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December 18, 2003

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 000121A-TP (OSS)

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of Amended Motion to Modify SEEM Plan and Request to Offset or Escrow Penalty Payments, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

J. Phillip Carver

J. Phillip Carver (llA)

Enclosures

cc: All parties of record
Marshall M. Criser, III
Nancy B. White
R. Douglas Lackey

CERTIFICATE OF SERVICE
Docket No. 000121A-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via First Class U. S. Mail this 18th day of December, 2003 to the following:

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J. Phillip Carver (LA)

(+) Signed Protective Agreement

#237366

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Performance Measurements for Telecommunications Interconnection, Unbundling and Resale	)	Docket No. 000121A-TP
	)	Filed: December 18, 2003

AMENDED MOTION TO MODIFY SEEM PLAN AND REQUEST TO OFFSET OR ESCROW PENALTY PAYMENTS

BellSouth Telecommunications, Inc. ("BellSouth"), hereby respectfully requests the entry of an Order authorizing BellSouth to modify the Self-Effectuating Enforcement Mechanism ("SEEM") Plan filed by BellSouth in this proceeding, and approved by the Commission, and states as grounds in support thereof the following:

INTRODUCTION

1. On October 17, 2003, BellSouth filed its Motion to Modify the SEEM Plan to remove penalties relating to line sharing because the FCC's Triennial Review Order[1] removed the obligation of incumbent LECs to provide line sharing as an unbundled network element ("UNE") pursuant to Section 251. A number of CLECs filed a response in which they essentially conceded that line sharing is no longer a Section 251 obligation. Instead, the CLECs contended that line sharing penalties should continue to be paid for reasons relating to (1) state law, (2) public policy and (3) the CLECs' interpretation of the requirements of Section 271. BellSouth filed its Reply to the CLECs' Response on November 14, 2003. Unfortunately, the Commission's rules do not allow for such a Reply. Accordingly, BellSouth withdrew its Motion and Reply and files this

Amended Motion in order to address both the Section 251 issues raised in BellSouth's original Motion as well as the 271 issues that the CLECs will likely raise in response[2]. Finally, BellSouth will also address the transitional period contemplated by the TRO, and explain why line sharing penalties should not be paid throughout the duration of this period.

Line Sharing Is No Longer Required Under Section 251

2. On August 21, 2003, the Federal Communications Commission ("FCC") released its Triennial Order, which became effective October 2, 2003. Among the many rulings in the TRO is the decision by the FCC that line sharing is no longer an unbundled network element that incumbent LECs are required to offer pursuant to Section 251 of the Act. For this reason, BellSouth should be relieved of any further obligation to pay SEEM penalties that relate to the provision of line sharing. Although BellSouth's SEEM plan is voluntary, it has been approved by an Order of this Commission. Therefore, BellSouth files this Motion to request that the Commission enter an Order authorizing BellSouth to remove the penalties relating to line sharing from the SEEM plan, and to cease the payment of any such penalties as of October 2, 2003.

3. The performance measurement plan—and more specifically, the penalty component of the plan—is not required by any portion of the Telecommunications Act. The FCC clearly made this point in the Order in which it approved BellSouth's 271 application for Georgia and Louisiana, as follows:

> 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 incentive

1 *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC-03-36). *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order" or "TRO").

2 Although this approach provides the only means for BellSouth to address both 251 and 271 issues, it does create an awkward situation in which BellSouth will, at certain points, use this Motion to reply to CLEC arguments that were made in response to a previous (now-withdrawn) motion. However, the CLECs have made the above-referenced 271 arguments not only in Florida, but in every state in which BellSouth's Motion has been filed. Thus, dealing with the CLECs' 271 arguments pre-emptively appears to be the only procedural route available to BellSouth to address that the CLECs are most likely to raise in response.

> 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 the satisfactory performance monitoring and enforcement mechanisms is probative evidence that the BOC will continue to meet its 271 obligations after a grant of such authority.[3]

Thus, "performance assurance mechanisms," including SEEM penalties, are not required by Section 271. To the contrary, a measurement plan is simply a mechanism that can be utilized to ensure that an RBOC meets its obligations under 251, after it is granted 271 authority. Consistent with this, every State Commission in BellSouth's region, including this Commission, has limited the application of automatic penalties to performance failures relating to offerings that an incumbent must provide to meet its obligations under Section 251, specifically, unbundled network elements, interconnection and resold services. The current SEEM plan does not include (and has never included) other products that BellSouth may provide to CLECs that are not encompassed within § 251. At the time the current SEEM plan was approved by this Commission, line sharing was, of course, included in the plan because it had previously been deemed by the FCC to be a UNE. With the FCC's above-referenced ruling in the Triennial Order, line sharing is no longer a UNE. Therefore, it should no longer be subject to penalties under the SEEM Plan.

4. Section 251 places upon ILECs the duty to provide "nondiscriminatory access to network elements on an unbundled basis." (§ 251(c)(3)). More specifically, network elements are to be made available on an unbundled basis if "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." (Section 251(d)(2)(b). Thus, whether a network element is required to

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[3] *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services In Georgia and Louisiana,* CC Docket No. 02-35, *Memorandum Opinion and Order*, 17 FCC Rcd 9018, 9181-82, ¶ 291 (2002).

be offered pursuant to Section 251 depends, at least in part, upon whether the lack of this element would impair the CLEC's ability to do business.

5. In the Triennial Order, the FCC stated in general terms its interpretation of the impairment standard as follows: "We find a requesting carrier to be impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into the market uneconomic." (¶ 84). Applying this standard, the FCC found that line sharing does not meet this impairment test. Specifically, the Commission found that carriers are "generally impaired on a national basis without unbundled access to an incumbent LEC's local loops . . ." (¶ 248). However, the Commission also determined "that unbundled access to conditioned stand-alone copper loops . . . is sufficient to overcome such impairment for the provision of broadband services." (Id.). Accordingly, the FCC further ruled, "that, subject to the grandfather provision and transition period explained below, the incumbent LECs do not have to unbundle the HFPL [High Frequency Portion of the Loop] for requesting telecommunications carriers (Id.). Further, by way of explaining this decision, the FCC stated that it disagrees "with the Commission's prior finding that competitive LECs are impaired without unbundled access to the HFPL . . ." (¶ 258). The Commission also noted that line splitting is available as a means to obtain the high frequency portion of the loop. (¶ 259).

6. Likewise, the FCC specifically rejected earlier Commission findings that "line sharing will level the competitive playing field." (¶ 261, quoting, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket Nos. 98-147 & 96-98, *Third Report and Order in CC Docket No. 98-147; Fourth Report and Order in CC Docket*

No. 96-98, 14 FCC Rcd 20912, 20975, ¶ 137 (1999)). Moreover, the FCC found that the availability of line sharing as a UNE could have the opposite effect:

> . . . [R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs and the competitive LECs' offerings. We find that such results would run counter to the statutes' express goal of encouraging competition and innovation in all telecommunications markets."

(¶ 261).

Thus, the FCC has clearly ruled that line sharing does not meet the impairment test, and, therefore, need not be offered on an unbundled basis pursuant to § 251.

7. Again, this Commission has always limited the application of SEEM penalties to the offerings that an incumbent must provide under § 251. Further, failure to continue this long-standing approach by not removing line sharing would likely have a deleterious effect. As noted above, the FCC specifically found that the continuation of rules to require line sharing "would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets." (¶ 261). Likewise, the continuation of SEEM penalties for line sharing, even though it is no longer a UNE, would likely have the same effect by encouraging CLECs to utilize line sharing rather than other competitive alternatives. Accordingly, the Commission should enter an Order to allow BellSouth to cease making penalty payments, effective October 2, 2003, for the portion of any SEEM penalties that apply to line sharing. Under the SEEM Plan currently in place, some measurements specifically identify line sharing as a product and several other measures contain data for line sharing as part of a group of products

even though it is not reported separately. BellSouth proposes to remove line sharing from SEEM in both of these cases.

8. BellSouth acknowledges that, in general, modifications to either the Service Quality Measurements (SQM) plan or the SEEM plan should be limited to the review process outlined in the Commission's Order(s) adopting the SQM and SEEM. BellSouth submits, however, that the instant circumstances are unique, and that they justify immediate modification. The Commission-ordered review process is an ongoing process in which information about the plan is gathered, and as this occurs, modifications are made to add additional necessary measurements, delete measurements or penalties that have proven to be unnecessary, make administrative changes in the plan, or make other appropriate changes on an ongoing basis. It is important to group these types of ongoing changes together and to deal with them as part of a periodic process to avoid having constant changes to the measurement and penalty plan.

9. BellSouth submits, however, that the removal of line sharing from SEEM should be dealt with outside of the periodic review process, due to the unique circumstances that pertain. Specifically, the FCC's recent decision constitutes a change in the law that has the effect of placing line sharing outside of the fundamental framework of the SEEM plan. As a result of this, line sharing can no longer appropriately be included in the SEEM plan, after October 2, 2003.

Line Sharing Is Not Required By Section 271

10. In their original response to BellSouth's Motion filed before this Commission (and in every State in which CLECs have responded to BellSouth's Motion), the CLECs have not disputed the fact that the FCC has found that line sharing does not meet the impairment standard set forth in Section 251(b)(2)(d), and, is, therefore, not subject to the unbundling requirements of Section 251(c)(3). It is not surprising that the CLECs would (at least implicitly) concede this

point, since the clarity of the FCC's ruling really leaves them no choice. Instead, the CLECs argued in their response that this Commission should require the continued payment of penalties relating to line sharing, even though it is no longer a UNE, based on (1) state law, and (2) public policy. These two related arguments both fail for precisely the same reason. They are both premised upon a completely fabricated view of the current competitive market that has no basis in reality.

11. The CLECs also made the illogical argument that even as the FCC removed the unbundling requirement for line sharing (pursuant to Section 251), it also determined that Section 271 applies to, in effect, counteract that removal. In other words, the CLECs argued that the FCC went to great lengths to make the explicit pronouncement that line sharing need not be unbundled, but at the same time, buried within the Triennial Review Order[4] language which should be read, by implication, to achieve precisely the opposite result. Although this contention is facially counterintuitive, BellSouth will explain below in more detail why the language of the TRO does not support this contention.

12. The argument that the imposition of penalties for line sharing is required by state law draws no support from the actual language of any state law, the Orders of this Commission, or the Orders of the FCC. The two Florida Statutes cited by the CLECs in their original response simply make the general statements that regulatory oversight is required to promote "the development of fair and effective competition" (Section 364.01(c)) and to preclude anticompetitive behavior (Section 364.01(4)(g)) (CLEC Reply, p. 2). There is no explicit requirement in the Florida Statutes that a performance assessment plan be developed (with or without penalties). There is, likewise, no explicit requirement that line sharing be offered on an

unbundled basis. In fact, the FCC has made it clear that if there were a state requirement to unbundle UNEs in a way that contradicts the federal scheme, it would be pre-empted. The FCC stated the following in the Triennial Review Order:

> Where appropriate, based on the record before us, we adopt uniform rules that specify the network elements that must be unbundled by incumbent LECs in all markets and the network elements that must not be unbundled, in any market, pursuant to Federal law. In doing so, we exercise our authority pursuant to Sections 201(b) and 251(d) of the Act. As we explain in this Order, we find that setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers including small entities. <u>We find that states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations</u>.

(¶ 187) (emphasis added).

13. Since there is no state law that <u>requires</u> either unbundling of line sharing or the imposition of penalties for line sharing, the "state law" argument and the policy argument previously advanced by the CLECs are ultimately identical. Each is dependent upon the unsupported (and unsupportable) contention that there will necessarily be an anticompetitive result if penalties are not paid for line sharing.

14. The CLECs' have argued here and in other jurisdictions that BellSouth would not offer line sharing if it were not required to, and that CLECs must obtain line sharing from BellSouth on nondiscriminatory terms to compete. This argument proves nothing other than the CLECs' stubborn refusal to acknowledge the reality of the current competitive market. After a process that spanned several years, this Commission recommended that BellSouth receive Section 271 authority, because (among other reasons) the local market is open to competition. The FCC specifically endorsed this decision, and also ruled that the local market is, in fact, open to competition. Moreover, perhaps more important in the context of line-sharing is the fact that

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[4] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking). In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.,* CC Docket No. 01-338, *et al.,*

BellSouth has only a fraction of the data market. As the FCC explicitly held, CLECs (and other providers) can and do compete in the data market, and do not need access to ILEC facilities to do so.

15. Likewise, the CLECs' contention that the removal of penalties for line sharing would have an anti-competitive effect is totally unsupported. The CLECs' "public interest" argument consists of little more than a general claim that the SEEM Plan is required to prevent anti-competitive behavior. The real issue here, however, has nothing to do with whatever general competitive benefits (if any) there may be to having a SEEM Plan. The pertinent, specific question is whether line sharing should continue to be a part of the SEEM plan. The FCC's removal of line sharing from the list of UNEs that must be offered pursuant to Section 251 has clearly answered that question in the negative.

16. The argument that the CLECs must obtain line sharing from incumbent LECs to compete in the local market was also made by CLECs to the FCC. The FCC rejected this argument in the TRO and found that competitive alternatives exist. In fact, the FCC found that there are available alternatives to line sharing based, in part, on the activity of two of the three CLECs that filed the previous Response in Florida. Specifically, the FCC stated the following:

> Moreover, we can no longer find that competitive LECs are unable to obtain the HFPL from other competitive LECs through line splitting. For example, the largest nonincumbent LEC provider of xDSL service, <u>Covad</u>, recently announced plans to offer ADSL service to 'more of <u>AT&T's</u> <u>fifty</u> <u>million</u> <u>consumer</u> <u>customers'</u> through line splitting.

(¶ 259) (emphasis added).

17. The FCC also noted that the above-quoted information was contained in a press release by Covad, which stated "that this agreement will enable more of AT&T's 50 million consumer customers to obtain xDSL service through Covad's network, <u>which</u> <u>itself</u> <u>covers</u> <u>more</u>

FCC 03-36 (rel. Aug 21, 2003) ("Triennial Review Order" or "TRO").

than 40 million households and businesses nationwide." (fn 767) (emphasis added). Given this, the FCC stated that it did "not find credible Covad's argument that the Commission's previous finding, that there are no third party alternatives to the incumbent LECs' HFPL, remains valid." (Id.).

18. Moreover, the FCC found that a continued unbundling requirement for line sharing could very well have an anti-competitive effect. As noted in BellSouth's Motion, the FCC specifically found the following:

> . . . [R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs and the competitive LECs' offerings. We find that such results would run counter to the statutes' express goal of encouraging competition and innovation in all telecommunications markets.

(¶ 261).

19. In sum, the CLECs' state law and policy arguments are dependent entirely upon their unsupported contention that the application of a SEEM penalty to line sharing is necessary to ensure competition. This contention completely ignores the facts that a competitive market for local services currently exists, that line sharing has been found to be competitively available (based in substantial part, upon the competitive activity of both AT&T and Covad), and that the FCC has also found that continuing to require the offering of unbundled line sharing under the standards that apply under Section 251 could well have an anti-competitive effect. Clearly, the CLECs' position is at odds with any reasonable assessment of the current competitive reality.

20. In the only portion of the Response previously filed by the CLECs that constitutes an actual (albeit incorrect) legal argument, they contend that, even in the wake of the FCC's

removal of Section 251 unbundling requirements for line sharing, BellSouth still has precisely the same obligation to provide nondiscriminatory, unbundled access pursuant to Section 271. This argument, however, is misplaced because BellSouth has no obligation to offer line sharing pursuant to Section 271. Again, the PAP was created to ensure BellSouth's compliance with its obligations under Section 251. Any use of the plan to enforce independent Section 271 obligations (even if they existed) would constitute a dramatic expansion of the Plan beyond its intended purposes, which BellSouth would obviously oppose. To rule upon BellSouth's Motion, however, the Commission does not need to consider the relation of the Plan to Section 271 because there is no requirement in Section 271 to offer unbundled line sharing.

21. The TRO contains no explicit statement that line sharing must be offered on an unbundled, nondiscriminatory basis pursuant to Section 271. The TRO does, however, <u>explicitly</u> state that line sharing is no longer required to be provided on an unbundled basis pursuant to Section 251. Any argument by the CLECs to the contrary would require one to believe that the FCC, after a lengthy analysis, explicitly determined that line sharing is no longer subject to the unbundling obligation of Section 251, then reimposed precisely the same unbundling obligation through the unarticulated implication of the TRO's discussion of Section 271. It is difficult to understand why the FCC would devote several pages of analysis to the question of whether line sharing should be unbundled, answer the question in the negative, <u>then</u> reverse its decision in another portion of the TRO. However, if the FCC <u>had</u> intended this illogical result, then surely it would have stated this intention. Instead, the TRO's eighteen-paragraph-long discussion of Section 271 issues never mentions the words "line sharing," "the high frequency portion of the loop" or "HFPL." Nevertheless, the CLECs have eschewed a common sense reading of the TRO,

and claimed (both here and in other jurisdictions) that the Section 271 discussion in the TRO reimposes an unbundling obligation.

22. To the contrary, while the TRO does discuss Section 271, there is nothing in the discussion from which one could reasonably conclude that the TRO ordered the provision of line sharing pursuant to Section 271. The TRO states that four of the checklist items for Section 271 compliance relate specifically to network elements that have been deemed to be UNEs subject to the standards of Section 251(c)(3). These include local transport, local switching, access to databases and associated signaling and "local loop transmission from the central office to the customer's premise," i.e., checklist items 4, 5, 6 and 10 (¶ 650). The CLECs make the simplistic assertion that since line sharing (i.e., the high frequency portion of the loop) is part of the loop, then the checklist item four requirement to provide loops must apply. This contention, however, flies in the face of the entire analytical framework that prevails, both in the *Line Sharing Order*[5] and in the TRO.

23. The FCC decided almost four years ago in the *Line Sharing Order* to designate the high frequency loop spectrum as an unbundled network element, i.e., separate from the loop UNE. Specifically, the FCC stated in the *Line Sharing Order* that, "we conclude that access to the high frequency spectrum of a local loop meets the statutory definition of a network element and satisfies the requirements of Sections 251(d)(2) and (c)(3)." (¶ 25).[6] Despite the FCC's designation of the loop and the HFPL as separate UNEs, the CLECs argue that the TRO's discussion of loop unbundling in the context of Section 271 applies equally to the HFPL UNE. The CLECs' argument, however, cannot be reconciled with the FCC's decision to treat the loop

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[5] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 14 FCC Rcd 20912 (1999) ("Line Sharing Order"), *vacated and remanded,* USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied,* 123 S. Ct. 1571 (2003).

and HFPL as separate UNEs. In other words, since the FCC ruled that the loop and the HFPL are separate UNEs, there is no basis for the CLECs to argue that a discussion of loop unbundling in the TRO also applies to the separate HFPL UNE, which was not even mentioned in this discussion.

24. Further, there are clear indications of the separate treatment of loops and HFPL throughout the TRO. The FCC found that requesting carriers of stand alone copper loops are generally impaired on a national basis (¶ 248), while, at the same time, finding that carriers that request HFPL are not impaired under any circumstances. Again, it makes no sense to conclude, as the CLECs do, that the FCC went to great lengths to conduct separate analyses of line sharing and whole loops for purposes of applying Section 251, but for purposes of applying Section 271, simply lumped these two separate UNEs together without any distinction. This conclusion makes even less sense when one considers that the FCC specifically found line sharing to be competitive (i.e., not to meet the impairment test), while reaching a different conclusion regarding whole loops.

25. Finally, the CLECs attempted in their previous Response to support their illogical position that the FCC has treated line sharing differently for Sections 251 and 271 purposes, by contending that "a long line of FCC 271 Orders confirms the continuing obligation of BellSouth companies to offer unbundled access to HFPL loop transmission after Section 271 approval." (CLEC Response, p. 4). In support of this contention, the CLECs cite to four 271 applications, all of which were filed before the current unbundling rules went into effect on October 2, 2003, and three of which were issued before that date.

[6] This decision was specifically referenced in the TRO in the context of the FCC's decision that line sharing no longer meets the impairment test (¶ 259).

26. Paradoxically, the CLECs specifically cited to the pronouncement in the TRO that "BOCs must continue to comply with any conditions required for [271] approval consistent with the changes in the law," but, at the same time, ignored the obvious intent of that language, i.e., that Section 271 requirements are based on the current law at any given point in time. In the portion of the TRO that the CLECs quoted, the FCC went on to explain this approach as follows:

> While we believe that Section 271(d)(6) established an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that 'the conditions required for such approval' would not change with time. Absent such a reading, the Commission would be in a position where it was imposing different backsliding requirements on BOCs solely based on date of Section 271 entry, rather than based on the law that currently exists. We reject this approach as antithetical to public policy because it would require the enforcement of out-of-date or even vacated rules.

(¶ 665) (emphasis added).

Thus, the particular standards that the Commission applied for Section 271 purposes prior to the effective date of the TRO are different from the standards that will apply with the advent of the TRO.

27. Although the CLECs cited in their previous Response to four Section 271 applications, they base their argument on this point almost entirely on a single Section 271 application approval that occurred on October 15, 2003, thirteen days after the date that the TRO became effective.[7] The CLECs quoted from this Order at great length, and argued that the references in this Order to line sharing prove definitively that, even in the aftermath of the TRO, line sharing continues to be considered as part of the loop for purposes of checklist 4 analysis. Unfortunately, the CLECs' contention reflects a less than thorough reading of the Order upon which they rely.

[7] *Application by SBC Communications, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin,* Memorandum Opinion and Order, WC Docket No. 03-167, FCC 03-243, issued October 15, 2003 ("SBC Order").

28. In the SBC Order, the Commission acknowledges that it adopted new unbundling rules as part of the Triennial Review on October 2, 2003 (¶ 10). The Commission then stated that for purposes of this application, it would apply the former rules. (¶ 11). Specifically:

> As the Commission found in the *Bell Atlantic New York Order*, we believe that using the network elements identified in the former unbundling rules as a standard in evaluating SBC's application, filed during the interim period between the time the rules were vacated by the DC Circuit and the effective date of the new rules, is a reasonable way to ensure that the application complies with the checklist requirements.

(Id.).

Thus, the FCC applied, based in substantial part on the date the application was filed, the old unbundling rules rather than the new rules. Thus, the SBC case does not demonstrate that line sharing remains under the umbrella of checklist item 4, even after the TRO became effective.

29. Further, the SBC Order demonstrates that, even under the old unbundling rules, the loop and the HFPL were treated as separate elements. In the SBC Order, the FCC stated specifically that "one part of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules concerning UNEs." (¶ 10). The FCC then listed seven UNEs that incumbent LECs are obliged to provide. The first UNE on the list is "local loops and subloops." The seventh UNE on this list is the "high frequency portion of the loop." (Id.). Thus, it is clear that the FCC has specifically separated the local loop UNE from the HFPL UNE. This separation first appeared in the *Line Sharing Order* and it continues to apply. Thus, even if Section 271 could be read to include a loop unbundling obligation, this obligation does not extend to the separate HFPL UNE.

Line Sharing Should Not Be Subject To Penalties During the Transitional Period

30. In other jurisdictions, the argument has been made that BellSouth should be required to pay SEEM penalties for line sharing during the duration of the "transitional period" provided in the Triennial Review Order. (Staff Comments, p. 2.) BellSouth obviously disagrees with this approach. Again, there is no continuing legal requirement under the Act to provide unbundled access to line sharing. Given this, the SEEM payments for line sharing should end immediately.

31. Although the TRO extends the time that line sharing must be offered, this extension does not in any way constitute a finding that there is a legal requirement to provide line sharing pursuant to Sections 251, 271 or any other portion of the Act. Both the three year transitional period and the grandfathering rule set forth in the TRO are designed solely to ensure that carriers that have utilized line sharing to provide service have adequate time to implement alternative arrangements, and to avoid the disruption of service to end users. The FCC specifically stated that the grandfathering rule is designed "to prevent consumers who rely on line sharing from losing their broadband service". (TRO, ¶ 264) In keeping with this intent, the "grandfathering" of existing line sharing arrangements pertains only until the next biennial review, which as the FCC noted, "will commence in 2004". (*Id.*) Thus, the grandfathering of existing service is clearly contemplated as a short-term arrangement to allow customers to transition to alternative service arrangements as quickly as possible.

32. Likewise, although the transitional period allows CLPs to order new line sharing arrangements for a three year period, the treatment of line sharing as a UNE that must be offered pursuant to 251 ends immediately. UNEs that must be offered on an unbundled basis pursuant to Section 251 are to be priced at TELRIC rates. (*See* TRO, ¶ 656) In contrast, during the transitional period, line sharing will immediately cease to be priced at the TELRIC rate. Instead, it

will be priced at an amount that equals 25% of the state approved recurring rates for stand alone copper loops (*Id.*, ¶ 264), and that price will increase throughout the three year transitional period. Thus, as the transitional period begins, the TRO affects an immediate change in the regulatory treatment of line sharing.

33. As stated previously, the entire purpose of the performance assessment plan (including the SEEM component) is to ensure compliance with Section 251 obligations after Section 271 authority is granted. Therefore, immediate removal of the SEEM penalties for the line sharing UNE that has already been found not to be a required Section 251 offering is the only appropriate result. At the same time, BellSouth's proposal does allow for a transitional process within the context of the measurement and penalty plan. As BellSouth noted in its Motion, BellSouth does not propose line sharing measurements be immediately removed from the SQM (BellSouth Motion, p. 6.) Instead, BellSouth's performance in providing line sharing will continue to be reported until the Commission deems in a future periodic review that such reporting is no longer necessary. The continuation of reporting without penalties is an appropriate match to the FCC-ordered approach of allowing a transitional period in which customers that utilize line sharing will migrate to other alternatives. It is not appropriate, however, to continue to treat line sharing in precisely the same manner for penalty purposes, even though it is no longer a Section 251 UNE.

34. The TRO states that the purpose of the transitional period is to "encourage requesting carriers either to migrate their customers to the whole loop in an orderly manner or to reach agreement, if it is desired, with the incumbent LEC to continue access to the HFPL on different terms and conditions." (TRO, ¶ 267). Continuing to pay penalties relating to line sharing throughout the transitional period would impede this desired migration of customers to

other alternatives to line sharing or the negotiations of other arrangements. In the TRO, the FCC specifically found that, given the fact that line sharing does not meet the impairment test, continued treatment of line sharing as a UNE would have an anticompetitive affect. As BellSouth stated previously (p. 5, above), the FCC stated the following in this regard:

> … [R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs and the competitive LECs' offerings. <u>We find that such results would run counter to the statutes' express goal of encouraging competition and innovation in all telecommunications markets.</u>"

(¶ 261) (emphasis added)

35. While the FCC contemplated that the removal of Section 251 obligations for line sharing would be handled in a way that would not cause disruption to customer service, the FCC obviously recognized the dangers of continuing to treat line sharing as a UNE even though it no longer meets the impairment test. It only follows from this recognition that alternative arrangements (either functional alternatives to line sharing or alternative line sharing arrangements that would be negotiated with ILECs) should be implemented as quickly as possible in order to avoid a deleterious, anti-competitive effect. Again, the entire point of the transition period is to <u>encourage</u> CLPs to find (in an orderly fashion) other alternatives to the current line sharing arrangements. If, however, BellSouth is required to pay penalties for line sharing throughout the entire transitional period – as if line sharing were still a Section 251 UNE – this requirement will obviously slow the transition and thwart the intent of the FCC.

36. The FCC clearly intended that a balance be struck between not transitioning current line sharing arrangements to other alternatives too quickly (since this could have an ill effect on

customers) and not transitioning too slowly (since this would have an ill effect on competition). It is (in part) for this reason that the FCC ordered that line sharing should be treated differently throughout the transitional period than it was treated when it was a Section 251 UNE. If, the FCC's decision notwithstanding, BellSouth is required to continue to pay penalties relating to line sharing as if it were a UNE, then this will only provide an additional incentive for CLPs to continue to utilize line sharing under the present arrangement for as long as possible. In other words, this will prevent achievement of the FCC's goal of ensuring that the transition occurs as quickly as possible.

37. Again, while it may have been appropriate to pay penalties for line sharing when it was categorized as a Section 251 UNE, now that it is not categorized in this manner (and is, therefore, clearly outside of the structure of the plan) the treatment of UNEs under the plan must change. The FCC has ordered a transitional process that must begin immediately. This means that the treatment of line sharing must change now, not at some later point. The only ruling by this Commission that would be consistent with this approach is to change the treatment of line sharing under the penalty plan immediately as well.

BellSouth's Request to Escrow or Offset Penalties

38. The FCC's Triennial Review Order became effective on October 2, 2003. Thus, the first month for which penalties relating to line sharing should not be paid is October of 2003. Under the terms of the SEEM Plan, both Tier I and Tier II penalties are paid 45 days after the end of the month in which the performance occurs. Thus, any penalties that would be payable for the month of October 2003 would be due on or about December 15, 2003. Given this, BellSouth was required to pay penalties relating to line sharing for the month of October 2003, even though this Commission may well (and should) determine that these penalties should not be paid.

39. Thus, BellSouth may be placed in the untenable position of having to attempt to recoup penalty payments from a number of CLECs. Under the best case scenario, BellSouth will have the unnecessary administrative burden of making payments to CLECs only to later expend additional efforts to recover these funds. There is, of course, a substantial likelihood that at least some of the CLECs would decline to voluntarily return the penalty payments. If these CLECs do not repay the subject penalties for line sharing, then BellSouth would be unjustly deprived of these payments.

40. BellSouth requests that the Commission mitigate this situation, if it is not able to rule on BellSouth's Motion promptly, by allowing BellSouth to escrow payments made after December 15, 2003, but before the Commission rules on BellSouth's Motion to Modify the SEEM Plan. If the Commission subsequently rules in BellSouth's favor, then the payments would be returned from escrow to BellSouth. Although BellSouth should prevail in this issue for the reasons set forth above, if BellSouth does not obtain the requested relief, any payments due would be promptly remitted to the CLECs upon the entry of an Order by the Commission. Therefore, granting BellSouth's request, and allowing these funds to be paid into escrow, would not cause harm to any party.

41. BellSouth also requests that the Commission allow BellSouth to offset any SEEM payments made for line sharing on or about December 15, 2003, which the Commission's subsequently determines are not required, against subsequent penalty payments due under Tier I and Tier II. In other words, if the Commission rules in BellSouth's favor on the Motion to Modify SEEM Plan, then BellSouth would be allowed to offset all SEEM payments for line sharing, beginning with those due December 15, 2003, against penalties that BellSouth otherwise would owe under the Plan. Thus, if at the time the Commission rules, BellSouth owes penalty payments

to a given CLEC, it would simply reduce the amount of the payment by the amount of the line sharing penalties that BellSouth paid on or about December 15, 2003.

42. Assuming the Commission will grant BellSouth's Motion to Modify, an alternative to escrowing payment would be to rule that BellSouth may offset all line sharing payments made prior to this ruling against other penalty payments. If the Commission anticipates ruling quickly on BellSouth's Motion, then this approach would be acceptable. BellSouth requests, however, that if the Commission anticipates any delay, BellSouth be allowed to offset the payments for the month of October 2003, as described above, and to escrow all subsequent line sharing payments, pending the ruling by the Commission.

WHEREFORE, BellSouth respectfully requests the entry of an Order granting it all relief requested herein.

Respectfully submitted this 18th day of December, 2003.

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