer_short_name>> as of March 11, 2005. Subsequent disconnects or loss of End Users shall be removed from the Embedded Base.

During the Transition Period only, BellSouth shall make available for the Embedded Base Dark Fiber Loops for <<customer_short_name>> at the terms and conditions set forth in this Attachment.

Transition Period Pricing. From March 11, 2005, through the completion of the Transition Period, BellSouth shall charge a rate for <<customer_short_name>>'s Embedded Base of Dark Fiber Loops equal to the higher of:

115% of the rate paid for that element on June 15, 2004; or

115% of a new rate the Commission establishes, if any, between June 16, 2004 and March 11, 2005.

These rates shall be as set forth in Exhibit _.

The Transition Period shall apply only to <<customer_short_name>>'s Embedded Base and <<customer_short_name>> shall not add new Dark Fiber Loops pursuant to this Agreement.

Effective September 11, 2006, Dark Fiber Loops will no longer be made available pursuant to this Agreement.

<<customer_short_name>> shall provide spreadsheets to BellSouth no later than September 10, 2006, identifying the specific Dark Fiber Loops, to be either disconnected or converted to other BellSouth services. <<customer_short_name>> may transition from Dark Fiber Loops to other available wholesale facilities provided by BellSouth, including special access, wholesale facilities obtained from other carriers, or self-provisioned facilities. For Conversions as defined in Section _, such spreadsheets shall take the place of an LSR or ASR. The Parties shall negotiate a project schedule for the Conversion of the Embedded Base Dark Fiber Loops. If a <<customer_short_name>> chooses to convert the Dark Fiber UNE Loops to special access circuits, BellSouth will include such Dark Fiber Loops once converted within <<customer_short_name>>'s total special access circuits and apply any discounts to which <<customer_short_name>> is entitled.

If <<customer_short_name>> submits the spreadsheets specified in Section _ above for all of its Embedded Base on or before September 10, 2006, Conversions shall be subject to Commission-approved switch-as-is charges and no UNE disconnect charges.

If <<customer_short_name>> fails to submit the spreadsheet(s) specified in Section _ above for all of its Embedded Base on or before September 10, 2006, BellSouth will identify <<customer_short_name>>'s remaining Embedded Base, if any, and will transition such circuits to the equivalent tariffed BellSouth service(s). Those circuits identified and transitioned by BellSouth pursuant to this Section _ shall be subject to all applicable disconnect charges as set forth in this Agreement and the full nonrecurring charges for installation of the equivalent tariffed BellSouth service as set forth in BellSouth's tariffs.

For Embedded Base circuits converted or transitioned, the applicable recurring tariff charge shall apply to each circuit as of September 11, 2006. The transition of the Embedded Base circuits should be performed in a manner that avoids, or otherwise minimizes to the extent possible, disruption or degradation to <<customer_short_name>>'s customers' service.

Local Switching

Notwithstanding anything to the contrary in this Agreement, the services offered pursuant to this Section _ are limited to DS0 level Local Switching and BellSouth is not required to provide Local Switching pursuant to this Agreement except as set forth in Section _ below.

BellSouth shall not be required to unbundle local circuit switching for <<customer_short_name>> for a particular End User when <<customer_short_name>>: (1) serves an End User with four (4) or more voice-grade (DS0) equivalents or lines served by BellSouth in Zone 1 of the following MSAs: Miami, FL; Orlando, FL; and Ft. Lauderdale, FL; or (2) serves an End User with a DS1 or higher capacity Loop in any service area covered by this Agreement. To the extent that <<customer_short_name>> is serving any End User as described above as of the Effective Date of this Agreement, such End User's arrangement may not remain in place and such Arrangement must be terminated by <<customer_short_name>> or transitioned by <<customer_short_name>>, or BellSouth shall disconnect such Arrangements upon thirty (30) days notice.

Transition for Local Switching

For purposes of this Section _, the Transition Period for the Embedded Base of Local Switching is the twelve (12) month period beginning March 11, 2005 and ending March 10, 2006.

For the purposes of this Section _, Embedded Base shall mean Local Switching and any additional elements that are required to be provided in conjunction therewith that were in service for <<customer_short_name>> as of March 11, 2005. Subsequent disconnects or loss of End Users shall be removed from the Embedded Base.

During the Transition Period only, BellSouth shall make Local Switching available for the Embedded Base, in addition to all elements (signaling networks, call-related databases, and shared transport) that are required to be provided in conjunction with Local Switching, as such elements are defined at 47 C.F.R. §51.319(d)(4)(i), at the rates, terms and conditions set forth in Section _ and Exhibit _. The Transition Period shall apply only to <<customer_short_name>>'s Embedded Base and <<customer_short_name>> shall not place new orders for Local Switching pursuant to this Agreement.

Transition Period Pricing. From March 11, 2005, through the completion of the Transition Period, BellSouth shall charge a rate for <<customer_short_name>>'s Embedded Base of Local Switching equal to the higher of:

The rate at which during <<customer_short_name>> leased that combination of elements on June 15, 2004, plus on dollar; or

The rate the Commission established, if any, between June 16, 2004, and the effective date of the TRRO, plus one dollar.

These rates shall be as set forth in Exhibit _.

<<customer_short_name>> must submit orders, to disconnect or convert all of its Embedded Base of Local Switching to other BellSouth services as Conversions on or before March 10, 2006. <<customer_short_name>> may transition from these Local Switching elements to other available wholesale arrangements provided by BellSouth, wholesale facilities obtained from other carriers, or self-provisioned facilities. The Parties shall negotiate a project schedule for the Conversion of the Embedded Base of Local Switching.

If <<customer_short_name>> submits the spreadsheets specified in Section _ above for all of its Embedded Base on or before March 10, 2006, Conversions shall be subject to Commission-approved switch-as-is charges and no UNE disconnect charges.

If <<customer_short_name>> fails to submit orders to disconnect or convert all of its Embedded Base of Local Switching on or before March 10, 2006, BellSouth will identify <<customer_short_name>>'s remaining Embedded Base of Local Switching and will disconnect such Local Switching. Those circuits identified and disconnected by BellSouth shall be subject to the applicable UNE disconnect charges as set forth in this Agreement.

Effective March 11, 2006, Local Switching will no longer be made available pursuant to this Agreement.

The transition of the Embedded Base should be performed in a manner that avoids, or otherwise minimizes to the extent possible, disruption or degradation to <<customer_short_name>>'s customers' service.

Notwithstanding any other provision of this Agreement, BellSouth will only provide unbundled access to Common (Shared) Transport to the extent BellSouth is required to provide and is providing Local Switching to <<customer_short_name>>.

UNE-P

DS0 Local Switching, in combination with a Loop and Common (Shared) Transport (UNE-P) provides local exchange service for the origination or termination of calls. UNE-P supports the same local calling and feature requirements as described in the Local Switching section of this Attachment and the ability to presubscribe to a primary carrier for intraLATA toll service and/or to presubscribe to a primary carrier for interLATA toll service.

Notwithstanding anything to the contrary in this Agreement, BellSouth is not required to provide UNE-P pursuant to this Agreement except as set forth in this Section.

Transition Period for UNE-P

For purposes of this Section _, the Transition Period for UNE-P is the twelve (12) month period beginning March 11, 2005 and ending March 10, 2006.

For purposes of this Section _, Embedded Base shall mean UNE-P and any additional elements that are required to be provided in conjunction with UNE-P (signaling networks, call-related databases, and shared transport), as such elements are defined at 47 C.F.R. §51.319(d)(4)(i), that were in service for <<customer_short_name>> as of March 11, 2005. Subsequent disconnects or loss of End Users shall be removed from the Embedded Base.

During the Transition Period only, BellSouth shall make UNE-P available for the Embedded Base, in addition to all elements that are required to be provided in conjunction with UNE-P (signaling networks, call-related databases, and shared transport), as such elements are defined at 47 C.F.R. §51.319(d)(4)(i), at the rates, terms and conditions set forth in this Attachment. The Transition Period shall apply only to <<customer_short_name>>'s Embedded Base and <<customer_short_name>> shall not place new orders for UNE-P pursuant to this Agreement.

Transition Period Pricing. From March 11, 2005, through the completion of the Transition Period, BellSouth shall charge a rate for <<customer_short_name>>'s Embedded Base of Local Switching equal to the higher of:

The rate at which during <<customer_short_name>> leased that combination of elements on June 15, 2004, plus on dollar; or

The rate the Commission established, if any, between June 16, 2004, and the effective date of the TRRO, plus one dollar.

These rates shall be as set forth in Exhibit _.

<<customer_short_name>> must submit orders, or spreadsheets if converting to UNE Loops through the Bulk Migration process, to either disconnect or convert all of its Embedded Base of UNE-P to other BellSouth services as Conversions on or before March 10, 2006. <<customer_short_name>> may transition from these UNE-P arrangements to other available wholesale arrangements provided by BellSouth, wholesale facilities obtained from other carriers, or self-provisioned facilities. The Parties shall negotiate a project schedule for the Conversion of the Embedded Base of UNE-P.

If <<customer_short_name>> submits the spreadsheets specified in Section _ above for all of its Embedded Base on or before March 10, 2006, Conversions shall be subject to Commission-approved switch-as-is charges.

If <<customer_short_name>> fails to submit orders or spreadsheets converting all of the Embedded Base of UNE-P on or before March 10, 2006, BellSouth will identify <<customer_short_name>>'s remaining Embedded Base of UNE-P and will transition such UNE-P to resold BellSouth telecommunication services, as set forth in Attachment _. Those circuits identified and transitioned by BellSouth shall be subject to the applicable disconnect charges as set forth in this Agreement and the full nonrecurring charges for installation of such BellSouth services as set forth in BellSouth's tariffs.

For Embedded Base UNE-P converted or transitioned, the applicable recurring tariff charges shall apply as of March 11, 2006. The transition of the Embedded Base should be performed in a

manner that avoids, or otherwise, minimizes to the extent possible, disruption or degradation to <<customer_short_name>>'s customers' service.

Effective March 11, 2006, UNE-P will no longer be made available pursuant to this Agreement.

BellSouth shall make 911 updates in the BellSouth 911 database for <<customer_short_name>>'s UNE-P. BellSouth will not bill <<customer_short_name>> for 911 surcharges. <<customer_short_name>> is responsible for paying all 911 surcharges to the applicable governmental agency.

Dedicated Transport and Dark Fiber Transport

Dedicated Transport. Dedicated Transport is defined as BellSouth's transmission facilities between wire centers or switches owned by BellSouth, or between wire centers or switches owned by BellSouth and switches owned by <<customer_short_name>>, including but not limited to DS1, DS3 and OCn level services, as well as dark fiber, dedicated to <<customer_short_name>>. BellSouth shall not be required to provide access to OCn level Dedicated Transport under any circumstances pursuant to this Agreement. In addition, except as set forth in Section _, BellSouth shall not be required to provide to <<customer_short_name>> unbundled access to interoffice transmission facilities that do not connect a pair of wire centers or switches owned by BellSouth ("Entrance Facilities").

Transition for DS1 and DS3 Dedicated Transport Including DS1 and DS3 Entrance Facilities

For purposes of this Section _, the Transition Period for the Embedded Base of DS1 and DS3 Dedicated Transport, Embedded Base Entrance Facilities and for Excess DS1 and DS3 Dedicated Transport, is the twelve (12) month period beginning March 11, 2005 and ending March 10, 2006.

For purposes of this Section _, Embedded Base means DS1 and DS3 Dedicated Transport that were in service for <<customer_short_name>> as of March 11, 2005 in those wire centers that, as of such date, met the criteria set forth in Sections _ or _ below. Subsequent disconnects or loss of End Users shall be removed from the Embedded Base.

For purposes of this Section _, Embedded Base Entrance Facilities means Entrance Facilities that were in service for <<customer_short_name>> as of March 11, 2005. Subsequent disconnects or loss of customers shall be removed from the Embedded Base.

For purposes of this Section _, Excess DS1 and DS3 Dedicated Transport means those <<customer_short_name>> DS1 and DS3 Dedicated Transport facilities in service as of March 11, 2005, in excess of the caps set forth in Section _. Subsequent disconnects and loss of End Users shall be removed from Excess DS1 and DS3 Loops.

Notwithstanding anything to the contrary in this Agreement, BellSouth shall make available Dedicated Transport as described in this Section _ only for <<customer_short_name>>'s Embedded Base during the Transition Period:

DS1 Dedicated Transport where both wire centers at the end points of the route contain 38,000 or more Business Lines or four (4) or more fiber-based collocators. (Tier 1 Wire Center)

DS3 Dedicated Transport where both wire centers at the end points of the route contain 24,000 or more Business Lines or three (3) or more fiber-based collocators (Tier 2 Wire Center).

The initial list of wire centers (Initial Wire Center List) meeting the criteria set forth in Sections _ and _ above, is set forth in Exhibit _. As of the effective date of this Amendment, no self-certification in any wire center set forth in the Initial Wire Center List is permitted.

Notwithstanding anything to the contrary in this Agreement, BellSouth shall make available Entrance Facilities only for <<<customer_short_name>>'s Embedded Base Entrance Facilities and only during the Transition Period.

Transition Period Pricing. From March 11, 2005, through the completion of the Transition Period, BellSouth shall charge a rate for <<customer_short_name>>'s Embedded Base of DS1 and DS3 Dedicated Transport and for <<customer_short_name>>'s Excess DS1 and DS3 Dedicated Transport, as described in this Section _, equal to the higher of:

115% of the rate paid for that element on June 15, 2004; or

115% of a new rate the Commission establishes, if any, between June 16, 2004 and March 11, 2005.

These rates shall be as set forth in Exhibit _.

From March 11, 2005, through the completion of the Transition Period, BellSouth shall charge a rate for <<customer_short_name>>'s Embedded Base Entrance Facilities as set forth in Exhibit _.

The Transition Period shall apply only to (1) <<customer_short_name>>'s Embedded Base circuits and Embedded Base Entrance Facilities; and (2) <<customer_short_name>>'s Excess DS1 and DS3 Dedicated Transport. <<customer_short_name>> shall not add new Entrance Facilities pursuant to this Agreement. Further, <<customer_short_name>> shall not add new DS1 or DS3 Dedicated Transport as described in this Section _ pursuant to this Agreement.

A wire center listed on the Initial Wire Center List exceeds either of the thresholds set forth in Sections _ or _. No further DS1 Dedicated Transport Unbundling will be required from that wire center to other Tier 1 wire centers.

A wire center listed on the Initial Wire Center List exceeds either of the thresholds set forth in Sections _ or _. No further DS3 Dedicated Transport unbundling will be required from that wire center to Tier 1 or Tier 2 wire centers.

No later than March 10, 2006 <<customer_short_name>> shall submit spreadsheet(s) identifying all of the Embedded Base circuits, Embedded Base Entrance Facilities, and Excess DS1 and DS3 Dedicated Transport to be either disconnected or converted to other BellSouth services pursuant to Section _. <<customer_short_name>> may transition from these DS1 and DS3 Dedicated

Transport, Entrance Facilities, and Excess DS1 and DS3 Dedicated Transport arrangements to other available wholesale arrangements provided by BellSouth, wholesale facilities obtained from other carriers, or self-provisioned facilities. For Conversions as defined in Section _, such spreadsheet shall take the place of an LSR or ASR. If a <<customer_short_name>> chooses to convert the DS1 and DS3 UNE Dedicated Transport circuits or UNE Entrance Facilities to special access circuits, BellSouth will include such DS1 and DS3 UNE Dedicated Transport circuits and UNE Entrance Facilities once converted within <<customer_short_name>>'s total special access circuits and apply any discounts to which <<customer_short_name>> is entitled. The Parties shall negotiate a project schedule for the Conversion of the Embedded Base, Embedded Base Entrance Facilities, and Excess DS1 and DS3 Dedicated Transport.

If <<customer_short_name>> submits the spreadsheets specified in Section _ above for all of its Embedded Base on or before March 10, 2006, Conversions shall be subject to Commission-approved switch-as-is charges.

If <<customer_short_name>> fails to submit the spreadsheet(s) specified in Section _ above for all of its Embedded Base circuits, Embedded Base Entrance Facilities and Excess DS1 and DS3 Dedicated Transport on or before March 10, 2006, BellSouth will identify <<customer_short_name>>'s remaining Embedded Base circuits, Embedded Base Entrance Facilities and Excess DS1 and DS3 Dedicated Transport, if any, and will transition such circuits to the equivalent tariffed BellSouth service(s). Those circuits identified and transitioned by BellSouth shall be subject to all applicable disconnect charges as set forth in this Agreement and the full nonrecurring charges for installation of the equivalent tariffed BellSouth service as set forth in BellSouth's tariffs.

For Embedded Base circuits, Embedded Base Entrance Facilities and Excess DS1 and DS3 Dedicated Transport converted or transitioned, the applicable recurring tariff charge shall apply to each circuit as of March 11, 2006. The transition of the Embedded Base, Embedded Base Entrance Facilities and Excess DS1 and DS3 Dedicated Transport should be performed in a manner that avoids, or otherwise, minimizes to the extent possible, disruption or degradation to <<customer_short_name>>'s customers' service.

Dark Fiber Transport. Dark Fiber Transport is defined as Dedicated Transport that consists of unactivated optical interoffice transmission facilities without attached signal regeneration, multiplexing, aggregation or other electronics. Except as set forth in Section _ below, BellSouth shall not be required to provide access to Dark Fiber Transport Entrance Facilities pursuant to this Agreement.

Transition for Dark Fiber Transport and Dark Fiber Transport Entrance Facilities

For purposes of this Section _, the Transition Period for the Embedded Base Dark Fiber Transport and Embedded Base Dark Fiber Entrance Facilities is the eighteen (18) month period beginning March 11, 2005 and ending September 10, 2006.

For purposes of this Section _, Embedded Base means Dark Fiber Transport that was in service for <<customer_short_name>> as of March 11, 2005 in those wire centers that, as of such date,

met the criteria set forth in _. Subsequent disconnects or loss of End Users shall be removed from the Embedded Base.

For purposes of this Section _, Embedded Base Dark Fiber Entrance Facilities means Fiber Entrance Facilities that were in service for <<customer_short_name>> as of March 11, 2005 in those wire centers that, as of such date, met the criteria set forth in _. Subsequent disconnects or loss of End Users shall be removed from the Embedded Base.

Notwithstanding anything to the contrary in this Agreement, BellSouth shall make available Dark Fiber Transport as described in this Section X only for <<customer_short_name>>'s Embedded Base during the Transition Period:

Dark Fiber Transport where both wire centers at the end points of the route contain twenty-four thousand (24,000) or more Business Lines or three (3) or more fiber-based collocators. (Tier 2 Wire Center)

The initial list of wire centers (Initial Wire Center List) meeting the criteria set forth in Sections _ and _ above, is set forth in Exhibit _. As of the effective date of this Amendment, no self-certification in any wire center set forth in the Initial Wire Center List is permitted.

Transition Period Pricing. From March 11, 2005, through the completion of the Transition Period, BellSouth shall charge a rate for <<customer_short_name>>'s Embedded Base and Embedded Base Dark Fiber Entrance Facilities shall be equal to the higher of:

115% of the rate paid for that element on June 15, 2004; or

115% of a new rate the Commission establishes, if any, between June 16, 2004 and March 11, 2005.

These rates shall be as set forth in Exhibit _.

From March 11, 2005, through the completion of the Transition Period, BellSouth shall charge a rate for <<customer_short_name>>'s Embedded Base Entrance Facilities as set forth in Exhibit _.

The Transition Period shall apply only to <<customer_short_name>>'s Embedded Base of Dark Fiber Transport and Dark Fiber Entrance Facilities. <<customer_short_name>> shall not add new Dark Fiber Transport as described in this Section X. <<customer_short_name>> shall not add new Dark Fiber Entrance Facilities pursuant to this Agreement.

Wire Centers listed on the Initial List exceed the threshold set forth in Section _. BellSouth will not be required to provide <<customer_short_name>> future access to Dark Fiber Transport from those wire centers.

No later than September 10, 2006 <<customer_short_name>> shall submit spreadsheet(s) identifying all of the Embedded Base of Dark Fiber Transport and Dark Fiber Entrance Facilities to be either disconnected or converted to other BellSouth services as Conversions pursuant to Section _. <<customer_short_name>> may transition from these Dark Fiber Transport and Dark

Fiber Entrance Facilities to other available wholesale arrangements provided by BellSouth, wholesale facilities obtained from other carriers, or self-provisioned facilities. For Conversions as defined in Section _, such spreadsheet shall take the place of an LSR or ASR. If a <<customer_short_name>> chooses to convert the Dark Fiber UNE Transport circuits and Dark Fiber Entrance Facilities to special access circuits, BellSouth will include such Dark Fiber UNE Transport circuits and Dark Fiber UNE Entrance Facilities once converted within <<customer_short_name>>'s total special access circuits and apply any discounts to which <<customer_short_name>> is entitled. The Parties shall negotiate a project schedule for the Conversion of the Embedded Base of Dark Fiber Transport and Dark Fiber Entrance Facilities.

If <<customer_short_name>> submits the spreadsheets specified in Section _ for all of its Embedded Base of Dark Fiber Transport and Dark Fiber Entrance Facilities on or before September 10, 2006, Conversions shall be subject to Commission-approved switch-as-is charges.

If <<customer_short_name>> fails to submit the spreadsheet(s) for all of its Embedded Base of Dark Fiber Transport and Dark Fiber Entrance Facilities prior to September 10, 2006, BellSouth will identify <<customer_short_name>>'s remaining Embedded Base of Dark Fiber Transport and Dark Fiber Entrance Facilities, if any, and will transition such circuits to the equivalent tariffed BellSouth service(s). Those circuits identified and transitioned by BellSouth shall be subject to all applicable UNE disconnect charges as set forth in this Agreement and the full nonrecurring charges for installation of the equivalent tariffed BellSouth service as set forth in BellSouth's tariffs.

For Embedded Base Dark Fiber Transport and Embedded Base Dark Fiber Entrance Facilities converted or transitioned, the applicable recurring tariff charge shall apply to each circuit as of September 11, 2006. The transition of the Embedded Base Dark Fiber Transport and Embedded Base Dark Fiber Entrance Facilities should be performed in a manner that avoids, or otherwise, minimizes to the extent possible, disruption or degradation to <<customer_short_name>>'s customers' service.

Conversion of Wholesale Services to Network Elements or Network Elements to Wholesale Services

Upon request, BellSouth shall convert a wholesale service, or group of wholesale services, to the equivalent Network Element or Combination that is available to <<customer_short_name>> pursuant to Section 251 of the Act and under this Agreement or convert a Network Element or Combination that is available to <<customer_short_name>> pursuant to Section 251 of the Act and under this Agreement to an equivalent wholesale service or group of wholesale services offered by BellSouth (collectively "Conversion"). BellSouth shall charge the applicable nonrecurring Commission-approved switch-as-is rates for Conversions to specific Network Elements or Combinations found in Exhibit _. BellSouth shall also charge the same nonrecurring switch-as-is rates when converting from Network Elements or Combinations. Any rate change resulting from the Conversion will be effective as of the next billing cycle following BellSouth's receipt of a complete and accurate Conversion request from <<customer_short_name>>. Any change from a wholesale service/group of wholesale services to a Network Element/Combination, or from a Network Element/Combination to a wholesale service/group of wholesale services, that requires a physical rearrangement will not be

considered to be a Conversion for purposes of this Agreement. BellSouth will not require physical rearrangements if the Conversion can be completed through record changes only. Orders for Conversions will be handled in accordance with the guidelines set forth in the Ordering Guidelines and Processes and CLEC Information Packages.

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?

(v) Business Line
(vi) Fiber-Based Collocation
(vii) Building
(viii) Route

Recommended Language:

Loops/Transport

Language to implement BellSouth's obligation to provide § 251 unbundled access to high capacity loops and dedicated transport is included under Issue 1.

(i) Business Line

For purposes of this Attachment __, a "Business Line" is, as defined in 47 C.F.R. § 51.5, a BellSouth-owned switched access line used to serve a business customer, whether by BellSouth itself or by a CLEC that leases the line from BellSouth. The number of business lines in a wire center shall equal the sum of all BellSouth business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with BellSouth end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

(ii) Fiber-Based Collocation

For purposes of this Attachment __ a "Fiber-Based Collocator" is, as defined in 47 C.F.R. § 51.5, any carrier, unaffiliated with BellSouth, that maintains a collocation arrangement in a BellSouth wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the BellSouth wire center premises; and (3) is owned by a party other than BellSouth or any affiliate of BellSouth, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.

(iii) Building

For purposes of this Attachment __, a "Building" is a permanent physical structure including, but not limited to, a structure in which people reside, or conduct business or work on a daily basis

and through which there is one centralized point of entry in the structure through which all telecommunications services must transit. As an example only, a high rise office building with a general telecommunications equipment room through which all telecommunications services to that building's tenants must pass would be a single "building" for purposes of this Attachment __. Two or more physical areas served by individual points of entry through which telecommunications services must transit will be considered separate buildings. For instance, a strip mall with individual businesses obtaining telecommunication services from different access points on the building(s) will be considered individual buildings, even though they might share common walls.

(iv) Route

The definition of a route is included under Issue 1.

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)?

Recommended Language:

Procedures For Additional Designations Of "Non-Impaired" Wire Centers

If BellSouth seeks to designate additional wire centers as "non-impaired" for purposes of the FCC's Triennial Review Remand Order (TRRO), BellSouth will post a Carrier Notification Letter (CNL) designating any new (additional) "non-impaired" wire centers ("subsequent wire centers"). The list of additional "non-impaired" wire centers as designated by BellSouth will reflect the number of Business Lines, as of December 31 of the previous year, and will also reflect the number of fiber-based collocators in each subsequent wire center on the list at the time of BellSouth's designation.

Designation by BellSouth of additional "non-impaired" wire centers will be based on the following criteria:

a. The CLLI of the wire center.
b. The number of switched business lines served by BellSouth in that wire center based upon data as reported in ARMIS 43-08 for the previous year.
c. The sum of all UNE Loops connected to each wire center, including UNE Loops provisioned in combination with other elements.
d. A completed worksheet that shows, in detail, any conversion of access lines to voice grade equivalents.
e. The names of any carriers relied upon as fiber-based collocators.

BellSouth and CLEC agree to resolve disputes concerning BellSouth's additional wire center designations in dispute resolution proceedings before the Commission.

The initial wire center list is shown below.

WIRE CENTER	BUSINESS LINES	FIBER-BASED COLLOCATION	TRANSPORT TIER	LOOP UNBUNDLING
MIAMFLPL	86,923	>4	1	No DS1/3
MIAMFLGR	68,580	>4	1	No DS1/3
ORLDFLMA	57,966	>4	1	No DS3
FTLDFLMR	55,881	>4	1	No DS3
GSVLFLMA	55,681	4	1	No DS3
ORLDFLPC	45,792	>4	1	No DS3
MIAMFLHL	43,021	>4	1	No DS3
JCVLFLCL	42,452	>4	1	No DS3
MIAMFLAE	41,912	>4	1	No DS3
BCRTFLMA	40,746	>4	1	No DS3
PRRNFLMA	37,969	3	2	
HLWDFLPE	37,415	4	1	
WPBHFLHH	36,053	3	2	
HLWDFLWH	34,022	--	2	
PMBHFLMA	33,993	4	1	
WPBHFLAN	33,521	4	1	
ORLDFLPH	33,148	4	1	
MLBRFLMA	32,547	4	1	
DYBHFLMA	32,282	>4	1	
FTLDFLCY	31,487	4	1	
ORLDFLAP	31,234	3	2	
PNSCFLFP	30,863	--	2	
FTLDFLPL	29,469	>4	1	
FTLDFLJA	29,209	>4	1	
PNSCFLBL	28,685	4	1	
BCRTFLBT	26,601	--	2	
WPBHFLGR	26,527	3	2	
ORLDFLSA	26,126	>4	1	
PMBHFLFE	25,909	4	1	
STRTFLMA	25,577	--	2	
WPBHFLGA	24,885	--	2	
MIAMFLRR	24,740	3	2	
DRBHFLMA	24,695	1	2	
MIAMFLBR	24,482	--	2	
MIAMFLPB	24,380	4	1	
JCVLFLSJ	24,088	3	2	
MIAMFLSO	23,802	3	2	
MIAMFLWM	23,310	4	1	
FTLDFLOA	23,008	>4	1	
MIAMFLCA	22,645	3	2	
ORLDFLCL	20,828	>4	1	

WIRE CENTER	BUSINESS LINES	FIBER-BASED COLLOCATION	TRANSPORT TIER	LOOP UNBUNDLING
WPBHFLRB	20,393			
MNDRFLLO	20,180	3	2	
SNFRFLMA	20,140			
NDADFLGG	18,239	>4	1	
COCOFLMA	18,097	4	1	
JCVLFLSM	17,820	>4	1	
BYBHFLMA	17,675			
DLBHFLMA	17,230			
WPBHFLLE	13,622	3	2	
JCVLFLAR	13,101			
MIAMFLBA	11,560			

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

Recommended Language:

2-wire or 4-wire HDSL-Compatible Loop. This is a designed Loop that meets Carrier Serving Area (CSA) specifications, may be up to 12,000 feet long and may have up to 2,500 feet of bridged tap (inclusive of Loop length). It may be a 2-wire or 4-wire circuit and will come standard with a test point, OC, and a DLR.

4-wire Unbundled DS1 Digital Loop.

This is a designed 4-wire Loop that is provisioned according to industry standards for DS1 or Primary Rate ISDN services and will come standard with a test point, OC, and a DLR. A DS1 Loop may be provisioned over a variety of loop transmission technologies including copper, HDSL-based technology or fiber optic transport systems. It will include a 4-wire DS1 Network Interface at the End User's location. For purposes of this Agreement, including the transition of DS1 and DS3 Loops described in Section XXX above, DS1 Loops include 2-wire and 4-wire HDSL Compatible Loops.

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?

Recommended Language:

(a) The following language is recommended only for CLECs with existing ICAs with BellSouth. Except to the extent expressly provided otherwise in this Attachment, <<customer_short_name>> may not maintain unbundled network elements or combinations of unbundled network elements, that are no longer offered pursuant to this Agreement (collectively "Arrangements"). In the event BellSouth determines that <<customer_short_name>> has in place any Arrangements after the Effective Date of this Agreement, BellSouth will provide <<customer_short_name>> with thirty (30) calendar days written notice to disconnect or convert such Arrangements. Those circuits identified by <<customer_short_name>> within such thirty (30) day period shall be subject to Commission-approved switch-as-is rates with no UNE disconnect charges. If <<customer_short_name>> fails to submit orders to disconnect or convert such Arrangements within such thirty (30)-day period, BellSouth will transition such circuits to the equivalent tariffed BellSouth service(s). Those circuits identified and transitioned by BellSouth shall be subject to all applicable UNE disconnect charges as set forth in this Agreement and the full nonrecurring charges for installation of the equivalent tariffed BellSouth service as set forth in BellSouth's tariffs. The applicable recurring tariff charges shall apply to each circuit beginning the day following the thirty (30)-day notice period.

(b) Modifications and Updates to the Wire Center List and Subsequent Transition Periods

The language below is applicable both to existing and new ICAs.

Self-Certification. Prior to submitting an order pursuant to this Agreement for high capacity (DS1 or above) Dedicated Transport or high capacity Loops, <<customer_short_name>> shall undertake a reasonably diligent inquiry to determine whether <<customer_short_name>> is entitled to unbundled access to such Network Elements in accordance with the terms of this Agreement. By submitting any such order, <<customer_short_name>> self-certifies that to the best of <<customer_short_name>>'s knowledge, the high capacity Dedicated Transport or high capacity Loop requested is available as a Network Element pursuant to this Agreement. Upon receiving such order, BellSouth shall process the request in reliance upon <<customer_short_name>>'s self-certification. To the extent BellSouth believes that such request does not comply with the terms of this Agreement, BellSouth shall seek dispute resolution in accordance with the General Terms and Conditions of this Agreement. In the event such dispute is resolved in BellSouth's favor, BellSouth shall bill <<customer_short_name>> the difference between the rates for such circuits pursuant to this Agreement and the applicable nonrecurring and recurring charges for the equivalent tariffed service from the date of

installation to the date the circuit is transitioned to the equivalent tariffed service. Within thirty (30) calendar days following a decision finding in BellSouth's favor, <<customer_short_name>> shall submit a spreadsheet identifying those non-compliant circuits to be transitioned to tariffed services or disconnected.

DS1 or DS3 loops, or Dedicated Transport in Wire Centers that Meet the TRRO Non-Impaired Criteria in the Future

In the event BellSouth identifies additional wire centers that meet the criteria set forth in Section _, but that were not included in the Initial Wire Center List, BellSouth shall include such additional wire centers in a carrier notification letter (CNL). Each such list of additional wire centers shall be considered a "Subsequent Wire Center List."

Effective thirty (30) calendar days after the date of a BellSouth CNL providing a Subsequent Wire Center List, BellSouth shall not be required to unbundle new DS1 or DS3 Loops, or transport, as applicable, in such additional wire center(s), except pursuant to the self-certification process.

BellSouth shall make available de-listed DS1 and DS3 Loops and transport that were in service for <<customer_short_name>> in a de-listed wire center on the Subsequent Wire Center List as of the thirtieth (30^{th}) calendar day after the date of BellSouth's CNL identifying the Subsequent Wire Center List (Subsequent Embedded Base) until one hundred and eighty (180) calendar days after the thirtieth (30th) calendar day from the date of BellSouth's CNL identifying the Subsequent Wire Center List (Subsequent Transition Period).

Subsequent disconnects or loss of End Users shall be removed from the Subsequent Embedded Base.

The rates that shall apply to the Subsequent Embedded Base throughout the entire Subsequent Transition Period. The rates shall equal the rate paid for that element at the time of the CNL posting, plus 15%.

No later than one hundred and eighty (180) calendar days from BellSouth's CNL identifying the Subsequent Wire Center List, <<customer_short_name>> shall submit a spreadsheet(s) identifying the Subsequent Embedded Base of circuits to be disconnected or converted to other BellSouth services. For Conversions as defined in Section _, such spreadsheets shall take the place of an LSR or ASR. The Parties shall negotiate a project schedule for the Conversion of the Subsequent Embedded Base of circuits. If a <<customer_short_name>> chooses to convert the de-listed DS1 and DS3 Loops and Transport to special access circuits, BellSouth will include such de-listed DS1 and DS3 Loops and Transport once converted within <<customer_short_name>>'s total special access circuits and apply any discounts to which <<customer_short_name>> is entitled. The Parties shall negotiate a project schedule for the Conversion of the Subsequent Embedded Base.

If <<customer_short_name>> submits the spreadsheet(s) for its Subsequent Embedded Base by one hundred and eighty (180) calendar days from BellSouth's CNL identifying the Subsequent Wire Center List, those identified circuits shall be subject to the Commission-approved switch-as-is conversion nonrecurring charges.

If <<customer_short_name>> fails to submit the spreadsheet(s) for all of its Subsequent Embedded Base by one hundred and eighty (180) calendar days after the date of BellSouth's CNL identifying the Subsequent Wire Center List, BellSouth will identify <<customer_short_name>>'s remaining Subsequent Embedded Base, if any, and will transition such circuits to the equivalent tariffed BellSouth service(s). Those circuits identified and transitioned by BellSouth shall be subject to the applicable disconnect charges as set forth in this Agreement and the full nonrecurring charges for installation of the equivalent tariffed BellSouth service as set forth in BellSouth's tariffs.

For Subsequent Embedded Base circuits converted or transitioned, the applicable recurring tariff charges shall apply on the first day after the end of the Subsequent Transition Period. The transition of the Subsequent Embedded Base circuits should be performed in a manner that avoids, or otherwise minimizes to the extent possible, disruption or degradation to <<customer_short_name>>'s customers' service.

Dark Fiber Transport in Wire Centers that Meet the TRRO Non-Impaired Criteria in the Future

In the event BellSouth identifies additional wire centers that meet the criteria set forth in Section _ above, but that were not included in the Initial Wire Center List, BellSouth shall include such additional wire centers in a CNL. Each such list of additional wire centers shall be considered a "Subsequent Wire Center List."

Effective thirty (30) calendar days after the date of a BellSouth CNL providing a Subsequent Wire Center List, BellSouth shall not be required to unbundle new Dark Fiber Transport, as applicable, in such additional wire center(s), except pursuant to the self-certification process as set forth in Section _ above.

For purposes of Section _, BellSouth shall make available dark fiber transport that was in service for <<customer_short_name>> in a wire center on the Subsequent Wire Center List as of the thirtieth (30^{th}) calendar day after the date of BellSouth's CNL identifying the Subsequent Wire Center List (Subsequent Embedded Base) until two hundred and seventy (270) calendar days after the thirtieth (30th) calendar day from the date of BellSouth's CNL identifying the Subsequent Wire Center List (Subsequent Transition Period).

Subsequent disconnects or loss of End Users shall be removed from the Subsequent Embedded Base.

The rates that shall apply to the Subsequent Embedded Base throughout the entire Subsequent Transition Period. The rates shall equal the rate paid for that element at the time of the CNL posting, plus 15%.

No later than two hundred and seventy (270) calendar days from BellSouth's CNL identifying the Subsequent Wire Center List <<customer_short_name>> shall submit a spreadsheet(s) identifying the Subsequent Embedded Base of circuits to be disconnected or converted to other BellSouth services. For Conversions as defined in Section _, such spreadsheets shall take the place of an LSR or ASR. The Parties shall negotiate a project schedule for the Conversion of the Subsequent Embedded Base of circuits. If a <<customer_short_name>> chooses to convert the Dark Fiber Transport to special access circuits, BellSouth will include such Dark Fiber Transport once converted within <<customer_short_name>>'s total special access circuits and apply any

discounts to which <<customer_short_name>> is entitled. The Parties shall negotiate a project schedule for the Conversion of the Subsequent Embedded Base.

If <<customer_short_name>> submits the spreadsheet(s) for its Subsequent Embedded Base within two hundred and seventy (270) calendar days from BellSouth's CNL identifying the Subsequent Wire Center List, those identified circuits shall be subject to the Commission-approved switch-as-is conversion nonrecurring charges are applicable

If <<customer_short_name>> fails to submit the spreadsheet(s) for all of its Subsequent Embedded Base within two hundred and seventy (270) calendar days after the date of BellSouth's CNL identifying the Subsequent Wire Center List, BellSouth will identify <<customer_short_name>>'s remaining Subsequent Embedded Base, if any, and will transition such circuits to the equivalent tariffed BellSouth service(s). Those circuits identified and transitioned by BellSouth shall be subject to the applicable disconnect charges as set forth in this Agreement and the full nonrecurring charges for installation of the equivalent tariffed BellSouth service as set forth in BellSouth's tariffs.

For Subsequent Embedded Base circuits converted or transitioned, the applicable recurring tariff charges shall apply on the first day after the end of the Subsequent Transition Period. The transition of the Subsequent Embedded Base circuits should be performed in a manner that avoids, or otherwise, minimizes to the extent possible, disruption or degradation to <<customer_short_name>>'s customers' service.

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

Recommended Language:

CLEC may purchase and use Network Elements and Other Services from BellSouth in accordance with 47 C.F.R §51.309. Performance Measurements associated with this Attachment 2 are contained in Attachment ___. The quality of the Network Elements provided pursuant to §251, as well as the quality of the access to said Network Elements that BellSouth provides to CLEC, shall be, to the extent technically feasible, at least equal to that which BellSouth provides to itself, and its affiliates.

The Parties shall comply with the requirements as set forth in the technical references within this Attachment 2. BellSouth shall comply with the requirements set forth in the technical reference TR73400, as well as any performance or other requirements identified in this Agreement, to the extent that they are consistent with the greater of BellSouth's actual performance or applicable industry standards. If one or more of the requirements set forth in this Agreement are in conflict, the technical reference TR73600 requirements shall apply. If the parties cannot reach agreement, the dispute resolution process set forth in the General Terms and Conditions of this Agreement shall apply.

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)?

Recommended Language:

Commingling of Services

Commingling means the connecting, attaching, or otherwise linking of a Network Element, or a Combination, to one or more Telecommunications Services or facilities that CLEC has obtained at wholesale from BellSouth, or the combining of a Network Element or Combination with one or more such wholesale Telecommunications Services or facilities. The wholesale services that can be commingled with Network Elements or a Combination include network elements required to be unbundled under Section 271. CLEC must comply with all rates, terms or conditions applicable to such wholesale Telecommunications Services or facilities.

Subject to the limitations set forth elsewhere in this Attachment, BellSouth shall not deny access to a Network Element or a Combination on the grounds that one or more of the elements: 1) is connected to, attached to, linked to, or combined with such a facility or service obtained from BellSouth; or 2) shares part of BellSouth's network with access services or inputs for mobile wireless services and/or interexchange services.

Unless expressly prohibited by the terms of this Attachment, BellSouth shall permit CLEC to Commingle an unbundled Network Element or a Combination of unbundled Network Elements with wholesale services obtained from BellSouth. For purposes of example only, CLEC may Commingle unbundled Network Elements or Combinations of unbundled Network Elements with wholesale services including switched and special access services, or services purchased under resale arrangements with BellSouth.

Unless otherwise agreed to by the Parties, the Network Element portion of a commingled circuit will be billed at the rates set forth in this Agreement and the remainder of the circuit or service will be billed in accordance with BellSouth's tariffed rates or rates set forth in that separate agreement.

When multiplexing equipment is attached to a commingled arrangement, the multiplexing equipment will be billed from the same agreement or the tariff as the higher bandwidth circuit. Central Office Channel Interfaces (COCI) will be billed from the same agreement or tariff as the lower bandwidth circuit.

Terms and conditions for order cancellation charges and Service Date Advancement Charges will apply in accordance with Attachment 6 and are incorporated herein by this reference. The charges shall be as set forth in Exhibit A.

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?

Recommended Language:

Conversion of Wholesale Services to Network Elements or Network Elements to Wholesale Services

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

Any outstanding conversions shall be effective on or after the effective date of this agreement.

Ordering Guidelines and Processes

For information regarding Ordering Guidelines and Processes for various Network Elements, Combinations and Other Services, CLEC should refer to the "Guides" section of the BellSouth Interconnection Web site.

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

The provisioning of Network Elements, Combinations and Other Services to CLEC's Collocation Space will require cross-connections within the central office to connect the Network Element, Combinations or Other Services to the demarcation point associated with CLEC's Collocation Space. These cross-connects are separate components that are not considered a part of the Network Element, Combinations or Other Services and, thus, have a separate charge pursuant to this Agreement.

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?

Recommended Language:

Any pending conversions shall be effective on the effective date of this agreement.

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 TI.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 TI .601.

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

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.

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

Recommended Language:

Line Splitting

Line splitting shall mean that <<customer_short_name>> purchases a whole loop and provides the splitter to provide voice and data services through an arrangement with a third party CLEC, who is either the provider of data services (Data CLEC) or the provider of voice services (Voice CLEC), to deliver voice and data service to End Users over the same Loop. The Voice CLEC and Data CLEC are different carriers, with <<customer_short_name>> being either the Voice CLEC or Data CLEC.

Line Splitting – UNE-L. In the event <<customer_short_name>> provides its own switching or obtains switching from a third party, <<customer_short_name>> may engage in line splitting arrangements with another CLEC using a splitter, provided by <<customer_short_name>>, in a Collocation Space at the central office where the loop terminates into a distribution frame or its equivalent.

Line Splitting –Loop and UNE Port (UNE-P)

To the extent <<customer_short_name>> is purchasing UNE-P pursuant to this Agreement, BellSouth will permit <<customer_short_name>> to replace UNE-P with Line Splitting. The UNE-P arrangement will be converted to a stand-alone Loop, a Network Element switch port, two (2) collocation cross-connects and the high frequency spectrum line activation. The resulting arrangement shall continue to be included in <<customer_short_name>>'s Embedded Base as described in Section XXX below.

<<customer_short_name>> shall provide BellSouth with a signed LOA between it and the third party CLEC (Data **C**LEC or Voice CLEC) with which it desires to provision Line Splitting services, where <<customer_short_name>> will not provide voice and data services.

Line Splitting arrangements in service pursuant to this Section XXX must be disconnected or provisioned pursuant to Section XXX above on or before March 10, 2006.

Provisioning Line Splitting and Splitter Space – UNE-P

<<customer_short_name>> or BellSouth may provide the splitter. When <<customer_short_name>> or its authorized agent owns the splitter, Line Splitting requires the following: a non-designed analog Loop from the serving wire center to the NID at the End User's location; a collocation cross-connection connecting the Loop to the collocation space; a second collocation cross-connection from the collocation space connected to a voice port; the high frequency spectrum line activation, and a splitter. When BellSouth owns the splitter, Line Splitting requires the following: a non-designed analog Loop from the serving wire center to the NID at the End User's location with CFA and splitter port assignments, and a collocation cross-connection from the collocation space connected to a voice port.

An unloaded 2-wire copper Loop must serve the End User. The meet point for the Voice CLEC and the Data CLEC is the point of termination on the MDF for the Data CLEC's cable and pairs.

The foregoing procedures are applicable to migration from a UNE-P arrangement to Line Splitting Service.

Provisioning Line Splitting and Splitter Space – UNE-L

<<customer_short_name**>>** provides the splitter when providing Line Splitting with UNE-L. When <<customer_short_name>> or its authorized agent owns the splitter, Line Splitting requires the following: a loop from NID at the End User's location to the serving wire center and terminating into a distribution frame or its equivalent.

CLEC Provided Splitter – Line Splitting – UNE-P and UNE-L

To order High Frequency Spectrum on a particular Loop, <<customer_short_name>> or its authorized agent must have a DSLAM collocated in the central office that serves the End User of such Loop.

<<customer_short_name>> or its authorized agent may purchase, install and maintain central office POTS splitters in its collocation arrangements. <<customer_short_name>> or its authorized agent may use such splitters for access to its customers and to provide digital line subscriber services to its customers using the High Frequency Spectrum. Existing Collocation rules and procedures and the terms and conditions relating to Collocation set forth in Attachment 4-Central Office shall apply.

Any splitters installed by <<customer_short_name>> or its authorized agent in its collocation arrangement shall comply with ANSI T1.413, Annex E, or any future ANSI splitter Standards. <<customer_short_name>> or its authorized agent may install any splitters that BellSouth deploys or permits to be deployed for itself or any BellSouth affiliate.

Maintenance – Line Splitting – UNE-P and UNE-L

BellSouth will be responsible for repairing voice troubles and the troubles with the physical loop between the NID at the End User's premises and the termination point.

BellSouth must make all necessary network modifications, including providing nondiscriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements. BellSouth may use existing state commission collaboratives and change management processes to address OSS modifications that are necessary to support line splitting.

Indemnity

<<customer_short_name>> shall indemnify, defend and hold harmless BellSouth from and against any Claims, Losses, and Costs, which arise out of actions related to the other service provider (i.e., CLEC party to the line splitting arrangement

who is not <<customer_short_name>>), except to the extent caused by BellSouth's gross negligence or willful misconduct.

PROVIDED, HOWEVER, that all amounts advanced in respect of such Claims, Losses and Costs shall be repaid to <<customer_short_name>> by BellSouth if it shall ultimately be determined in a final judgment without further appeal by a court of appropriate jurisdiction that BellSouth is not entitled to be indemnified for such Claims, Losses and Costs because the Claims, Losses and Costs arose as a result of BellSouth's gross negligence or willful misconduct.

BellSouth will indemnify, defend and hold harmless <<customer_short_name>> from and against any Claims, Losses, and Costs, which arise out of actions related to the other service provider (i.e., CLEC party to the line splitting arrangement who is not <<customer_short_name>>) brought against <<customer_short_name>> to the extent such Claim alleges that the cause of Claim, Loss and Cost was the result of BellSouth's gross negligence or willful misconduct.

PROVIDED, HOWEVER, that BellSouth shall have no obligation to indemnify <<customer_short_name>> under this section unless: <<customer_short_name>> provides BellSouth with prompt written notice of any such Claim; <<customer_short_name>> permits BellSouth to assume and control the defense to such action, with counsel chosen by BellSouth; and BellSouth does not enter into any settlement or compromise of such Claim.

PROVIDED, HOWEVER, that all amounts advanced in respect of such Claims, Losses and Costs shall be repaid to BellSouth by <<customer_short_name>> if it shall ultimately be determined in a final judgment without further appeal by a court of appropriate jurisdiction that <<customer_short_name>> is not entitled to be indemnified for such Claims, Losses and Costs because the Claims, Losses and Costs did not arise as a result of BellSouth's gross negligence or willful misconduct.

"Claim" means any threatened, pending or completed action, suit or proceeding, or any inquiry or investigation that BellSouth or <<customer_short_name>> in good faith believes might lead to the institution of any such action, suit or proceeding.

"Loss" means any and all damages, injury, judgments, fines, penalties, amounts paid or payable in settlement, deficiencies, and expenses (including all interest, assessments, and other charges paid or payable in connection with or respect of such Losses) incurred in connection with the Claim.

"Costs" means all reasonable attorney's fees and all other reasonable fees, expenses and obligations paid or incurred in connection with the Claim or related matters, including without limitation, investigating, defending or participating (as

a party, witness or otherwise) in (including on appeal), or preparing to defend or participate in any Claim.

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

Recommended Language:

Call Related Databases and Signaling

Call Related Databases are the databases other than OSS, that are used in signaling networks, for billing and collection, or the transmission, routing or other provision of a Telecommunication Service. Notwithstanding anything to the contrary herein, BellSouth shall only provide unbundled access to call related databases and signaling including but not limited to, BellSouth Switched Access 8XX Toll Free Dialing Ten Digit Screening Service, LIDB, Signaling, Signaling Link Transport, STP, SS7 AIN Access, Service Control Point(SCP\Databases, Local Number Portability (LNP) Databases and Calling Name (CNAM) Database Service pursuant to this Agreement where BellSouth is required to provide and is providing Local Switching or UNE-P to <<customer_short_name>> pursuant to this Agreement. *(See NOTE #1)*

NOTE #1: For CLECs with existing agreements with BellSouth as of March 11, 2005, insert the following: Such unbundled access is only available until March 10, 2006. (The sentence is not applicable or necessary for all other CLECs.)

BellSouth Switched Access (SWA) 8XX Toll Free Dialing Ten Digit Screening Service

The BellSouth SWA 8XX Toll Free Dialing Ten Digit Screening Service database (8XX SCP Database) is a SCP that contains customer record information and the functionality to provide call-handling instructions for 8XX calls. The 8XX SCP IN software stores data downloaded from the national SMS/8XX database and provides the routing instructions in response to queries from the SSP or tandem. The BellSouth SWA 8XX Toll Free Dialing Ten Digit Screening Service (8XX TFD Service) utilizes the 8XX SCP Database to provide identification and routing of the 8XX calls, based on the ten digits dialed. At <<customer_short_name>>'s option, 8XX TFD Service is provided with or without POTS number delivery, dialing number delivery, and other optional complex features as selected by <<customer_short_name>>.

The 8XX SCP Database is designated to receive and respond to queries using the ANSI Specification of SS7 protocol.

LIDB

LIDB is a transaction-oriented database accessible through Common Channel Signaling (CCS) networks. For access to LIDB, <<customer_short_name>> must purchase appropriate signaling links pursuant to Section X.4 below. LIDB contains records associated with End User Line Numbers and Special Billing Numbers. LIDB accepts queries from other Network Elements and provides appropriate responses. The query originator need not be the owner of LIDB data. LIDB queries include functions such as screening billed numbers that provides the ability to accept Collect or Third Number Billing calls and validation of Telephone Line Number based non-proprietary calling cards. The interface for the LIDB functionality is the interface between

BellSouth's CCS network and other CCS networks. LIDB also interfaces to administrative systems.

Technical Requirements

BellSouth will offer to <<customer_short_name>> any additional capabilities that are developed for LIDB during the life of this Agreement.

BellSouth shall process <<customer_short_name>>'s customer records in LIDB at least at parity with BellSouth customer records, with respect to other LIDB functions. BellSouth shall indicate to <<customer_short_name>> what additional functions (if any) are performed by LIDB in the BellSouth network.

Within two (2) weeks after a request by <<customer_short_name>>, BellSouth shall provide <<customer_short_name>> with a list of the customer data items, which <<customer_short_name>> would have to provide in order to support each required LIDB function. The list shall indicate which data items are essential to LIDB function and which are required only to support certain services. For each data item, the list shall show the data formats, the acceptable values of the data item and the meaning of those values.

BellSouth shall provide LIDB systems for which operating deficiencies that would result in calls being blocked shall not exceed thirty (30) minutes per year.

BellSouth shall provide LIDB systems for which operating deficiencies that would not result in calls being blocked shall not exceed twelve (12) hours per year.

BellSouth shall provide LIDB systems for which the LIDB function shall be in overload no more than twelve (12) hours per year.

All additions, updates and deletions of <<customer_short_name>> data to the LIDB shall be solely at the direction of <<customer_short_name>>. Such direction from <<customer_short_name>> will not be required where the addition, update or deletion is necessary to perform standard fraud control measures (e.g., calling card auto-deactivation).

BellSouth shall provide priority updates to LIDB for <<customer_short_name>> data upon <<customer_short_name>>'s request (e.g., to support fraud detection), via password-protected telephone card, facsimile, or electronic mail within one hour of notice from the established BellSouth contact.

BellSouth shall provide LIDB systems such that no more than 0.01% of <<customer_short_name>> customer records will be missing from LIDB, as measured by <<customer_short_name>> audits. BellSouth will audit <<customer_short_name>> records in LIDB against Data Base Administration System (DBAS) to identify record mismatches and provide this data to a designated <<customer_short_name>> contact person to resolve the status of the records and BellSouth will update system appropriately. BellSouth will refer record of mismatches to <<customer_short_name>> within one (1) business day of audit. Once reconciled records are received back from <<customer_short_name>>, BellSouth will update LIDB the same business day if less than five hundred (500) records are received before 1:00 p.m. Central

Time. If more than five hundred (500) records are received, BellSouth will contact <<customer_short_name>> to negotiate a time frame for the updates, not to exceed three (3) business days.

BellSouth shall perform backup and recovery of all of <<customer_short_name>>'s data in LIDB including sending to LIDB all changes made since the date of the most recent backup copy, in at least the same time frame BellSouth performs backup and recovery of BellSouth data in LIDB for itself. Currently, BellSouth performs backups of the LIDB for itself on a weekly basis; and when a new software release is scheduled, a backup is performed prior to loading the new release.

BellSouth shall provide <<customer_short_name>> with LIDB reports of data which are missing or contain errors, as well as any misrouted errors, within a reasonable time period as negotiated between <<customer_short_name>> and BellSouth.

BellSouth shall prevent any access to or use of <<customer_short_name>> data in LIDB by BellSouth personnel that are outside of established administrative and fraud control personnel, or by any other Party that is not authorized by <<customer_short_name>> in writing.

BellSouth shall provide <<customer_short_name>> performance of the LIDB Data Screening function, which allows a LIDB to completely or partially deny specific query originators access to LIDB data owned by specific data owners, for Customer Data that is part of an NPA-NXX or RAO-0/1XX wholly or partially owned by <<customer_short_name>> at least at parity with BellSouth Customer Data. BellSouth shall obtain from <<customer_short_name>> the screening information associated with LIDB Data Screening of <<customer_short_name>> data in accordance with this requirement. BellSouth currently does not have LIDB Data Screening capabilities. When such capability is available, BellSouth shall offer it to <<customer_short_name>> under the BFR/NBR Process as set forth in Attachment __.

BellSouth shall accept queries to LIDB associated with <<customer_short_name>> customer records and shall return responses in accordance with industry standards.

BellSouth shall provide mean processing time at the LIDB within 0.50 seconds under normal conditions as defined in industry standards.

BellSouth shall provide processing time at the LIDB within one (1) second for ninety-nine percent (99%) of all messages under normal conditions as defined in industry standards.

Interface Requirements

BellSouth shall offer LIDB in accordance with the requirements of this subsection.

The interface to LIDB shall be in accordance with the technical references contained within.

The CCS interface to LIDB shall be the standard interface described herein.

The LIDB Data Base interpretation of the ANSI-TCAP messages shall comply with the technical reference herein. Global Title Translation (GTT) shall be maintained in the signaling network in order to support signaling network routing to the LIDB.

The application of the LIDB rates contained in Exhibit A will be based on a Percent CLEC LIDB Usage (PCLU) factor. <<customer_short_name>> shall provide BellSouth a PCLU. The PCLU will be applied to determine the percentage of total LIDB usage to be billed to the other Party at local rates. <<customer_short_name>> shall update its PCLU on the first of January, April, July and October and shall send it to BellSouth to be received no later than thirty (30) calendar days after the first of each such month based on local usage for the past three months ending the last day of December, March, June and September, respectively. Requirements associated with PCLU calculation and reporting shall be as set forth in BellSouth's Jurisdictional Factors Reporting Guide.

Signaling. BellSouth shall offer access to signaling and access to BellSouth's signaling databases subject to compatibility testing and at the rates set forth in this Attachment. BellSouth may provide mediated access to BellSouth signaling systems and databases. Available signaling elements include signaling links, STPs and SCPs. Signaling functionality will be available with both A-link and B-link connectivity.

Signaling Link Transport. Signaling Link Transport is a set of two (2) or four (4) dedicated 56 kbps transmission paths between <<customer_short_name>> designated SPOI that provide appropriate physical diversity.

Technical Requirements

Signaling Link Transport shall consist of full duplex mode 56 kbps transmission paths and shall perform in the following two ways:

As an "A-link" Signaling Link Transport is a connection between a switch or SCP and a home STP switch pair; and

As a "B-link" Signaling Link Transport is a connection between two (2) STP switch pairs in different company networks (e.g., between two (2) STP switch pairs for two (2) CLECs).

Signaling Link Transport shall consist of two (2) or more signaling link layers as follows:

An A-link layer shall consist of two (2) links; and

A B-link layer shall consist of four (4) links.

A signaling link layer shall satisfy interoffice and intraoffice diversity of facilities and equipment, such that:

No single failure of facilities or equipment causes the failure of both links in an A-link layer (i.e., the links should be provided on a minimum of two (2) separate physical paths end-to-end); and

No two (2) concurrent failures of facilities or equipment shall cause the failure of all four (4) links in a B-link layer (i.e., the links should be provided on a minimum of three (3) separate physical paths end-to-end).

Interface Requirements. There shall be a DS1 (1.544 Mbps) interface at <<customer_short_name>>'s designated SPOIs. Each 56 kbps transmission path shall appear as a DS0 channel within the DS1 interface.

STP. An STP is a signaling network function that includes all of the capabilities provided by the signaling transfer point switches and their associated signaling links that enables the exchange of SS7 messages among and between switching elements, database elements and signaling transfer point switches.

Technical Requirements

STPs shall provide access to BellSouth Local Switching or Tandem Switching and to BellSouth SCPs/Databases connected to BellSouth SS7 network. STPs also provide access to third party local or tandem switching and third party provided STPs.

The connectivity provided by STPs shall fully support the functions of all other Network Elements connected to the BellSouth SS7 network. This includes the use of the BellSouth SS7 network to convey messages that neither originate nor terminate at a signaling end point directly connected to the BellSouth SS7 network (i.e., transit messages). When the BellSouth SS7 network is used to convey transit messages, there shall be no alteration of the Integrated Services Digital Network User Part (ISDNUP) or Transaction Capabilities Application Part (TCAP) user data that constitutes the content of the message. Rates for ISDNUP and TCAP messages are as set forth in Exhibit A.

If a BellSouth tandem switch routes traffic, based on dialed or translated digits, on SS7 trunks between a <<customer_short_name>> local switch and third party local switch, the BellSouth SS7 network shall convey the TCAP messages that are necessary to provide Call Management features (Automatic Callback, Automatic Recall, and Screening List Editing) between <<customer_short_name>> local STPs and the STPs that provide connectivity with the third party local switch, even if the third party local switch is not directly connected to BellSouth STPs.

STPs shall provide all functions of the SCCP necessary for Class 0 (basic connectionless) service as defined in Telcordia ANSI Interconnection Requirements. This includes GTT and SCCP Management procedures, as specified in ANSI T1.112.4. Where the destination signaling point is a <<customer_short_name>> or third party local or tandem switching system directly connected to BellSouth SS7 network, BellSouth shall perform final GTT of messages to the destination and SCCP Subsystem Management of the destination. In all other cases, BellSouth

shall perform intermediate GTT of messages to a gateway pair of STPs in an SS7 network connected with BellSouth SS7 network and shall not perform SCCP Subsystem Management of the destination. If BellSouth performs final GTT to a <<customer_short_name>> database, then <<customer_short_name>> agrees to provide BellSouth with the Destination Point Code for <<customer_short_name>> database.

STPs shall provide all functions of the Operations, Maintenance and Administration Part (OMAP) as specified in applicable industry standard technical references, which may include, where available in BellSouth's network, MTP Routing Verification Test (MRVT) and SCCP Routing Verification Test (SRVT).

Where the destination signaling point is a BellSouth local or tandem switching system or database, or is a <<customer_short_name>> or third party local or tandem switching system directly connected to the BellSouth SS7 network, STPs shall perform MRVT and SRVT to the destination signaling point. In all other cases, STPs shall perform MRVT and SRVT to a gateway pair of STPs in an SS7 network connected with the BellSouth SS7 network. This requirement may be superseded by the specifications for Internetwork MRVT and SRVT when these become approved ANSI standards and available capabilities of BellSouth STPs.

SS7

When technically feasible and upon request by <<customer_short_name>>, SS7 AIN Access shall be made available in association with switching. SS7 AIN Access is the provisioning of AIN 0.1 triggers in an equipped BellSouth local switch and interconnection of the BellSouth SS7 network with <<customer_short_name>>'s SS7 network to exchange TCAP queries and responses with a <<customer_short_name>> SCP.

SS7 AIN Access shall provide <<customer_short_name>> SCP access to an equipped BellSouth local switch via interconnection of BellSouth's SS7 and <<customer_short_name>> SS7 Networks. BellSouth shall offer SS7 AIN Access through its STPs. If BellSouth requires a mediation device on any part of its network specific to this form of access, BellSouth must route its messages in the same manner. The interconnection arrangement shall result in the BellSouth local switch recognizing the <<customer_short_name>> SCP as at least at parity with BellSouth's SCPs in terms of interfaces, performance and capabilities.

Interface Requirements

BellSouth shall provide the following STP options to connect <<customer_short_name>> or <<customer_short_name>>-designated Local Switching systems to the BellSouth SS7 network:

An A-link interface from <<customer_short_name>> Local Switching systems; and

A B-link interface from <<customer_short_name>> local STPs.

Each type of interface shall be provided by one or more layers of signaling links.

The SPOI for each link shall be located at a cross-connect element in the CO where the BellSouth STP is located. There shall be a DS1 or higher rate transport interface at each of the

SPOIs. Each signaling link shall appear as a DS0 channel within the DS1 or higher rate interface.

BellSouth shall provide intraoffice diversity between the SPOI and BellSouth STPs so that no single failure of intraoffice facilities or equipment shall cause the failure of both B-links in a layer connecting to a BellSouth STP.

STPs shall provide all functions of the MTP as defined in the applicable industry standard technical references.

Message Screening

BellSouth shall set message screening parameters so as to accept valid messages from <<customer_short_name>> local or tandem switching systems destined to any signaling point within BellSouth's SS7 network where the <<customer_short_name>> switching system has a valid signaling relationship.

BellSouth shall set message screening parameters so as to pass valid messages from <<customer_short_name>> local or tandem switching systems destined to any signaling point or network accessed through BellSouth's SS7 network where the <<customer_short_name>> switching system has a valid signaling relationship.

BellSouth shall set message screening parameters so as to accept and pass/send valid messages destined to and from <<customer_short_name>> from any signaling point or network interconnected through BellSouth's SS7 network where the <<customer_short_name>> SCP has a valid signaling relationship.

SCP/Databases

Call Related Databases provide the storage of, access to, and manipulation of information required to offer a particular service and/or capability. BellSouth shall provide access to the following Databases: LNP, LIDB, Toll Free Number Database, ALI/DMS, and CNAM Database. BellSouth also provides access to SCE/SMS application databases and DA.

A SCP is deployed in a SS7 network that executes service application logic in response to SS7 queries sent to it by a switching system also connected to the SS7 network. SMS provides operational interfaces to allow for provisioning, administration and maintenance of subscriber data and service application data stored in SCPs.

Technical Requirements for SCPs/Databases

BellSouth shall provide physical access to SCPs through the SS7 network and protocols with TCAP as the application layer protocol.

BellSouth shall provide physical interconnection to databases via industry standard interfaces and protocols (e.g., SS7, ISDN and X.25).

The reliability of interconnection options shall be consistent with requirements for diversity and survivability.

LNP Database. The Permanent Number Portability (PNP) database supplies routing numbers for calls involving numbers that have been ported from one local service provider to another. BellSouth agrees to provide access to the PNP database at rates, terms and conditions as set forth by BellSouth and in accordance with an effective FCC or Commission directive.

CNAM Database Service

CNAM is the ability to associate a name with the calling party number, allowing the End User (to which a call is being terminated) to view the calling party's name before the call is answered. The calling party's information is accessed by queries launched to the CNAM database. This service also provides <<customer_short_name>> the opportunity to load and store its subscriber names in the BellSouth CNAM SCPs.

<<customer_short_name>> shall submit to BellSouth a notice of its intent to access and utilize BellSouth CNAM Database Services. Said notice shall be in writing no less than sixty (60) days prior to <<customer_short_name>>'s access to BellSouth's CNAM Database Services and shall be addressed to <<customer_short_name>>'s Local Contract Manager.

<<customer_short_name>>'s End Users' names and numbers related to UNE-P Services and shall be stored in the BellSouth CNAM database, and shall be available, on a per query basis only, to all entities that launch queries to the BellSouth CNAM database. BellSouth, at its sole discretion, may opt to interconnect with and query other calling name databases. In the event BellSouth does not query a third party calling name database that stores the calling party's information, BellSouth cannot deliver the calling party's information to a called End User. In addition, BellSouth cannot deliver the calling party's information where the calling party subscribes to any service that would block or otherwise cause the information to be unavailable.
For each <<customer_short_name>> End User that subscribes to a switch based vertical feature providing calling name information to that End User for calls received, BellSouth will launch a query on a per call basis to the BellSouth CNAM database, or, subject to Section X.6.2.1 above, to a third party calling name database, to provide calling name information, if available, to <<customer_short_name>>'s End User. <<customer_short_name>> shall pay the rates set forth in Exhibit A, on a per query basis, for each query to the BellSouth CNAM database made on behalf of an <<customer_short_name>> End User that subscribes to the appropriate vertical features that support Caller ID or a variation thereof. In addition, <<customer_short_name>> shall reimburse BellSouth for any charges BellSouth pays to third party calling name database providers for queries launched to such database providers for the benefit of <<customer_short_name>>'s End Users.

BellSouth currently does not have a billing mechanism for CNAM queries. Until a mechanized billing solution is available for CNAM queries, BellSouth shall bill <<customer_short_name>> at the applicable rates set forth in Exhibit A based on a surrogate of two hundred and fifty-six (256) database queries per month per <<customer_short_name>>'s End Users with the Caller ID feature.

SCE/SMS AIN Access

BellSouth's SCE/SMS AIN Access shall provide <<customer_short_name>> the capability to create service applications in a BellSouth SCE and deploy those applications in a BellSouth SMS to a BellSouth SCP.

BellSouth's SCE/SMS AIN Access shall provide access to SCE hardware, software, testing and technical support (e.g., help desk, system administrator) resources available to <<customer_short_name>>. Training, documentation, and technical support will address use of SCE and SMS access and administrative functions but will not include support for the creation of a specific service application.

BellSouth SCP shall partition and protect <<customer_short_name>> service logic and data from unauthorized access.

When <<customer_short_name>> selects SCE/SMS AIN Access, BellSouth shall provide training, documentation, and technical support to enable <<customer_short_name>> to use BellSouth's SCE/SMS AIN Access to create and administer applications.
<<customer_short_name>> access will be provided via remote data connection (e.g., dial-in, ISDN).

BellSouth shall allow <<customer_short_name>> to download data forms and/or tables to BellSouth SCP via BellSouth SMS without intervention from BellSouth.

Automatic Location Identification/Data Management System

911 and E911 Databases

BellSouth shall provide <<customer_short_name>> with nondiscriminatory access to 911 and E911 databases on an unbundled basis, in accordance with 47 C.F.R. § 51.319 (f).

The ALI/DMS database contains End User information (including name, address, telephone information, and sometimes special information from the local service provider or End User) used to determine to which PSAP to route the call. The ALI/DMS database is used to provide enhanced routing flexibility for E911. <<customer_short_name>> will be required to provide

the BellSouth 911 database vendor daily service order updates to E911 database in accordance with Section XX.2.1 below.

Technical Requirements

BellSouth's 911 database vendor shall provide <<customer_short_name>> the capability of providing updates to the ALI/DMS database through a specified electronic interface. <<customer_short_name>> shall contact BellSouth's 911 database vendor directly to request interface. <<customer_short_name>> shall provide updates directly to BellSouth's 911 database vendor on a daily basis. Updates shall be the responsibility of <<customer_short_name>> and BellSouth shall not be liable for the transactions between <<customer_short_name>> and BellSouth's 911 database vendor.

It is <<customer_short_name>>'s responsibility to retrieve and confirm statistical data and to correct errors obtained from BellSouth's 911 database vendor on a daily basis. All errors will be assigned a unique error code and the description of the error and the corrective action is described in the CLEC Users Guide for Facility Based Providers that is found on the BellSouth Interconnection Web site.

<<customer_short_name>> shall conform to the BellSouth standards as described in the CLEC Users Guide to E911 for Facilities Based Providers that is located on the BellSouth's Interconnection Web site: www.interconnection.bellsouth.com/guides.

Stranded Unlocks are defined as End User records in BellSouth's ALI/DMS database that have not been migrated for over ninety (90) days to <<customer_short_name>>, as a new provider of local service to the End User. Stranded Unlocks are those End User records that have been "unlocked" by the previous local exchange carrier that provided service to the End User and are open for <<customer_short_name>> to assume responsibility for such records.

Based upon End User record ownership information available in the NPAC database, BellSouth shall provide a Stranded Unlock annual report to <<customer_short_name>> that reflects all Stranded Unlocks that remain in the ALI/DMS database for over ninety (90) days. <<customer_short_name>> shall review the Stranded Unlock report, identify its End User records and request to either delete such records or migrate the records to <<customer_short_name>> within two (2) months following the date of the Stranded Unlock report provided by BellSouth. <<customer_short_name>> shall reimburse BellSouth for any charges BellSouth's database vendor imposes on BellSouth for the deletion of <<customer_short_name>>'s records.
911 PBX Locate Service®. 911 PBX Locate Service is comprised of a database capability and a separate transport component.

Description of Product. The transport component provides a dedicated trunk path from a Private Branch Exchange (PBX) switch to the appropriate BellSouth 911 tandem.

The database capability allows <<customer_short_name>> to offer an E911 service to its PBX End Users that identifies to the PSAP the physical location of the <<customer_short_name>> PBX 911 End User station telephone number for the 911 call that is placed by the End User.

<<customer_short_name>> may order either the database capability or the transport component as desired or <<customer_short_name>> may order both components of the service.

911 PBX Locate Database Capability. <<customer_short_name>>'s End User or <<customer_short_name>>'s End User's database management agent (DMA) must provide the End User PBX station telephone numbers and corresponding address and location data to BellSouth's 911 database vendor. The data will be loaded and maintained in BellSouth's ALI database.

Ordering, provisioning, testing and maintenance shall be provided by <<customer_short_name>> pursuant to the 911 PBX Locate Marketing Service Description (MSD) that is located on the BellSouth Interconnection Web site.

<<customer_short_name>>'s End User, or <<customer_short_name>>'s End User database management agent must provide ongoing updates to BellSouth's 911 database vendor within a commercially reasonable timeframe of all PBX station telephone number adds, moves and deletions. It will be the responsibility of <<customer_short_name>> to ensure that the End User or DMA maintain the data pertaining to each End User's extension managed by the 911 PBX Locate Service product. <<customer_short_name>> should not submit telephone number updates for specific PBX station telephone numbers that are submitted by <<customer_short_name>>'s End User, or <<customer_short_name>>'s End User DMA under the terms of 911 PBX Locate product.

<<customer_short_name>> must provision all PBX station numbers in the same LATA as the E911 tandem.

<<customer_short_name>> agrees to release, indemnify, defend and hold harmless BellSouth from any and all loss, claims, demands, suits, or other action, or any liability whatsoever, whether suffered, made, instituted or asserted by <<customer_short_name>>'s End User or by any other party or person, for any personal injury to or death of any person or persons, or for any loss, damage or destruction of any property, whether owned by <<customer_short_name>> or others, or for any infringement or invasion of the right of privacy of any person or persons, caused or claimed to have been caused, directly or indirectly, by the installation, operation, failure to operate, maintenance, removal, presence, condition, location or use of PBX Locate Service features or by any services which are or may be furnished by BellSouth in connection therewith, including but not limited to the identification of the telephone number, address or name associated with the telephone used by the party or parties accessing 911 services using 911 PBX Locate Service hereunder, except to the extent caused by BellSouth's gross negligence or willful misconduct. <<customer_short_name>> is responsible for assuring that its authorized End Users comply with the provisions of these terms and that unauthorized persons do not gain access to or use the 911 PBX Locate Service through user names, passwords, or other identifiers

assigned to <<customer_short_name>>'s End User or DMA pursuant to these terms. Specifically, <<customer_short_name>>'s End User or DMA must keep and protect from use by any unauthorized individual identifiers, passwords, and any other security token(s) and devices that are provided for access to this product.

<<customer_short_name>> may only use BellSouth PBX Locate Service solely for the purpose of validating and correcting 911 related data for <<customer_short_name>>'s End Users' telephone numbers for which it has direct management authority.

911 PBX Locate Transport Component. The 911 PBX Locate Service transport component requires <<customer_short_name>> to order a CAMA type dedicated trunk from <<customer_short_name>>'s End User premise to the appropriate BellSouth 911 tandem pursuant to the following provisions.

Except as otherwise set forth below, a minimum of two (2) End User specific, dedicated 911 trunks are required between the <<customer_short_name>>'s End User premise and the BellSouth 911 tandem as described in BellSouth's Technical Reference (TR) 73576 and in accordance with the 911 PBX Locate Marketing Service Description located on the BellSouth Interconnection Web site. <<customer_short_name>> is responsible for connectivity between the End User's PBX and <<customer_short_name>>'s switch or POP location. <<customer_short_name>> will then order 911 trunks from their switch or POP location to the BellSouth 911 tandem. The dedicated trunks shall be, at a minimum, DS0 level trunks configured as part of a digital interface (delivered over a <<customer_short_name>> purchased DS1 facility that hands off at a DS1 or higher level digital or optical interface). <<customer_short_name>> is responsible for ensuring that the PBX switch is capable of sending the calling station's Direct Inward Dial (DID) telephone number to the BellSouth 911 tandem in a specified Multi-frequency (MF) Address Signaling Protocol. If the PBX switch supports Primary Rate ISDN (PRI) and the calling stations are DID numbers, then the 911 call can be transmitted using PRI, and there will be no requirement for the PBX Locate Transport component.

Ordering and Provisioning. <<customer_short_name>> will submit an Access Service Request (ASR) to BellSouth to order a minimum of two (2) End User specific 911 trunks from its switch or POP location to the BellSouth 911 tandem.

Testing and maintenance shall be provided by <<customer_short_name>> pursuant to the 911 PBX Locate Marketing Service description that is located on the BellSouth Interconnection Web site.

Rates. Rates for the 911 PBX Locate Service database component are set forth in Exhibit __. Trunks and facilities for 911 PBX Locate transport component may be ordered by <<customer_short_name>> pursuant to the terms and conditions set forth in Attachment __.

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?

Recommended Language:

Fiber to the Home (FTTH) loops are local loops consisting entirely of fiber optic cable, whether dark or lit, serving an End User's premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends to the MDU minimum point of entry (MPOE). Fiber to the Curb (FTTC) loops are local loops consisting of fiber optic cable connecting to a copper distribution plant that is not more than five hundred (500) feet from the End User's premises or, in the case of predominantly residential MDUs, not more than five hundred (500) feet from the MDU's MPOE. The fiber optic cable in a FTTC loop must connect to a copper distribution plant at a serving area interface from which every other copper distribution subloop also is not more than five hundred (500) feet from the respective End User's premises.

In new build (Greenfield) areas, where BellSouth has only deployed FTTH/FTTC facilities, BellSouth is only 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.

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

Recommended Language:

A hybrid loop is a local loop, composed of both fiber optic cable, usually in the feeder plant, and copper twisted wire or cable, usually in the distribution plant. BellSouth shall provide CLEC with nondiscriminatory access to the time division multiplexing features, functions and capabilities of such hybrid loop, including DS1 and DS3 capacity under Section 251 where impairment exists, on an unbundled basis to establish a complete transmission path between BellSouth's central office and an End User's premises.

BellSouth shall not engineer the transmission capabilities of its network in a manner, or engage in any policy, practice, or procedure, that disrupts or degrades access to a local loop or subloop, including the time division multiplexing-based features, functions, and capabilities of a hybrid loop, for which a requesting telecommunications carrier may obtain or has obtained access pursuant to this Attachment.

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

Recommended Language:

Routine Network Modifications

BellSouth will perform Routine Network Modifications (RNM) in accordance with FCC 47 CFR 51.319 (a)(7) and (e)(4) for Loops and Dedicated Transport provided under this Attachment. If BellSouth normally provides such RNM for its own customers and has recovered the costs for performing such modifications through the rates set forth in Exhibit __, then BellSouth will perform such RNM at no additional charge. A routine network modification is an activity that BellSouth regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; and deploying a new multiplexer or reconfiguring an existing multiplexer. Routine network modifications may entail activities such as accessing manholes, deploying bucket trucks to reach aerial cable, and installing equipment casings. Routine network modifications do not include the construction of a new loop, or the installation of new aerial or buried cable for a CLEC.

RNM will be performed within the intervals established for the Network Element and subject to the performance measurements and associated remedies set forth in Attachment __ of this Agreement. If BellSouth does not normally provide such RNM for its own customers, and has not recovered the costs of such RNM in the rates set forth in Exhibit __, then such request will be handled as a project on an individual case basis. BellSouth will provide a price quote for the request and, upon receipt of payment from CLEC, BellSouth will perform the RNM.

Line Conditioning

Line Conditioning is defined as routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers. This may include the removal of any device, from a copper Loop or copper Subloop that may diminish the capability of the Loop or Subloop to deliver high-speed switched wireline telecommunications capability, including xDSL service. Such devices include, load coils, excessive bridged taps, low pass filters, and range extenders. Excessive bridged taps are bridged taps that serve no network design purpose and that are beyond the limits set according to industry standards and/or the BellSouth's TR 73600 Unbundled Local Loop Technical Specification.

BellSouth will remove load coils only on copper Loops and Subloops that are less than eighteen thousand (18,000) feet in length.

Any copper loop being ordered by CLEC which has over 6,000 feet of combined bridged tap will be modified, upon request from CLEC, so that the loop will have a maximum of 6,000 feet of bridged tap. This modification will be performed at no additional charge to CLEC. Line conditioning orders that require the removal of other bridged tap that serves no network design purpose on a copper Loop that will result in a combined total of bridged tap between two

thousand five hundred (2,500) and six thousand (6,000) feet will be performed at the rates set forth in Exhibit __.

CLEC may request removal of any unnecessary and non excessive bridged tap (bridged tap between zero (0) and two thousand five hundred (2,500) feet which serves no network design purpose), at rates pursuant to BellSouth's SC Process as mutually agreed to by the Parties.

Rates for Unbundled Loop Modification (ULM) are as set forth in Exhibit __.

BellSouth will not modify a Loop in such a way that it no longer meets the technical parameters of the original Loop type (e.g., voice grade, ADSL, etc.) being ordered.

If CLEC requests ULM on a reserved facility for a new Loop order, BellSouth may perform a pair change and provision a different Loop facility in lieu of the reserved facility with ULM if feasible. The Loop provisioned will meet or exceed specifications of the requested Loop facility as modified. CLEC will not be charged for ULM if a different Loop is provisioned. For Loops that require a DLR or its equivalent, BellSouth will provide LMU detail of the Loop provisioned.

CLEC will request Loop make up information pursuant to this Attachment prior to submitting a service inquiry and/or a LSR for the Loop type that CLEC desires BellSouth to condition.

When requesting ULM for a Loop that BellSouth has previously provisioned for CLEC, CLEC will submit a SI to BellSouth. If a spare Loop facility that meets the Loop modification specifications requested by CLEC is available at the location for which the ULM was requested, CLEC will have the option to change the Loop facility to the qualifying spare facility rather than to provide ULM. In the event that BellSouth changes the Loop facility in lieu of providing ULM, CLEC will not be charged for ULM but will only be charged the service order charges for submitting an order.

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

Recommended Language:

The recommended language is included under Issue 25.

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?

Recommended Language:

In FTTH/FTTC overbuild situations where BellSouth also has copper Loops, BellSouth may make those copper Loops available to <<customer_short_name>> on an unbundled basis, until such time as BellSouth chooses to retire those copper Loops using the FCC's network disclosure requirements. Alternatively, BellSouth will offer a 64 Kbps second voice grade channel over its FTTH/FTTC facilities. BellSouth's retirement of copper Loops must comply with applicable law.

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

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

Recommended Language:

EELs Audit provisions

BellSouth may, on an annual basis audit CLEC's records in order to verify compliance with the high capacity EEL eligibility criteria. To invoke its limited right to audit, BellSouth will send a Notice of Audit to CLEC. Such Notice of Audit will be delivered to CLEC no less than thirty (30) calendar days prior to the date upon which BellSouth seeks to commence an audit.

The audit shall be conducted by a third party independent auditor, retained and paid for by BellSouth. The audit must be performed in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA) which will require the auditor to perform an "examination engagement" and issue an opinion regarding CLEC's compliance with the high capacity EEL eligibility criteria. AICPA standards and other AICPA requirements will be used to determine the independence of an auditor. The independent auditor's report will conclude whether CLEC complied in all material respects with the applicable service eligibility criteria. Consistent with standard auditing practices, such audits require compliance testing designed by the independent auditor.

To the extent the independent auditor's report concludes that CLEC failed to comply with the service eligibility criteria, CLEC must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis.

To the extent the independent auditor's report concludes that CLEC failed to comply in all material respects with the service eligibility criteria, CLEC shall reimburse BellSouth for the cost of the independent auditor. To the extent the independent auditor's report concludes that CLEC did comply in all material respects with the service eligibility criteria, BellSouth will reimburse CLEC for its reasonable and demonstrable costs associated with the audit. CLEC will maintain appropriate documentation to support its certifications. The Parties shall provide such reimbursement within thirty (30) calendar days of receipt of a statement of such costs.