

FCC Again Supports CLECs in 1996 Act Litigation

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One of the trends in 2011 has been the rise in amicus filings by the FCC in litigation matters. This trend is fueled, no doubt, by the Supreme Court's determination in [Talk America v. Michigan Bell](#) earlier this year that such interpretations by the agency are entitled to deference by the courts.

The latest example of this once again involves interpretation of the FCC's rules for the provision of unbundled network elements ("UNEs"). In the latest amicus brief, the FCC agrees with CLECs that a BOC is required to permit the commingling of section 271 elements with UNEs obtained via section 251(c)(3).

The case is [BellSouth Telecommunications, Inc. v. Kentucky PSC](#), pending in the Sixth Circuit. The case results from proceedings to implement the 2003 *Triennial Review Order* and the 2005 *Triennial Review Remand Order*, in which the FCC reduced the list of network elements that incumbent LECs must offer on an unbundled basis pursuant to Section 251(c)(3). In those orders, however, the FCC also removed its "commingling" restriction for UNEs. Specifically, the FCC adopted a rule stating:

an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

47 C.F.R. 51.309(e).

Separately, Bell Operating Companies such as BellSouth (now AT&T Kentucky) also must offer unbundled switching, transport and local loops (among other checklist items) pursuant to its Section 271 obligations. AT&T Kentucky contends that the commingling provision does not require it to permit the commingling of UNEs with section 271 elements.

The case is on appeal to the Sixth Circuit, and the court asked the FCC to submit its view on the commingling question. In its [Amicus Brief](#), the FCC disagreed with AT&T Kentucky's claim. Specifically, on the question of whether Section 271 elements are "wholesale services" within the meaning of Section 51.309(e), the brief states:

FCC orders make clear the agency's view that a BOC is required under FCC rules to commingle UNEs provided under Section 251(c)(3) with facilities and services provided under section 271. ...

Thus, the only pertinent question not explicitly addressed in the FCC's rules is whether section 271 checklist items are 'wholesale' facilities and services that fall within the scope of rule 51.309(e)-(f), as well as paragraph 579 of the *Triennial Review Order*. On multiple occasions, the FCC has explained that they are. ...

The brief further disagreed with AT&T Kentucky's contention that the commingling rule applied only to tariffed services, not to services obtained via other methods such as commercial agreements. Finally, the FCC argued that the state commission had authority to enforce section 51.309(e) in an

arbitration, and that in doing so, the state commission is not enforcing section 271.

We will update this blog when the Sixth Circuit issues its decision.