

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

OPPOSITION OF Z-TEL COMMUNICATIONS, INC.

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Pursuant to the Commission's *Public Notice*,¹ Z-Tel Communications, Inc. ("Z-Tel") respectfully submits this Opposition to Petitions for Reconsideration and Clarification filed in the Commission's *Triennial Review* proceeding.

INTRODUCTION AND SUMMARY

This Opposition focuses on four aspects of BellSouth's Petition for Clarification and/or Partial Reconsideration.² Specifically, BellSouth asks that the Commission: 1) reverse its

¹ See Public Notice, *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, 68 Fed. Reg. 60391 (Oct. 22, 2003).

² See Petition for Clarification and/or Partial Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 2, 2003) ("*BellSouth Petition*").

conclusion in the *TRO*³ that section 271 of the Communications Act of 1934 (the “Act”) imposes unbundling obligations on the Bell Operating Companies (“BOCs”) independent of those imposed on all incumbent local exchange carriers (“ILECs”) by sections 251 and 252; 2) create a broad exception to section 271 – entirely untethered to the statutory language – excusing ILECs from unbundling facilities used to provide broadband services; 3) authorize ILECs to impose wasteful reconnection costs on competitive local exchange carriers (“CLECs”) seeking to obtain network elements unbundled under section 271 “commingled” with other facilities provided at wholesale; and 4) roll back the *TRO*’s clear mandate that ILECs continue to provide access to the TDM-based features, functions, and capabilities of their networks. While framed largely as requests for “clarification,” these requests are, in fact, flatly contrary to specific Commission findings in the *TRO*, as well as past Commission precedent and sound public policy. BellSouth’s requests should be denied.

First, BellSouth’s claim that section 271 adds nothing to the unbundling requirements of sections 251 and 252 merely reargues an issue upon which the ILECs lost in the *TRO*. With the benefit of extensive comment by both sides, the Commission properly found that the ILECs’ reading of section 271 would be inconsistent with the plain statutory text, would violate the cardinal interpretive rule against rendering portions of a statute “surplusage,” and would contravene the core market-opening purpose of the provision.

Second, BellSouth’s imaginative claim that section 271 somehow elides unbundling of network elements used to provide broadband services is flatly inconsistent with the statute’s plain

³ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 2003 FCC LEXIS 4697 (rel. Aug. 21, 2003) (“*TRO*”).

language. Section 271(c)(2)(B)(iv) provides in no uncertain terms that the BOCs must provide competitors “local loop transmission from the central office to the customer’s premises,” making no distinction between broadband and narrowband loops. Moreover, in its section 271 application orders – including those cited by BellSouth’s own Petition – the Commission has consistently interpreted section 271’s mandate of “loop” unbundling as requiring the unbundling of loops used to provide both narrowband and broadband services.

Third, BellSouth’s argument that network elements subject to unbundling only under section 271 need not be commingled with other wholesale services or UNEs represents a renewed effort to impose wasteful reconnection costs on new entrants. In *AT&T v. Iowa Utilities Board*, the Supreme Court strongly disapproved of such unjustifiable and inefficient “glue charges” in the section 251/252 context. Such charges in connection with elements unbundled under section 271 are no more defensible.

Fourth, BellSouth’s ambiguous request that the Commission “ensure that its rules are not misconstrued to impose unbundling or network design requirements on next-generation networks” appears to be no more than an effort to avoid unbundling obligations plainly mandated by the *TRO*. Specifically, the *TRO* makes clear that an ILEC’s offering of packet-based services over a portion of its network does not render those facilities a “next-generation network” immune to unbundling. Incumbent LECs remain obligated to provide unbundled access to TDM-based features, functions, and capabilities. Indeed, the *TRO* also *rejects* the ILECs’ position that they need not provide TDM-capable loops if that requires some modifications to their existing facilities. ILECs must undertake “routine network modifications” that they would undertake for their own customers for CLECs as well, specifically including “deploying a new multiplexer or reconfiguring an existing multiplexer” to enable TDM-based services.

ARGUMENT

I. THE COMMISSION CORRECTLY FOUND THAT THE SECTION 271 CHECKLIST REQUIRES BOCs TO UNBUNDLE LOOPS, TRANSPORT, AND SWITCHING.

BellSouth's Petition reiterates arguments made by it and other BOCs during the comment cycle to the effect that the unbundling requirements of section 271 add nothing to those of sections 251 and 252.⁴ Indeed, BellSouth expressly urges this Commission to "state that the unbundling obligations of Section 271 are *co-extensive* with those imposed under Section 251."⁵ For the reasons previously presented by Z-Tel⁶ and other CLECs and adopted by the Commission in the *TRO*, BellSouth's request must be rejected.

First, as the *TRO* correctly states, "the plain language and the structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271":⁷

Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so⁸

Second, and equally important, reading the statute as BellSouth urges would "render checklist items 4, 5, 6, and 10 entirely redundant and duplicative . . . and thus violate one of the enduring

⁴ See *BellSouth Petition* at 12-15.

⁵ *Id.* at 15 (emphasis added).

⁶ See, e.g., Comments of Z-Tel Communications, Inc., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147 at 7-20 (filed April 5, 2002) ("*Z-Tel Comments*"); Reply Comments of Z-Tel Communications, Inc., at 102-112 (filed July 17, 2002) ("*Z-Tel Reply Comments*").

⁷ *TRO*, ¶ 654.

⁸ *Id.*

tenets of statutory construction: to give effect, if possible, to every clause and word of a statute.”⁹ Finally, as the *TRO* also states, the approach advocated by BellSouth would ignore the “historical underpinning” of section 271: properly construed, that provision “reflect[s] Congress’ concern, repeatedly recognized by the Commission and the courts, with balancing the BOCs’ entry into the long distance market” with off-setting obligations designed to facilitate the “increased presence of competitors in the local market.”¹⁰

BellSouth does not deny that its request for reconsideration is inconsistent with the plain language of section 271, or that its approach would render the checklist items mere “surplusage.” Nor does it present any sound policy reason for reading the checklist items out of the statute. Instead, BellSouth advances the novel argument that the conclusions of the *TRO* “cannot be reconciled with [the Commission’s] own decisions in the Section 271 context or the D.C. Circuit’s direction in *USTA*.”¹¹ Those claims are wholly meritless.

Indeed, while BellSouth cites language in several of the Commission’s section 271 orders for the proposition that “unbundling is not required under Section 271 when it is no longer required under Section 251,” placing BellSouth’s carefully selected quotes in context illustrates the obvious irrelevance of the decisions it cites.¹² The quote from the *SBC Arkansas/Missouri Order*¹³ appears in a discussion of Sage Telecom’s argument that the application should be denied because SBC had purportedly “refuse[d] to allow Sage access to line class codes needed

⁹ *Id.*

¹⁰ *Id.*, ¶ 655.

¹¹ *BellSouth Petition* at 12.

¹² *Id.* at 13.

¹³ Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, ¶ 113 (2001) (“*SBC Arkansas/Missouri Order*”).

to provide ‘one-way extended area calling scopes.’”¹⁴ The Commission found that SBC in fact *did* provide “line class codes on a UNE basis” and “thereby complie[d] with . . . its unbundled switching obligation established in the *UNE Remand Order*.”¹⁵ That finding has nothing to do with the question whether section 271 imposes independent unbundling obligations on the BOCs, and certainly cannot justify departing from the plain language of the statute.

BellSouth’s reliance on the *Qwest Nine-State Order*¹⁶ fares no better. There, AT&T challenged Qwest’s implementation of an aspect of section 51.319(c) of the Commission’s rules establishing ILEC unbundling obligations “in accordance with § 51.311 [requiring nondiscriminatory access to unbundled network elements] and section 251(c)(3) of the Act.”¹⁷ Specifically, AT&T argued that Qwest had improperly implemented rule 51.319(c)(2) – which relieved ILECs from unbundling local switching under section 251 in certain high-density areas for end users with four or more lines¹⁸ – because Qwest had “counted customers’ lines on a ‘per wire center’ basis,” rather than by customer location.¹⁹ The Commission rejected AT&T’s argument on the ground that Qwest had recently revised its policy to apply the carveout only “where there are four or more lines per customer location.”²⁰ The Commission also observed that “[a]s a practical matter, no parties have been denied unbundled local circuit-switching, as

¹⁴ *Id.*, ¶ 112.

¹⁵ *Id.*, ¶ 113.

¹⁶ Memorandum Opinion and Order, *Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, 17 FCC Rcd 26303, ¶ 359 (2002) (“*Qwest Nine-State Order*”).

¹⁷ 47 C.F.R. § 51.319(c).

¹⁸ *See* 47 C.F.R. § 51.319(c)(2).

¹⁹ *See Qwest Nine-State Order*, ¶ 359 & n. 1375.

²⁰ *Id.*, ¶ 360.

Qwest maintains that it has never enforced the switching carveout in the three states where the exception applies.”²¹

Clearly, this dispute about Qwest’s interpretation of the Commission’s regulations implementing section 251(c) has nothing to do with the question whether section 271 imposes obligations on the BOCs *beyond* those attaching to all ILECs under sections 251 and 252. That question was, however, presented in the *UNE Remand Order*.²² More specifically, after “conclud[ing] that circuit switching and shared transport need not be unbundled in certain circumstances,” the Commission held that “providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval” because they are required by the checklist in section 271(c)(2)(B).²³ Thus, the Commission’s *TRO* finding that the BOCs have “an independent and ongoing access obligation under section 271” merely reinforces a prior Commission holding that is now more than four years old.²⁴

Ironically, the Commission’s basic framework for reviewing section 271 applications – including the application that was considered in the *SBC Arkansas/Missouri Order* – addresses this very issue with regard to Checklist Item 7, operator services and directory assistance (“OS/DA”). While the *UNE Remand Order* largely eliminated the ILECs’ section 251 obligations for these UNEs, the Commission found that “Checklist item obligations that do not fall within a BOC's UNE obligations ... still must be provided in accordance with sections

²¹ *Id.*, ¶ 361.

²² See Third Report and Order and Fourth Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (“*UNE Remand Order*”).

²³ *Id.*, ¶ 468.

²⁴ *TRO*, ¶ 654.

201(b) and 202(a).”²⁵ Accordingly, in the *SBC Arkansas/Missouri Order*, the Commission evaluated SBC’s provision of OS/DA against this standard.²⁶ Importantly, the Commission did not conclude that SBC had *no* obligation to provide OS/DA, a fact that BellSouth conveniently neglects to mention.

In short, BellSouth’s claim that the Commission “got it right in its Section 271 Orders, and got it wrong in the *Triennial Review Order*” makes no sense. The Commission got “it” right in the *UNE Remand Order*, applied “it” in subsequent section 271 orders, and merely affirmed “it” in the *TRO*.²⁷

The D.C. Circuit’s decision in *United States Telecommunications Ass’n v. FCC*,²⁸ which BellSouth also invokes, is equally irrelevant. In *USTA*, the D.C. Circuit rejected the Commission’s “uniform national rule” implementing the “impairment” standard of section 251(d)(2) on the ground that the Supreme Court’s *Iowa Utilities Board* decision requires “a more nuanced concept of impairment” than one “detached from any specific markets or market categories.” 290 F.3d at 426. The Court also cautioned that impairment analysis under section 251(d)(2) may not be predicated on “cost comparisons . . . devoid of any interest in whether the cost characteristics of an ‘element’ render it at all unsuitable for competitive supply.” *Id.* at 427. But the Court did not, by any stretch of the imagination, construe the unbundling obligations

²⁵ *SBC Arkansas/Missouri Order*, Appendix D (“Statutory Framework”), ¶ 58.

²⁶ *See id.*

²⁷ Notably, while the *TRO* correctly found that the section 271 checklist imposes independent unbundling requirements on the BOCs, the Commission erred in holding that such unbundling need not take place in accordance with the section 252(d)(1) pricing standard adopted by Congress. Z-Tel intends to challenge that determination in its petition for review pending in the D.C. Circuit.

²⁸ 290 F.3d 415 (D.C. Cir. 2002) (“*USTA*”).

imposed on BOCs by the section 271 checklist, or consider whether those responsibilities go beyond those imposed on all ILECs under sections 251 and 252. Like the Commission's section 271 orders, the D.C. Circuit's *USTA* decision thus presents no warrant for departing from the plain language of the section 271.

BellSouth's argument that "Section 271 cannot be read, as the *Order* suggests, to require unbundling in perpetuity" is a straw man.²⁹ The *TRO* does not indicate that the section 271 checklist requires unbundling "in perpetuity" – rather, the order correctly points out that "section 271(d)(6) grants the Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271" after authorization has been granted.³⁰ To the extent that the BOCs believe such continued enforcement unnecessary, they are free to petition the Commission for forbearance from section 271's unbundling requirements – as, indeed, they have already done.³¹ Of course, as Z-Tel has argued elsewhere,³² those petitions are grossly premature, because the standards of section 10(a) and 10(d) are not yet close to satisfied.³³ Still, *all* parties appear to agree that the section 271 requirements do not apply in "perpetuity," but only until the BOCs can demonstrate that section 10 has been satisfied.

²⁹ *BellSouth Petition* at 14.

³⁰ *TRO*, ¶ 665.

³¹ See, e.g., Verizon Petition for Forbearance, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket Nos. 01-338, 96-98, 98-147 (filed July 29, 2002); Petition for Forbearance, *Petition of Verizon for Forbearance From The Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203 Of The Commission's Rules*, CC Docket No. 96-149 (filed Aug. 5, 2002).

³² See *Z-Tel Reply Comments* at 112-24; Opposition of Z-Tel Communications, Inc., *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, CC Docket No. 01-338 at 18-23 (filed Sept. 3, 2002).

³³ See 47 U.S.C. §10; *Z-Tel Reply Comments* at 117-24 (arguing, *inter alia*, that section 271 cannot be considered "fully implemented" within the meaning of section 10 until there is a fully functioning wholesale market in which competitors can obtain the elements needed to serve end-users).

Finally, BellSouth’s claim that section 271 was intended to apply only until “the Commission adopted rules implementing Section 251” is utterly implausible³⁴ – particularly given that the Commission was required to issue its rules implementing section 251 within only six months of enactment.³⁵ No BOC sought authorization pursuant to section 271 during that period and, in fact, no BOC submitted an acceptable application for more than three years. The Commission noted this fact in the *UNE Remand Order* when it rejected similar BOC arguments and “decline[d] to adopt a sunset provision for removing network elements from the national list” because there was “no basis in the record before us to make predictive judgments about when an unbundling standard will no longer be met for particular network elements.”³⁶

Indeed, it would have been extremely surprising for any BOC to have sought entry during the six-month window for promulgation of rules under section 251. Section 271(c)(1)(A) expressly requires the “presence of a facilities-based competitor” with a “binding [interconnection] agreement[]” in place prior to issuance of section 271 authorization. The BOCs, of course, entered very few such agreements voluntarily, but rather obliged CLECs to obtain them through arbitration. Under section 252(b)(1), arbitration could not even be initiated until 135 days “after the date on which an incumbent local exchange carrier receives a request for negotiation under this section.” And the Act gives state commissions nine months “after the date on which the local carrier received the request under this section” to conclude the arbitration. Moreover, BOC supporters had argued that the Act was defective since it did not contain “a date certain for entry,” which they contended was needed “because the FCC and the

³⁴ *BellSouth Petition* at 14.

³⁵ 47 U.S.C. § 251(d)(1).

³⁶ *UNE Remand Order*, ¶ 152.

Department of Justice are very slow to act.”³⁷ In short, *no one* – including the BOCs – remotely imagined that section 271 would even come into play before the Commission’s section 251 regulations issued, and a reading of section 271 predicated on the notion that Congress had done so would be absurd.³⁸

The legislative history of section 271 confirms that Congress had other reasons for including loops, transport, and switching on the checklist. Specifically, the Senate Report explains that those items were included to establish “what must, at a minimum, be provided by a Bell operating company in any interconnection agreement approved under section 251 to which that company is a party . . . before the FCC may authorize the Bell operating company to provide in region interLATA services.”³⁹

Accordingly, the Commission should reject BellSouth’s contrived attack on the *TRO*’s construction of section 271 and reaffirm that that provision imposes independent unbundling obligations on the BOCs.

II. SECTION 271 CLEARLY APPLIES TO BROADBAND.

In addition to rearguing the same section 271 issue that it lost in the *TRO*, BellSouth also makes the surprising new claim that the Commission should – even if it reaffirms its finding that section 271 imposes independent obligations – “clarify that BOCs do not need to unbundle

³⁷ S. Rep. 104-23, 104th Cong., 1st Sess. 11 (1995) (statement of Peter Huber).

³⁸ Indeed, congressional supporters of the BOCs opposed the bills that led to the Act because it would purportedly delay BOC entry into the long-distance market. Senators Packwood and McCain, for example, contended that a “calendar deadline” was needed because whether BOC entry would be “in the ‘public interest, convenience and necessity’ can be argued endlessly at the Federal Communications Commission and in the courts.” *Id.* at 70-71.

³⁹ S. Rep. 104-23, *supra*, at 43.

broadband services or capabilities under Section 271.⁴⁰ This request is flatly inconsistent with both the text of the Act and Commission precedent.

Section 271(c)(2)(B)(iv) provides in no uncertain terms that the BOCs must provide competitors “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”⁴¹ The text of the Act thus mandates BOC unbundling of loops, and makes no distinction between loops used to provide broadband services and those used to provide narrowband services. This Commission has no authority to ignore the plain language of the statute.

Moreover, the Commission has consistently interpreted section 271’s straightforward requirement of unbundled “[l]ocal loop transmission” to mandate unbundling of loops used to provide both narrowband and broadband services. Indeed, the Commission’s very first order granting an application under section 271 contained no fewer than 75 paragraphs discussing Bell Atlantic’s performance on loop unbundling, and nearly half of that lengthy discussion concerned loops used by competitors to provide broadband services.⁴² The Commission stated that it defined the “loop” under section 271 as “a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises.”⁴³ The Commission also expressly indicated that that this definition

⁴⁰ *BellSouth Petition* at 11.

⁴¹ 47 U.S.C. § 271(c)(2)(B)(iv).

⁴² Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶¶ 268-342 (1999) (“*Bell Atlantic New York Section 271 Order*”).

⁴³ *Id.*, ¶ 268 (quoting *Local Competition First Report and Order*, 11 FCC Rcd at 15691).

“includes different types of loops, including . . . loops that are conditioned to transmit the digital signals needed to provide services such as IDSN, ADSL, HDSL, and DS1-level signals.”⁴⁴

The Commission’s interpretation of the term “loop” in section 271 has remained the same since the time of the *Bell Atlantic New York Section 271 Order*. Indeed, the recent section 271 orders cited by BellSouth only underscore the point. In the *Qwest Nine-State Order* the Commission wrote that its review of Qwest’s loop unbundling includes, “as in past section 271 orders, voice grade loops, xDSL-capable loops, and high capacity loops.”⁴⁵ The *SBC Arkansas/Missouri Order* says exactly the same thing,⁴⁶ and discusses SBC’s performance with regard to “high capacity loops” in detail.⁴⁷ BellSouth thus asks this Commission to ignore not only the text of the Act itself, but also the numerous section 271 orders consistently interpreting section 271 to require unbundling of *all* types of loops, including broadband loops.

Instead of even attempting to square its arguments with the statute, BellSouth argues that “[a]ll of the policy reasons that led [in the *TRO*] to the sound conclusion not to require unbundling of broadband in the Section 251 context compel the Commission” to “clarify” that BOCs need not unbundle broadband under section 271, either.⁴⁸ But there is really nothing to “clarify.” The Commission’s finding in the *TRO* that “the plain language and structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing” obligation to unbundle

⁴⁴ *Id.*

⁴⁵ *Qwest Nine-State Order*, ¶ 335.

⁴⁶ *SBC Arkansas/Missouri Order*, ¶ 97.

⁴⁷ *Id.*, ¶¶ 107-109.

⁴⁸ *BellSouth Petition* at 11.

loops is perfectly clear: it plainly means that the BOCs must unbundle “loops” as that term has *always* been used in the section 271 context, including broadband as well as narrowband loops.⁴⁹

Moreover, the *TRO* itself also rebuts BellSouth’s suggestion that the Commission could not have intended unbundling of broadband to continue under 271 because it would “undermine [BOC] incentives to deploy next-generation networks.”⁵⁰ To the contrary, the Commission found that notwithstanding its new limitations on section 251/252 unbundling, ILECs (including, of course, the BOCs) must continue to make wholesale broadband services available at just, reasonable, and non-discriminatory rates, terms, and conditions:

We expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act.⁵¹

Accordingly, the Commission clearly saw no inconsistency between limiting broadband unbundling under sections 251/252, but yet continuing to require such unbundling under section 271 at just and reasonable rates. BellSouth’s strained arguments to the contrary must be rejected.

III. THE COMMISSION SHOULD AGAIN REJECT BELLSOUTH’S ATTEMPT TO IMPOSE “GLUE CHARGES” ON NETWORK ELEMENTS UNBUNDLED UNDER SECTION 271.

BellSouth also argues that even if the Commission reaffirms section 271’s imposition of independent unbundling obligations on the BOCs, it should “clarify” that network elements – “transmission, switching, transport, or signaling” – subject to “unbundl[ing] only under Section 271 need not be commingled with wholesale services

⁴⁹ *TRO*, ¶ 654.

⁵⁰ *BellSouth Petition* at 11.

⁵¹ *TRO*, ¶ 253.

or combined with UNEs.”⁵² This request represents a renewed effort to impose wasteful reconnection costs (or “glue charges”) on new entrants. As such, it must be denied.

BellSouth correctly points out that the *Erratum* issued after the *TRO* removed portions of paragraph 584 and footnote 1990, eliminating an inconsistency regarding the treatment of elements that must be unbundled under section 271 but not under sections 251 and 252.⁵³ Paragraph 584 originally stated that ILECs must “permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271” Footnote 1990, in contrast, originally “decline[d] to apply [the] commingling rule, set forth in Part VII.A, to services that must be offered pursuant to these [section 271] checklist items.” Clearly, with both references eliminated, the Commission has left it open to the state commissions to determine (in the context of section 252 arbitrations) the rates, terms, and conditions under which a CLEC may access elements that must be unbundled under section 271, including issues related to commingling.⁵⁴

⁵² *BellSouth Petition* at 15.

⁵³ *See id.*

⁵⁴ In fact, Verizon’s recent tariff revisions implementing the commingling requirements in ¶ 581 of the *TRO* concede that state commissions have jurisdiction to resolve these issues. According to Verizon’s tariff revisions, only those “telecommunications carriers who obtain unbundled network elements or combinations of unbundled network elements pursuant to a Statement of Generally Available Terms, under Section 252 of the Act, or pursuant to an interconnection agreement with the Telephone Company, may connect, combine, or otherwise attach such unbundled network elements or combinations of unbundled network elements to access services purchased under this tariff except to the extent such agreement (1) expressly prohibits such commingling; or (2) does not address commingling *and the requesting carrier has no negotiated an interconnection agreement (or amendment) expressly permitting commingling.*” *Verizon Telephone Companies Tariff FCC Nos. 1, 11, 14, 16 & 20, Transmittal No. 367, Tariff F.C.C. No. 11, Original Page 2-13.1* (filed Oct. 2, 2003) (emphasis added). By requiring CLECs to negotiate an interconnection agreement (or amendment thereto), Verizon has subjected the rates, terms, and conditions for commingling to state commission review under section 252(e). And, to

Equally clearly, however, the Commission should clarify that the BOCs are prohibited from assessing “glue charges” of the sort that the Supreme Court strongly disapproved in upholding the Commission’s combinations rules.⁵⁵ As the Supreme Court explained there, the ILECs had persuaded the Eighth Circuit in 1997 that they had the right to disconnect loops from switches “not for any productive reason, but just to impose wasteful reconnection costs on new entrants.”⁵⁶ Before the Supreme Court reversed the Eighth Circuit’s erroneous decision, the ILECs told CLECs that they would refrain from disconnecting loops from switches only if the CLECs paid “glue charges” to keep them connected. That is presumably what the BOCs would now do as to elements unbundled under section 271, if such “glue charges” were to be permitted.

The Supreme Court, however, used harsh language in condemning the ILECs’ “glue charge” arguments in *Iowa Utilities Board*. Indeed, the Court unanimously concluded that the Act “forbids incumbents to sabotage network elements.”⁵⁷ “It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against [such] an anticompetitive practice,” the Court further held.⁵⁸ It is, needless to say, unusual for the Court to describe litigants’ actions as “anticompetitive practice[s],” much less as “sabotage,” or to note that they were acting “not for any productive reason, but just to impose wasteful reconnection costs on new entrants.” There can be no doubt where the Supreme Court stands on this issue.

BellSouth nevertheless again seeks authorization to impose wasteful reconnection costs on competitors, this time for elements unbundled under section 271. But glue charges for section

the extent that parties cannot reach agreement, a state commission can arbitrate these matters pursuant to section 252(b).

⁵⁵ See *AT&T v. Iowa Utilities Board*, 525 U.S. at 393-95.

⁵⁶ *Id.* at 395 (quoting Reply Brief for Federal Petitioners at 23).

⁵⁷ *Id.* at 394.

⁵⁸ *Id.* at 395.

271 elements make no more sense than glue charges for section 251/252 elements. In either case, the question is simply whether incumbents should be allowed to “impose wasteful reconnection costs” – and the answer is clearly “no.”

IV. THE COMMISSION SHOULD REJECT BELLSOUTH’S REQUEST TO RECONSIDER THE MODIFICATION RULES.

Perhaps the most puzzling aspect of BellSouth’s petition is an elliptical and ambiguous section broadly requesting the Commission to ensure that its rules are not misconstrued to impose unbundling or network design requirements on next-generation networks.⁵⁹ Only slightly more specifically, BellSouth asks the Commission to clarify that ILECs are not required to “design, reconfigure, or modify [next-generation] networks to facilitate an unbundling request for a TDM capability,” and to “clarify or reconsider its network modification rules to make clear that an ILEC is not required to deploy a new multiplexer that provides TDM functionality if it has no plans to do so for its own customers.”⁶⁰

Much of the ambiguity of BellSouth’s request arises because it neglects to define what it means by “next-generation networks.” Plainly, however, the mere fact that an ILEC provides packet-based services over a portion of its network does not render those facilities a “next-generation network” immune to unbundling. Indeed, with respect to hybrid loops, the *TRO*’s obligation that ILECs’ continue to provide unbundled access to the TDM portions of their networks is perfectly clear: To enable competitors to “provide broadband capabilities to end users” over hybrid loops, “incumbent LECs must provide unbundled access to a complete transmission path over their TDM networks to address the impairment that . . . requesting

⁵⁹ See *BellSouth Petition* at 16.

⁶⁰ *Id.* at 17.

carriers currently face.”⁶¹ “[T]he availability of TDM-based loops, such as DS1s and DS3s, provide competitive LECs with a range of options for providing broadband capabilities.”⁶² Moreover, the Commission emphasized, “we prohibit incumbent LECs from engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs.”⁶³ “[A]ny incumbent LEC practice, policy, or procedure that has the effect of disrupting or degrading access to the TDM-based features, functions, and capabilities of hybrid loops ... is prohibited under the section 251(c)(3) duty to provide unbundled access to loops on just, reasonable, and nondiscriminatory terms and conditions.”⁶⁴

With respect to unbundling for provision of narrowband services to end users, the *TRO* is equally clear. The Commission again underscored the ILECs’ “unbundling obligations for . . . the TDM-based features, functions, and capabilities of these hybrid loops.”⁶⁵ Incumbents must provide “either a TDM-based narrowband pathway over their hybrid loop facilities,” or a “homerun copper loop . . . if the incumbent has not removed such loop facilities.”⁶⁶

Significantly – as BellSouth appears aware – the ILECs’ responsibilities to provide TDM-capable loops under the *TRO* do not stop with situations where “the facilities necessary to provision the service requested [already] exist and are currently available.”⁶⁷ To the contrary, the *TRO*’s discussion of the modification rules adopted by the Commission specifically *rejects* that argument. Most relevant here, the Commission expressly rejected Verizon’s claim that it

⁶¹ *TRO*, ¶ 289.

⁶² *Id.*, ¶ 291.

⁶³ *Id.*, ¶ 294.

⁶⁴ *Id.*

⁶⁵ *Id.*, ¶ 296.

⁶⁶ *Id.* & n. 850.

⁶⁷ *TRO*, ¶ 639 n. 1936, quoting an argument by Verizon that the Commission proceeds to reject.

was entitled to deny requests for TDM-based loops, such as DS1s and DS3s, on the ground that there was “no capacity for the service requested on existing multiplexer (DS1s and DS3s over fiber).”⁶⁸ The Commission held that ILECs must undertake “routine network modifications” that it would undertake for its own customers for CLECs as well, specifically including “deploying a new multiplexer or reconfiguring an existing multiplexer.”⁶⁹

Notably, a brief recently issued by the Staff of the Virginia State Corporation Commission applying the *TRO*’s modification rules again resoundingly rejected Verizon’s claim that it need not perform network modifications such as “deploying a new multiplexer.”⁷⁰ The Staff correctly found that Verizon’s “no facilities” policy “departed from industry practice, and was never consistent with federal law.”⁷¹ BellSouth’s arguments here must similarly be rejected – they, too, were “never consistent with federal law,” and the *TRO* properly makes that fact even more clear.

⁶⁸ *Id.*

⁶⁹ *Id.*, ¶ 634.

⁷⁰ *Petition of Cavalier Telephone, LLC, For Injunction Against Verizon Virginia Inc. for Violations of Interconnection Agreement and for Expedited Relief to Order Verizon Virginia Inc. to Provision Unbundled Network Elements in Accordance with the Telecommunications Act of 1996*, Staff Brief, Case No. PUC-2002-00088, Virginia State Corporation Commission at 3 (filed Oct. 31, 2003).

⁷¹ *Id.* at 4.

CONCLUSION

For the reasons set forth above, the Commission should reject BellSouth's petition for clarifications and modifications discussed in this Opposition.

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