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February 23, 2006

VIA HAND DELIVERY

Ms. Lisa Polak Edgar, Chairman
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: *Docket No. 041269-TP: Petition to Establish a Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes in Law by BellSouth Telecommunications, Inc.*

Dear Chairman Edgar:

NuVox Communications, Inc. and Xspedius Communications, Inc., on behalf of itself and its Florida operating subsidiaries, Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville LLC (together, the "CLEC Parties"), through counsel, hereby respectfully request that the Florida Public Service Commission (the "Commission"), *sua sponte*, vacate certain of its rulings on Issues 25 and 26 in the above-referenced proceeding (specifically, those rulings addressing BellSouth's obligation to perform Line Conditioning upon request by a Florida CLEC), and direct Staff to assign new Staff members to review the existing record addressing those Issues and to prepare a Staff recommendation on those Issues for consideration by the Commission, *de novo*. The Staff Recommendation in the above-referenced proceeding addressing Issues 25 and 26 is based, at least in part, on a prior Commission Order in an interconnection agreement arbitration proceeding between BellSouth Telecommunications, Inc. ("BellSouth") and the CLEC Parties that is tainted by the bias of former Commission Staff member Doris Moss.[1] Therefore,

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[1] *See Joint Petition by NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC and Xspedius Communications, LLC, on behalf of Itself and 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.*, Docket No. 040130-TP, Final Order Regarding Petition for

consistent with Staff's prior recommendation regarding treatment of issues in this proceeding reviewed by Ms. Moss,[2] the Commission should take the actions requested by the CLEC Parties.

The subject matter addressed by Issues 25 and 26, in part, in the above-referenced proceeding (specifically, BellSouth's obligation to perform Line Conditioning upon request by a Florida CLEC) is identical to that addressed by Issues 36, 37 and 38 in Docket No. 040130-TP. The Commission's Final Order Regarding Petition for Arbitration in Docket No. 040130-TP, dated October 11, 2005, with respect to those issues relies exclusively on the Staff Recommendation prepared by Doris Moss[3] which was approved by the Commission, without modification, at its August 30, 2005 agenda meeting.[4] Thus, the Line Conditioning issues subsequently decided by the Commission in the above-referenced proceeding also are impacted by the biased review and analysis submitted by Ms. Moss in Docket No. 040130-TP.[5] Of further importance, the rulings of the Commission addressing BellSouth's obligation to perform Line Conditioning upon request by a Florida CLEC are at odds with the rulings of the Georgia Public Service Commission,[6] the Kentucky Public Service Commission[7] and the North Carolina Utilities Commission[8] addressing the same issue.

Arbitration, Order No. PSC-05-0975-FOF-TP (Oct. 11, 2005) ("Joint Petitioners' Arbitration Order"); Memorandum from Division of Competitive Markets and Enforcement (Marsh, Barrett, Hallenstein, K. Kennedy, Moss, Pruitt, Rich, Vickery) and Office of the General Counsel (Susac, Scott) to Director, Division of the Commission Clerk and Administrative Services (Bayo) Re: Docket No. 040130-TP (Jul. 21, 2005) ("Joint Petitioners' Arbitration Staff Recommendation").

2 Memorandum from Division of Competitive Markets and Enforcement (Salak) and Office of the General Counsel (Teitzman, Wiggins) to Director, Division of the Commission Clerk and Administrative Services (Bayo) Re: Docket No. 041269-TP (Feb. 17, 2006) ("Moss Memorandum").

3 Joint Petitioners' Arbitration Staff Recommendation at 29-54 (Issues 36A, 36B, 37 and 38).

4 Docket No. 040130-TP, Vote Sheet (Aug. 30, 2005).

5 **Recommendation at 160** ("As noted by BellSouth in its brief this Commission also found in its Joint Petitioners' Order that [Routine Network Modifications] and line conditioning are to be performed at parity.").

6 *See Generic Proceeding to Examine Issue Related to BellSouth's Obligation to Provide Unbundled Network Elements*, Georgia Public Service Commission Docket No. 19341-U, Commissioner Motion for the Resolution of the Remaining Issues in Docket No. 19341-U (Feb. 7, 2006) (Issues 26 and 27) (relevant portions attached as *Exhibit A*).

7 *See Joint Petition for Arbitration by NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC and Xspedius*

The Commission Staff already has concluded that the actions of Doris Moss in the above-captioned proceeding is contrary to the Commission's Code of Ethics, and thereby warrants "aggressive action" to ameliorate a "perception of bias" and "reasonable concerns regarding the impartiality of her analyses and recommendations."[9] Specifically, Commission Staff stated, in a Memorandum to the Division of the Commission Clerk and Administrative Services, that Ms. Moss improperly communicated with BellSouth during contested proceedings.[10] Moreover, BellSouth recently confirmed that Doris Moss, a 24-year employee of BellSouth, currently receives financial compensation from BellSouth (retirement benefits), and remains enrolled in BellSouth's group health plan.[11] At bottom, the ongoing relationship between BellSouth and Doris Moss necessitates that the Commission take similar steps with regard to *all* issues decided in the above-referenced proceeding, including Issues 25 and 26, that rely in any way on the basis of Ms. Moss' review and analysis.[12]

For the reasons set forth herein, and consistent with Staff's February 17, 2006 Memorandum in the above-referenced proceeding, the CLEC Parties respectfully request that that the Commission, *sua sponte*, vacate its decision on Issues 25 and 26 in the above-referenced proceeding, and direct Staff to assign new Staff members to review the existing record

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Communications, LLC, on behalf of Itself and its Operating Subsidiaries, Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Kentucky Public Service Commission Case No. 2004-00044, Order (Sept. 26, 2005) (Issues 36, 37 and 38) (relevant portions attached as *Exhibit B*)

8 *In the Matter of Joint Petition of NewSouth Communications Corp. et al for Arbitration with BellSouth Telecommunications, Inc.*, North Carolina Utilities Commission Docket Nos. P-772, Sub. 8; P-913, Sub. 5; P-989, Sub. 3; P-824, Sub. 6, P-1202, Sub. 4, Order Ruling on Objections and Requiring the Filing of the Composite Interconnection Agreement (Feb. 8, 2006); Recommended Arbitration Order (Jul. 26, 2005) (Issues 36, 37, 38) (relevant portions attached as *Exhibit C*).

9 Moss Memorandum at 4.

10 *Id.*

11 Letter from Nancy B. White, General Counsel – Florida, BellSouth Telecommunications, Inc. to Richard D. Melson, General Counsel, Florida Public Service Commission (Feb. 17, 2006) (attached as *Exhibit D*).

12 The CLEC Parties appreciate the Commission's efforts to further investigate the conduct of Doris Moss, and respectfully note that the evidence before the Commission in no way suggests that the improper actions taken by Ms. Moss impact only the above-referenced proceeding. Indeed, as discussed more fully above, Doris Moss presently receives financial compensation and other benefits provided by BellSouth.

addressing those Issues and to prepare a Staff recommendation on those Issues for consideration by the Commission, *de novo*, during the same time frame recommended by Staff for other issues previously vacated in the above-referenced proceeding.

Respectfully submitted,

for Norman H. Horton

cc: Commissioner Isilio Arriaga
Commissioner J. Terry Deason
Commissioner Matthew M. Carter, II
Commissioner Katrina J. Tew
Richard D. Melson
Blanca Bayo
Patrick Wiggins
Adam Teitzman
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Beth Salak
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Susan Berlin
Docket File
Parties of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Hand Delivery (*) and U. S. Mail this 23rd day of February, 2006.

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for Norman H. ~~Horton,~~ Jr.

Commissioner Motion for the resolution of the remaining issues in Docket No. 19341-U.

SUMMARY

Issue 2: TRRO Transition Plan – What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's TRRO, issued February 4, 2005?

(1) BellSouth has argued that state commissions do not have the authority to require it to offer de-listed UNEs at rates terms and conditions found just and reasonable under Section 271. The Commission has already concluded that it does have such authority.

(2) CLECs have until March 11, 2006 to order conversions from BellSouth. To the extent that it takes BellSouth beyond March 11 to process these orders, BellSouth is entitled to a true-up of the difference between the TELRIC rate and the rate BellSouth may charge after that date for the time period after March 11, 2006 that it charged TELRIC rates for these services.

(3) Parties are required to negotiate appropriate transition mechanisms through the Section 252 process for high-capacity loops for which the FCC found impairment in the *TRRO,* but which may meet the thresholds for non-impairment in the future.

Issue 3: Modification and Implementation of Interconnection Agreement Language – (a) How should existing ICAs be modified to address BellSouth's obligation to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations? (b) What is the appropriate way to implement in new agreements pending in arbitration any modifications to BellSouth's obligations to provide network elements that the FCC has found are no longer Section 251(c)(3) obligations?

(1) Parties are obligated to negotiate the necessary changes in good faith so as not to unduly delay the implementation of the changes in law.

(2) The Commission adopts CompSouth's position to limit its consideration in this proceeding to those issues that resulted from the *TRO* and *TRRO.*

(3) The Commission adopts BellSouth's position and finds that parties are bound by the decision in this generic proceeding, unless they have entered into an agreement with BellSouth that indicates otherwise.

(4) The Commission adopts BellSouth's position and concludes that the Abeyance Agreement does not excuse Cbeyond from implementing the *TRRO* until the parties have a new interconnection agreement.

In overbuild deployments, the requirement that incumbent LECs provide capacity to competitive LECs, regardless of whether the copper facilities have been retired, applies only to narrowband facilities. *See* 47 C.F.R. 51.319(a)(3)(iii) BellSouth proposes the following language:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will not apply, and the order will be handled on a project basis by which the Parties will negotiate the applicable provisioning interval.

The Commission finds that BellSouth's proposal is consistent with the federal rule for the most part and adopts BellSouth's language with one modification. Because the third sentence of BellSouth's language would exclude orders for legacy copper from the SQM/ SEEM plan, the Commission modifies that sentence to require these orders to remain in the SQM/ SEEM plan until the Commission determines the appropriate interval for provisioning such an order. BellSouth may petition the Commission to modify the interval. Therefore, the Commission orders the following language:

> Furthermore, in FTTH/FTTC overbuild areas where BellSouth has not yet retired copper facilities, BellSouth is not obligated to ensure that such copper Loops in that area are capable of transmitting signals prior to receiving a request for access to such Loops by <<customer_short_name>>. If a request is received by BellSouth for a copper Loop, and the copper facilities have not yet been retired, BellSouth will restore the copper Loop to serviceable condition if technically feasible. In these instances of Loop orders in an FTTH/FTTC overbuild area, BellSouth's standard Loop provisioning interval will apply.

Finally, CompSouth appears to argue that the FTTH/ FTTC rules do not apply in central offices in which the FCC found that competitive LECs were impaired without access to DS1s and DS3s. However, the FCC rules on FTTC/ FTTH make no mention of any exclusion based on impairment analysis. Presumably, the FCC did not anticipate that competitive LECs would seek to provide high-capacity services to residential customers. The Commission finds that the FCC's FTTH/ FTTC rules apply to all central offices.

Issue 26: -- What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?

Positions of the Parties

BellSouth

A.

Routine Network Modifications (RNMs) are "those activities that incumbent LECs regularly undertake for their own customers." (*TRO*, ¶ 632). ILECs are not obligated to alter substantially its network to provide superior quality interconnection. (*TRO*, at ¶ 630 quoting Iowa Util. Bd. 120 F.3d. 753 (1997)).

B.

Line conditioning is an RNM. (*TRO*, ¶ 643). Therefore, BellSouth's only obligation is to provide line conditioning at parity. *Id.* Paragraph 250 of the *TRO* states that "line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service."

C.

The Florida Public Service Commission did not obligate BellSouth to remove at TELRIC rates load coils on loops greater than 18,000 feet. (BellSouth Brief, pp. 98-99). The Florida Commission held that BellSouth's obligation to remove bridged taps was to provide parity access. *Id.* at 99.

CompSouth

A.

BellSouth is wrong to "submerge the FCC's pre-existing rules on line conditioning into the rules adopted in the TRO regarding routine network modifications." (CompSouth Brief, p. 106). In its *Local Competition Order,*[7] the FCC established ILECs must modify their facilities to accommodate CLEC access to UNEs. (¶ 209). In the *UNE Remand Order*, the FCC adopted line conditioning rules, which stated that ILECs are required to condition copper loops and subloops "to ensure that the copper loop or subloop is suitable for providing digital subscriber line services . . . whether or not the [ILEC] offers advanced services to the end-user customer on that copper loop or subloop." 51.319(a)(1)(iii).

In the *TRO,* the FCC (1) re-adopted the line conditioning rules, (2) identified the concept of "routine network modification" for the first time, (3) treated line conditioning and RNMs in different sections and (4) included language that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." (¶ 643).

This dispute has important policy implications because there are emerging DSL technologies, and CLECs need to be able to respond with innovative offers. BellSouth's position is a roadblock. (CompSouth Brief, pp. 109-10).

B.

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[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, *First Report and Order,* 11 FCC Rcd at 15608 (1996) ("*Local Competition Order*").

BellSouth struck language from the CLECs proposal that was taken directly from the FCC's rule on RNMs. *Id.* at 110-11).

Discussion

The Commission finds that BellSouth is obligated to perform line conditioning in instances in which BellSouth is not providing advanced services to the customers in question. The FCC notes that in the context of the *UNE Remand Order* it concluded that the Eighth Circuit holding stating that an ILEC is not required to construct a network of "superior quality" did not overturn the FCC's rules requiring an ILEC to condition loops regardless of whether it was providing advanced services to those customers. (TRO, fn 1947). The FCC notes that in the *UNE Remand Order* it found that line conditioning enabled the requesting carrier to use the basic loop. (TRO fn 1947, quoting UNE Remand Order, ¶ 173).

The FCC promulgated line conditioning rules provide, in part, as follows:

> The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop.

47 C.F.R. § 319(a)(1)(iii).

The FCC states in the *TRO* that it is re-adopting its line conditioning rules set forth in the UNE Remand Order. (¶ 642).

The language relied upon by BellSouth states that line conditioning does not constitute the creation of a superior network, but rather, should be "seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." (*TRO*, ¶ 643). Read in the context of the remainder of the section on line conditioning and the pertinent FCC's rules, this paragraph cannot mean that ILECs are not required to provide line conditioning unless it provides advanced services to the end-user customers. Such a reading would flatly conflict with the remainder of the line conditioning section and 47 C.F.R. § 319(a)(1)(iii). The more consistent reading of the language at issue is that the FCC was explaining why the requirement expressly set forth in its rules does not conflict with the Eighth Circuit holding on the creation of a superior network. At the bottom of paragraph 643, the FCC notes that "Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices." This explanation is properly viewed as an expansion on the policy behind the excerpt from the *UNE Remand Order* set forth in footnote 1947 of the *TRO* that line conditioning enables use of the basic loop. The FCC did not backtrack on the requirement set forth in its earlier orders. Instead, it rebutted once again the claim that the requirement runs afoul of the Eighth Circuit holding.

The FCC emphasizes that ILECs must provide line conditioning to CLECs on a nondiscriminatory basis. (*TRO*, ¶ 643). The FCC states that line conditioning is seen as a routine network modification that an ILEC regularly performs to provide advanced services to its own customers and does not constitute the creation of a superior network. *Id.* Given this direction, the Commission finds that BellSouth is obligated to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers.

As to the second issue, the Commission directs BellSouth to permit inclusion of the CompSouth proposed language on RNMs that mirrors the FCC rule.

Issue 27 – What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in Commission-approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?

Positions of the Parties

BellSouth

If BellSouth is not obligated to perform an RNM, such as removing load coils on loops that exceed 18,000 feet or removing bridged taps, then the appropriate rate is not TELRIC. The appropriate rate is a commercial or tariffed rate. (BellSouth Brief, p. 99).

CompSouth

A.

BellSouth should not be allowed to impose individual case basis pricing for routine modifications. The rate should be cost-based. (CompSouth Brief, p. 111).

B.

Recovery should be allowed if its RNM costs are not recovered in loop rates. BellSouth should not be able to double recover its costs. *Id.* at 112).

Discussion

In its Line Conditioning Order, the FCC applied ILECs' line conditioning obligation to loops of any length. 14 FCC Rcd 20912, 20951-53, ¶¶ 81-87. BellSouth's position that a commercial rate is appropriate for removing load coils or bridged tap on loops that exceed 18,000 feet was premised on its argument that it is not obligated to perform these functions on such loops. Based on the FCC's Line Conditioning Order, and the reference to such order in the *TRO*, the Commission reaches a different conclusion. Because the Commission has found that BellSouth has the obligation to condition lines to enable a requesting CLEC to provide advanced services to the CLEC's customers to the same extent that BellSouth would condition lines to provide advanced services to its own customers, the rate for such line conditioning should be

TELRIC. To the extent that BellSouth maintains any additional rates are needed, it should petition the Commission to establish those rates.

The Commission also agrees with CompSouth that BellSouth should not be allowed to recover as part of its RNM rate costs that are already recovered as part of the loop cost.

Issue 29 – Enhanced Extended Link ("EEL") Audits: -- What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?

Position of the Parties

BellSouth

A.

BellSouth proposed language that would enable it to audit CLECs on an annual basis to determine compliance with the qualifying service eligibility criteria. BellSouth should not be required to show cause prior to the commencement of an audit. (BellSouth Brief, p. 85). It argues that the requirement is both unnecessary because it is paying for the audit and is used as a delay tactic. *Id.*

B.

BellSouth should not be required to incorporate a list of acceptable auditors in interconnection agreements or only use an auditor the other party agrees to use. *Id.*

C.

If the auditor determines that a CLEC's noncompliance is material in one area, then the CLEC should be responsible for the cost of the audit. *Id.*

CompSouth

A.

BellSouth's audit rights are limited. The cause requirement is set forth in paragraph 622 of the *TRO*. (CompSouth Brief, p. 113). This requirement could make the process run smoother because if BellSouth identifies circuits, then the internal review conducted by the CLEC may obviate the need for an audit. *Id.* In addition, the identification of circuits would make relevant documentation available earlier in the process. *Id.*

B.

CompSouth's proposal for a mutual agreement process would resolve problems on the front end and is consistent with the way PIU/PLU audits are performed. *Id.* at 115. The CLECs are not willing to agree to a "pre-approved" list of entities. (CompSouth Brief, p. 114).

C.

CLECs should only have to pay for the costs of the audit concerning those audits where material. *Id.* at 116.

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED	)	CASE NO. 2004-00044

O R D E R

NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC (collectively, "Joint Petitioners") filed with the Commission a joint petition for arbitration seeking resolution of 107 issues arising between the Joint Petitioners and BellSouth Telecommunications, Inc. ("BellSouth"). BellSouth answered the petition.

The parties have agreed that they will continue operating under their current interconnection agreements until they are able to negotiate or arbitrate new agreements

EXHIBIT "B"

In an errata order issued after the TRO, the FCC deleted the reference to Section 271 in its discussion of commingling. Thus, according to BellSouth, it has no obligations to commingle any Section 271 elements. BellSouth contends that this Commission may not regulate the rates, terms, and conditions for elements required to be provided by BellSouth pursuant to Section 271.

The TRO and subsequent FCC orders have not relieved BellSouth of its obligation to commingle UNEs or combinations of UNEs that it is required to make available pursuant to Section 271. If BellSouth prevails, commingling would be eliminated. This elimination is not required by the FCC. Moreover, the network facilities used by BellSouth to provide access which it is obligated to provide pursuant to Section 271 are within this Commonwealth and are used to provide intrastate service. Accordingly, BellSouth has not been relieved from obligations to commingle these facilities as requested by Joint Petitioners.

ISSUE 36: HOW SHOULD LINE CONDITIONING BE DEFINED AND WHAT SHOULD BELLSOUTH'S OBLIGATIONS BE WITH RESPECT TO LINE CONDITIONING?

This issue, and the two that follow it, relate to line conditioning. The parties disagree over how line conditioning should be defined, what BellSouth's obligations are with respect to it, whether line conditioning should be limited to copper loops of 18,000 feet or less, and under what terms and rates BellSouth should be required to perform line conditioning to remove bridged taps.

According to the Joint Petitioners, line conditioning, which is a 47 U.S.C. § 251(c)(3) obligation, should be defined by FCC Rule 51.319(a)(1)(III)(A). The Joint

Petitioners are asking for "status quo."[9] The Joint Petitioners assert that line conditioning obligations were not eliminated by the TRO but were, instead, expanded. The TRO states that the FCC views "loop conditioning as intrinsically linked to the local loop and included within the definition of loop network element."[10] Moreover, the FCC indicates that "line conditioning does not constitute the creation of a superior network."[11] Instead, loop conditioning enables a requesting carrier to use the basic loop.[12]

BellSouth asserts that it is obligated to perform line conditioning only on the same terms and conditions that it provides for its own customers. In support of its views, BellSouth quotes the FCC to require "incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves."[13] Thus, according to BellSouth, its obligations regarding line conditioning are to establish nondiscriminatory access pursuant to 47 U.S.C. § 251(c)(3). BellSouth contends that if the Joint Petitioners prevail, they will be receiving service which BellSouth routinely does not provide to its own customers.

The Commission finds that line conditioning is a routine network modification, not the creation of a superior network. As such, BellSouth must provide line conditioning when requested by the Joint Petitioners as specified in 47 C.F.R. 51.319(a).

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[9] T.E. at 120.

[10] TRO at Paragraph 643.

[11] Id.

[12] UNE Remand Order, 15 FCC Record at 3775, Paragraph 173.

[13] TRO at Paragraph 643.

ISSUE 37: SHOULD THE AGREEMENT CONTAIN SPECIFIC PROVISIONS LIMITING THE AVAILABILITY OF LINE CONDITIONING TO COPPER LOOPS OF 18,000 FEET OR LESS?

BellSouth asked that the interconnection agreement specifically limit the availability of line conditioning to copper loops of 18,000 feet or less. It contends that it has no obligation to remove load coils in excess of 18,000 feet at Total Element Long Run Incremental Cost ("TELRIC") for the Joint Petitioners because it does not remove load coils on such long loops for its own customers. BellSouth asserts that if requested to remove load coils on loops in excess of 18,000 feet, it will do so pursuant to the special construction process and charges contained in its tariff.

The Joint Petitioners assert that the limitation proposed by BellSouth imposes an artificial restriction on its obligations. Despite indicating that it does not remove load coils on loops in excess of 18,000 feet, BellSouth testified that it routinely removed load coils on such loops in order to provide T1 circuits.[14]

Based on the provision of load coil removal for such long loops for the provision of T1 circuits and based on BellSouth's assertion that it seeks to provide its services at parity, the Commission finds that when requested by the Joint Petitioners, BellSouth should remove the load coils on loops in excess of 18,000 feet at the existing TELRIC rates.

ISSUE 38: UNDER WHAT RATES, TERMS AND CONDITIONS SHOULD BELLSOUTH BE REQUIRED TO PERFORM LINE CONDITIONING TO REMOVE BRIDGED TAPS?

The Joint Petitioners propose that BellSouth should perform line conditioning, including the removal of bridged taps, at TELRIC rates regardless of the resulting

[14] T.E. at 248.

combined level of bridged taps that remain. Bridged taps are network enhancements used to allow a utility to maximize the extent of voice service that can be provided over certain copper pairs.[15] The Joint Petitioners argue that BellSouth's attempt to assess tariffed rates for the removal of bridged taps beyond a combined level of 2,500 feet is contrary to federal law. According to the Joint Petitioners, FCC Fule 51.319(a)(1)(iii) requires BellSouth to unconditionally perform line conditioning, including the removal of bridged taps, at TELRIC rates.

Similar to prior arguments, BellSouth contends that removal of bridged taps, as requested by the Joint Petitioners, is not required to preserve non-discrimination obligations. BellSouth advises this Commission that line conditioning at TELRIC rates, including the removal of bridged taps, is only required to the extent that it provides such functions to itself. According to BellSouth, it does not routinely remove bridged taps that result in a combined level of less than 2,500 feet for its customers. BellSouth asserts that removing bridged taps at TELRIC rates, as requested by the Joint Petitioners, will result in providing CLECs with a "superior network." BellSouth proposes that the removal of bridged taps resulting in combined levels of less than 2,500 feet should be assessed special construction rates contained in its FCC tariff.

The Commission finds that the removal of bridged taps should be performed at TELRIC rates. The fact that BellSouth utilizes loops that contain greater combined levels of bridged tap length is immaterial to the capability being sought by the Joint Petitioners. TELRIC rates, by definition, recover the "incremental" costs plus a profit for the function being performed and therefore should adequately compensate BellSouth.

[15] BellSouth Brief at 46.

Furthermore, BellSouth has offered no evidence to support its position that generic special construction rates are appropriate.

ISSUE 51: SHOULD THERE BE A NOTICE REQUIREMENT FOR BELLSOUTH TO CONDUCT AN AUDIT AND WHO SHOULD CONDUCT THE AUDIT?

The unresolved matters related to Issue 51 deal with appropriate notice requirement for BellSouth to conduct an audit of Enhanced Extended Links ("EELs"), who should conduct such an audit, and how it should be conducted. These matters are currently the subject of litigation in federal court. The parties to that litigation are NuVox Communications, Inc., BellSouth, and the Commission.[16] The Commission reaffirms its previous orders which are pending in litigation and declines to address the matter further herein.

ISSUE 65: SHOULD BELLSOUTH BE ALLOWED TO CHARGE THE CLEC A TRANSIT INTERMEDIARY CHARGE FOR THE TRANSPORT AND TERMINATION OF LOCAL TRANSIT TRAFFIC AND ISP-BOUND TRANSIT TRAFFIC?

BellSouth contends that it should be authorized to assess Joint Petitioners a Transit Intermediary Charge ("TIC") for transiting traffic in addition to the TELRIC tandem switching and common transport charges the parties have already agreed will apply. BellSouth asserts that it does not have a duty to provide this transit service at TELRIC rates. Joint Petitioners, BellSouth contends, have the option of directly

[16] NuVox Communications, Inc. v. BellSouth Telecommunications, Inc.; Kentucky Public Service Commission; Mark David Goss, in his official capacity as Chairman of the Kentucky Commission; and W. Gregory Coker, in his official capacity as Commissioner of the Kentucky Commission, Civil Action No. 05-cv-41-JMH, United States District Court, Eastern District of Kentucky.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-772, SUB 8
DOCKET NO. P-913, SUB 5
DOCKET NO. P-1202, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.	)	ORDER RULING ON OBJECTIONS AND REQUIRING THE FILING OF THE COMPOSITE AGREEMENT

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Robert V. Owens, Jr., and Lorinzo L. Joyner

BY THE COMMISSION: On July 26, 2005, the Commission issued its *Recommended Arbitration Order* (*RAO*) in this docket. The Commission made the following:

FINDINGS OF FACT

1. The term "End User" should be defined as "the customer of a party."

2. The industry standard limitation of liability limiting the liability of the provisioning party to a credit for the actual cost of services or functions not performed or improperly performed should apply.

3. If a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from its decision not to include the limitation of liability.

4. The rights of end users should be defined pursuant to state contract law.

5. The Agreement should state that incidental, indirect, and consequential damages should be defined pursuant to state law.

6. The proposal of the Joint Petitioners (including NewSouth Communications Corp. (NewSouth), NuVox Communications, Inc. (NuVox), and Xspedius Communications, LLC on behalf of its operating subsidiary, Xspedius Management Co. Switched Services, LLC (Xspedius)) found in Section 10.5 of their Appendix A should be approved.

Commission believes that its decision herein is in harmony with the FCC's general emphasis on the continued access by competitors to certain Section 271 services, elements, and offerings by RBOCs regardless of any de-listing due to a nonimpairment analysis under Section 251.

Based upon the foregoing, the Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration on Finding of Fact No. 9 and to alter Finding of Fact No. 9 to state, as follows:

> BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act, including those obtained as Section 271 elements.

CONCLUSIONS

The Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration and, thus, alter Finding of Fact No. 9, as outlined hereinabove. The Commission notes that its decision herein does not address the issue of the appropriateness of including Section 271 elements in interconnection agreements. Nor does the decision herein address the issue of the appropriate rates for Section 271 elements. These issues, in addition to the specific commingling issue decided herein, will be addressed by the Full Commission by order in the change of law docket (Docket No. P-55, Sub 1549).

FINDING OF FACT NO. 10 (ISSUE NO. 10 – MATRIX ITEM NO. 36): How should line conditioning be defined in the Agreement; and what should BellSouth's obligations be with respect to line conditioning?

FINDING OF FACT NO. 11 (ISSUE NO. 11 – MATRIX ITEM NO. 37):

Joint Petitioners' Issue Statement: Should the Agreement contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less?

BellSouth's Issue Statement: Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less?

FINDING OF FACT NO. 12 (ISSUE NO. 12 – MATRIX ITEM NO. 38): Under what rates, terms, and conditions should BellSouth be required to perform line conditioning to remove bridged taps?

INITIAL COMMISSION DECISION

In Findings of Fact Nos. 10, 11, and 12, the Commission concluded as follows:

10. The term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51.3219(a)(1)(iii)(A). BellSouth should perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii).

11. The line conditioning activity of load coil removal on copper loops should not be limited to copper loops with only a length of 18,000 feet or less.

12. Any copper loop ordered by a CLP with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. Line conditioning orders that require the removal of other bridged tap (bridged tap between 0 and 6,000 feet) should be performed at the BellSouth UNE rates previously adopted by the Commission.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: In its Objection No. 2, BellSouth objected to Findings of Fact Nos. 10, 11, and 12 in the *RAO*. BellSouth asserted that the Commission erred in requiring BellSouth to perform line conditioning for the Joint Petitioners that exceeds what BellSouth provides to its own customers in contravention of its nondiscrimination obligations under the Act. BellSouth argued that both the *TRO* and the FCC Rules relating to line conditioning require the Commission to reach a different conclusion and rule in favor of BellSouth. In its Footnote No. 3 of its September 1, 2005 Motion for Reconsideration, BellSouth observed that these line sharing issues are also captured by Issue No. 26, in Docket No. P-55, Sub 1549 (change of law docket): "What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?"

BellSouth maintained that it is undisputed that BellSouth's line conditioning obligation is derived from its Section 251(c) duty to provide nondiscriminatory access. Further, BellSouth stated that the FCC has expressly held, in relation to line conditioning, 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." As such, BellSouth asserted that both the FCC Rules and the *TRO* require the Commission to find that BellSouth's line conditioning obligations are limited to what BellSouth provides to its own customers.

BellSouth noted that, in the *RAO*, the Commission focused on the express wording of FCC Rule 51.319(a)(1)(iii)(A) and held that "ILEC's line conditioning obligations remained virtually the same as they did before the *TRO*, with the exception that the line conditioning obligations were expanded to include copper subloops." BellSouth stated that it could appreciate the Commission's decision, because the subject matter can be confusing in light of the various FCC decisions. However, BellSouth argued that the Commission's analysis and findings are incorrect as a matter of law.

BellSouth observed that its line conditioning obligations in FCC Rule 51.319(a)(1)(iii) expressly state that line conditioning applies to copper loops being requested "under

paragraph (a)(1) of this section . . . ." Next, BellSouth noted that Paragraph (a)(1) of the section states that "[a]n incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the copper loop on an unbundled basis." BellSouth argued that the obligation to provide nondiscriminatory access to the copper loop is identical to BellSouth's general obligation to provide access to local loops as set forth in subsection (a) of the same Rule 51.319(a), which provides that "[a]n incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the local loop on an unbundled basis, in accordance with Section 252(c) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section." Accordingly, BellSouth maintained that its obligation to provide line conditioning is limited and based upon its obligation to provide nondiscriminatory access to copper loops, specifically, and local loops, generally, pursuant to Section 251(c)(3) of the Act and the FCC's rules.

Further, BellSouth stated that nondiscriminatory access is defined under the FCC Rules (47 C.F.R. § 51.311(a) and (b)) established in the *TRO* in the following manner:

> (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. . . .

BellSouth asserted that, prior to the *TRO*, the FCC's Rules provided that, upon request, an ILEC had to provide access to UNEs superior in quality to that which it provides itself, which is exactly what the Joint Petitioners are asking here. In particular, BellSouth stated that the prior rule (47 C.F.R. § 51.311(c) (2001 ed.)) provided the following: "To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network elements, that an incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be superior in quality to that which the incumbent LEC provides to itself." BellSouth observed that this "superior in quality" standard was struck down by the Eighth Circuit in *Iowa Utilities Board*.[26] BellSouth argued that the FCC memorialized this nondiscrimination requirement in the *TRO*, wherein, at Paragraph 643, it found that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide [digital subscriber line] xDSL

[26] *Iowa Util. Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000), *aff'd in part and reversed in part on other grounds, Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) (*Iowa Utilities Board*).

services to their own customers. . . incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves. . . 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."

Accordingly, BellSouth contended that the parameters of its line conditioning obligations changed in the *TRO*, even though the definition of line conditioning in Rule 51.319(a)(1)(iii) did not. Thus, BellSouth maintained that its obligation to perform line conditioning for the Joint Petitioners is limited as a matter of law to its nondiscrimination obligation under the Act, which requires BellSouth to provide to the Joint Petitioners the same type of line conditioning that it provides to itself, nothing more. In addition, BellSouth noted that the Florida PSC, in an arbitration proceeding in Docket No. 040130-TP[27], reached this same conclusion such that it rejected the Joint Petitioners' interpretation and proposed language and held that "to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders."

Furthermore, BellSouth commented that the fact that the Commission established TELRIC pricing for load coil removal and bridged taps of any length in 2001 does not require a different conclusion because these UNE rates were established prior to the FCC's issuance of the *TRO* and the new rules relating to BellSouth's nondiscrimination obligation. In summary, BellSouth contended that the Commission should make the *RAO* consistent with BellSouth's nondiscrimination obligations under the Act, adopt BellSouth's language for Issue Nos. 10-12 (Matrix Item Nos. 36-38), and find that BellSouth's obligation to provide line conditioning at TELRIC is limited to the type of line conditioning BellSouth provides to itself.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners maintained that BellSouth's arguments are not compelling and they provide no sound reasons for the Commission to modify the *RAO* in any respect with regard to these issues.

The Joint Petitioners noted that BellSouth has lodged a single objection on these three separate issues with the principal theory in BellSouth's objection being that the Commission's decisions effectively provide the Joint Petitioners with access to a superior network. As noted in the *RAO*, the FCC in its *TRO*, at Paragraph 643, states that "[l]ine conditioning does not constitute the creation of a superior network, as some incumbent LECs argue." Further, the Joint Petitioners observed that the FCC in Paragraph 643 also states that "requiring the conditioning of xDSL-capable loops is not

[27] An Exhibit A was attached to BellSouth's filing of objections in this docket. Said Exhibit A is a copy of the Florida PSC Staff's recommendations set forth in its July 21, 2005 Memorandum in Docket No. 040130-TP and the Florida PSC's August 30, 2005 Vote Sheet ruling on said recommendations.

mandating superior access." The Joint Petitioners pointed out that the FCC did not qualify these statements or make compliance with its independent line conditioning rule contingent upon a BellSouth decision to make such line conditioning available (routinely) on a retail basis. Thus, the Joint Petitioners argued that, without having to go further, the Commission should dismiss BellSouth's superior network argument which already has been rejected by the FCC in the *TRO*.[28]

Next, the Joint Petitioners pointed out that, notwithstanding the foregoing and without citation, BellSouth is asserting that a superior network results when it is required to condition loops beyond the parameters in which it boldly claims it is routinely willing to condition loops for its own retail customers. The Joint Petitioners asserted that there is no legal basis for BellSouth's argument, which incorporates a carefully skewed re-articulation of the Act's nondiscrimination standard, which ignores the fact that the *copper loop* is the network element to which the nondiscrimination obligation attaches and that obligation commands that CLPs be afforded the same access to the loop that BellSouth has – not the same gated access that BellSouth elects to provide to its retail customers (who are not similarly entitled to purchase such loops at TELRIC pricing). Thus, the Joint Petitioners stated that the Act's nondiscrimination standard commands that CLPs will have cost-based access to copper loops, which the FCC has defined to include line conditioning,[29] irrespective of whether BellSouth elects to perform such conditioning "routinely" or claims that it does not or perhaps "no longer" performs[30] such conditioning routinely and does so only when it can charge "special construction" or similarly unpredictable and non-TELRIC compliant pricing.[31] The Joint Petitioners asserted that the *RAO* comports fully with the Act's nondiscriminatory access obligation, as it provides the Joint Petitioners with the same nondiscriminatory access to copper loops, including the ability to condition them for use in providing advanced services that BellSouth has – regardless of whether BellSouth elects to make such conditioning available to its retail customers on a routine basis. Moreover, the Joint Petitioners stated that, given that BellSouth conditions loops of all lengths routinely to provide DS1 service, the basis upon which BellSouth claims it does not condition loops routinely is

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[28] The Joint Petitioners remarked that, "notably, the *USTA II* provided BellSouth the opportunity to challenge the FCC's finding that line conditioning does not create a superior network, but FCC determination was not at issue in the case before the court. BellSouth may not lodge an indirect challenge to the FCC's decision through this proceeding."

[29] See *TRO*, Paragraph 643, where the FCC stated: "[w]e therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element."

[30] See *In the Matter of Joint Petition for Arbitration of NewSouth Communications Corp., et al.*, Georgia PSC, Docket No. 18409-U, Hearing Transcripts at Page 813:16-17 (February 8-10, 2005). The Joint Petitioners observed that, therein, BellSouth witness Fogle stated in the Georgia hearing that "we no longer routinely remove load coils."

[31] The Joint Petitioners observed that the *RAO* notes that the FCC readopted its line conditioning obligations for the same reasons stated in the *UNE Remand Order* and that in the *UNE Remand Order* the FCC required line conditioning regardless of whether the ILEC did it for its own customers.

anything but clear.[32] Thus, the Joint Petitioners asserted that there is nothing in the Act, the *TRO*, or the FCC's rules that says line conditioning is limited to those functions BellSouth determines it is willing to offer "routinely" to its retail customers. In addition, the Joint Petitioners maintained that the *Iowa Utilities Board* finding pertaining to interconnection, upon which BellSouth heavily relies, lends no credence to BellSouth's theory as it merely holds that the FCC could not mandate superior access to interconnection.

Further, the Joint Petitioners commented that the *TRO* clearly notes that the FCC's intent behind its line conditioning obligations is that the obligations "*cover loops of all lengths*" and, thus, the limitation proposed by BellSouth is not in the FCC's Order.[33] In other words, as explained by the Joint Petitioners, line conditioning applies to the entire loop (not just to portions of the loop) and to loops in excess of 18,000 feet ("long loops"), and a superior network does not result where line conditioning is requested beyond an incumbent's self-imposed parameters. The Joint Petitioners maintained that, as the FCC repeatedly has found, line conditioning results in the modification of the existing network and not the construction of an un-built superior one.[34] The Joint Petitioners maintained that nondiscriminatory access requires that the Joint Petitioners have the same access to the loop that BellSouth has, regardless of whether BellSouth elects to take advantage of its access by conditioning the loop in order to provide a retail advanced services offering.[35]

Furthermore, the Joint Petitioners asserted that if the Commission were to reverse its decision, then it would bestow upon BellSouth the ability to wipe out its line conditioning obligations in their entirety. The Joint Petitioners pointed out that, at the hearing, in this proceeding, Commissioner Kerr recognized that BellSouth's position necessarily reaches this untenable conclusion. The Joint Petitioners also noted that other state commissions have seen this, as well. In particular, the Joint Petitioners stated that in Georgia, a panel member (Commissioner Burgess) observed during hearing in an arbitration proceeding that "literally you [BellSouth] could wipe away your [its]

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[32] At this point, the Joint Petitioners cited the following: *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 Paragraphs 172-173 (1999) (*UNE Remand Order), reversed and remanded in part sub. nom. United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) *(USTA), cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n*, 123 S.Ct 1571 (2003 Mem.); *see also TRO*, Paragraph 642, where the FCC stated: "[a]ccordingly, we readopt the [FCC's] previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order.*"

[33] See *TRO*, Paragraph 642, Footnote 1947.

[34] See *TRO*, Paragraph 643; see also *UNE Remand Order*, Paragraph 173.

[35] See *UNE Remand Order*, Paragraph 173, where the FCC disagreed with GTE's contention "that the Eighth Circuit, in *Iowa Utils. Bd. v. FCC* decision, overturned the rules established in the *Local Competition First Report and Order* that required incumbents to provide competing carriers with conditioned loops capable of supporting advanced services even where the incumbent is not itself providing advanced services to those customers."

requirement and obligation" and that BellSouth is attempting "to change" the rules.[36] The Joint Petitioners stated that, simply put, what BellSouth wants is in direct defiance of the FCC's line conditioning rules. The Joint Petitioners contended that the clear intent in creating the rules was not to provide incumbents with the ability to dictate their line conditioning obligations. Indeed, it is the position of the Joint Petitioners that if the Commission were to reverse its recommendation here, then BellSouth will cease conditioning loops at TELRIC rates, regardless of loop length, which would be detrimental to the deployment of competitive advanced services and contrary to the Act, the FCC's rules, and the federal regulatory scheme.

In addition, the Joint Petitioners asserted that BellSouth's argument that the parameters of BellSouth's line conditioning obligations changed with the *TRO,* even if such change was not reflected in the FCC's rules, is also untenable. The Joint Petitioners maintained that the Commission already has soundly rejected this claim in its *RAO.*[37] The Joint Petitioners commented that the Commission correctly notes that the FCC's adoption of its routine network modification rules in the *TRO* did not change BellSouth's line conditioning obligations. In the *RAO*, the Commission noted that in the *TRO*, the FCC stated that it was readopting its previous line conditioning rules for the reasons previously set forth by the FCC in the *UNE Remand Order.*[38] The Joint Petitioners contended that if, as BellSouth claims, the *TRO*'s adoption of the routine network modification rules changed line conditioning obligations, then the FCC certainly would have noted the change in how the rules would be applied and would have modified the basis it set forth for re-adopting the line conditioning rules. The Joint Petitioners opined that the only change in application evident on the record is that the line conditioning obligations were extended to include copper subloops.[39] The Joint Petitioners maintained that the FCC would not have noted only this single change in application if there were another.

In response to BellSouth's notation concerning the Florida PSC's action on similar issues in an arbitration proceeding, the Joint Petitioners commented that under the standard embraced by the Florida PSC, the Joint Petitioners, at least in certain contexts, apparently have no rights greater than Florida retail customers. The Joint Petitioners asserted that the Florida PSC's decision renders, in many respects, the Act and the FCC's line conditioning rules a nullity; and the Joint Petitioners intend to appeal the Florida PSC's ruling to federal court. The Joint Petitioners also noted that in the concurrent Kentucky arbitration proceeding, the Kentucky PSC made the same finding

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[36] See Georgia Transcript of Hearing of an arbitration proceeding between NewSouth, et al., with BellSouth, in Docket No. 18409-U, at Page 816:13-14 and Page 812:18.

[37] See *RAO* at Pages 32-33.

[38] Id. at Page 34, citing *TRO* Paragraph 250, Footnote 747; see also Id. at Page 35, citing *TRO* Paragraph 642.

[39] Id. at Page 28.

as the Commission here on all three line conditioning issues in its Order released September 26, 2005, in Case No. 2004-00044.[40]

Finally, the Joint Petitioners argued that BellSouth's position is belied by the FCC's purpose in creating the line conditioning rules. The Joint Petitioners explained that as noted in the *TRO*, "line conditioning speeds the deployment of advanced services by ensuring that competitive LECs are able to obtain, as a practical matter, a local loop UNE with the features, functions, and capabilities necessary to provide broadband services."[41] By setting limitations on when line conditioning will be provided at TELRIC rates, the Joint Petitioners stated that BellSouth is attempting to hobble the Joint Petitioners' ability to innovate and compete.

In summary, the Joint Petitioners maintained that for each of the forgoing reasons, as well as those already stated so well by the Commission in its *RAO*, BellSouth's arguments offer no compelling reason why the Commission should change its initial decisions on these three issues and, therefore, the Commission should affirm its decisions on Issue Nos. 10-12 (Matrix Item Nos. 36-38).

PUBLIC STAFF: The Public Staff stated that BellSouth's objections with respect to these findings do not warrant a change in the Commission's conclusions rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth responded to the Joint Petitioners' initial comments by stating that the Joint Petitioners made two erroneous arguments: (1) BellSouth's nondiscrimination obligations require it to provide a copper loop only on a nondiscriminatory basis; and (2) adoption of BellSouth's position will "hobble" the Joint Petitioners' ability to compete. BellSouth asserted that both of these arguments should be rejected by the Commission.

First, BellSouth stated that the Joint Petitioners claimed that BellSouth's nondiscrimination obligation "commands that CLPs be afforded the same access to the loop that BellSouth has – not the same gated access that BellSouth elects to provide to its retail customers . . . ." BellSouth argued that this assertion is incorrect as a matter of law. BellSouth stated that FCC Rule 51.319(a) provides that "[a]n incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the local loop on an unbundled basis, in accordance with Section 251(c) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section." BellSouth maintained that its obligation to provide line conditioning is limited to its obligation to

[40] See *In the Matter of Joint Petitioner for Arbitration of NewSouth Communications Corp. et al.*, Kentucky PSC, Order, Case No. 2004-00044 (released September 26, 2005) (*Kentucky Arbitration Order*) at Pages 10-14.

[41] See *TRO* Paragraph 644.

provide nondiscriminatory access to copper loops pursuant to Section 251(c) of the Act and the FCC's rules.

BellSouth stated that its nondiscriminatory access obligation requires it to provide CLPs with the "quality of an unbundled network element, as well as the quality of the access to such unbundled network... [that is] at least equal in quality to that which the incumbent LEC provides itself." (47 C.F.R. § 51.311(a)and (b)). In other words, it is BellSouth's position that the nondiscrimination obligation requires it to provide the Joint Petitioners with the same quality UNE that it provides to itself, nothing more; and this obligation takes into account line conditioning. Again, BellSouth noted that the FCC's rules in the *TRO,* as well as federal courts, have rejected a "superior in quality" obligation.[42]

Next, BellSouth asserted that the FCC's statement in Paragraph 643 of the *TRO* that line conditioning does not "constitute the creation of a superior network" does not support the decision reached in the *RAO.* BellSouth represented that the FCC made this finding in rejecting Verizon's argument that providing line conditioning to a CLP customer that is not receiving advanced services from the ILEC constitutes the creation of a superior network for the CLP's end user. BellSouth maintained that this statement does not, however, translate into BellSouth being obligated to provide line conditioning to CLPs that exceeds what it provides for its retail customers; and BellSouth believes that this is made clear in the remaining section of *TRO* Paragraph 643, where the FCC further describes the incumbent LECs' line conditioning obligations.

In particular, BellSouth explained that the FCC stated in Paragraph 643 that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." Further, BellSouth noted that the FCC went on to state 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" and that "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."

Second, BellSouth stated that the Joint Petitioners argued that adoption of BellSouth's position for line conditioning would prohibit them from competing. BellSouth noted that the Joint Petitioners made the unsupported statements that BellSouth's position would "bestow upon BellSouth the ability to wipe out its line conditioning obligations in their entirety" and that "if the Commission were to reverse its recommendation here, then

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[42] *Iowa Util. Bd. v. FCC,* 219 F.3d 744, 758 (8th Cir. 2000), *aff'd in part and reversed in part on other grounds, Verizon Communications, Inc. v. FCC,* 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002). BellSouth noted that prior to the implementation of the FCC's Rules in the *TRO,* the FCC's Rules provided that, upon request, an ILEC had to provide access to UNEs superior in quality to that which it provides itself. 47 C.F.R. § 51.311(c) (2001 ed.).

BellSouth will cease conditioning loops at TELRIC rates, regardless of loop length." BellSouth asserted that these are erroneous arguments.

BellSouth argued that changing the *RAO* to reflect BellSouth's position will not result in BellSouth refusing to condition any loops at TELRIC rates, as BellSouth has agreed to provide the Joint Petitioners with the same line conditioning that it provides its own end users at TELRIC. BellSouth explained that it will condition all loops by removing load coils on loops up to 18,000 feet at TELRIC. However, BellSouth stated that the removal of load coils beyond 18,000 feet would be done pursuant to special construction charges.

Further, BellSouth commented that just as specious is the Joint Petitioners' claim that, by adopting BellSouth's language, BellSouth could effectively prevent any line conditioning from occurring by deciding not to provide any line conditioning to itself. While technically possible, BellSouth observed that this hypothetical is not very practical because BellSouth "is very interested in selling its DSL services."

BellSouth again recommended that the Commission conclude that BellSouth's obligation to provide line conditioning at TELRIC is limited to the type of line conditioning BellSouth provides to itself. Further, in response to the Joint Petitioners' notation concerning the Kentucky PSC's action on similar issues in an arbitration proceeding, wherein the Kentucky PSC made the same finding as the Commission here on all three line conditioning issues in its Order in Case No. 2004-00044, BellSouth commented that it has sought rehearing of this decision.

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff reiterated its position that BellSouth's objections with respect to these findings do not warrant a change in the Commission's conclusions rendered in the *RAO*, which was issued after extensive testimony and briefing by the parties. The Public Staff did not provide any other comments on these issues.

DISCUSSION

In summary, in regard to Findings of Fact Nos. 10, 11, and 12 (Matrix Item Nos. 36, 37, and 38) in the *RAO*, BellSouth requested that the Commission reconsider said findings and conclude that BellSouth's language should be adopted for these three findings, such that BellSouth's obligation to provide line conditioning at TELRIC rates would be limited to only the type of line conditioning BellSouth provides to itself.

In opposition, the Joint Petitioners asserted that BellSouth's arguments are not compelling and provide no sound reasons for the Commission to modify the *RAO* in any respect regarding these issues. Likewise, the Public Staff commented that BellSouth's objections with respect to these findings do not warrant a change in the Commission's conclusions rendered in the *RAO*.

Based upon our further review of these matters, the Commission agrees with the Joint Petitioners and the Public Staff that these findings in the *RAO* should not be modified. The Commission finds no new or compelling rationale in BellSouth's arguments that warrants any change in our prior decisions with respect to these issues.

In the *RAO*, the Commission found that BellSouth's line conditioning obligations were not changed by the *TRO*, nor were the line conditioning rules and the routine network modification rules changed by the *TRRO*[43]. The Commission believes it is appropriate to affirm our initial findings on these issues. In support of such affirmation, the Commission finds it pertinent to note just a couple of paragraph excerpts from the *RAO* as follows:

> . . . . The Commission notes that the text of Paragraph 642 [in the *TRO*] explicitly indicates that the FCC readopted its previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order*. In addition, in said Paragraph and Footnotes, the FCC (1) required incumbent LECs to provide access, on an unbundled basis, to xDSL-capable stand-alone copper loops because competitive LECs are impaired without such loops; (2) recognized that access to xDSL-capable stand-alone copper loops may require incumbent LECs to condition the local loop for the provision of xDSL-capable services; (3) explained that line conditioning is necessary because of the characteristics of xDSL service, i.e., certain devices added to the local loop to provide voice service disrupt the capability of the loop in the provision of xDSL services; (4) concluded that providing a local loop without conditioning the loop for xDSL services would fail to address the impairment CLPs face; (5) required incumbent LECs to provide line conditioning to requesting carriers; (6) identified the removal of bridge taps, load coils, and similar devices as part of the line conditioning obligation; and (7) observed that the *Line Sharing Order* refined the conditioning obligation to cover loops of any length, to recognize the potential degradation of analog voice service, and to enable incumbent LECs to charge for conditioning loops. Based upon the foregoing, the Commission does not believe that BellSouth's line conditioning obligations have now been constrained by the FCC's inclusion in Rule 51.319 of its routine network modifications' Section (a)(8).
>
> . . . . The Commission does not believe that the FCC's statement in Paragraph 643 [in the *TRO*], that 'line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers' supports BellSouth's position that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL

[43] *Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, FCC 04-290, rel. February 4, 2005. (*Triennial Review Remand Order* or *TRRO*).

services to its own customers and that BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. The Commission believes that this language merely means that the function of line conditioning is to be properly seen as a routine network modification, i.e, the function of line conditioning, constitutes a form of routine network modification, not the conditions under which this function is performed. The Commission observes that in Footnote 1951, the FCC stated that '[w]e note that all BOCs offer xDSL service throughout their service areas.' Furthermore, the FCC found that 'Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices. We therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element.' Consistent with that finding, the Commission notes that in the FCC's specific unbundling requirements, Rule 51.319(a)(1), the FCC provided, in part, that 'A copper loop is a stand-alone local loop comprised entirely of copper wire or cable. Copper loops include two-wire and four-wire analog voice-grade copper loops, digital copper loops (e.g., DS0s and integrated services digital network lines), as well as two-wire and four-wire loops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the copper loops are in service or held as spares.' (Emphasis added.)

CONCLUSIONS

The Commission finds that it is appropriate to deny BellSouth's request and to affirm and uphold our initial rulings, as set forth in the *RAO* in Findings of Fact Nos. 10, 11, and 12 (Matrix Item Nos. 36, 37, and 38).

FINDING OF FACT NO. 13 (ISSUE NO. 13 – MATRIX ITEM NO. 51):

(B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?

(C) Who should conduct the audit and how should the audit be performed?

INITIAL COMMISSION DECISION

The Commission concluded that the *TRO* sufficiently outlines the requirements for an audit. A 30 – 45 day notice of the audit provides a CLP with adequate time to prepare. In its Notice of Audit, BellSouth should state its concern that the requesting CLP has not met the qualification criteria and a concise statement of its reasons thereof. The Commission further concluded that BellSouth may select the independent auditor without the prior approval of the CLP or this Commission. Challenges to the independence of the auditor may be filed with the Commission after the audit has concluded. Additionally, the Commission concluded that BellSouth is not required to

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-772, SUB 8
DOCKET NO. P-913, SUB 5
DOCKET NO. P-989, SUB 3
DOCKET NO. P-824, SUB 6
DOCKET NO. P-1202, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.	)))	RECOMMENDED ARBITRATION ORDER

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on January 11 through 13, 2005

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Robert V. Owens, Jr., and Lorinzo L. Joyner

APPEARANCES:

For NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Management Co. Switched Services, LLC:

Garret R. Hargrave, John J. Heitmann, and Stephanie A. Joyce, Kelley, Drye & Warren LLP, 1200 19th Street N.W., Suite 500, Washington, DC 20036

Henry C. Campen, Jr., Parker, Poe, Adams & Bernstein, LLP, Wachovia Capitol Center, 150 Fayetteville Street Mall, Suite 1400, P.O. Box 389, Raleigh, North Carolina 27602-0389

For BellSouth Telecommunications, Inc.:

James Meza, III and Robert Culpepper, BellSouth Telecommunications, Inc., Suite 4300, BellSouth Center, 675 West Peachtree Street, N.E., Atlanta, Georgia 30375

Edward L. Rankin, III, 1521 BellSouth Plaza, 300 South Brevard Street, Charlotte, North Carolina 28202

Further, in the Section 271 Issues section of the *TRO*, the FCC states:

> 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 ... do not refer back to the combination requirement set forth in Section 251(c)(3).

The Commission believes that the foregoing shows that the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements. After careful consideration, the Commission finds that there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.

CONCLUSIONS

The Commission concludes that BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act. However, this does not include services, network elements or other offerings made available only under Section 271 of the Act.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

ISSUE NO. 10 - MATRIX ITEM NO. 36: How should line conditioning be defined in the Agreement; and what should BellSouth's obligations be with respect to line conditioning?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners asserted that line conditioning should be defined in the Agreement as set forth in FCC Rule 51.319(a)(1)(iii)(A); and BellSouth should perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii).

BELLSOUTH: BellSouth maintained that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide digital subscriber line (xDSL) services to its own customers; and BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers.

PUBLIC STAFF: The Public Staff agreed with the Joint Petitioners' position.

DISCUSSION

According to the Joint Petitioners' Petition for Arbitration and the Joint Petitioners' Exhibit A, this issue relates to the matter of the appropriate contract

language to be included in Section 2.12.1 of Attachment 2 (Network Elements and Other Services) to the Agreement.

The Joint Petitioners asserted that the term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51.319(a)(1)(iii)(A). That paragraph of the Rule states:

> Line conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders.

The Joint Petitioners also contended that BellSouth should perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii). That paragraph of the Rule states:

> 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) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop. 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.

BellSouth argued that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers. BellSouth contended that its line conditioning obligations should be limited to what BellSouth routinely provides for its own customers.

The specific language proposed to be included in the Agreement in Attachment 2, Section 2.12.1 is as follows, with the differences between the Joint Petitioners' proposal and BellSouth's proposal being denoted with underlined text:

Joint Petitioners' Version –

> BellSouth shall perform line conditioning in accordance with FCC 47 C.F.R. 51.319(a)(1)(iii). Line Conditioning is as defined in FCC 47 C.F.R. 51.319(a)(1)(iii)(A). Insofar as it is technically feasible, BellSouth shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.

BellSouth's Version –

> Line Conditioning is defined as a RNM [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 sub-loop that may diminish the capability of the loop or sub-loop to deliver high-speed switched wireline telecommunications capability, including xDSL service. Such devices include, but are not limited to; load coils, low pass filters, and range extenders. Insofar as it is technically feasible, BellSouth shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.

In their Proposed Order, the Joint Petitioners stated that line conditioning is a Section 251(c)(3) obligation of the ILECs. The Joint Petitioners observed that in its *UNE Remand Order*[11], the FCC clarified its unbundling rules to require that ILECs condition copper loops to provide advanced services; and FCC Rule 51.319(a)(3)[12] was

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[11] FCC 99-238, CC Docket No. 96-98, released on November 5, 1999.

[12] In the *UNE Remand Order*, the FCC's Rule 51.319(a)(3), including subsections, was worded as follows:

> Line conditioning. The incumbent LEC shall condition lines required to be unbundled under this section wherever a competitor requests, whether or not the incumbent LEC offers advanced services to the end-user customer on that loop.
>
> (A) Line conditioning is defined as the removal from the loop of any devices that may diminish the capability of the loop to deliver high-speed switched wireline telecommunications capability, including xDSL service. Such devices include, but are not limited to, bridge taps, low pass filters, and range extenders.
>
> (B) Incumbent LECs shall recover the cost of line conditioning from the requesting telecommunications carrier in accordance with the Commission's forward-looking pricing principles promulgated pursuant to section 252(d)(1) of the Act.
>
> (C) Incumbent LECs shall recover the cost of line conditioning from the requesting telecommunications carrier in compliance with rules governing nonrecurring costs in § 51.507(e).
>
> (D) In so far as it is technically feasible, the incumbent LEC shall test and report trouble for all the features, functions, and capabilities of conditioned lines, and may not restrict testing to voice-transmission only.

promulgated with the *UNE Remand Order* to effect the clarification stated in the Order. Further, the Joint Petitioners pointed out that pursuant to that rule, the Commission addressed the issues surrounding line conditioning in its *Recommended Order Concerning all Phase I and Phase II Issues Excluding Geographic Deaveraging*, issued June 7, 2001, in Docket No. P-100, Sub 133d. The Joint Petitioners noted that in that docket, the Commission established rates for removing load coils on loops less than 18,000 feet and for loops 18,000 feet and greater; and it established rates for bridged tap removal. The Joint Petitioners commented that, thereafter, BellSouth signed interconnection agreements incorporating these services at rates prescribed by the Commission.

Further, the Joint Petitioners maintained that they found no basis for BellSouth's position that its line conditioning obligations were changed by the FCC's *TRO*, as the line conditioning rules were readopted in the *TRO*. The Joint Petitioners pointed out that even BellSouth witness Fogle conceded on cross-examination, that the FCC's definition of line conditioning in the *TRO* was virtually identical to the definition in the *UNE Remand Order*. The Joint Petitioners also observed that they found it persuasive that there is no mention in the line conditioning rules of the routine network modification rules, much less a limitation on the former by the latter.

In addition, the Joint Petitioners argued that BellSouth's reliance on a single sentence in the *TRO*, at Paragraph 643 is misplaced. That sentence reads as follows: "Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." The Joint Petitioners asserted that there is no conflict between the subject sentence in Paragraph 643 and the routine network modification rules on the one hand and the line conditioning rules on the other hand.

Furthermore, the Joint Petitioners commented that KMC witness Johnson explained the relationship between the two sets of rules. In particular, witness Johnson stated that the way to reconcile the second sentence in Paragraph 643 of the *TRO* and the rule from the *TRO*, is to recognize that there is an intersection between two separate and distinct functions. Witness Johnson testified that the first function is line conditioning and even in the *TRO*, in Footnote 1947, the FCC recognized that conditioning is an obligation to cover loops of any length, to recognize the potential degradation of analog voice service, and to enable ILECs to charge for conditioning loops. As a point of further clarification, witness Johnson stated that the FCC provided two distinct definitions – one for line conditioning, which is set forth in Part iii, Letter A of the Rule, and then the second for routine network modifications. Witness Johnson remarked that the FCC recognized that there may be some subset of line conditioning activities that are routine network modifications. Witness Johnson stated that the subject sentence in Paragraph 643 references one type of line conditioning function known as routine network modifications. Witness Johnson contended that the definition set forth by the FCC in its line conditioning rule is what the FCC intended the definition to be, which is "Line conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver

high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders." In addition, witness Johnson testified that "[i]t's important to note that the line conditioning definition focuses on the removal of these types of gadgets and equipment from lines. Whereas, if you look at the routine network modifications definition, it focuses on the addition of whatever devices are required in order to make sure that the quality of the line functions. So, I believe that the FCC intended and clearly set forth two separate and distinct functions line conditioning and routine network modifications, and [Paragraph] 643 just references one type of line conditioning." Further, witness Johnson illustrated her position with a Venn diagram which was identified as Joint Petitioners Redirect Exhibit 1, which showed two intersecting circles, with the intersection of the circles representing those activities common to both definitions.

The Joint Petitioners contended that under BellSouth's interpretation, the exception would swallow the rule. The Joint Petitioners remarked that on questioning by Commissioner Kerr, BellSouth witness Fogle conceded that BellSouth's conditioning obligations would be entirely dependent upon BellSouth's sole discretion as to what activities were or were not routine for BellSouth. The Joint Petitioners opined that they did not believe the FCC had any such intention, when it adopted its line conditioning and routine network modification rules, since such a result would effectively eliminate line conditioning.

In its Brief, BellSouth maintained that for the same reasons as discussed in its comments for Matrix Item No. 26, the Commission should move Matrix Item No. 36 to the change of law docket (Docket No. P-55, Sub 1549) for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum, BellSouth asserted that the Commission should defer resolution of this item until its decision in the change of law proceeding to avoid inconsistent rulings.

However, in the event the Commission chooses to address this issue now, BellSouth argued that the Joint Petitioners' position should be rejected because it conflicts with the *TRO* and BellSouth's nondiscriminatory obligations under the Act. Further, BellSouth observed that Matrix Item Nos. 36, 37, and 38 are all interrelated as they address BellSouth's line conditioning obligations in both a general and a specific fashion.

It is BellSouth's position that it is obligated to perform line conditioning on the same terms and conditions that BellSouth provides for its own customers. In particular, BellSouth contended that in Paragraph 643 of the *TRO*, the FCC stated that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." BellSouth explained that the FCC went on further, in Paragraph 643, to state 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" and that "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."

BellSouth maintained that the Joint Petitioners conceded that "parity" means "equal" and that the FCC's rationale for establishing an obligation to perform line conditioning was based upon BellSouth's nondiscrimination obligation. Notwithstanding these concessions, BellSouth contended that the Joint Petitioners' position is that BellSouth's line conditioning obligations are established by the related FCC Rule, as provided in Appendix B of the *TRO*, which does not provide for the same definition of line conditioning that appears in Paragraph 643 of the *TRO*. BellSouth argued that the only interpretation of both Paragraph 643 as well as the FCC Rule that gives effect to both provisions is BellSouth's interpretation. It is BellSouth's opinion that to decide otherwise, would be to "read away" and ignore the FCC's express findings in Paragraph 643, because BellSouth would then be required to perform line conditioning for the Joint Petitioners that exceed what BellSouth provides for its own customers.

Furthermore, BellSouth asserted that the fact that the Joint Petitioners' current agreements contain TELRIC rates for line conditioning in excess of what BellSouth provides for its customers is of no consequence. BellSouth maintained that this is because their current agreements are not *TRO*-compliant since the FCC clarified in the *TRO* that BellSouth's line conditioning obligations are limited to what BellSouth routinely provides for its own customers. Thus, BellSouth contended that the Joint Petitioners' argument that not all line conditioning is a routine network modification should be rejected. BellSouth pointed out that in the FCC's discussion of routine network modifications, the FCC expressly equated its routine network modification rules to its line conditioning rules in the *TRO*, in Paragraph 635, stating that "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules." Furthermore, BellSouth noted that the FCC echoed these sentiments in Paragraph 250 of the *TRO*, which states that "As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service."

In addition, BellSouth observed that in response to KMC witness Johnson's testimony, BellSouth witness Fogle explained that witness Johnson's Venn diagram illustration actually proves that line conditioning is a subset of routine network modification. Witness Fogle testified that

> Well, I'll say that when I heard the use of a VIM [Venn] diagram, from an electrical engineering standpoint, that's very exciting in a hearing. Because it involves mathematics, and it's actually a whole area of mathematics called set theory. If you take a sentence or words and you want to convert to a VIM [Venn] diagram, there are actually mathematical definitions of words that are then used to create these VIM [Venn] diagrams. . . . If you take the sentence, line conditioning is properly seen

> as a network – as a routine network modification. The word 'properly' according to dictionaries and others, has a mathematical definition, and the mathematical definition is [a] subset. In other words, line conditioning is a subset of routine network modifications . . . So that all line conditioning is a subset of a routine network modification, but there are routine network modifications that are not considered line conditioning.

Based upon its foregoing arguments, BellSouth recommended that the Commission should harmonize Paragraph 643 and the FCC Rule by adopting BellSouth's language and finding that BellSouth's obligation is to provide the Joint Petitioners with line conditioning on the same terms and conditions that it provides to its own customers.

In its Proposed Order, the Public Staff agreed with the Joint Petitioners' position that BellSouth is obligated to provide line conditioning, without limitation, in accordance with FCC Rule 51.319 (a)(1)(iii). The Public Staff stated that Paragraph 643 of the *TRO* clearly reflects the FCC's belief that line conditioning does not constitute creation of a superior network and illustrates the FCC's point that load coil and bridge tap removal (i.e. line conditioning) are network modifications that ILECs perform on a routine basis to provide advanced services to their customers. The Public Staff contended that because ILECs routinely condition lines, performing line conditioning for a CLP does not constitute the creation of a superior network. Further, the Public Staff explained that since ILECs provide line conditioning for their retail customers, they must also offer line conditioning as a loop network element. The Public Staff asserted that the importance of line conditioning to CLPs is emphasized by the FCC when it states in Paragraph 643 that "[c]ompetitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices."

The Public Staff stated that the FCC did not intend for Paragraph 643, in the *TRO*, to limit BellSouth's line conditioning obligations only to those situations in which BellSouth itself would perform these modifications for its own customers. Instead, the Public Staff contended that it is the function of removing load coils or bridge taps that constitutes a routine network modification, not the conditions under which these functions are performed. The Public Staff asserted that this is made clear in FCC Rule 51.319(a)(1)(iii)(A), which defines line conditioning "as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders." The Public Staff maintained that the FCC's definition does not limit line conditioning to the removal of devices only in situations where BellSouth would typically remove them.

Furthermore, the Public Staff observed that Paragraph 642 of the *TRO* supports the view that ILECs are obligated to perform the functions associated with line conditioning because of the characteristics of xDSL service. The Public Staff explained that certain devices added to the local loop to provide voice service disrupt the

capability of the loop in the provision of xDSL services. Thus, the Public Staff contended that because providing a local loop without conditioning the loop for xDSL services would fail to address the impairment CLPs face, the FCC requires ILECs to provide line conditioning to CLPs.

In addition, the Public Staff also observed that Footnote 1947 of the *TRO* states that the FCC refined the conditioning obligation to cover loops of any length in its *Line Sharing Order*[13]. Thus, the Public Staff asserted that even if an ILEC chooses not to condition loops of certain lengths, it is not absolved from its obligation to condition loops of any length upon request of a CLP.

Based upon the foregoing arguments of the parties, the Commission has reviewed the various sections of FCC orders referenced by the parties and, consequently, we begin our analysis by observing that in the FCC's *UNE Remand Order*, released November 5, 1999, at Paragraph 172, which concerns loop conditioning, the FCC stated the following:

> Conditioned Loops. We clarify that incumbent LECs are required to condition loops so as to allow requesting carriers to offer advanced services. The terms 'conditioned,' 'clean copper,' 'xDSL-capable' and 'basic' loops all describe copper loops from which bridge taps, low-pass filters, range extenders, and similar devices have been removed. Incumbent LECs add these devices to the basic copper loop to gain architectural flexibility and improve voice transmission capability. Such devices however, diminish the loop's capacity to deliver advanced services, and thus preclude the requesting carrier from gaining full use of the loop's capabilities. Loop conditioning requires the incumbent LEC to remove these devices, paring down the loop to its basic form. (Footnotes omitted.)

Thus, the Commission understands that in said Paragraph the FCC required the ILECs to condition loops by removing bridge taps, low-pass filters, range extenders, and similar devices from copper loops to allow requesting carriers to offer advanced services. The Commission also notes that the FCC in its Appendix C to the *UNE Remand Order* adopted its revised Rule 51.319 (Specific unbundling requirements) which included a Local Loop Section (a)(3) with subsections A-D regarding line conditioning. In addition, we note that that portion of the Rule is reflected, herein, under a previous footnote included within the discussion of this issue and, thus, it will not be repeated here. However, we are compelled to note, in part, that the Rule provides that "[t]he incumbent LEC shall condition lines required to be unbundled under this section wherever a competitor requests, whether or not the incumbent LEC offers advanced services to the end user customer on that loop. . . . Line conditioning is defined as the removal from the loop of any devices that may diminish the capability of the loop to deliver high-speed switched wireline telecommunications capability, including xDSL service".

[13] CC Docket No. 98-147 and CC Docket No. 96-98, released on December 9, 1999.

On August 21, 2003, the FCC released its *TRO* and, therein, the FCC in its Appendix B to the *TRO* adopted its further revised Rule 51.319 which included a Local Loop – Copper Loops Section (a)(1)(iii) with its subsections A-E regarding line conditioning. As stated previously, Section (a)(1)(iii) states, in part, that "The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop." And Section (a)(1)(iii)(a) states, in part, that "[l]ine conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders." Also, in the FCC's *TRO*-revised Rule 51.319, separate and apart from the line conditioning rule section, the FCC included another Local Loop Section (a)(8)(i-ii) regarding routine network modifications. The routine network modifications rule section states, in part, that "[a]n incumbent LEC shall make all routine network modifications to unbundled loop facilities used by requesting telecommunications carriers where the requested loop facility has already been constructed. . . . A routine network modification is an activity that the incumbent LEC 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; 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."

On February 4, 2005, the FCC released its *TRRO*. In the *TRRO*, the FCC further revised Rule 51.319, however, the sections of the Rule concerning the line conditioning rules and the routine network modification rules were not changed by the FCC.

As discussed herein, BellSouth's argument is that its line conditioning obligations were changed by the *TRO*, as a result of the FCC's adoption of its routine network modification rules; therefore, BellSouth maintained that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers; and BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. BellSouth has cited certain language in the *TRO* from Paragraphs 250, 635, and 643 in support of its position.

Based upon our review of the *TRO* as it relates to the matters at issue here, the Commission does not believe that BellSouth's line conditioning obligations were

changed by the *TRO*. As discussed previously, BellSouth has cited certain excerpts of text from *TRO*-Paragraphs 250, 635, and 643, to support its position that the only interpretation of both Paragraph 643, as well as the FCC Rule that gives effect to both line conditioning and routine network modification provisions, is BellSouth's interpretation. We disagree with BellSouth's interpretation of the FCC's actions.

The *TRO* provided a discussion in Part VI.A.4.a.(v)(a), consisting of three Paragraphs (248-250), concerning "Legacy Networks" – "Stand-Alone Copper Loops". Paragraph 250 is worded as follows, including footnotes:

> **250.** The practical effect of this unbundling requirement is to ensure that requesting carriers have access to the copper transmission facilities they need in order to provide narrowband or broadband services (or both) to customers served by copper local loops. We understand that this unbundling obligation may require an incumbent LEC to provide the functionality available in certain equipment, as well as to remove the functionality from other equipment (*i.e.,* to condition the loop), in order to provide a complete transmission path between its main distribution frame (or equivalent) and the demarcation point at the customer's premises.[747] As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service.[748]
>
> [Footnotes for Paragraph 250:]
>
> [747] As discussed in Part VI.A. *infra*, we readopt incumbent LECs' line conditioning obligations. The Commission noted in its *Line Sharing Order* that devices such as load coils and bridged taps interfere with the provision of xDSL service and, absent a certain showing by the incumbent LEC to the relevant state commission, must be removed at the request of the competitive LEC. *See Line Sharing Order*, 14 FCC Rcd at 20952-54, paras. 83-86. We determine that, upon the competitive LEC's request, incumbent LECs must similarly condition unbundled stand-alone loops to make them xDSL-compatible.
>
> [748] We also require such conditioning for the HFPL consistent with the grandfather provision and transition period described below. *See Line Sharing Order*, 14 FCC Rcd at 20952-54, paras, 83-87.

The Commission does not believe that the FCC's statement from Paragraph 250, which states that "we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service" requires that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers and that BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. Instead, the Commission believes that this language means that the function of line conditioning, i.e., the removal of devices such as bridge taps, load coils, low pass filters, and range extenders, constitutes a form of routine network modification, not the

conditions under which this function is performed. The Commission also notes that in Footnote 747, the FCC stated "we readopt incumbent LECs' line conditioning obligations."

Further on in the *TRO*, the FCC provided a discussion in Part VII.D.2.a., consisting of 10 Paragraphs (632-641), concerning "Routine Network Modifications to Existing Facilities". Paragraph 635 is worded as follows, including footnotes:

> **635.** The record reveals that attaching routine electronics, such as multiplexers, apparatus cases, and doublers, to high-capacity loops is already standard practice in most areas of the country.[1923] Moreover, performing such functions is easily accomplished. The record shows that requiring incumbent LECs to make the routine adjustments to unbundled loops discussed above that modify a loop's capacity to deliver services in the same manner as incumbent LECs provision such facilities for themselves is technically feasible[1924] and presents no significant operational issues.[1925] In fact, the routine modifications that we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules.[1926] 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.[1927]
>
> [Footnotes for Paragraph 635:]
>
> [1923] The record reflects that different incumbent LECs perform varying degrees of network modifications when provisioning unbundled high-capacity loops. See, e.g., Letter from Patrick J. Donovan, Counsel for Cbeyond, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (Cbeyond Dec. 16, 2002 No Facilities Ex Parte Letter), Declaration of Richard Batelaan at paras. 8-9 (filed Dec. 16, 2002) (discussing the different "no facilities" policies of Qwest, SBC, and Verizon).
>
> [1924] See Allegiance Sept. 30, 2002 Ex Parte Letter at 5, Attach. 4 (citing Verizon Maryland, Inc.'s response to a data request stating "[g]enerally speaking, Verizon MD does not reject DS1 requests for end users due to no facilities.").
>
> [1925] See Allegiance Sept. 30, 2002 Ex Parte Letter at 2.
>
> [1926] See infra Part VII.D.2.b. Specifically, in the UNE Remand Order, the Commission held that incumbent LECs must remove certain devices, such as bridge taps, low-pass filters, and range extenders, from basic copper loops in order to enable the requesting carrier to offer advanced services. UNE Remand Order, 15 FCC Rcd at 3775, para. 172. Although Verizon rejects unbundled DS1 loop orders where there is no apparatus or doubler case on the loop claiming that installation of these cases is "complex" – requiring a truck roll to either dig up existing cable or a "bucket" to reach aerial cables in order to splice open the cable sheath – it must perform similar activities to accommodate line conditioning requests. See Letter from W. Scott Randolph, Director – Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 4-5 (filed Oct. 18, 2002) (Verizon Oct. 18, 2002 No Facilities Ex Parte Letter); see also El Paso Galindo Decl. at para. 14 ("When an ILEC outside plant technician conditions a

copper loop for xDSL by removing bridged tap and Load Coils in the loop, the work is generally performed by the same staff that performs rearrangement for DS1 services.").

[1927] See Cbeyond Nov. 23, 2002 Ex Parte Letter at 3. Furthermore, these routine modifications are generally provided by incumbent LECs within relatively short intervals. Mpower Reply at 29 (stating that Verizon's customers "[i]n almost every instance . . . can order service and have it installed within one week.").

The Commission does not believe that the FCC's statement in Paragraph 635, 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", supports BellSouth's position that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers and that BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. To the contrary, the Commission believes that the FCC is simply stating that its required routine modifications are substantially similar activities to those undertaken by the ILECs, as required by the FCC's line conditioning rules. Furthermore, the Commission notes that in Footnote 1926, which is an integral part of the subject statement, the FCC referenced Part VII.D.2.b. of the *TRO* concerning line conditioning and explained that "[s]pecifically, in the UNE Remand Order, the Commission held that incumbent LECs must remove certain devices, such as bridge taps, low-pass filters, and range extenders, from basic copper loops in order to enable the requesting carrier to offer advanced services. UNE Remand Order, 15 FCC Rcd at 3775, para. 172. Although Verizon rejects unbundled DS1 loop orders where there is no apparatus or doubler case on the loop claiming that installation of these cases is 'complex' – requiring a truck roll to either dig up existing cable or a 'bucket' to reach aerial cables in order to splice open the cable sheath – it must perform similar activities to accommodate line conditioning requests."

Next, the *TRO* provided a discussion in Part VII.D.2.b., consisting of three Paragraphs (642-644), concerning "Line Conditioning". Paragraph 642 is worded as follows, including footnotes:

> **642.** As noted above, we conclude that incumbent LECs must provide access, on an unbundled basis, to xDSL-capable stand-alone copper loops because competitive LECs are impaired without such loops.[1946] Such access may require incumbent LECs to condition the local loop for the provision of xDSL-capable services.[1947] Accordingly, we readopt the Commission's previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order*.[1948] Line conditioning is necessary because of the characteristics of xDSL service – that is, certain devices added to the local loop in order to facilitate the provision of voice service disrupt the capability of the loop in the provision of xDSL services. In particular, bridge taps, load coils, and other equipment disrupt xDSL transmissions.[1949] Because providing a local loop without conditioning the loop for xDSL services would fail to address the impairment competitive LECs face, we require incumbent LECs to provide line conditioning to requesting carriers.

[Footnotes for Paragraph 642:]

[1946] *See supra* Part VI.A.4.a.(v)(a).

[1947] In the *UNE Remand Order,* the Commission made clear that incumbent LECs must condition loops to allow requesting carriers to offer advanced services, and identified the removal of bridge taps, load coils, and similar devices as part of this obligation. *UNE Remand Order*, 15 FCC Rcd at 3775, para. 172. The Commission specifically rejected the contention that the Eighth Circuit's holding on "superior quality" overturned the rules requiring incumbents to provide conditioned loops even where the incumbent itself is not providing advanced services to those customers. *Id.* at 3775, para. 173 ("We find that loop conditioning, rather than providing a 'superior quality' loop, in fact enables a requesting carrier to use the basic loop."). The Commission subsequently refined the conditioning obligation to cover loops of any length, to recognize the potential degradation of analog voice service, and to enable incumbent LECs to charge for conditioning loops. *Line Sharing Order*, 14 FCC Rcd 20912, 20951-53, paras. 81-87.

[1948] We note that the *USTA court* did not expressly opine on the Commission's line and loop conditioning rules.

[1949] *See* Telcordia Technologies, Inc. NOTES ON DSL at 2-10 to 2-16 (describing limitations of xDSL service); Padmanand Warrier and Balaji Kumar, xDSL ARCHITECTURE 95-97 (2000) (describing the effect of bridge taps, load coils, various gauges of copper cable, and analog/digital conversions on xDSL transmissions); *see also Line Sharing Order*, 14 FCC Rcd at 20951-52, para. 83.

The Commission notes that the text of Paragraph 642 explicitly indicates that the FCC readopted its previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order.* In addition, in said Paragraph and Footnotes, the FCC (1) required incumbent LECs to provide access, on an unbundled basis, to xDSL-capable stand-alone copper loops because competitive LECs are impaired without such loops; (2) recognized that access to xDSL-capable stand-alone copper loops may require incumbent LECs to condition the local loop for the provision of xDSL-capable services; (3) explained that line conditioning is necessary because of the characteristics of xDSL service, i.e., certain devices added to the local loop to provide voice service disrupt the capability of the loop in the provision of xDSL services; (4) concluded that providing a local loop without conditioning the loop for xDSL services would fail to address the impairment CLPs face; (5) required incumbent LECs to provide line conditioning to requesting carriers; (6) identified the removal of bridge taps, load coils, and similar devices as part of the line conditioning obligation; and (7) observed that the *Line Sharing Order* refined the conditioning obligation to cover loops of any length, to recognize the potential degradation of analog voice service, and to enable incumbent LECs to charge for conditioning loops. Based upon the foregoing, the Commission does not believe that BellSouth's line conditioning obligations have now been constrained by the FCC's inclusion in Rule 51.319 of its routine network modifications' Section (a)(8).

Further, *TRO*-Paragraph 643 is worded as follows, including footnotes:

643. Line conditioning does not constitute the creation of a superior network, as some incumbent LECs argue.[1950] Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers. As noted above, 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.[1951] 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. We therefore agree with the commenters that argue that requiring the conditioning of xDSL-capable loops is not mandating superior access,[1952] and reject Verizon's renewed challenge that the Commission lacks authority to require line conditioning.[1953] Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices. We therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element.[1954]

[Footnotes for Paragraph 643:]

[1950] *See* Verizon Jan. 17, 2003 Guyer *Ex Parte* Letter at 3-4 (arguing that line conditioning constitutes the creation of a superior network).

[1951] We note that all BOCs offer xDSL service throughout their service areas. *See, e.g.*, Verizon, *Verizon Online DSL for Your Home Including Personal or Office Use and Price Packages for DSL*, http://www22.verizon.com/ForHomeDSL/channels/dsl/forhomedsl.asp > (describing Verizon's xDSL offerings for residential customers).

[1952] *See, e.g.*, NuVox *et al.* Reply at 43; WorldCom Reply at 42-43.

[1953] Verizon Comments at 63 (arguing that "loop conditioning plainly is an unlawful requirement to provide a superior quality network."). More specifically, we do not accept Verizon's contention that line conditioning is a "significant construction activity" that provides a "*superior* quality network facility." Jan. 17, 2003 Verizon Guyer *Ex Parte* Letter at 4.

[1954] As the Commission noted in the *UNE Remand Order*, the Eighth Circuit expressly affirmed the Commission's determination that section 251(c)(3) requires incumbent LECs to provide modifications to their facilities in order to accommodate access to network elements. *UNE Remand Order*, 15 FCC Rcd at 3775, para. 173 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813, n.33). With respect to making routine network modifications, the Eighth Circuit stated: "Although we strike down the Commission's rules requiring incumbent LECs to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.'" *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813, n.33 (citing *Local Competition Order*, 11 FCC Rcd at 15602-03, para. 198).

The Commission does not believe that the FCC's statement in Paragraph 643, that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers" supports BellSouth's position that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers and that BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. The Commission believes that this language merely means that the function of line conditioning is to be properly seen as a routine network modification, i.e, the function of line conditioning, constitutes a form of routine network modification, not the conditions under which this function is performed. The Commission observes that in Footnote 1951, the FCC stated that "[w]e note that all BOCs offer xDSL service throughout their service areas." Furthermore, the FCC found that "Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices. We therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element." Consistent with that finding, the Commission notes that in the FCC's specific unbundling requirements, Rule 51.319(a)(1), the FCC provided, in part, that "A copper loop is a stand-alone local loop comprised entirely of copper wire or cable. Copper loops include two-wire and four-wire analog voice-grade copper loops, digital copper loops (e.g., DS0s and integrated services digital network lines), as well as two-wire and four-wire loops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the copper loops are in service or held as spares." (Emphasis added.)

The Commission rejects BellSouth's position that its line conditioning obligations are now constrained by the FCC's *TRO*-implemented rule on routine network modifications. The FCC did not modify the line conditioning definition in its *TRO* rules to allow for any routine network modification limitation as BellSouth is now seeking to impose on the definition for line conditioning. Moreover, the FCC concluded that line conditioning is intrinsically linked to the local loop; the FCC included line conditioning within the definition of an unbundled copper loop network element; and the FCC found that providing a local loop without conditioning the loop for xDSL services would fail to address the impairment CLPs face and, thus, the FCC required ILECs to provide line conditioning to the requesting carriers. The Commission believes that the ILECs' line conditioning obligations remained virtually the same as they did before the *TRO*, with the exception that the line conditioning obligations were expanded to include copper subloops. We understand that the CLPs need to have access to line conditioning at TELRIC rates, so that they will be able to deploy advanced services on copper loops (including subloops), free of devices that diminish the capabilities of the loop, and we also understand that the ILEC's line conditioning obligations apply to loops of any length. Based upon the foregoing, the Commission believes it is entirely appropriate to agree with the Joint Petitioners' and the Public Staff's positions such that line conditioning would be defined in the Agreement as set forth in FCC Rule 51.319(a)(1)(iii)(A); and BellSouth would be obligated to provide line conditioning in accordance with FCC Rule 51.319 (a)(1)(iii).

CONCLUSIONS

The Commission concludes that line conditioning should be defined in the Agreement as set forth in FCC Rule 51.319(a)(1)(iii)(A); and BellSouth should be required to perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii). Accordingly, the Commission adopts the Joint Petitioners' proposed language for inclusion in the Agreement, in Attachment 2, Section 2.12.1.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

ISSUE NO. 11 - MATRIX ITEM NO. 37:

Joint Petitioners' Issue Statement: Should the Agreement contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less?

BellSouth's Issue Statement: Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners argued that the Agreement should not contain specific provisions limiting the availability of line conditioning - in this case, load coil removal - to copper loops of 18,000 feet or less.

BELLSOUTH: BellSouth maintained that it has no obligation to remove load coils on copper loops in excess of 18,000 feet at TELRIC rates for the Joint Petitioners because BellSouth does not remove load coils on long loops for its own customers.

PUBLIC STAFF: The Public Staff agreed with the Joint Petitioners' position.

DISCUSSION

According to the Joint Petitioners' Petition for Arbitration and the Joint Petitioners' Exhibit A, this issue relates to the matter of the appropriate contract language to be included in Section 2.12.2 of Attachment 2 (Network Elements and Other Services) to the Agreement.

The Joint Petitioners asserted that the Agreement should not contain any specific contract language limiting the availability of line conditioning for load coil removal to only copper loops of 18,000 feet or less in length.

Whereas, BellSouth argued that the Agreement should contain specific language indicating that BellSouth has no obligation to remove load coils on copper loops in excess of 18,000 feet. However, BellSouth represented that it will remove such load coils upon request of a CLP, but only pursuant to special construction pricing, which

would allow BellSouth's engineers to evaluate the specific costs associated with removing and replacing such an individual load coil.

The specific language proposed to be included in the Agreement in Attachment 2, Section 2.12.2 is as follows:

Joint Petitioners' Version –

No Section.

BellSouth's Version –

> BellSouth will remove load coils only on copper loops and sub loops that are less than 18,000 feet in length. BellSouth will remove load coils on copper loops and sub loops that are greater than 18,000 feet in length upon <<customer_short_name>>'s request at rates pursuant to BellSouth's Special Construction Process contained in BellSouth's FCC No. 2 as mutually agreed to by the Parties.

This issue is essentially a subpart of the issue previously addressed in the Evidence and Conclusions for Finding of Fact No. 10, concerning Matrix Item No. 36. Thus, consistent with their position regarding Matrix Item No. 36, the Joint Petitioners asserted that BellSouth should not be permitted to impose artificial restrictions on its obligation to provide line conditioning at Commission-approved TELRIC-compliant rates. The Joint Petitioners maintained that BellSouth should be required to remove load coils at TELRIC rates on loops of any length as required by the FCC's line conditioning rules. The Joint Petitioners argued that BellSouth's refusal to remove load coils on loops greater than 18,000 feet at TELRIC rates because BellSouth believes that such activity is not a routine network modification as defined by the FCC, is a flawed interpretation of the FCC's line conditioning rules. As discussed previously, in regard to Matrix Item No. 36, the Joint Petitioners again argued that BellSouth's line conditioning obligations are not constrained by the FCC's routine network modification rule.

Further, in their Brief, the Joint Petitioners observed that the Commission has already set TELRIC rates for load coil removal on loops of all lengths. In particular, the Joint Petitioners noted that, during the hearing, BellSouth witness Fogle was provided with the Joint Petitioners Cross-Examination Exhibit 4, which was an excerpt from BellSouth's current interconnection agreement with NewSouth, which included a detailed table of the rates applied to load coil removal; and the Joint Petitioners commented that witness Fogle agreed that these rates are TELRIC-compliant and had been set by the Commission. Consequently, the Joint Petitioners asserted that in seeking to impose unpredictable, individual case basis, FCC tariff Special Construction Rates for load coil removal on long loops, BellSouth is attempting to circumvent the rates set by prior order of this Commission. The Joint Petitioners maintained that they are not willing to waive the application of these rates; thus, they opposed the inclusion of BellSouth's proposed language for Section 2.12.2. Accordingly, the Joint Petitioners

recommended that the Commission should adopt the Joint Petitioners' position to ensure the applicability of its TELRIC rates for load coil removal on loops, including those that are greater than 18,000 feet in length, and to avoid the imposition of the artificial conditioning limitation that BellSouth seeks to impose contrary to the ILEC's conditioning obligations under existing FCC line conditioning rules and rulings.

In its Brief, BellSouth maintained that for the same reasons as discussed in its comments for Matrix Item No. 26, the Commission should move Matrix Item No. 37 to the change of law docket (Docket No. P-55, Sub 1549) for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum, BellSouth asserted that the Commission should defer resolution of this item until its decision in the change of law proceeding to avoid inconsistent rulings.

However, in the event the Commission chooses to address this issue now, BellSouth argued that the Joint Petitioners' position should be rejected because it conflicts with the *TRO* and BellSouth's nondiscriminatory obligations under the Act. Further, BellSouth commented that Matrix Item Nos. 36, 37, and 38 are all interrelated as they address BellSouth's line conditioning obligations in both a general and a specific fashion.

BellSouth asserted that it should have no obligation to remove load coils in excess of 18,000 feet at TELRIC rates for the Joint Petitioners because BellSouth does not remove load coils on long loops for its own customers. BellSouth noted that as it commented in regard to Matrix Item No. 36, this standard complies with Paragraph 643 of the *TRO*, as well as BellSouth's nondiscrimination obligations under the Act. Further, BellSouth explained that, if requested, it will remove load coils on such loops pursuant to its FCC tariff via the special construction process.

Additionally, BellSouth explained that pursuant to current network standards, BellSouth places load coils on loops greater than 18,000 feet to enhance voice service. As stated by witness Fogle, "[w]e start placing them at 18,000 feet, and it essentially takes static off the line so your voice service works better." BellSouth indicated that it placed load coils, generally in groups of 400 or more, after 18,000 feet when the network was originally built; and according to witness Fogle those load coils were designed to be in the network for long periods of time. Consequently, witness Fogle testified that load coils are generally found inside splice cases that are typically buried underground, and they could be under concrete or asphalt. As a result of the difficulties encountered in removing such load coils and because BellSouth believes it has no obligation to remove load coils on loops in excess of 18,000 feet since it does not remove load coils on long loops for its own customers, BellSouth asserted that it will remove such load coils upon request of a CLP, but only pursuant to special construction pricing, which allows BellSouth's engineers to evaluate the specific costs associated with removing and replacing an individual load coil.

The Public Staff agreed with the Joint Petitioners' position. The Public Staff maintained that since load coil removal on loops greater than 18,000 feet is in effect providing line conditioning on those loops, then for the same reasons supporting its

position on Matrix Item No. 36, the Agreement should not contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less. The Public Staff also noted that the FCC's *Line Sharing Order* makes the conditioning obligation cover loops of any length. Thus, the Public Staff asserted that adopting BellSouth's language would conflict with this requirement and would permit BellSouth to limit offerings by the Joint Petitioners. Consequently, the Public Staff agreed with the Joint Petitioner's position that the Agreement should not contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less in length.

The Commission, as previously concluded in regard to Matrix Item No. 36 (Issue No. 10), rejects BellSouth's assertion that its line conditioning obligations are now constrained by the FCC's *TRO*-implemented rule on routine network modifications, i.e., BellSouth asserted that its obligations to provide line conditioning at TELRIC rates should be limited to what BellSouth routinely provides for its own customers. The Commission agrees with the Joint Petitioners' and the Public Staff's position. Consistent with our findings and conclusions in regard to Matrix Item No. 36, we find that the Agreement should not contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less in length. In particular, as discussed in the Evidence and Conclusions for Finding of Fact No. 10 (Matrix Item No. 36), we found that (1) the ILECs' line conditioning obligations remained virtually the same as they did before the *TRO*, with the exception that the line conditioning obligations were expanded to include subloops; (2) the CLPs need to have access to line conditioning at TELRIC rates, so that they will be able to deploy advanced services on copper loops (including subloops), free of devices that diminish the capabilities of the loop; and (3) the ILEC's line conditioning obligations apply to loops of any length. Furthermore, we note that the Commission has previously concluded in its *Recommended Order Concerning all Phase I and Phase II Issues Excluding Geographic Deaveraging*, issued June 7, 2001, in Docket No. P-100, Sub 133d, that ILECs are obligated, pursuant to the FCC's *UNE Remand Order* and its line conditioning rules, to remove load coils from loops of any length at TELRIC rates.

CONCLUSIONS

The Commission concludes that the Agreement should not contain any specific contract language limiting the availability of line conditioning for load coil removal to only copper loops of 18,000 feet or less in length.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

ISSUE NO. 12 - MATRIX ITEM NO. 38: Under what rates, terms, and conditions should BellSouth be required to perform line conditioning to remove bridged taps?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners commented that any copper loop being ordered by a CLP with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. Line conditioning orders that require the removal of other bridged tap should be performed at the rates set forth in Exhibit A of Attachment 2 to the Agreement.

BELLSOUTH: BellSouth stated that any copper loop being ordered by a CLP that has over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, so that the loop will have a maximum of 6,000 feet of bridged tap. Such modification will be performed at no additional charge to the CLP. Line conditioning orders that require the removal of bridged tap which serves no network design purpose on a copper loop, that will result in a combined level of bridged tap between 2,500 feet and 6,000 feet will be performed at the rates set forth in Exhibit A of Attachment 2 to the Agreement. A CLP may request the removal of any unnecessary and non-excessive bridged tap (bridged tap between 0 and 2,500 feet which serves no network design purpose), at rates pursuant to BellSouth's special construction process. BellSouth is only required to perform line conditioning that it performs for its own xDSL customers.

PUBLIC STAFF: The Public Staff agreed with the Joint Petitioners' position.

DISCUSSION

According to the Joint Petitioners' Petition for Arbitration and the Joint Petitioners' Exhibit A, this issue relates to the matter of the appropriate contract language to be included in Section 2.12.3 and Section 2.12.4 of Attachment 2 (Network Elements and Other Services) to the Agreement.

BellSouth has agreed to remove bridged tap in excess of 6,000 feet from copper loops without charge. The Joint Petitioners and BellSouth have also agreed to TELRIC rates for the removal of bridged tap between 2,500 feet and 6,000 feet in length. The disputed issues between the parties are the cost for removal of bridged tap from copper loops between 0 and 2,500 feet in length and BellSouth's proposed limitation that only bridged tap between 0 and 6,000 feet which "serves no network design purpose" will be removed in accordance with BellSouth's rate proposals.

The Joint Petitioners asserted that Sections 2.12.3 and 2.12.4 of Attachment 2 of the Agreement should provide that BellSouth will remove bridged tap between 0 and 2,500 feet in length from any copper loop ordered by a CLP at TELRIC rates.

Whereas, BellSouth contended that, upon request by a CLP, it will remove bridged taps between 0 and 2,500 feet which serves no network design purpose pursuant to special construction pricing.

The specific language proposed to be included in the Agreement in Attachment 2, Section 2.12.3 and Section 2.12.4 is as follows, with the differences between the Joint Petitioners' proposal and BellSouth's proposal being denoted with underlined text:

Joint Petitioners' Version – Section 2.12.3

> Any copper loop being ordered by <<customer_short_name>> which has over 6,000 feet of combined bridged tap will be modified, upon request from <<customer_short_name>>, 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 <<customer_short_name>>. Line conditioning orders that require the removal of <u>other</u> bridged tap will be performed at the rates set forth in Exhibit A of this Attachment.

BellSouth's Version – Section 2.12.3

> Any copper loop being ordered by <<customer_short_name>> which has over 6,000 feet of combined bridged tap will be modified, upon request from <<customer_short_name>>, 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 <<customer_short_name>>. Line conditioning orders that require the removal of bridged tap <u>that serves no network design purpose on a copper loop that will result in a combined level of bridged tap between 2,500 and 6,000 feet</u> will be performed at the rates set forth in Exhibit A of this Attachment.

Joint Petitioners' Version – Section 2.12.4

> <u>No Section.</u>

BellSouth's Version – Section 2.12.4

> <u><<customer_short_name>> may request removal of any unnecessary and non-excessive bridged tap (bridged tap between 0 and 2,500 feet which serves no network design purpose), at rates pursuant to BellSouth's Special Construction Process contained in BellSouth's FCC No. 2 as mutually agreed to by the Parties.</u>

This issue, like Matrix Item No. 37, is essentially a subpart of the issue addressed in the Evidence and Conclusions for Finding of Fact No. 10, concerning

Matrix Item No. 36. As with Matrix Item No. 37, the Joint Petitioners asserted that BellSouth is relying on its incorrect interpretation of the routine network modification rule for its refusal to remove bridged tap less than 2,500 feet in length from copper loops at TELRIC rates. Like Matrix Item No. 37, the Joint Petitioners observed that this issue would be resolved in the Joint Petitioners' favor with the proper resolution of the issue in Matrix Item No. 36.

As discussed previously in regard to Matrix Item No. 36, the Joint Petitioners again argued that BellSouth's line conditioning obligations are not constrained by the routine network modification rule. The Joint Petitioners disagreed with BellSouth's position which was that since BellSouth does not remove bridged tap less than 2,500 feet in length from copper loops serving its own retail customers, this activity is not a routine network modification. The Joint Petitioners further explained that since BellSouth incorrectly equates line conditioning with routine network modification, then BellSouth considers that this type of bridged tap removal does not constitute line conditioning and need not be done at TELRIC rates. However, consistent with their position on Matrix Item No. 36, the Joint Petitioners again argued that the FCC does not equate line conditioning and routine network modifications. The Joint Petitioners opined that they are separate and distinct rules. The Joint Petitioners contended that the ILEC's line conditioning obligations are not modified or limited by the routine network modification rules. The Joint Petitioners observed that there was no length limitation in the FCC line conditioning rules before the *TRO*, and there is none now. Consequently, the Joint Petitioners maintained that BellSouth remains obligated to remove bridged tap from loops of any length pursuant to Section 251(c)(3) of the Act and FCC Rule 51.319(a)(1)(iii)(A).

Next, the Joint Petitioners noted that BellSouth has proposed to limit bridged tap removal to that which "serves no network design purpose." In opposition, the Joint Petitioners asserted that there is no legal basis for that purported standard. The Joint Petitioners maintained that such a standard would provide BellSouth with the sole discretion to determine when bridged tap would be removed.

Further, in regard to BellSouth's argument that requiring it to remove bridged tap of this length would create a "superior network" for Joint Petitioners, the Joint Petitioners commented that the FCC has expressly stated that "[l]ine conditioning does not constitute the creation of a superior network, as some incumbent LECs argue."[14] Accordingly, the Joint Petitioners argued that the proposed implementation of FCC Rule 51.319 as to line conditioning does not violate any precept of parity, but rather comports exactly with the FCC's own interpretation of an ILEC's conditioning responsibilities.

Additionally, the Joint Petitioners observed that, as with load coils, the Commission has previously concluded in its *Recommended Order Concerning all Phase I and Phase II Issues Excluding Geographic Deaveraging*, issued June 7, 2001, in Docket No. P-100, Sub 133d, that ILECs were obligated, pursuant to the FCC's *UNE*

[14] *TRO*, at Paragraph 643.

Remand Order and its line conditioning rules, to remove bridge taps from loops of any length at TELRIC rates. Further, the Joint Petitioners noted that the Joint Petitioners Cross-Examination Exhibit 4 included rates for removing bridged taps for all loops, and that during cross-examination, in regard to said Exhibit 4, BellSouth witness Fogle testified that those rates were TELRIC rates set by this Commission. Consequently, the Joint Petitioners argued that BellSouth should not be permitted to impose other rates — particularly "Special Construction" rates — in contravention of the Commission's decision. Thus, the Joint Petitioners requested that the Commission adopt the Joint Petitioners' language for Sections 2.12.3 and 2.12.4.

In its Brief, BellSouth maintained that for the same reasons as discussed in its comments for Matrix Item No. 26, the Commission should move Matrix Item No. 38 to the change of law docket (Docket No. P-55, Sub 1549) for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum, BellSouth contended that the Commission should defer resolution of this item until its decision in the change of law proceeding to avoid inconsistent rulings.

However, in the event the Commission chooses to address this issue now, BellSouth argued that the Joint Petitioners' position should be rejected because it conflicts with the *TRO* and BellSouth's nondiscriminatory obligations under the Act. Further, BellSouth commented that Matrix Item Nos. 36, 37, and 38 are all interrelated as they address BellSouth's line conditioning obligations in both a general and a specific fashion.

BellSouth commented that the dispute concerning Matrix Item No. 38 centers on whether BellSouth should be required to remove bridge taps between 0 and 2,500 feet at TELRIC rates. BellSouth alleged that bridge taps are standard network enhancements that are used to allow BellSouth to reconfigure its network without reconfiguring the copper wire and that BellSouth deploys bridge taps in its network pursuant to industry standards. Further, in its Brief, BellSouth noted that even though BellSouth does not remove bridge taps at any length for its own customers, in conjunction with the CLP Shared Loop Collaborative, BellSouth has agreed to remove bridge taps for CLPs in the following scenarios: (1) over 6,000 feet for free; (2) between 2,500 feet and 6,000 feet at TELRIC; and (3) between 0 and 2,500 feet pursuant to special construction pricing. BellSouth has offered these same terms and conditions to the Joint Petitioners. Furthermore, BellSouth asserted that no carrier has ever asked BellSouth to remove bridge taps of this length; none of the services that the Joint Petitioners are providing would be impacted by bridge taps of this length; and the Joint Petitioners cannot present any evidence to rebut this fact because they do not even know the percentage of its loops that contain bridge taps of this length or whether they have ever asked BellSouth to remove bridge taps. BellSouth remarked that this lack of knowledge to support their claim is not surprising given that the Joint Petitioners did not participate in the CLP Shared Loop Collaborative. Accordingly, BellSouth recommended that the Commission reject the Joint Petitioners' language on this issue and adopt BellSouth's, as it provides the Joint Petitioners with exactly what the CLP Shared Loop Collaborative has already agreed to.

The Public Staff noted that the Joint Petitioners argued that BellSouth's proposed language would limit the removal of bridged tap between 2,500 feet and 6,000 feet that serves no network design purpose. The Public Staff asserted that this language leaves to BellSouth's discretion the determination of which bridged taps serve no network purpose and precludes the removal of bridged tap that is less than 2,500 feet that could possibly inhibit the provision of high-speed data transmission.

The Public Staff observed that, as with Matrix Item Nos. 36 and 37, BellSouth maintained that it has no obligation under Section 251 of the Act to perform bridged tap removal beyond what it performs for its own customers. Furthermore, the Public Staff pointed out that, nevertheless, BellSouth acknowledged that it currently offers bridged tap removal beyond what it contends are its obligations under Section 251, as a result of a process developed by the CLP Shared Loop Collaborative.

The Public Staff maintained that for the reasons supporting its position on Matrix Item No. 36, the Commission should find that BellSouth should perform line conditioning to remove bridged taps, without limitation as to the length of the bridged tap. The Public Staff argued that BellSouth has an obligation to condition loops regardless of the loop's length and may not limit the Joint Petitioners' offerings based on its own practices and procedures.

The Public Staff also observed that the parties concur that BellSouth has agreed through an industry collaborative to modify any copper loop ordered by a CLP at no additional charge to the CLP with over 6,000 feet of combined bridged tap, such that the loop will have a maximum of 6,000 feet of bridged tap. The Public Staff asserted that because loop conditioning is a Section 251 obligation, BellSouth must charge TELRIC-based rates for conditioning loops with combined bridged tap of 6,000 feet or less. Accordingly, the Public Staff recommended that the Commission find that any copper loop ordered by a CLP with over 6,000 feet of combined bridged tap would be modified, upon request from the CLP, at no additional charge to the CLP, so that the loop will have a maximum of 6,000 feet of bridged tap and that line conditioning orders that require the removal of other bridged tap should be performed at the BellSouth UNE rates previously adopted by the Commission.

The Commission, as previously concluded in regard to Matrix Item No. 36 (Issue No. 10), rejects BellSouth's assertion that its line conditioning obligations are now constrained by the FCC's *TRO*-implemented rule on routine network modifications, i.e., BellSouth asserted that its obligations to provide line conditioning at TELRIC rates should be limited to what BellSouth routinely provides for its own customers. In addition, the Commission rejects BellSouth's proposal to further limit the removal of bridged tap to that which "serves no network design purpose"; the FCC did not modify the line conditioning rules to allow such a limitation and the allowance of such a limitation would, inappropriately, provide BellSouth with the sole discretion to further determine when bridged tap would be removed. The Commission agrees with the Joint Petitioners' and the Public Staff's position. Consistent with our findings and conclusions in regard to Matrix Item No. 36, we conclude that BellSouth is required by the FCC's

rulings regarding line conditioning to condition copper loops to remove bridged tap between 0 to 6,000 feet at TELRIC rates. In particular, as discussed in the Evidence and Conclusions for Finding of Fact No. 10 (Matrix Item No. 36), we found that (1) the ILECs' line conditioning obligations remained virtually the same as they did before the *TRO*, with the exception that the line conditioning obligations were expanded to include subloops; (2) the CLPs need to have access to line conditioning at TELRIC rates, so that they will be able to deploy advanced services on copper loops (including subloops), free of devices that diminish the capabilities of the loop; and (3) the ILEC's line conditioning obligations apply to loops of any length.

CONCLUSIONS

The Commission accepts the parties' agreement that any copper loop ordered by a CLP with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. The Commission concludes that line conditioning orders that require the removal of other bridged tap (bridged tap between 0 and 6,000 feet) should be performed at the BellSouth UNE rates previously adopted by the Commission. Accordingly, the Commission adopts the Joint Petitioners' proposed language for inclusion in the Agreement in Attachment 2, Section 2.12.3 and Section 2.12.4.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

ISSUE NO. 13 - MATRIX ITEM 51:

(B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?

(C) Who should conduct the audit and how should the audit be performed?

POSITIONS OF PARTIES

JOINT PETITIONERS: With respect to (B) the Joint Petitioners position is that to invoke its limited right to audit CLP records in order to verify compliance with the high capacity EEL service eligibility criteria, BellSouth should send a Notice of Audit to the CLPs, identifying particular circuits for which BellSouth alleges noncompliance and demonstrating the cause upon which BellSouth rests its allegations. The Notice of Audit should also include all supporting documentation upon which BellSouth relies to form the basis of its allegations of noncompliance. Such Notice of Audit should be delivered to the CLPs with all supporting documentation no less than 30 days prior to the date upon which Bellsouth seeks to commence an audit.

With respect to (C) the Joint Petitioners argued that the audit should be conducted by a third-party independent auditor mutually agreed-upon by the Parties. The provisions regarding when a CLP must reimburse BellSouth and when BellSouth must reimburse a CLP should mirror those contained in the *TRO*.

Legal Department

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(305) 347-5558

February 17, 2006

Via Electronic Mail and U.S. Mail

Richard D. Melson
General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: In re: Ms. Doris Moss

Dear Mr. Melson:

In response to the above captioned Subpoena Duces Tecum issued on February 16, 2006 by the Florida Public Service Commission, please be advised that, in January of 2002, Ms. Moss was in the employment of BellSouth Telecommunications, Inc. On October 1, 2002, Ms. Moss accepted and received a lump sum payment under the Transitional Payment Plan: Enhanced Voluntary (severance offer). From that date until May, 2004, Ms. Moss was on transitional unpaid leave from BellSouth. She became eligible to receive pension payments on May 23, 2004 and currently receives them. Ms. Moss is also enrolled in the retiree group health plan. In June 2005, Ms. Moss requested and received a cash distribution from her BellSouth 401K.

Sincerely,

Nancy B. White

NBW/vf

EXHIBIT "D"