EXHIBIT B

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint petition by NewSouth Communications Corp., NuVox Communications, Inc., and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecommunications, Inc.	DOCKET NO. 040130-TP ORDER NO. PSC-05-0975-FOF-TP ISSUED: October 11, 2005

The following Commissioners participated in the disposition of this matter:

RUDOLPH "RUDY" BRADLEY
LISA POLAK EDGAR

FINAL ORDER REGARDING PETITION FOR ARBITRATION

BY THE COMMISSION:

APPEARANCES:

NORMAN H. HORTON, Jr., Esquire, Messer, Caparello & Self, P.A., Post Office Box 1876, Tallahassee, Florida 32302-1876; and
JOHN J. HEITMANN, Esquire, STEPHANIE JOYCE, Esquire, and GARRET R. HARGRAVE, Esquire, Kelley Drye & Warren LLP, 1200 19th Street, NW, Suite 500, Washington, DC 20036
On behalf 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 and Xspedius Management Co. of Jacksonville, LLC. ("JOINT PETITITONERS").

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On behalf of BellSouth Telecommunications, Inc. ("BST").

JEREMY L. SUSAC, Esquire; and KIRA SCOTT, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission ("STAFF").

Abbreviations and Acronyms

Act	Telecommunications Act of 1996
ASR	Access Service Request
BellSouth	BellSouth Telecommunications, Inc.
CABS	Carrier Access Billing System
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CO	Central Office
CPNI	Customer Proprietary Network Information
CSR	Customer Service Record
DA	Directory Assistance
DS0	Digital Signal, level Zero. DS0 is 64,000 bits per second.
DS1	Digital Signal, level One. A 1.544 million bits per second digital signal carried on a T-1 transmission facility.
DSL	Digital Subscriber Line
FCC	Federal Communications Commission
FPSC	Florida Public Service Commission
GTC	General Terms and Conditions
ICA	Interconnection Agreement
ILEC	Incumbent Local Exchange Carrier
ISP	Internet Service Provider
IXC	Interexchange Carrier
Joint Petitioners	Joint Petitioners
KMC	KMC Telecom V, Inc., KMC Telecom III, LLC
LEC	Local Exchange Carrier
LENS	Local Exchange Navigation System
LSR	Local Service Request
NewSouth	NewSouth Communications Corporation
NRC	Non-Recurring Charge
NuVox	NuVox Communications, Inc.
NXX	Central Office Code/Prefix
OSS	Operational Support Systems
TELRIC	Total Element Long-Run Incremental Cost
TRO	Triennial Review Order, FCC 03-36
TRRO	Triennial Review Remand Order, FCC 04-290

UNE	Unbundled Network Element
UNE-L	Unbundled Network Element-Loop
UNE-P	Unbundled Network Element-Platform
USOC	Universal Service Order Code
USTA II	DC Circuit Court of Appeals' TRO remand; *United States Telecom Ass'n. v. FCC,* 359 F.3d 554 (D.C. Cir. 2004)
xDSL	"x" distinguishes various types of DSL
Xspedius	Xspedius Management Co. Switched Services LLC and Xspedius Management Co. of Jacksonville LLC

I. CASE BACKGROUND

On February 11, 2004, the Joint Petitioners[1] filed their Joint Petition for Arbitration with BellSouth Telecommunications, Inc. (BellSouth) pursuant to the Telecommunications Act of 1996. On March 8, 2004, BellSouth filed its Answer to the Joint Petitioners' Petition. On July 20, 2004, both parties filed a Joint Motion to Hold Proceeding in Abeyance for 90 days. As a result, Order No. PSC-04-0807-PCO-TP, issued on August 19, 2004, revised the procedural schedule as set forth in Order No. PSC-04-0488-PCO-TP and required the parties to file an updated issues matrix on October 15, 2004.

An issue identification was held on November 15, 2004, at which time the parties agreed to the inclusion of all supplemental issues, with the exception of issues 113(b) and 114(b). Parties filed briefs in support of their positions regarding these two issues, and on January 4, 2005, Order No. PSC-05-0018-PCO-TP was issued granting the Joint Petitioners' request for inclusion of issues 113(b) and 114(b).

On March 25, 2005, BellSouth filed a Motion to Move Issues to BellSouth's Generic Docket (Motion). On April 1, 2005, the Joint Petitioners filed their Response in Partial Support of and Partial Opposition to BellSouth's Motion. On April 15, 2005, our staff held an informal conference call with the parties to discuss the motion and response.

By Order No. PSC-05-0443-PCO-TP, issued April 26, 2005, BellSouth's Motion was granted in part and denied in part. Pursuant to that Order issues 23, 108, 113 and 114 were moved from this docket to Docket No. 041269-TP, Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, by BellSouth Telecommunications, Inc. Upon resolution of these issues in Docket No. 041269-TP, the decisions are to be applied to Docket No. 040130-TP as if arbitrated. It was further ordered that issues 26, 36, 37, 38 and 51 would be addressed in this proceeding, while issues 109, 110, 111 and 112 were found moot.

Numerous issues were resolved by the parties during the pendency of this case. Pursuant to Order Nos. PSC-04-0488-PCO-TP, PSC-05-0065-PCO-TP, and PSC-05-0330-PCO-TP, an administrative hearing was held on April 26 through 28, 2005, to address the remaining issues.

On May 27, 2005, KMC filed its notice of withdrawal from the case. On July 12, 2005, Order No. PSC-05-0742-PCO-TP acknowledged KMC's notice, stating that the withdrawal pertains to KMC only and does not apply to the remaining petitioners. Pursuant to Order No. PSC-04-0488-PCO-TO, issued May 12, 2004, CLEC witnesses selected one main witness to testify to each issue or position where the CLECs have a joint position. As a result KMC's

[1] NewSouth Communications Corp. (NewSouth); NuVox Communications, Inc. (NuVox); KMC Telecom V, Inc. (KMC V) and KMC Telecom III LLC (KMC III)(collectively "KMC"); and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC (Xspedius Switched) and Xspedius Management Co. of Jacksonville, LLC (Xspedius Management) (collectively "Xspedius");(collectively the "Joint Petitioners" or "CLECs")

testimony represents the Joint Petitioners, not KMC specifically. Thus, it remains a part of the record in the case.

On July 6, 2005, BellSouth filed a letter stating that the parties have settled issues 2 and 104. Thus, these issues have been removed from this proceeding.

II. LIMITATION OF EACH PARTIES' LIABILITY

A. PARTIES' ARGUMENTS

The Joint Petitioners propose that the appropriate limitation on each party's liability should be an amount equal to 7.5% of the aggregate fees, charges or other amounts billed for any and all services provided or to be provided pursuant to the Agreement as of the day the claim arose. They propose that the negligent party would thus pay the damages proved before a competent tribunal. Joint Petitioners claim that they are not currently afforded this minimal relief in their interconnection agreements with BellSouth. They support their argument stating in their brief that, "an injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance." In addition, Joint Petitioners argue that "money paid by a party to a vendor for services rendered is subject to restitution if the party were injured by the vendor's conduct or performance." The Joint Petitioners claim that they are not even granted this minimal relief in their interconnection agreements when they suffer harm through BellSouth's negligence. They claim that this inequity does not exist in other commercial contracts and does not reflect the settled law of contracts.

The Joint Petitioners also argue in their brief that, historically, BellSouth has always been able to impose harsh liability terms. The Joint Petitioners claim in their briefs that BellSouth's negligence is the Joint Petitioners' burden. In their briefs, Joint Petitioners disagree with BellSouth's bill credits proposal, because it does not stand for the notion that liability caused by the negligent party should be eliminated. The Joint Petitioners also argue that issuing bill credits is not the industry standard, but is BellSouth's standard. The Joint Petitioners support this argument by referencing a NuVox-ALLTEL interconnection agreement in Hearing Exhibit 27 that diverges from BellSouth's standard. This agreement provides liability up to $250,000 for harm caused by negligence and does not limit recovery to bill credits. In sum, Joint Petitioners implicitly argue in their briefs that bill credits are not the industry standard and not a replacement for monetary damages resulting from negligence.

BellSouth claims that the Joint Petitioners' proposal is an attempt to deviate from standard industry practice regarding limitation of liability. BellSouth's central argument rests on a decision from the FCC Wireline Competition Bureau (Bureau).[2] BellSouth asserts that the Bureau has already determined that an incumbent local exchange carrier's (ILEC) liability is

[2] See, In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission, CC Docket No. 00-218, 17 FCC Rcd. 27,039. (Jul. 17, 2002).

parity when contracting with a competitive local exchange carrier (CLEC). BellSouth claims that the Bureau specifically stated in an Order resulting from a Virginia Arbitration that, "in determining Verizon's liability, it is appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers."[3] BellSouth also argues that pursuant to this rationale, BellSouth should treat the Joint Petitioners in the same manner as it treats its retail customers, which would result in BellSouth issuing the Joint Petitioners bill credits. BellSouth claims that this is exactly the standard that has governed the parties' relationship for the last eight years. BellSouth argues that even the Joint Petitioners concede that provision of bill credits is probably the current practice in the industry. In contrast, BellSouth argues that the 7.5% language proposed by the Joint Petitioners is not the industry standard. BellSouth points to Hearing Exhibit 15 and concludes that the Joint Petitioners want greater limitations of liability rights against BellSouth than what BellSouth provides for its own customers, and what the Joint Petitioners are willing to provide to their customers.

BellSouth also takes issue with Hearing Exhibit 27. First, BellSouth argues that the NuVox-ALLTEL Interconnection Agreement was not produced in discovery and, therefore, should not be given much credence. Moreover, BellSouth argues that this Commission should further discount Exhibit 27, because ALLTEL is a rural ILEC that does not have a Section 251(c) obligation to provide UNEs at cost-based rates.

BellSouth argues that interconnection agreements are not typical commercial agreements and therefore should not be treated as commercial contracts. BellSouth argues that even the Joint Petitioners' witness Russell concedes that the Mississippi Federal District Court held that interconnection agreements are not ordinary contracts and are not to be construed as traditional contracts. BellSouth argues that this Commission should reject the Joint Petitioners' proposal because it imposes costs on BellSouth that were not taken into consideration when establishing BellSouth's UNE costs. Rather, BellSouth argues that its UNE costs were determined using a limitation of liability to bill credits. Last, BellSouth argues that the Joint Petitioners' language regarding limitation of liability is unworkable and that each of the Joint Petitioners originally had different understanding of the language.

B. ANALYSIS

Although we find merit in both BellSouth's and the Petitioners' arguments, we agree with the reasoning of the FCC Wireline Competition Bureau regarding an incumbent local exchange company's liability when contracting with a competitive local exchange. The FCC Wireline Competition Bureau, acting through authority expressly delegated from the FCC to stand in the stead of the Virginia State Corporation Commission, found that:

> Verizon has no contractual relationship with WorldCom's customers, and therefore lacks the ability to limit its liability in such instances, as it may with its own customers. As the carrier

[3] Id.

> with a contractual relationship with its own customers, WorldCom is in the best position to limit its own liability against its customers in a manner that conforms with this provision.

See, 17 FCC Rcd 27039, 27382 (FCC 2002). We find that in this instance, BellSouth and the Joint Petitioners are in the best position to limit their liability with their customers.

Further, we find that BellSouth shall treat the Joint Petitioners in the same manner BellSouth treats its own retail customers. It is undisputed that BellSouth's liability to its own retail customers is limited to the issuance of bill credits; therefore, it is appropriate for BellSouth's liability to Joint Petitioners to be similarly limited. Further, even the Joint Petitioners concede that the provision of bill credits is probably the current practice in the industry. The Joint Petitioners will not be prejudiced by our approach because they admittedly limit their liability to their own customers to the issuance of bill credits. Id. However, even if this was not the case, we note that each of the parties to this proceeding has the ability to limit its liability to its customers through its own tariffs. If a party (e.g., a Joint Petitioner) chooses not to limit its liability through its own tariff, then that party shall assume the heightened risk itself, and not shift the risk to the other party to the interconnection agreement (e.g., BellSouth).

Under the Joint Petitioners' proposal, negligence would be limited to an amount equal to 7.5% of the aggregate fees, charges or other amounts billed for any and all services provided or to be provided pursuant to the Agreement as of the day the claim arose. We find that this record does not support a proposal limiting liability to 7.5% of the aggregate billings, and that bill credits are the appropriate limitation regarding each party's liability. The Petitioners argue that service contracts generally include such liability terms, and they cite to an agreement with a software company to support their argument. They also cite to their prefiled testimony where the Petitioners discuss contracts that cap liability at 15% to 30% of total revenues. Last, the Joint Petitioners cite to the NuVox-ALLTEL interconnection agreement that provides liability up to $250,000 for harm caused by negligence. In this instance, we do not deem it appropriate to compare an ILEC with Section 251(c) wholesale obligations with a rural ILEC that does not have Section 251(c) wholesale obligations. Theoretically, rural ILECs, such as ALLTEL, may charge higher prices for UNEs to take into account the possibility of additional liability, while BellSouth cannot.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that a party's liability should be limited to the issuance of bill credits in all circumstances other than gross negligence or willful misconduct.

III. ALLOCATION OF RISK

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their briefs that BellSouth seeks to have the Joint Petitioners pay any and all claims attributable to BellSouth's negligence, simply because BellSouth limits its liability completely in its tariffs. The Joint Petitioners presently have commercially reasonable limitation of liability terms in their tariffs and customer agreements, and do not plan to remove them. The Joint Petitioners assert in their briefs that they need to respond to the demands of a competitive market place wherein customers are insisting on less stringent limitations. Joint Petitioners argue in their briefs and Joint Petitioners' witness Russell testified at hearing, that BellSouth remains protected by existing provisions of the Agreement and applicable commercial law stipulating that a Party is precluded from recovering damages to the extent it has failed to act with due care and commercial reasonableness. Further, the Joint Petitioners argue that they are "often times competing to win [BellSouth] customers," as the Telecom Act of 1996 expressly permits, and if the Joint Petitioners are contractually obligated and confined by the terms of these interconnection agreements not to have different terms than those in the BellSouth tariff, then the Joint Petitioners are not on a level playing field.

BellSouth responds by stating the purpose of this issue is to put BellSouth in the same position that it would be in if the CLEC end user was a BellSouth end user. BellSouth claims it should not suffer any financial hardship as a result of Joint Petitioners' business decisions. (BellSouth BR at 18) The exact language BellSouth proposes is in its current interconnection agreement with the Joint Petitioners and has never been the subject of any dispute. BellSouth supports its point with Hearing Exhibit 6 and by stating that the Joint Petitioners currently have limitation of liability language in their tariffs and will enforce the tariff provisions limiting their liability. BellSouth also directs our attention to Joint Petitioners' Hearing Exhibit 4 which is witness Russell's deposition wherein he stated that unlimited liability is not a prudent business-move. BellSouth concludes that it is not limiting any third-party's rights, but rather is imposing obligations upon the Joint Petitioners in the event they make a business decision that would not limit their liability in accordance with industry standards. In addition, BellSouth argues that it needs this level of protection in light of the Joint Petitioners' position regarding indemnification. BellSouth concludes that the issue is further compounded by the fact that the Joint Petitioners' end users are not purchasing services out of BellSouth's tariffs and have no contractual relationship to BellSouth.

B. ANALYSIS

Each CLEC has the ability to limit its liability through its customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC shall bear the resulting risk. We note that all parties to this proceeding currently limit their liability via their tariffs. We find that there is no compelling reason to deviate from such practice. The appropriate method of limiting liability is through the parties' tariffs. The Joint Petitioners and BellSouth currently have limitation of liability language in their tariffs and can enforce the tariff provisions limiting their liability. Further, the Joint Petitioners concede that

with regard to limiting liability, the provision of bill credits is probably the current practice in the industry. In light of these facts, we do not find that deviating from the industry standard is necessary or appropriate in this instance. However, even if this was not the case, we note that each of the parties to this proceeding has the ability to limit its liability to its customers through its own tariffs. If a party chooses not limit its liability through its own tariff, then it must assume the risk of liability.

C. DECISION

Upon consideration and review, we find that CLECs have the ability to limit their liability through their customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC shall bear the resulting risk.

IV. DEFINITION OF DAMAGES CATEGORIES

A. PARTIES' ARGUMENTS

The Joint Petitioners seek to define the terms indirect, incidental and consequential damages in a manner that does not unfairly deprive any party of damages that are reasonably foreseeable. Specifically, the Joint Petitioners argue in their briefs and witness Russell testifies that damages to end users that are direct, proximate and reasonably foreseeable from BellSouth's performance of obligations set forth in the Agreement should be considered direct damages and not indirect or incidental. The Joint Petitioners argue that reasonably foreseeable damages are those for which contracting parties are responsible when they act negligently, recklessly or in a manner that violates the law. Joint Petitioners define consequential damages as "any loss resulting from general or particular requirements under the contract, of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise."

Joint Petitioners state that they rely on BellSouth's facilities. Any acts or omissions by BellSouth that are reasonably foreseeable directly impact the Joint Petitioners' ability to operate. For example, if an outage was caused by BellSouth's negligence, recklessness or willful misconduct, BellSouth should compensate Joint Petitioners for the losses incurred therefrom.

BellSouth argues in its brief that each party to the proceeding "agrees" that they should not be liable to each other for indirect, consequential or incidental damages. BellSouth, however, takes issue with the Joint Petitioners' language because BellSouth believes it is an attempt to preserve certain damage claims the Joint Petitioners' end users may have against BellSouth. BellSouth asserts in its brief that Joint Petitioners' witness Russell conceded at hearing that as a matter of law a company cannot impact the rights of third parties via a contract. BellSouth concludes in its brief that if it cannot legally limit the rights of a third-party end user through this interconnection agreement, then the Joint Petitioners' language is of no force and effect.

B. ANALYSIS

Upon review of the record and the parties' arguments, we find that there is no need to define these terms in an interconnection agreement. The issue of whether particular damages constitute indirect, incidental or consequential damages is best determined, consistent with applicable precedents, if and when a specific damage claim is presented to us or to a court. We note that third-party claims that solely involve damages would more than likely fall outside our jurisdiction.

For example, in Southern Bell Tel. & Tel. Co. v. Mobile America Corp, the court held, "Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, § 5(b), Fla.Const." 291 So.2d 199, 202 (Fla. 1974) In light of this decision, we will not define the aforementioned damages. We have previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to Section 364.162, Florida Statutes." See, PSC Order No. PSC-04-0972-TP, issued October 7, 2004. However, in the event a dispute falls outside our jurisdiction or the FCC's jurisdiction, then the claimant may seek relief in a court of competent jurisdiction. In that situation, it would then fall under the review of that court to define the terms based upon the applicable case law.

C. DECISION

Upon review and consideration of the record and the parties' briefs, we shall not define indirect, incidental or consequential damages for purposes of the Agreement. The decision of whether a particular type of damage is indirect, incidental or consequential shall be made, consistent with applicable law, if and when a specific damage claim is presented to this Commission, the FCC or a court of law.

V. INDEMNIFICATION

A. PARTIES' ARGUMENTS

The Joint Petitioners argue that parties must be responsible for damages caused by their own acts or omissions. The Joint Petitioners argue that their proposal provides that the party providing service must indemnify the other party for damages caused as a result of providing those services. They also argue in their brief that their proposal comports with industry practice as reflected in the Joint Petitioners' tariffs and contracts. Joint Petitioner witness Russell testified that, "A party that is negligent should bear the cost of its own mistakes." Joint Petitioner witness Russell also testifies that " . . .in virtually all other commercial-services contexts, the service provider, not the receiving party, bears the more extensive burden on indemnities." Joint Petitioners also argue in their brief that BellSouth witness Blake agrees that the party receiving service should indemnify the party providing service for damages caused by the receiving party's own unlawful conduct. The Joint Petitioners argue in their brief that the

parties' differences are with respect to the instances where the providing party is negligent. Further, the Petitioners claim that BellSouth incorrectly insists the receiving party should indemnify the providing party. Petitioners assert in their briefs that this is backwards, contrary to law and common sense. For example, the Joint Petitioners, cite to Xspedius' tariffs stating that the company does not indemnify customers for damages caused by "the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees." The Joint Petitioners conclude that an injured party is entitled to relief from the causing party, and anything else would run contrary to longstanding legal principles.

BellSouth claims in its brief that the Joint Petitioners' position is asymmetrical and only benefits the Joint Petitioners (which is contrary to industry standards). BellSouth argues that "indemnity clauses [are] means for allocating foreseen risks, not as means to induce Parties to insure another against unanticipated and unbounded possibilities." BellSouth responds by arguing that the Joint Petitioners are attempting to change industry standard by requiring the party providing service to indemnify the receiving party for: (1) failure to abide by applicable law or (2) for injuries arising out of or in connection with the Agreement to the extent caused by the providing party's negligence. However, BellSouth argues that under the Joint Petitioners' proposal, the receiving party would only indemnify the providing party "against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications." BellSouth reasons that under this proposal, BellSouth will have virtually unlimited obligations to the Joint Petitioners, and the Joint Petitioners will have essentially no indemnification obligations to BellSouth. BellSouth fears that if it were sued by a third-party solely resulting from the Joint Petitioners' negligence, then it would have no indemnification rights against the Joint Petitioners. BellSouth also notes that the Joint Petitioners have already insulated their liability through the Joint Petitioners' tariffs. BellSouth also argues that pursuant to the FCC Wireline Bureau decision, it should not have to indemnify the Joint Petitioners.[4] BellSouth cites a Minnesota Arbitration Order[5] supporting the notion that the Petitioners' proposed language would make parties potentially liable for another party's conduct far removed from the ICA. BellSouth also claims that interconnection agreements are not typical commercial agreements and should not be construed as such. Further, BellSouth argues that its UNE rates were not established under the premise that it would have almost unlimited exposure via indemnification language in an interconnection agreement. Therefore, BellSouth reasons that the Joint Petitioners' proposal should be rejected because it does not comply with industry standards.

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[4] 17 FCC Rcd 27039, 27382 (FCC 2002)

[5] 2003 WL 22870903 at 17.

B. ANALYSIS

Although we find merit in each of the parties' positions, we hold that a party shall be indemnified, defended and held harmless against claims, loss or damage to the extent reasonably arising from or in connection with the other party's gross negligence or willful misconduct. While both BellSouth's and the Joint Petitioners' arguments are very persuasive, we do not find a compelling reason to deviate from the usual practice of limiting liability through the use of its tariffs. Neither party shall be required to indemnify the other party for claims of negligence. This issue only applies to instances of gross negligence or willful misconduct by a party to the Agreement. We find that the carrier with a contractual relationship with its own customers is in the best position to limit its own liability against that customer in instances other than gross negligence and willful misconduct.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that a Party shall be indemnified, defended and held harmless against any claims, loss or damage to the extent reasonably arising from or in connection with the other Party's gross negligence or willful misconduct.

VI. FORUM FOR DISPUTE RESOLUTION

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their brief that they have a right to resolve disputes in a court of law, and they are not willing to give up that right. The Joint Petitioners also argue in their brief that BellSouth is seeking to limit Petitioners' right to seek relief in court to the extent that the jurisdiction or expertise of the dispute is not in the possession of this Commission or the FCC. Joint Petitioners also argue in their brief that BellSouth witness Blake testified that courts should not hear matters that fall within the jurisdiction of this Commission or FCC. The Joint Petitioners are concerned with BellSouth's witness' generalization contained in Hearing Exhibit 6 that, "there could be some facets that aren't relative to the interpretation or implementation [of an interconnection agreement]" that fall outside agency jurisdiction but "can't think of any specific examples." Thus, the Joint Petitioners argue in their brief that BellSouth's language would in effect deprive the Petitioners of their right to seek adjudication by a court of competent jurisdiction. In addition, the Joint Petitioners argue that the jurisdiction of the courts in Florida is set by Section 1 of the Florida Constitution which holds that "[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts." Florida Constitution § 1.

Further, Joint Petitioners argue that adjudication in a court of law may be more efficient. The Joint Petitioners are also concerned that BellSouth's position would have the parties litigating before nine different state commissions and the FCC. Joint Petitioners' witness Falvey

testified that this "often is able to force carriers into heavily discounted, non-litigated settlements."

BellSouth argues in its brief that if the dispute is outside the jurisdiction of this Commission or the FCC, then the parties can take the dispute to a court of competent jurisdiction. BellSouth argues in its brief that there can be no question we should resolve matters that are within its expertise and jurisdiction. Specifically, Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the Commission for approval. As such, BellSouth's position is that state commissions are in the best position to resolve disputes relating to the interpretation and enforcement of the agreement.

In addition, BellSouth points to the Eleventh Circuit decision[6] in its brief as support for its position. BellSouth argues in its brief that this decision used this rationale to find that state commissions have the authority under the Act to interpret interconnection agreements. The language of § 252 persuaded the 11th Circuit that in "granting the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce **in the first instance** and to subject their determination to challenges in the federal courts." Id. (emphasis added) BellSouth also argues in its brief that the Joint Petitioners' language would have us standing by or seeking intervention in a state court proceeding regarding interpretation and enforcement of interconnection agreements that we approved. Further, BellSouth asserts that the Joint Petitioners witness Falvey recognized our authority at the hearing, and conceded that state commissions are experts with respect to a number of issues in the agreement.

Last, BellSouth argues in its brief that the Joint Petitioners' position would not reduce litigation. BellSouth also argues in its brief that its position allows for the possibility of dispute resolution to a single forum, the FCC, to resolve a dispute(s).

B. ANALYSIS

The constitutional guaranty of due process demands that a party may petition a tribunal it deems to have jurisdiction over the claim. See, Black's Law Dictionary, Fifth Edition, p. 449, citing, Di Aaio v. Reid, 132 N.J.L. 17, 37 A.2d. 829, 830. It is our understanding that it would be incumbent on that tribunal to either exercise its jurisdiction, or to determine that it lacks jurisdiction. In light of this constitutional guarantee, we find that no tribunal shall be foreclosed to the Parties, and either Party shall be able to petition this Commission, the FCC or a court of competent jurisdiction.

However, we note that this Commission has primary jurisdiction over most disputes arising out of interconnection agreements, and is in the best position to resolve those disputes. For example, we have previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to

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[6] See, BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services Inc., 317 F.3d 1270, 1277 (11th Cir. 2003).

Section 364.162, Florida Statutes." See, PSC Order No. PSC-04-0972-TP, issued October 7, 2004. In the event the dispute falls outside this Commission's or the FCC's jurisdiction, such as a claim for third-party damages, then the claimant could file in a court of competent jurisdiction.

We do not find merit in Joint Petitioners' argument that litigating before state commissions would force them into heavily discounted, non-litigated settlements with BellSouth. We find little, if any, efficiency gained in their position. For example, the Joint Petitioners would still have to file a complaint in the state in which they sought relief. We determine the only difference would be that the litigation take place in the court system of a state, rather than in that state's public service commission. Neither party shall be foreclosed in a forum, thus the Agreement will not define a specific forum. However, we strongly note that this Commission has primary jurisdiction over most disputes arising from interconnection agreements.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that either party shall be able to file a petition for resolution of a dispute in any available forum. However, we note that this Commission has primary jurisdiction over most disputes arising from interconnection agreements and that a petition filed in an improper forum would ultimately be subject to being dismissed or held in abeyance while we addressed the matters within our jurisdiction.

VII. APPLICABLE LAW

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their brief that it is undisputed that Georgia law will govern the agreement. Joint Petitioners argue that under Georgia contract law, all laws of general applicability that exist at the time of contracting will apply to the contract unless expressly repudiated via an explicit exception or displaced by conflicting requirements. Id. The Supreme Court of Georgia has held that "[l]aws that exist at the time and place of the making of a contract, enter into and form a part of it . . . and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter."[7] This comports with the United States Supreme Court holding that "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if fully they have been incorporated in its terms . . . "[8] The Joint Petitioners argue that due to this presumption, contracts are deemed to include any tenet of applicable law unless expressly excluded. In short, a "contract may not be construed to contravene a rule of law."[9] The Joint

[7] Magnetic Resonance Plus, In., v. Imaging Systems, Int'l, 273 Ga. 525, 543 S.E.2d 32, 34-35 (2001).

[8] Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.Su 117, 130 (1991).

[9] Van Dyck v. Van Dyck, 263 Ga. 161, 429 S.E.2d 914, 916 (1993).

Petitioners claim in their brief that parties could not be expected to expressly include all elements of generally applicable law into one contract. If this were expected, then contracts would result in tens of thousands of pages to the agreement. In conclusion, the Joint Petitioners argue that if BellSouth intends to comply with the law, then incorporating the law of the land should not be a problem.

BellSouth argues that this issue is about providing the parties with certainty in the interconnection agreement as to their respective telecommunications obligations. Specifically, BellSouth's concern is that, without relying on specific provisions, the Joint Petitioners will review a telecommunications rule or order, interpret it in a manner that BellSouth could not have anticipated and claim that such forms the basis of a contractual obligation. As indicated by Hearing Exhibit 7, BellSouth' proposal to address this is to include language in the agreement that,

> to the extent that either Party asserts that an obligation, right or other requirement, **not expressly memorialized herein,** is applicable under this Agreement by virtue of a reference to an FCC or Commission rule or order, or **with respect to substantive telecommunications law only** . . .

In addition, BellSouth argues that the Joint Petitioners concede that the interconnection agreement contains the Parties' interpretation of various FCC rules and decisions. Further, BellSouth argues that the Joint Petitioners agree that Parties should not be able to use the Applicable Law provision to circumvent what the Parties memorialize in this Agreement. Id.

BellSouth also argues that the Joint Petitioners' position - that the law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise – should be rejected. Taken to its logical extreme, the parties would only need a one-page interconnection agreement stating that parties agree to comply with Applicable Law, rather than the 500 page agreement currently in existence. BellSouth cites to the North Carolina Utility Commission's decision which expressly rejected this argument in the context of conducting an EEL audit. See, In re: BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp., Docket No. P-772, Sub 7, *Order Granting Motion for Summary Disposition and Allowing Audit* (Aug. 24, 2004).

B. ANALYSIS

The purpose of an agreement is to create specific obligations to do or not to do a particular thing. We find it is essential to have a document that contains specific terms and conditions. That being said, a provision in the Agreement stating when explicit language would apply, and when it would not, could cause more confusion. While the parties raise arguments over applicable law, we find these arguments are premature. These arguments are more appropriately addressed on a case-by-case basis as disputes arise.

C. DECISION

Upon consideration of the parties' briefs and the record, we find that the Agreement will not explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties. A provision including such a statement could be subject to various interpretations in the context of a dispute. Instead, the contract shall be interpreted according to its explicit terms if those terms are clear and unambiguous. If the contract language at issue in a dispute is deemed ambiguous, the terms shall be interpreted in accordance with applicable law governing contract interpretation.

VIII. COMMINGLING

The FCC has reversed its previous prohibition of commingling and defines, within the TRO, the meaning of the term and applicable conditions. The issue here is that BellSouth commits to commingling certain section 271 elements that are required to be provided under section 251(c)(3). However, BellSouth will not commit to commingling section 271 elements that are not required to be unbundled pursuant to section 251(c)(3). In that situation BellSouth will do so only under a commercial agreement; therefore, it asserts this aspect should not be included in a § 252 arbitration proceeding.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Mertz[10] employs the FCC's definition and explanation of commingling to form the basis of his argument. Specifically, commingling means "the connecting, attaching, or otherwise linking of a UNE or a UNE [c]ombination to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services." Witness Mertz expresses that "clearly" the elements BellSouth provides under § 271 are obtained by a method other than unbundling under § 251(c)(3) and thus the Joint Petitioners should be allowed to commingle them. He argues that nothing regarding commingling in the TRO or the errata to the TRO supports BellSouth's position that it is not obligated to commingle § 271 elements with § 251 UNEs. Joint Petitioners witness Mertz also argues that the FCC concluded that § 271 requires Regional Bell Operating Companies, such as BellSouth, "to provide network elements, services, and other offerings, and those obligations operate completely separate and apart from section 251." Witness Mertz continues that BellSouth is incorrect in its interpretation of the commingling rule to the extent that its proposed language "turns the rule on its head."

Joint Petitioners witness Mertz argues that when the FCC issued an errata to paragraph 584 of the TRO, the elimination of the phrase "any network elements unbundled pursuant to section 271" was to "clean up stray language" dealing with the commingling of section 251

[10] Mr. James Mertz adopted all testimony, discovery responses, etc., of Joint Petitioner's witness Ms. Marva Brown Johnson.

UNEs with services provided for resale under section 251(c)(4). The inclusion of the phrase was inconsistent with the rest of the paragraph and the errata corrected the deficiency, he asserts. Witness Mertz states "BellSouth's attempt to create by implication an affirmative adoption of commingling restrictions with respect to section 271 elements cannot withstand scrutiny." In addition, he argues that the D.C. Circuit's *USTA II* holding does not prohibit commingling of UNEs and UNE combinations with § 271 offerings, because the D. C. Circuit's discussions concerning § 271 were directed at combining, not commingling. He concludes that elements utilized under § 271 fall within the "any other method" definition and are not obtained pursuant to § 251(c)(3) unbundling.

Witness Blake argues that BellSouth's position is "consistent" with the FCC's errata to paragraph 584 of the TRO, stating that there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available pursuant to § 271 of the Act. She explains that the TRO errata is significant in that the FCC took action to delete a sentence that specifically made reference to "any network elements unbundled pursuant to section 271." Witness Blake argues that the FCC, in striking the sentence, meant to exclude certain § 271 elements from commingling under § 251, and she states that BellSouth will only commingle § 271 elements under separate commercial agreements.

The BellSouth witness points to the D.C. Circuit's *USTA II* decision issued on March 2, 2004, as additional support for BellSouth's position. In the discussion concerning "Section 271 Pricing and Combination Rules" of the checklist items (loops, transport, switching, and call-related databases), the FCC and the D.C. Circuit agreed that there was no duty to combine network elements by the incumbent LEC. Witness Blake continues stating that "it is clear that both the FCC and D.C. Circuit have determined there is <u>no</u> requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the 1996 Act."

Witness Blake asserts that "BellSouth's interpretation of its commingling requirement is based solely on the obligations stated in the TRO by the FCC." Citing paragraph 579 of the TRO, BellSouth's witness Blake argues that the Joint Petitioners are not prevented from commingling wholesale services purchased from its special access tariff with UNEs and UNE combinations obtained via § 251. However, when the Joint Petitioners are asking to commingle UNEs with "non-tariffed services provided only pursuant to BellSouth's Section 271 obligations, commingling is not required by Section 251 or 252 . . . ." Witness Blake contends that such commingling is outside the scope of an interconnection agreement and should be detailed in a separate agreement negotiated by the parties. Last, in its brief, BellSouth argues that under the Joint Petitioners' interpretation of BellSouth's commingling obligations, BellSouth could be required to combine § 271 switching with a UNE loop, thereby resurrecting UNE-P, which BellSouth contends it has no § 251 obligation to provide.[11] \

[11] We acknowledge that the 271 switching and 251 loop elements are priced differently..

B. ANALYSIS

The FCC devoted paragraphs 579 through 584, including numerous footnotes and several examples, to support its decision to address restrictions to commingling. We note that the Joint Petitioners and BellSouth provided the FCC's definition of commingling located in paragraph 579 of the TRO:

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

BellSouth's arguments above contain the details of the errata to the TRO concerning paragraph 584. In paragraph 584 of the TRO, the FCC said "as a final matter we require the incumbent LECs to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act."[12] The FCC's errata to the TRO struck the portion of paragraph 584 referring to ". . . any network elements unbundled pursuant to section 271. . . ." The removal of this language illustrates that the FCC did not intend commingling to apply to section 271 elements that are no longer also required to be unbundled under section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to section 271. Further, we find that connecting a section 271 switching element to a section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential re-creation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition.

C. DECISION

Upon review and consideration, we find that BellSouth is required, upon a CLEC's request, to commingle or to allow commingling of UNEs or UNE combinations with any service, network element or other offering it is obligated to make available. However, this does not include offerings made available only under Section 271. We find that striking the reference to section 271 means BellSouth's commingling obligation does not extend to elements obtained pursuant to section 271.

[12] See TRO ¶ 584 before the TRO errata.

IX. LINE CONDITIONING - DEFINITION

In the UNE Remand Order,[13] the FCC concluded ILECs must provide access on an unbundled basis, to xDSL-capable stand-alone copper loops because CLECs are impaired without such loops. Such access may require ILECs to condition the local loop. Line conditioning involves removing any device, such as bridged taps and load coils, that could diminish the capability of the loop or subloop to deliver xDSL services. (47 C.F.R. § 51.319(a)(1)(iii)(A)) However, on copper loops over 18,000 feet, load coils are necessary to provide analog voice capability; thus, a dispute on whether such loops should be conditioned can arise. The parties do not appear to dispute that line conditioning involves removing devices from the loop, but appear to disagree on the rates, terms and conditions under which the ILEC must provide line conditioning.

A. PARTIES' ARGUMENTS

The Joint Petitioners witness Russell asserts that line conditioning should be defined in the Agreement pursuant to 47 C.F.R. § 51.319(a)(1)(iii)(A), which 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, bridged taps, load coils, low pass filters, and range extenders.

He asserts that "this language does not provide Petitioners with anything more than what the FCC rules prescribe." (TR 51)

The Joint Petitioners point out in their brief that BellSouth has "signed interconnection agreements containing rates, terms and conditions for conditioning **all** copper loops. These agreements provided for conditioning copper loops of any length and removing bridged tap, without length restrictions, at TELRIC rates **already set by this Commission.**"[14] Further, the Joint Petitioners note that BellSouth has sought to limit the line conditioning obligations only after the TRO was issued. They believe that nothing in the text of the TRO suggests that ILEC line conditioning obligations were limited by that order.

BellSouth counters in its brief that the definition proposed by the Joint Petitioners excludes terminology that addresses its obligation to provide line conditioning at parity to that provided to its own customers or other telecommunications carriers, which was clarified within the TRO. BellSouth emphasizes that the Joint Petitioners' definition is unlimited in scope and would lead to BellSouth being required to provide superior access to the network than it affords its own customers or to other telecommunications carriers and finds such a position in violation

[13] Order No. FCC 99-238 issued November 5, 1999, CC Docket No. 96-98 Third Report and Order and Fourth Further Notice of Proposed Rulemaking. (UNE Remand Order).

[14] See Exhibit 24 of Joint Petitioners Brief (BellSouth/New South Agreement excerpt).

of BellSouth's nondiscrimination obligations under the Act. BellSouth points out that, although the Joint Petitioners have current agreements containing TELRIC rates for line conditioning, it is of no consequence because their current agreements are not TRO-compliant.

BellSouth witness Fogle proposes a definition using language from the TRO, defining line conditioning as "a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." He points to the FCC's discussion of line conditioning in TRO ¶ 643, which states:

> 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 unbundle loops to deliver services with parity with how incumbent LECs provision such facilities for themselves.

BellSouth's position is that "the FCC expressly equated its routine modification rules to its line conditioning rules in the TRO," pointing to ¶ 635, where the FCC stated, "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LEC currently undertake under our line conditioning rules." It noted that those sentiments were echoed in ¶ 250, which states, "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." BellSouth further explains that the mathematical definition for the term "properly," as used in ¶ 643 cited above, is distinctly a subset. BellSouth witness Fogle clarified that a subset means that it is wholly contained within the set; therefore, line conditioning is wholly contained within routine network modifications, or that line conditioning is a subset of routine modifications.

Joint Petitioners witness Falvey argues that this language from the TRO is contrary to the intent of the definition in the rule. He contends that no weight should be given to the language in the order. Joint Petitioners believe that neither the line conditioning rule, 47 C.F.R. § 51.319(a)(1)(iii), nor the routine modification rule, 47 C.F.R. § 51.319(a)(8), expresses any modification or limitation on line conditioning obligations, stating that "the two rules are distinct and do not cross reference each other." Witness Falvey admitted that the adoption of the Joint Petitioners' proposed language would require BellSouth to perform line conditioning at TELRIC prices in instances where it does not perform line conditioning for its own customers. In addition, Joint Petitioners witness Russell asserts that BellSouth's assessment that line conditioning is only for xDSL services contravenes 47 C.F.R. § 51.319(a)(1)(iii), which he claims "is neutral as to the services that can be provided over conditioned loops."

B. ANALYSIS

We find that neither definition provided by the parties is appropriate because both parties selected specific, but incomplete, text from the FCC rules and the TRO that they thought were supportive of their respective positions. BellSouth selected text from the TRO, while the Joint Petitioners selected text from the rules. We do not agree with this approach, but instead find that a definition must encompass all of the defining elements expressed throughout the rules, in order

to maintain the integrity and full meaning expressed in the rule. Neither text offered by the parties can be read in isolation.

We note that neither party disputes that line conditioning involves the removal of disruptive devices;[15] therefore, the removal of devices can certainly be included in the definition. They disagree on whether the TRO imposes limiting standards on line conditioning, such as parity or conditioning to enable xDSL services. We also note that the definition of line conditioning has evolved with the issuance of each FCC order and the definition expressed in the proposed agreement should comply with current law.

We find Hearing Exhibit 4 convincing and agree with Joint Petitioners witness Falvey that one would expect to find similarity between the FCC's discussion of line conditioning in the TRO and how it was incorporated into the rule. As reflected in Hearing Exhibit 4, he states that if the FCC meant for a limiting factor to be imposed on line conditioning, "It would appear in paragraph 1, front and center." We, therefore, refer to the first paragraph under 47 C.F.R. § 51.319(a)(1)(iii), which contains the text which the Joint Petitioners have submitted as their definition for line conditioning. The following is an excerpt from 47 C.F.R. § 51.31:

> **§ 51.319 Specific unbundling requirements.**
>
> (a) *Local loops.* An 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)(3) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section.
>
> . . .
>
> (1) *Copper loops.* An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the copper loop on an unbundled basis.
>
> . . .
>
> (iii) *Line conditioning.* The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop *under paragraph (a)(1) 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.

[15] Such devices include, but are not limited to, bridged taps, load coils, low pass filters, and range extenders. (47 C.F.R. § 51.319(a)(1)(iii)(A)).

. . .

> (A) 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, bridged taps, load coils, low pass filters, and range extenders. (emphasis added)[16]

This Commission notes that the first paragraph under 47 C.F.R. § 51.319(a)(1)(iii) refers to conditions "under paragraph (a)(1) of this section," that further clarifies the conditions under which the ILEC must condition a line. Paragraph (a)(1) begins, "An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the copper loop on an unbundled basis." (emphasis added) Additionally, we observe that the encompassing paragraph (a), states, "An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the local loop on an unbundled basis." (emphasis added) We also note that each inclusive paragraph to the one selected by the Joint Petitioners as a defining paragraph for line conditioning includes a nondiscriminatory access restriction or obligation.

Witness Willis testifies that the FCC established the line conditioning rule under its section 251 authority provided by the Act. Section 251(c)(2)(C) requires incumbent LECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself. . ." (47 U.S.C. § 251(c)(2)) Section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers with "*nondiscriminatory access* to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252." (47 U.S.C. § 251(c)(3); emphasis added) Nondiscriminatory access has been the standard for accessing the loop since the issuance of Section 251(c)(3). As stated in paragraph 203 of the TRO, "In the UNE Remand Order, the Commission broadened the definition of the loop to include all features, functions, and capabilities of these transmission facilities," including line conditioning. As expressed in the line conditioning rules, the same nondiscriminatory access standard that applies to the loop also applies to line conditioning, which is an element of the loop.

However, as a result of the issuance of the Local Competition Order[17] and carried forward to the UNE Remand Order prior to the issuance of the TRO, the definition of nondiscriminatory access provided:

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[16] "the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section" refers to line sharing. The term "advanced services" is defined as "high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high quality voice, data. Graphics or video telecommunications using any technology." Line Sharing Order, 14 FCC Rcd at 20915, para. 4.

[17] Order No. FCC 96-325 issued August 8, 1996, CC Docket Nos. 96-98, 95-185, First Report and Order. (Local Competition Order).

> 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 the incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be *superior in quality* to that which the incumbent LEC provides to itself." (47 C.F.R. § 51.311 (c))[18] (emphasis added)

Such language was found by the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) to violate the plain terms of the Act,[19] so with the issuance of the TRO, this definition was revised, eliminating a "superior in quality" access standard. Nondiscriminatory access is now defined as:

> (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.
>
> (b) To the extent technically feasible, the quality of an 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 *provides to itself.* (47 C.F.R. § 51.311)(emphasis added)

The Eighth Circuit concluded that the phrase "at least equal in quality" leaves open the possibility for the parties to negotiate agreements to provide a superior quality access, with the ILECs being *compensated* for the additional cost involved in providing superior quality; however, the ILECs are *not mandated* to meet such a standard.[20] With the "superior in quality" access standard now null and void, we find *parity alone reigns as the qualifying standard*, thereby becoming a limiting factor for line conditioning.

With the FCC redefining nondiscriminatory access as parity, we find that the ILEC is now obligated to provide access to the loop and its elements, which include line conditioning, "at least equal in quality to that which the incumbent provides to itself." (47 C.F.R. § 51.311) By the Joint Petitioners limiting their focus to the language contained in 47 C.F.R. § 51.319(a)(1)(iii)(A) and disregarding any encompassing paragraphs, their proposed definition omits the parity standard, leaving us to conclude that the definition is insufficient.

BellSouth's definition includes the parity standard, but it does so by equating line conditioning with routine modifications. Consequently, the parties engage in substantial argument over whether line conditioning is or is not a routine modification, which we find was to belabor the point of whether or not line conditioning is governed by a parity standard.

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[18] 47 C.F.R. § 51.311 (c) (10-1-00 Edition).

[19] Iowa Utilities Bd. v. FCC, (Remand Decision) Nos. 96-3321(and consolidated cases) issued July 18, 2000, p. 22. before the United States Court of Appeals for the Eighth Circuit.

[20] See, Iowa Utils. Bd., 120 F.3d at 812-13.

Therefore, we find that discussion is irrelevant, in that the parity standard is now required. (47 C.F.R. § 51.311)

Joint Petitioners object to BellSouth's inclusion of the term xDSL in the definition, stating that 47 C.F.R. § 51.319(a)(1)(iii)(A) includes other high-speed switched wireline telecommunications services, including digital subscriber line service, and is not limited to any service or to xDSL capability. We note that higher-speed services could require more line conditioning than xDSL services. Lower speeds can tolerate more interference. However, we disagree with the Joint Petitioners' interpretation. When read in context, the phrase "high-speed switched wireline telecommunications capability, including digital subscriber line service," refers to the removal of devices. (47 C.F.R. § 51.319(a)(1)(iii)(A)) Those same devices are known to diminish high-speed switched wireline telecommunications capability in general. They are also known to diminish xDSL capability. The rule went on to state that "[s]uch devices include, but are not limited to, bridged taps, load coils, low pass filters, and range extenders," giving further evidence that the context of the previous statement was referring to devices. (47 C.F.R. § 51.319(a)(1)(iii)(A)) However, the encompassing paragraph, (a)(1)(iii), specifically addresses services, stating, "[t]he incumbent LEC *shall condition* a copper loop at the request of the carrier seeking access to a copper loop . . . to ensure that the copper loop or copper subloop is suitable *for provisioning digital subscriber line services.*" (47 C.F.R. § 51.319(a)(1)(iii), emphasis added)

We understand the rule and paragraph 642 of the TRO to require line conditioning in order to provide an xDSL-capable stand-alone copper loop. The FCC states throughout the TRO that line conditioning is for provisioning xDSL services.[21] We also believe that it was clearly the intent of the rule and footnote 624 of the TRO to focus on provisioning digital subscriber line services, services which are typically associated with the mass market, a market in which the FCC found impairment. We find that the FCC has established limits to line conditioning based on xDSL service suitability.

BellSouth's definition includes a standard of delivery for xDSL. However, this definition was taken from the order, leading the parties' arguments to center around whether the rules take precedence over the order or vice versa. We find this discussion is unnecessary to draw a conclusion on this issue. Seeing no conflict between the rule and the order, we prefer a definition derived from the rules. The parties are free to negotiate a definition provided it includes the limiting factors of nondiscriminatory access and xDSL capability expressed in the rules as a whole, as discussed in our analysis.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that the definition for line conditioning shall be taken from the FCC rules and contain the limiting conditions of nondiscriminatory access and suitability for xDSL delivery which appear

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[21] TRO ¶ 7, ¶ 23, ¶ 26, Note 465, Note 624, ¶ 211, ¶ 215, Note 661, ¶ 249, ¶ 250, Note 746, Note 747, ¶ 255, ¶ 344, ¶ 347, ¶ 350, ¶ 642, ¶ 643, ¶ 644.

in the rules leading to the definition found in 47 C.F.R. § 51.319(a)(1)(iii)(A). If the parties through negotiation cannot agree on a definition that includes the stated conditions, then the following language shall serve as a default:

> 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 xDSL capability,[22] to ensure that the copper loop or copper subloop is suitable for providing xDSL services[23] and provided the same for all telecommunications carriers requesting access to that network[24] and at least in quality to that which the incumbent provides to itself.[25]

X. LINE CONDITIONING - OBLIGATION

The parties appear to dispute whether BellSouth's obligations to provide line conditioning have been limited in any way due to the issuance of the TRO. Such limits, if any, would affect the rates, terms and conditions by which line conditioning would be provided.

A. PARTIES' ARGUMENTS

Joint Petitioners believe that line conditioning is a section 251(c)(3) obligation that has remained unchanged since prior to the issuance of the TRO. Joint Petitioners note that BellSouth signed current agreements which included TELRIC-compliant rates approved by the FPSC for removing load coils on loops in excess of 18,000 feet and removing bridged taps without respect to the length of the bridged tap. They believe that BellSouth must continue to perform line conditioning at those rates. Joint Petitioners further argue that "[n]othing in any FCC order allows BellSouth to treat [l]ine [c]onditioning in different manners depending on the length of the loop . . . [and] BellSouth's imposition of 'special construction' rates for [l]ine [c]onditioning is inappropriate . . . , [since] the work performed in connection with providing UNEs must be priced at TELRIC-compliant rates."

BellSouth witness Fogle counters by arguing that, while the law does not change line conditioning obligations based on loop length, its availability is governed by a parity standard; therefore, if loop lengths are a factor in providing parity, then loop lengths become a factor in line conditioning obligations. Witness Fogle testified that for its customers, "BellSouth adds or does not add load coils depending on the length of the copper loop . . . and has offered this same procedure to the Joint Petitioners." BellSouth understands parity to mean that it is obligated to

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[22] See 47 C.F.R. § 51.319(a)(1)(iii)(A).

[23] See 47 C.F.R. § 51.319(a)(1)(iii).

[24] See 47 C.F.R. § 51.311(a).

[25] See 47 C.F.R. § 51.311(b).

provide the line conditioning it routinely performs for itself and believes that the Joint Petitioners seek "to obtain rights that exceed what BellSouth offers its own customers." Although the Joint Petitioners have current agreements containing TELRIC rates for line conditioning, BellSouth points out that it is of no consequence because their current agreements are not TRO-compliant.

Joint Petitioners object to line conditioning being limited to what BellSouth routinely conditions for itself. Joint Petitioners present that if BellSouth were permitted to condition loops based on what it does for its own customers, BellSouth would be able to "**eliminate all line conditioning completely**." They claim that if BellSouth determined that something was not *routinely* done for itself, then it would not do what was required by the rule.

BellSouth witness Fogle asserts that section 251(c)(3) of the Act and the TRO obligates BellSouth to provide nondiscriminatory access by "perform[ing] line conditioning functions . . . to the extent the function is a routine modification that BellSouth regularly undertakes to provide xDSL to its own customers," and the Joint Petitioners have not been denied this right. Witness Fogle notes that BellSouth "adheres to current industry technical standards that require the placement of load coils on copper loops greater than 18,000 feet in length to support high quality voice service. . . [and] does not remove load coils for BellSouth's retail end users served by copper loops of over 18,000 feet in length." He states that BellSouth also does not remove bridged tap at less than 2,500 feet for its own customers. Witness Fogle testifies that the Joint Petitioners' fears of all line conditioning being eliminated are "purely hypothetical." He expressed that although BellSouth is not obligated, by the parity standard expressed in TRO ¶ 643, to provide to the Joint Petitioners line conditioning beyond that provided to its own customers, BellSouth does offer to do so "via BellSouth's Special Construction tariffs on a time and materials basis." He notes that BellSouth's proposed language is found in other agreements with other carriers, such as with those CLECs who are members of the Shared Loop Collaborative.[26] Witness Fogle believes that BellSouth's proposed language for the interconnection agreement with the Joint Petitioners provides nondiscriminatory access as required by the law.

As to BellSouth's agreement with the Shared Loop Collaborative, the Joint Petitioners state that they are not bound by any agreements made by BellSouth and any other CLECs.

B. ANALYSIS

Joint Petitioners witness Falvey states that the ILEC is obligated to provide the CLEC with line conditioning wherever requested. It is our understanding that this position is derived from a standard that came into being after the issuance of the UNE Remand Order.[27] The rule that evolved from the UNE Remand Order held that the incumbent LEC was obligated to

[26] The following carriers were identified as some members of the Shared Loop Collaborative: Northpoint, Rhythms, Covad, AT&T, and MCI (Fogle TR 713-715, 718).

[27] Order No. FCC 99-238 issued November 5, 1999, CC Docket No. 96-98 Third Report and Order and Fourth Further Notice of Proposed Rulemaking. (UNE Remand Order).

provide line conditioning "wherever a competitor requests." (47 C.F.R. § 51.319 (a)(3))[28] However, that phrase has now been stricken from the rule and replaced with

> . . . 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 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 . . . . (47 C.F.R. § 51.319(a)(1)(iii))

The Joint Petitioners consider the revision noted above as an expansion of "wherever a competitor requests." However, this paragraph is subsumed within paragraphs referring to an obligation to provision line conditioning on a nondiscriminatory basis. Nondiscriminatory access is now defined as:

> (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.
>
> (b) To the extent technically feasible, the quality of an 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 *provides to itself.* (47 C.F.R. § 51.311)(emphasis added)

However, parties are free to negotiate agreements to provide superior quality access, with the ILECs *being compensated* for the additional cost involved in providing superior quality; however, the ILECs are *not mandated* to provide service at such a standard.[29] With the FCC redefining nondiscriminatory access as parity, we find that the ILEC is now obligated to provide a quality of access to the loop and its elements, which includes line conditioning, "at least equal in quality to that which the incumbent provides to itself." (47 C.F.R. § 51.311)

Joint Petitioners object to BellSouth refusing to condition lines to enable xDSL on loops in excess of 18,000 feet, when it routinely conditions DS1 loops longer than 18,000 feet. BellSouth notes that Joint Petitioners witness Willis did acknowledge that NuVox was not ordering services that would require load coil removal on loops over 18,000 feet and were using DS1s to provide broadband services to customers regardless of loop length. Witness Willis also noted that the provisioning of DS1s or the line conditioning for such loops is not at issue in this dispute.

We note that in addition to parity, the rule also limits line conditioning to a standard of providing "suitability for digital subscriber line services." (47 C.F.R. § 51.319(a)(1)(iii)) This is

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[28] 47 C.F.R. § 51.319 (a)(3)(10-1-00 Edition).

[29] See Iowa Utils. Bd., 120 F.3d at 812-13.

clarified in paragraph 643 of the TRO, which states, "[l]ine 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 FCC restates throughout the TRO that line conditioning is for provisioning xDSL services.[30] Further, in footnote 624 of the TRO, it states that DS0 loops are typically used to deploy xDSL services to customers associated with the mass market. As stated in paragraph 209 of the TRO, the enterprise market typically purchases high-capacity loops such as DS1. The FCC noted in paragraph 210 of the TRO that the economic considerations in provisioning DS1 loops vary from provisioning DS0 loops, and adopted loop unbundling rules specific to each loop type. The Joint Petitioners note one DS1 could provide the capacity of 24 DS0 loops. We find that in evaluating whether BellSouth is meeting its nondiscriminatory obligation to provide line conditioning suitable for xDSL services, we must focus on the conditions under which BellSouth's own customers obtain line conditioning for xDSL services. Therefore, we conclude that any line conditioning afforded to DS1 customers is irrelevant.

In paragraph 2 of the TRRO, the FCC "recognized the marketplace realities of robust broadband competition and increasing competition from intermodal sources, and thus eliminated most unbundling requirements for broadband architectures serving the mass market." The FCC used its section 251 unbundling authority in a more targeted manner, and in paragraph 2 of the TRRO, the FCC noted that it "impose[d] unbundling obligations only in those situations where [it found] that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition." In response to the USTA II court's directive, the FCC modified its "approach regarding carriers' unbundled access to incumbent LECs' network elements for provision of certain services," which it expressed in paragraph 22 of the TRRO. We find that as more and more elements become "de-listed" as network elements requiring unbundling, the obligation to provide line conditioning wanes accordingly. This limiting focus is reflected in the FCC's revision of the line conditioning rules to providing "suitability for digital subscriber line services." (47 C.F.R. § 51.319(a)(1)(iii))

We conclude that the rules obligate BellSouth to provide parity in the quality of access to the unbundled network element -- in this case, line conditioning. Further, we note that nondiscriminatory access has now been defined in paragraph 643 of the TRO as "at least equal in quality to that which the incumbent provides to itself," and understand the term parity to hold the same meaning. (47 C.F.R. § 51.311) This Commission finds that BellSouth has met the requirement of the law and that the request of the Joint Petitioners goes beyond what BellSouth provides for itself or to other carriers. Moreover, we find that to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders.

C. DECISION

[30] TRO ¶ 7, ¶ 23, ¶ 26, Note 465, Note 624, ¶ 211, ¶ 215, Note 661, ¶ 249, ¶ 250, Note 746, Note 747, ¶ 255, ¶ 344, ¶ 347, ¶ 350, ¶ 642, ¶ 643, ¶ 644.

Upon consideration and review of the record and arguments in the parties' briefs, we find that BellSouth's obligations with respect to line conditioning are to provide nondiscriminatory access and ensure digital subscriber line capability.

XI. LOAD COIL REMOVAL ON COPPER LOOPS OF 18,000 FEET OR MORE

Joint Petitioners witness Willis notes that BellSouth proposes to unload loops of less than 18,000 feet at TELRIC rates. There is no disagreement over this proposal. Witness Fogle points out in Hearing Exhibit 2 that load coils on loops less than 18,000 feet are not necessary to sustain the underlying voice service, and are removed by BellSouth to provide its own xDSL service. Pursuant to current network design standards, no load coils are anticipated on loops extending to 18,000 feet. However, load coils are required on loops with lengths exceeding 18,000 feet to support voice service. Once a loop extends beyond 18,000 feet, pursuant to current network design standards, it would require a minimum of three load coils with the first placed at 3,000 feet from the central office and subsequent load coils placed at 6,000 foot intervals thereafter. The Joint Petitioners do not dispute these facts. Where the parties differ is that BellSouth proposes to unload loops longer than 18,000 feet using its special construction process.[31]

A. PARTIES' ARGUMENTS

Joint Petitioners witness Willis proposes that rates for unloading loops longer than 18,000 feet should be at TELRIC, stating primarily that "[n]othing in any FCC order allows BellSouth to treat Line Conditioning in different manners depending on the length of the loop." Witness Willis further points out that the FCC's Line Sharing Order[32] held that ILECs are required to condition loops, regardless of the loop length, and the FCC reiterated this obligation in footnote 1947 of the TRO. Joint Petitioners note that the FPSC has already approved TELRIC rates for load coil removal on loops longer than 18,000 feet.[33] Joint Petitioners state in their brief that those rates are in their existing agreements with BellSouth and should remain applicable. Witness Willis believes that BellSouth is obligated by the FCC's line conditioning rules and the FPSC's order[34] to unload all loops at TELRIC-compliant rates, even those longer than 18,000 feet.

BellSouth witness Fogle states that the TRO provides for nondiscriminatory access, which is parity. Witness Fogle testifies that for its customers, "BellSouth adds or does not add

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[31] Special construction provision is contained in a FCC tariff. Actual costs are calculated on an individual case basis.

[32] Order No. FCC 99-355 issued December 9, 1999, CC Docket Nos. 96-98, 98-147, Third Report and Order in CC Docket No. 98-147; Fourth Report and Order in CC Docket No. 96-98. (Line Sharing Order).

[33] See Order No. PSC-01-2051-FOF-TP (Appendix A, Element A.17), issued October 18, 2001.

[34] See PSC-01-1181-FOF-TP.

load coils depending on the length of the copper loop." He purports that BellSouth does not unload its facilities to provide digital subscriber line service capability for its own customers on loops longer than 18,000 feet and states that under its nondiscriminatory obligations under the Act, BellSouth should not be obligated to do so at TELRIC for the Joint Petitioners. However, BellSouth will remove load coils on loops extending beyond 18,000 feet upon request pursuant to its special construction process. Witness Fogle testifies that using this methodology, BellSouth is able to calculate the specific costs associated with removing and replacing an individual load coil. Witness Fogle notes that in some cases, the resulting cost could be "less than the TELRIC rate for removing load coils, if the load coil is on aerial cable and can easily be removed."

BellSouth witness Fogle argues that the Joint Petitioners have current agreements containing TELRIC rates for line conditioning, which are of no consequence because their current agreements are not TRO-compliant. Where the ILEC is not obligated to perform line conditioning, BellSouth notes that such line conditioning is not bound to TELRIC pricing. BellSouth confirmed, "state law . . . can provide no 'back door' for reimposition of TELRIC rates for network elements that the FCC has determined BOCs should not be required to make available at forward-looking prices."

Joint Petitioners reiterate that BellSouth acknowledges the definition of line conditioning in rule 47 C.F.R. § 51.319 (a)(1)(iii)(A) has not materially changed. They further propose that the text of the TRO does not express any limitations. Joint Petitioners believe that the parity standard, which BellSouth purports is applicable to line conditioning, is only relevant for routine network modifications. They express that the rules governing line conditioning and routine modifications "are distinct and do not reference each other." Furthermore, the Joint Petitioners point out, by using the special construction tariff, each request would have both a cost and interval for delivery calculated on an individual case basis, which they find unacceptable.

Joint Petitioners witness Willis contends that access to unloaded loops in excess of 18,000 feet is important for the deployment of Etherloop[35] and G.SHDSL,[36] which could provide broadband capabilities on such loops. He claims that without line conditioning on loops longer than 18,000 feet, these services will not work. Witness Willis states that the Petitioners have a "right to provide the service of their choice and to obtain loops that can carry those services."

BellSouth states in its brief that the Joint Petitioners' claims that Etherloop and G.SHDSL will not work on loop lengths in excess of 18,000 feet without line conditioning is pure speculation, pointing out that the job duties of the Joint Petitioners' sole witness, Jerry Willis, do not include the development of new technologies. BellSouth asserts that the Joint Petitioners' concerns regarding Etherloop and G.SHDSL are inaccurate, with witness Fogle testifying that

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[35] "Etherloop . . . is a blending of DSL and Ethernet, combining the high data rates of DSL and the half-duplex communications model of Ethernet [providing] "burst" packet delivery capabilities." See, Hearing Exhibit 2

[36] G.SHDSL is a new standards-based single pair implementation of DS-1, offering symmetric bandwidths of between 192 Kbps to 2.3 Mbps, with a 30 percent longer loop reach than SDSL and is spectrally compatible with other DSL variants within the network, as set forth in Hearing Exhibit 2.

new technologies being developed to provide broadband services on copper loops in excess of 18,000 feet take into consideration the network limitations of the embedded loop in their development. BellSouth's brief notes that Joint Petitioners witness Willis did acknowledge that his firm, NuVox, was not ordering services that would require load coil removal on DS0 loops longer than 18,000 feet and were using DS1s to provide broadband services to customers regardless of loop length, also noting that the provisioning of DS1s or the line conditioning for such loops is not at issue in this dispute.

Joint Petitioners indicate that BellSouth removes load coils on DS1 loops exceeding 18,000 feet in length. They further conclude that BellSouth should be required to remove load coils on all loops. BellSouth witness Fogle objects, stating that BellSouth must apply the same criteria to the Joint Petitioners that are applied to its own retail customers and if BellSouth does not condition loops longer than 18,000 feet to enable xDSL delivery for itself, then by its parity obligation BellSouth should not be required to do so for the Joint Petitioners at TELRIC.

BellSouth reveals that receiving requests to condition loops of any length is rare, stating that BellSouth received only 14 requests from all CLECs throughout its entire nine-state region to remove load coils in 2004, with only two of those being for loops in excess of 18,000 feet; the Joint Petitioners, in particular, "did not request a single order to perform any form of line conditioning in 2004." BellSouth concludes that the Joint Petitioners' claims that BellSouth's proposed language will prevent them from deploying broadband services is not credible because the Joint Petitioners have not used nor have they presented any plans for using a technology that requires line conditioning. Further, the Joint Petitioners are currently providing broadband access to their customers at all lengths via alternative approaches that do not require line conditioning.

B. ANALYSIS

We agree with Joint Petitioners witness Willis that the FCC does not treat line conditioning in different manners depending on the length of the loop. In ¶ 86 of the Line Sharing Order, the FCC states in particular, incumbent LECs are required to condition any loop requested by a competitor, regardless of length, unless such conditioning would significantly degrade the customer's analog voice service provided by the incumbent. Further, the FCC states that "an incumbent LEC will rarely, if ever, be able to demonstrate a valid basis for refusing to condition a loop under 18,000 feet."[37] The FCC specifically addressed conditioning loops over 18,000 feet in its Line Sharing Reconsideration Order (LSRO).[38] The FCC in ¶ 34 of that Order considered comments that loading loops which exceed lengths of 18,000 feet was a "well-established engineering principle" and removing such devices would degrade voice service, since

[37] Line Sharing Order, 14 FCC Rcd at 20954, para 86.

[38] Order No. FCC 01-26 issued January 19, 2001, CC Docket No. 98-147, CC Docket No. 96-98, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98. (Line Sharing Recon Order).

loading was required to obtain minimally acceptable levels of voice quality. However, the FCC in ¶¶ 35-36 of the LSRO refused to make a "categorical finding" that loaded loops over 18,000 feet were ineligible for line sharing because conditioning would degrade the voice service:

> We reject . . . mak[ing] a categorical finding that loops over 18,000 feet . . . are ineligible for line sharing because conditioning them will significantly degrade the voice service. . . . [I]n some cases, unloaded loops longer than 18,000 feet may be able to support quality voice service. We also agree . . . that the simple loop length standard . . . is inappropriate because it does not focus on the quality of the voice service that can be provisioned over the line. AT&T suggests that the loss characteristics of a loop are a more relevant determination when considering voice degradation, with loss being a function *both* of the loop's length and the gauge of the loop wire. . . . [I]n fact, the differing positions on this point further support our finding in the Line Sharing Order that it is appropriate for state commissions to consider such various loop conditioning scenarios on a case-by-case basis. . . .
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> . . . Our intent in requiring loops in excess of 18,000 feet to be conditioned, unless the incumbent LEC demonstrates that conditioning will significantly degrade voice service, was to prevent the incumbent LECs from refusing to condition the loop merely because the loop is over 18,000 feet.

We find that the FCC's refusal to make a "categorical" finding, leaves the FPSC the option to make such a finding.

We agree with Joint Petitioners witness Falvey that the FPSC previously set rates for line conditioning loops longer than 18,000 feet[39] after the issuance of the UNE Remand Order.[40] We also recognize that the FCC made no material changes to 47 C.F.R. § 51.319 (a)(1)(iii)(A), where line conditioning is described as the removal of devices from the copper loop. However, both parties fail to note that the FCC changed the definition of nondiscriminatory access in 47 C.F.R. § 51.311, which is a pivotal term used in the line conditioning rules.

As discussed in Section VIII herein, the "superior in quality" standard that became law after the issuance of the Local Competition Order[41] and that was carried forward to the UNE Remand Order, and was the basis for the line conditioning obligations prior to the issuance of the TRO. With the issuance of the TRO, this definition was revised, eliminating a "superior in quality" access standard. The FCC's rule 47 C.F.R. § 51.319 (a) states that nondiscriminatory access shall be provided to line conditioning as an element of the local loop. Nondiscriminatory

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[39] See PSC-01-2051-FOF-TP.

[40] Order No. FCC 99-238 issued November 5, 1999, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking. (UNE Remand Order).

[41] Order No. FCC 96-325 issued August 8, 1996, CC Docket Nos. 96-98, 95-185, First Report and Order. (Local Competition Order).

access is *now* defined as "at least *equal* in quality to that which the incumbent provides to itself." (47 C.F.R. § 51.311, emphasis added) Nondiscriminatory access at this point carries the same definition as parity. Parity is currently the standard established by the FCC for access to the unbundled network. As stated in ¶643 of the TRO section discussing line conditioning, the FCC stated that the "incumbent LECs must make the routine adjustments to unbundled loops to deliver services *at parity* with how incumbent LECs provision such facilities for themselves." (emphasis added) Furthermore, the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) in its Remand Decision,[42] has found that the phrase "at least equal in quality" leaves open the possibility for the parties to negotiate agreements to provide a superior quality access, with the ILECs being compensated for the additional cost involved in providing superior quality, but ruled that the ILECs are not mandated to provide such a standard.[43] By changing what constitutes nondiscriminatory access, we find that the FCC now permits line conditioning to be treated in different manners depending on how the incumbent provides service to its retail customers, with access that exceeds parity provided at non-TELRIC rates.

In analyzing whether the Joint Petitioners are impaired[44] without access to unloaded loops longer than 18,000 feet, we consider

- The manner in which BellSouth provides advanced services[45] to its own customers on loops longer than 18,000 feet (parity),
- Whether the limitation on unloading loops longer than 18,000 feet poses any practical barriers to providing advanced services to customers, and
- Whether unloading loops longer than 18,000 feet poses serious interference with the incumbent's network operations.

Access to elements described in 47 C.F.R. § 51.319 is to be provided

> at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires the incumbent LEC to . . . [provide] the *same technical criteria and service standards* that are used within the incumbent LEC's network. (47 C.F.R. § 51.305(a)(3), emphasis added)

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[42] Iowa Utilities Bd. v. FCC, (Remand Decision) Nos. 96-3321(and consolidated cases) issued July 18, 2000, p. 22. before the United States Court of Appeals for the Eighth Circuit.

[43] See, Iowa Utils. Bd., 120 F.3d at 812-13.

[44] When analyzing impairment, the cost of unbundling must be adequately weighed. (TRRO ¶ 8).

[45] The term "advanced services" is defined as "high speed, *switched*, broadband, wireline telecommunications capability that enables users to originate and receive high quality voice, data, graphics or video telecommunications using any technology." (Line Sharing Order, 14 FCC Rcd at 20915, ¶ 4. (emphasis added).

We find that in evaluating whether BellSouth is meeting its nondiscriminatory obligation to provide line conditioning, we must focus on all of the criteria under which BellSouth's own customers are bound in obtaining line conditioning. According to BellSouth witness Fogle, BellSouth does not remove load coils for its own xDSL customers on loops with lengths exceeding 18,000 feet, but offers to do so for other parties at non-TELRIC rates. In accord with what it has offered other carriers, BellSouth makes the same offer to the Joint Petitioners.

In footnote 16 of the TRRO, the FCC states that in evaluating impairment other alternatives may not be ignored. Additionally, in footnote 20 of the TRO, the FCC adds that consideration must be given whether practical barriers to competitive entry have been removed must be considered along with whether serious interference with the incumbent's network operations can be avoided. BellSouth witness Fogle states that BellSouth serves customers on loops over 18,000 feet with multiple other options for broadband services, including but not limited to the use of remote terminals, Digital Subscriber Line Access Multiplexers (DSLAM), fiber technology or the use of DS1s. It is our understanding that multiple options are available to the CLECs as well. We note that advanced services can and are being served with DS1 loops by the Joint Petitioners. Joint Petitioners witness Willis did acknowledge that NuVox was using DS1s to provide broadband services to customers regardless of loop length. BellSouth notes that Joint Petitioners were not ordering services that would require load coil removal on loops longer than 18,000 feet. Joint Petitioners suggested that BellSouth routinely conditions DS1 loops longer than 18,000 feet. Witness Willis also noted that the provisioning of DS1s or the line conditioning for such loops is not at issue in this dispute.

As read in footnote 624 of the TRO, DS0 loops are typically used to deploy xDSL services to customers associated with the mass market. DS0 loops exceeding lengths of 18,000 feet require load coils to provide voice service to those customers. In Hearing Exhibit 2, BellSouth presents that the loop tapers, becoming smaller and smaller, at longer lengths. Therefore, at greater distances, spare capacity and flexibility become more critical. As also indicated by Hearing Exhibit 2, the costs of unloading at those distances is far greater than at distances less than 18,000 feet, since cables less than 18,000 feet may be unloaded, whereas, those loops exceeding 18,000 feet have at minimum three load points and more as the loop lengthens. To reuse loops for voice service that are previously unloaded to enable advanced services would require reloading, which would require loading at three or more locations.[46] The costs of reloading these facilities is not included in TELRIC pricing.

The Joint Petitioners witness Willis further notes that one DS1 provides the capacity of 24 DS0 loops. Furthermore, in Hearing Exhibit 2, the Joint Petitioners provided evidence, as reflected by Hearing Exhibit 2, that one DS1 could be provided using one or two pairs; therefore,

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[46] "Many bridged taps and load coils are permanently attached, often buried, connect hundreds of loops at a single junction, and not designed for easy access. To remove a load coil or bridged tap often involves digging up the splice case, locating and identifying the correct loop, performing the steps associated with . . . removing the bridged tap or load coil, and reclosing the cable/splice case, re-burying and possible re-landscaping the affected location, including replacing asphalt or concrete when necessary. . . All of this is possibly repeated when . . . the loop is abandoned by the current customer or CLEC, and BellSouth desires to return the loop to industry standard specifications." (Hearing Exhibit 2, Item No. 121(d))

we find that using DS0 loops rather than DS1 could increase network modifications 12 to 24-fold in an environment, as reflected by BellSouth in Hearing Exhibit 2, where pairs are less available, the network is less flexible and the likelihood of the facility being less accessible increases due to a likelihood that the cable is buried. It is our understanding that the Joint Petitioners do not appear to be hampered in accessing customers at distances greater than 18,000 feet to provide advanced services as evidenced by their current use of DS1 or other technology for those customers. Therefore, we find that practical barriers have been removed. Considering both the advantages and disadvantages of removing load coils on cables in excess of 18,000 feet, we find that unloading DS0 loops with lengths greater than 18,000 feet poses greater harm to the incumbent's network than any perceived advantage to the CLECs.

BellSouth notes in Hearing Exhibit 2 that standard ADSL technology, including the ADSL standard technology used by BellSouth, is designed to work with Carrier Serving Area (CSA) and Revised Resistance Design (RRD) standard networks. For this reason, BellSouth limits the removal of load coils to loops less than 18,000 feet in length for provisioning xDSL service to its customers. Since standardized xDSL technologies are designed to work in a standard network, modification of a copper loop beyond what is necessary to provide xDSL would be non-routine, extraordinary, and non-standard, which BellSouth believes it is not obligated to provide at TELRIC. BellSouth states that such costs would be rare and higher than standard, routine ordinary line conditioning activities that BellSouth is obligated to provide. BellSouth believes that current law does not require it to condition a loop that will significantly degrade its ability to provide voice services, substantially alter its network, or create significant operational issues. BellSouth believes that any conditioning that would create a non-standardized loop would fall into those categories.

In Hearing Exhibit 2, BellSouth suggests using the special construction tariffs as a convenient mechanism to handle the relatively few line conditioning requests received from the CLECs. Joint Petitioners have stated that using the special construction tariff would be prohibitively expensive, although no cost data was provided. Also in Hearing Exhibit 2, BellSouth witness Fogle noted "the only fair, just, and reasonable method of cost recovery must take into account the relative infrequency of these requests." He continues that "the costs associated with developing and maintaining a cost methodology . . . is not justified given the scarcity that line conditioning is requested by CLECs." BellSouth maintains that individual case-based pricing afforded by the special construction process is the appropriate process to address these rare, non-routine requests. Also within Hearing Exhibit 2, BellSouth states that this same individual case-based pricing is performed for other carriers and offered to the Joint Petitioners at parity to what is afforded to those other carriers.

We find the FCC's rules obligate BellSouth to provide nondiscriminatory access to line conditioning. BellSouth provides unrefuted evidence that it does not unload copper loops having lengths greater than 18,000 feet for its own customers. The Joint Petitioners acknowledge that BellSouth has offered the Joint Petitioners equal quality to what BellSouth provides to itself. Therefore, we deduce that the request of the Joint Petitioners goes beyond what BellSouth provides for itself or to other carriers. We conclude that to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders. We find that non-TELRIC

pricing for unloading DS0 loops longer than 18,000 feet does not pose any practical barriers to the Joint Petitioners providing advanced services.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that the Agreement shall contain specific provisions addressing the availability of load coil removal by loop length, specifically less than or greater than 18,000 feet, provided that the criteria established remains at parity with what BellSouth offers its own customers or other carriers.

XII. LINE CONDITIONING / REMOVAL OF BRIDGED TAPS

As reflected in the record, bridged tap is an offshoot of a cable pair that allows flexibility for the loop to terminate in more than one location. Bridged taps increase the electrical loss on the pair because signals traveling down the cable are also transmitted down each bridged tap or branch. Signal echoes can form if the end of the pair is not terminated, and in such cases, the echo could combine with the original signal and cause errors and signal loss. Most loops contain at least one bridged tap, and the effect of multiple bridged taps is cumulative. Premises wiring contains additional bridged taps, which contribute to signal loss.

BellSouth has proposed to remove at no charge cumulated bridged tap greater than 6,000 feet, so that the loop will have a maximum of 6,000 feet of bridged tap. Where the combined level of bridged tap is between 2,500 and 6,000 feet and serves no network design purpose, BellSouth has proposed to remove these spans at TELRIC; those rates are set forth in Exhibit A of Attachment 2 of the Interconnection Agreement. There is no disagreement over these two proposals. Where the parties differ is that BellSouth proposes to price the removal of unnecessary and non-excessive cumulated bridged taps totaling less than 2,500 feet and serving no network design purpose pursuant to BellSouth's Special Construction Process contained in its FCC Tariff No. 2.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Willis discusses four major points of dispute:

- There is no federal support to restrict ILECs' obligations to remove bridged tap based on length or location on the loop.
- BellSouth's position would preclude the removal of bridged tap totaling less than 2,500 feet, thereby significantly impairing the provision of high speed data transmission.
- BellSouth's use of the phrase "serv[ing] no network design purpose" would place the determination of this condition solely to BellSouth's discretion.
- BellSouth's proposal is deemed unworkable.

Joint Petitioners believe that "[f]ederal law provides, without limitation, that CLECs may request this type of Line Conditioning, insofar as they pay for the work required based on TELRIC-compliant rates."

Joint Petitioners witness Willis asserts that "the work performed in connection with provisioning UNEs must be priced at TELRIC-compliant rates." He objects to BellSouth's proposal to use its special construction rates for the following reasons:

- Those rates are not predetermined but are calculated on an individual case basis.
- Those rates are likely prohibitively expensive.
- Those rates preclude offering advanced services, including DSL.

BellSouth witness Fogle explains that the FCC only restricts ILECs' obligations to remove bridged tap according to length or location on the loop based on parity. Witness Fogle points to the FCC's discussion of line conditioning in ¶ 643 of the TRO, which states:

> 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 unbundle loops to deliver services with *parity* with how incumbent LECs provision such facilities for themselves.

BellSouth witness Fogle further testifies that since BellSouth does not routinely remove any bridged taps for its own retail DS0 or xDSL customers, then BellSouth is not obligated to do so for CLECs. In Hearing Exhibit 2, he stresses that "BellSouth uses ADSL technology, which is designed to work in the presence of bridged taps which are in compliance with Carrier Serving Area (CSA) and Revised Resistance Design (RRD) industry standards." Witness Fogle confirms that the proposal BellSouth presents for inclusion in the agreement is the same as one presented to another group of carriers, members of the Shared Loop Collaborative.

Witness Fogle asserts that BellSouth's line conditioning obligations are limited to providing xDSL capability, TRO ¶ 643 quoted above. He notes in Hearing Exhibit 2 that "all industry xDSL standards and most proprietary xDSL standards are designed to work on a standard network [deployed by BellSouth], which includes the presence of bridged taps."[47] He acknowledges that "BellSouth is not aware of any advanced data service that does not work with bridged taps."[48] As reflected within Hearing Exhibit 2, he further advises that "[t]he interference of a bridged tap with the specific deployment of a specific service must be determined on a case-by-case basis." To emphasize the lack of necessity to remove bridged taps, BellSouth points out the rarity of requests for bridged tap removal, noting that the Joint Petitioners have not requested any bridged tap removals in the past year.

As indicated by Hearing Exhibit 4, Joint Petitioners believe that the manner in which BellSouth removes bridged tap for its own customers is irrelevant. As seen in Hearing Exhibit 4, when asked whether the rule or the FCC's order states that BellSouth is to provide Joint Petitioners with the same standard that it provides to its own customers, the Joint Petitioners insisted that it does not. In their brief, Joint Petitioners deny that parity is a limiting factor, stating that "BellSouth's line conditioning obligations are not constrained by the routine network modification rule."

Joint Petitioners also contend that their perceived harm should outweigh considerations that BellSouth's policy was established in conjunction with members of the Shared Loop Collaborative, and BellSouth claims that its policies are consistent with industry standards for xDSL services. As reflected by Hearing Exhibit 2, Joint Petitioners witness Willis further points out that services the Joint Petitioners are seeking to deploy, specifically noting Etherloop and G.SHDSL technologies, are not Shared Loop services.

BellSouth indicates in Hearing Exhibit 2 that the current industry standards for the new technologies, Etherloop and G.SHDSL Long, require that they work with bridged taps; therefore, the Joint Petitioners are in no way prevented from developing such technologies. BellSouth further asserts that the effect of bridged taps on advanced data services is well known, and engineers from both sides can quickly determine the need for removal.

B. ANALYSIS

As indicated by Hearing Exhibit 2, Joint Petitioners and BellSouth acknowledge that we have set rates for bridged tap removal on loops of all lengths. Joint Petitioners object to imposing any new rates. Consistent with Hearing Exhibit 2, Joint Petitioners assert that BellSouth is obligated by the FCC's line conditioning rules and the FPSC's order to remove cumulative bridged taps totaling less than 2,500 feet and to do so at TELRIC-compliant rates. BellSouth's witness Fogle counters that the rates established by the FPSC for removing cumulative bridged taps totaling less than 2,500 feet are now not TRO-compliant. The BellSouth

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[47] See EXH 2, BST-3, Response to Staff's 4th Interrogatories, Item No. 123 (a).

[48] See EXH 2, BST-3, Response to Staff's 4th Interrogatories, Item No. 124 (b).

witness emphasizes that the FCC clarified the obligation to provide line conditioning is at parity in ¶ 643 of the TRO.

In Hearing Exhibit 2, Joint Petitioners support their claim that the law has not changed, citing TRO ¶ 250, footnote 747, where the FCC stated that the line conditioning rules were readopted. The Joint Petitioners reiterate that the definition of line conditioning in the FCC's rules has not materially changed. Joint Petitioners object to BellSouth equating its line conditioning obligations with its routine network modification obligations. Joint Petitioners further oppose line conditioning being limited to what BellSouth routinely conditions for itself. They claim that if BellSouth determined that something was not routinely done for itself, then BellSouth would not do what was required by the rule. However, we find that there has been a change in law that affects line conditioning, in particular, the redefining of nondiscriminatory access in 47 C.F.R. § 51.311, to parity.

BellSouth witness Fogle states that BellSouth wants to avoid removing bridged tap that serves a network design purpose. As indicated in Hearing Exhibit 2, Joint Petitioners acknowledge that while removing bridged taps "may sound like a trivial exercise, the lack of proper documentation and opening and closing cable splices often makes the process of locating and removing bridged taps a time-consuming and therefore costly challenge." As also reflected by Hearing Exhibit 2, BellSouth understands ¶ 635 of the TRO to limit its obligations to make adjustments that present significant operational issues.

The Joint Petitioners also contend that the presence of bridged tap could reduce data throughput. Joint Petitioners' witness Willis stated that no lessening of data throughput was acceptable. We disagree, noting that other record evidence does not support this position. As reflected by portions of Hearing Exhibit 2, both Joint Petitioners and BellSouth admit that Etherloop reportedly works through multiple bridged taps. BellSouth noted that G.SHDSL standards state that the service works with bridged taps as well. Joint Petitioners further admitted that other advanced services could tolerate bridged taps; however, this would need to be reviewed on a case-by-case basis. In response to discovery in Hearing Exhibit 2, Joint Petitioners note that "short bridged taps have the greatest impact on wideband services, while long bridged taps have a greater impact on narrowband services." Therefore, we conclude that the retail service to be provided over the loop is the determining factor of the need to remove any amount of bridged tap to meet industry standards must be determined by.

As indicated in Hearing Exhibit 2, BellSouth maintains that industry standard-compliant equipment is designed to work in the presence of industry standard bridged taps, and only non-standard bridged taps should need to be removed. Witness Fogle further emphasized that industry standards should be the most appropriate measure for determining whether the loop is capable of handling the requested service. BellSouth expressed that to determine if bridged tap is interfering with the data service involves signal testing by BellSouth engineers.

Joint Petitioners counter BellSouth's remarks, stating that BellSouth's obligations should not be limited by industry standards Hearing Exhibit 2. They further contend that BellSouth does not have the right to decline conditioning based on its own assessment of whether the CLEC actually needs it in the manner requested. BellSouth in turn explains that both the ILEC

and CLEC can engage in cooperative testing to determine if the type of interference the CLEC is experiencing is of the nature caused by bridged taps or the CLEC can submit test measurements that would indicate the likelihood of bridged tap causing interference. However, BellSouth also noted that it anticipates that bridged tap would rarely be the cause of interference.

We find that the TRO imposed limiting conditions on the ILECs' line conditioning obligations. Furthermore, we contend that if the ILEC provides a loop that meets all of the industry standards to support the CLEC's requested retail xDSL service, then the ILEC's obligations are met. Additionally, if testing indicates that the existing bridged tap is not causing interference with a data service, then it is unnecessary to remove that bridged tap. Considering that paragraph 633 of the TRO expresses that the ILEC is to accommodate access "to the extent necessary," we find that any accommodation above necessity would be beyond the ILEC's obligation.

As reflected by Hearing Exhibit 2, Joint Petitioners witness Willis acknowledges that they have not yet deployed DSL technologies that would require the removal of bridged taps of less than 2,500 feet in length. Moreover, we find the evidence provided by the Joint Petitioners, did not indicate any plans to deploy any services that would require the removal of bridged tap of 2,500 feet or less, further supported by Hearing Exhibit 4. Joint Petitioners are currently using DS1 service to provide advanced services, and conditioning of DS1 loops is not disputed. Furthermore, Joint Petitioners witness Fury admits that the Joint Petitioners are not being prohibited from providing any service on the loop because of the existence of bridged tap of less than 2,500 feet.

Evaluating requests for removal of bridged taps, based on industry standards for the retail service being deployed over the loop, appears reasonable to us. We find the rules obligate BellSouth to provide nondiscriminatory access to the UNE -- in this case, line conditioning to remove bridged taps. The Joint Petitioners acknowledge that BellSouth has offered the Joint Petitioners parity access. We conclude that BellSouth has met the requirement of the law and that the request of the Joint Petitioners goes beyond what BellSouth provides for itself or other carriers. We find that to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders. We see no reason to recommend a position other than what the law requires.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, BellSouth shall be required to remove bridged taps to ensure xDSL capability at parity with what it does for itself. Cumulative bridged taps greater than 6,000 feet shall be removed at no charge. Cumulative bridged taps between 2,500 feet and 6,000 feet shall be removed at no more than TELRIC rates. Bridged taps less than 2,500 feet may be removed based upon the rates, terms and conditions negotiated by the parties. If negotiations are not successful, BellSouth's Special Construction Process shall apply.

XIII. NOTICE REQUIREMENT OF AUDIT

BellSouth witness Blake agrees that notifying the CLEC of an upcoming audit is appropriate and states that an audit will only be conducted if BellSouth has cause to believe that circuits are out of compliance. The parties' testimony centers around the timeframe for a notice, and whether or not BellSouth must show to the Joint Petitioners BellSouth's basis for believing an audit is warranted.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Russell proposes that BellSouth be required to identify the specific circuits that are to be audited in the notice and "include all supporting documentation upon which BellSouth establishes the cause that forms the basis of BellSouth's allegations of noncompliance." Witness Russell claims that the Joint Petitioners' proposal is appropriate since BellSouth agrees that the audit must be based upon cause. Therefore, showing that cause to the Joint Petitioner would place no additional burden on BellSouth. Additionally, witness Russell states that although the TRO does not specifically require the ILEC to notify the CLEC of an audit, this Commission may order such a requirement observing that paragraph 625 of the TRO notes that, "states are in a better position to address that implementation." He continues that "[t]hese requirements – which BellSouth provides no sound reason for rejecting – will contribute dramatically to curtailing EEL audit litigation that currently is consuming too many of the Parties' and the Commission's resources."

Witness Russell claims that requiring BellSouth to identify the circuits that are to be audited, up front, and providing documentation to back up its belief that those circuits are noncompliant, will aid the CLEC being audited in evaluating the audit request, as well as avoiding unnecessary disputes and resolving "real disputes" efficiently. He maintains, "the Joint Petitioners have created a better proposal for eliminating, narrowing and more quickly resolving disputes over whether or not BellSouth has the right to proceed with an EEL audit." Finally, witness Russell suggests that providing this information will allow the CLEC to properly prepare for the audit.

Witness Russell also takes issue with BellSouth's language regarding the timeframe of the notice of the audit. The question is whether BellSouth should seek commencement of the audit in 30 days or whether it may affirmatively establish that the audit will begin in 30 days. Although the language may seem similar on the surface, witness Russell claims that BellSouth's language is "unnecessarily inflexible." He states that the CLEC may need more time to gather resources, records and personnel for an upcoming audit.

BellSouth witness Blake states that BellSouth will provide a notice at least 30 days prior to the audit, and the notice will state the cause that it has found that warrants such an audit. Witness Blake states that the audit should commence no earlier than 30 days from the date of the notice. "Naturally, there is room for negotiation as to the specific start date and time, and BellSouth will certainly consider extenuating circumstances that may not permit a CLEC to be

ready within 30 days. But in no case should the CLEC be permitted to unduly and unilaterally delay the start of the audit."

Witness Blake does not believe that identifying the circuits at issue is necessary or even appropriate. She claims that such a requirement "defeats the purpose of the compliance audit." She explains, "To require BellSouth to pre-identify specific circuits to be examined would provide an opportunity for a non-compliant CLEC to correct the mischaracterization of the EELs circuits in advance of the audit." Moreover, the findings of an audit "may dictate that the audit follow a direction not originally intended in the initial scope." Witness Blake agrees that the ultimate goal is to correct any mischaracterized circuits. However, an additional goal is to correct the underlying processes and procedures that are used in the accounting of EELs circuits. Further, witness Blake opines that requiring documentation to be included with the notice will only provide a non-compliant CLEC the opportunity to object to the audit. "The Joint Petitioners or any CLEC could say that is not good enough documentation so you can't audit."

B. ANALYSIS

In the UNE Remand Order,[49] the FCC required ILECs to provide unbundled access to enhanced extended links (EELs), combinations of "unbundled loop, multiplexing/concentrating equipment, and dedicated transport." In the Supplemental Order,[50] the FCC required CLECs to "provide a significant amount of local exchange service . . . to a particular customer" in order to be allowed access to an EEL. The FCC quickly added the safe harbor requirements in the Supplemental Order Clarification[51] to define the phrase "a significant amount of local exchange service," in order to limit the availability and ensure CLECs are using EELs for their intended purpose.

In paragraph 586 of the TRO, the FCC allows CLECs to convert to EELs, existing loop/transport combinations purchased originally as special access. Paragraph 579 of the TRO also allows commingling, which is combining special access circuits and unbundled network elements (UNEs). As set forth in ¶579 of the TRO, a commingled EEL, for instance, is a combination of loop and transport where one is special access and the other is a UNE. Both EELs and commingled EELs must satisfy the revised EEL eligibility criteria contained in ¶593 of the TRO, which include 911/E911 capability, termination into a collocation arrangement and local number assignment. Similar to the Supplemental Order Clarification, ¶623 of the TRO allows a CLEC to self-certify that it is in compliance with the EEL eligibility criteria, and the ILEC to verify compliance through the auditing process.

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[49] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, FCC 99-238 ¶476, ¶480 (rel. Nov 5, 1999). (UNE Remand Order)

[50] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Supplemental Order, FCC 99-370, ¶9 (rel. Nov 24, 1999). (Supplemental Order)

[51] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Supplemental Order Clarification, FCC 00-183, ¶22 (rel. June 2, 2000). (Supplemental Order Clarification)

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

The Joint Petitioners are asking this Commission to add steps to the auditing process which could hinder the process. One such step is the requirement that BellSouth identify the specific circuits that it wishes to audit and provide documentation to back up its claims. According to witness Russell, "Joint Petitioners have every right to insist that [the 'for cause' standard is] met before BellSouth proceeds with an intrusive and resource consuming audit of our business records." We understand the Joint Petitioners' concern of unwarranted audits; however, the FCC addressed those concerns in paragraph 628 of the TRO:

> To the extent the independent auditor's report concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit. We expect that this reimbursement requirement will eliminate the potential for abusive or unfounded audits, so that incumbent LEC[s] will only rely on the audit mechanism in appropriate circumstances.

By requiring the CLEC to reimburse the ILEC for the cost of the audit if the auditor found material noncompliance, the FCC in paragraph 627 of the TRO hoped to ensure a CLEC only ordered EEL circuits when it was entitled to them. If a CLEC is able to delay that process, we find the scale is unfairly tipped toward the CLEC. On the other hand, the FCC requires the ILEC to reimburse the CLEC for the CLEC's costs to comply with the audit, if the auditor finds material compliance. Again, the FCC in ¶628 of the TRO was attempting to "eliminate the potential for abusive or unfounded audits." If an ILEC were allowed to audit any CLEC at any time with no repercussions, then the scale is tipped toward the ILEC. We find the FCC's rules set out in the TRO achieve a reasonable balance, and that adding additional conditions is not appropriate and may upset this balance.

We agree with BellSouth that requiring BellSouth to identify specific circuits and to provide documentation to support its belief of noncompliance, could unnecessarily delay the audit. If the CLEC did not believe that BellSouth provided adequate documentation or that the documentation did not support an audit, the CLEC could object to the audit, possibly requiring our involvement to settle the dispute. After BellSouth performed the audit and found those specified circuits out of compliance, the CLEC could object to auditing the rest of the circuits,

even though Joint Petitioners witness Russell testifies, at hearing and in his deposition in Hearing Exhibit 2, that such an additional audit could be warranted. BellSouth witness Blake points out in response to one of our staff's interrogatory in Hearing Exhibit 2, "if a CLEC is in violation of the law, there [is] no amount of documentation that would be sufficient for the CLEC such that it would not object to the audit proceeding." We find this argument compelling.

Additionally, Joint Petitioners witness Russell's testimony provides contradictory statements. He indicates that the Joint Petitioners' proposal will reduce future disputes, but agrees that their proposal could lead to them as well. In order to ensure that the audit process is not hindered by such delays, we conclude that the notice need only include the information that BellSouth has agreed to provide.

Finally, the language regarding the timeframe for notice seems to be settled between the parties. Joint Petitioner witness Russell responded to one of our staff's interrogatory located within Hearing Exhibit 2, "The parties have reached an agreement with regard to this particular aspect of Item 51/Issue 2-33, and the language is no longer in dispute. The parties agree that any notice of audit will be delivered no less than thirty (30) calendar days prior to the date upon which BellSouth seeks to commence the audit." During BellSouth witness Blake's deposition she stated, "I don't believe . . . the disagreement is relative to the timing period as far as the number of days in the notice." Further, witness Blake confirmed in response to a late-filed deposition request, "There is no dispute between the Parties that the audit shall commence no sooner than 30 days after the Notice of Audit is sent to the CLEC."

Nevertheless, due to the uncertainty, we reach the following conclusion. The TRO is silent as to when a notice of audit should be sent, except to the extent that it refers to the Supplemental Order Clarification and adopts comparable procedures in ¶622 of the TRO. In footnote 1898 of the TRO, the FCC noted that in ¶¶31–32 of the Supplemental Order Clarification, it had "found 'that incumbent LECs must provide at least 30 days written notice to a carrier that has purchased [an EEL] that it will conduct an audit.'" We conclude that 30 days shall be ample time to prepare for an audit under normal operating parameters.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that BellSouth shall provide written notice to the CLEC 30 days prior to the date that BellSouth seeks to commence the audit. The notice shall include the cause that BellSouth believes warrants the audit, but need not identify the specific circuits that are to be audited or contain additional detailed documentation.

XIV. AUDITOR AND SCOPE OF THE AUDIT

The parties have agreed that the audit should be performed according to the AICPA standards as required by paragraph 626 of the TRO. The parties' testimony focuses on how the auditor should be selected.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Russell believes that the parties should mutually agree to the independent third-party auditor prior to conducting the audit. He maintains that past disputes regarding the independence of the auditor have consumed too many resources. Joint Petitioner witness Russell testifies, "BellSouth's language simply sets the stage for additional disputes . . . Joint Petitioners are unwilling to subject themselves to audits by entities whose independence is doubtful and reasonably challenged." He continues that to address this issue later "seems nonsensical." Moreover, he notes that agreement as to the auditor is required with regard to PIU and PLU[52] audits. Witness Russell testifies that he is "unaware of any litigation over the selection of an auditor that has resulted in the percentage interstate usage context."

BellSouth witness Blake asserts that BellSouth is unwilling to include language in the agreement that requires the parties' mutual agreement on the auditor, because it is not a requirement of the TRO or the FCC's rules, and such a requirement could delay the start of the audit. She explains that since the parties have agreed that the auditor must perform the evaluation in accordance with the standards established by the AICPA, which includes that the auditor be independent, mutually agreeing to an auditor prior to the audit will only lead to delay. Additionally, witness Blake testifies,

> BellSouth will select the auditor. As paragraph 627 of the TRO states, "In particular, we conclude that incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria."

Finally, witness Blake comments, "If a CLEC is abusing the service eligibility requirements, these objections provide a simple path to delay the audit indefinitely."

Joint Petitioners witness Russell disputes BellSouth's exclusion of language regarding mutual agreement on the auditor. Witness Russell contends that this mutual agreement ensures equality in that if the CLEC is found materially noncompliant, the CLEC must reimburse BellSouth for the cost of the audit. "With this much at stake, the Commission should not find the Petitioners' proposal to agree to the auditor pointless, but rather essential to equality of the audit process." Additionally, "while BellSouth argues that this is simply a delay tactic, the Petitioners submit that BellSouth's refusal to agree to such a reasonable position is a tactic to keep CLECs out of the decision-making process, perhaps to their detriment."

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[52] Percentage Interstate Usage and Percentage Local Usage.

BellSouth witness Blake raises three additional points of contention. The first concerns language that the Joint Petitioners had requested for a mutually agreeable location and timeframe. The second additional requirement that witness Blake finds objectionable is "'other requirements' for establishing the independence of the auditor." She does not mention or explain what these other requirements are, but states that the "AICPA standards govern each of these areas. No other requirements are needed." Witness Blake believes that these additional requirements would allow a CLEC to further delay the audit. According to BellSouth, the third and final point that witness Blake raised, regarding materiality, appears no longer to be in dispute.

Joint Petitioners witness Russell questions witness Blake's testimony regarding these other outstanding disputes, stating, "The only issue that remains is whether the Agreement will include a requirement that the independent auditor must be mutually agreed-upon." He claims that BellSouth has previously agreed to language regarding a mutually agreeable location. He continues, "We have no idea about (and neither address nor accept) the 'other requirements' and 'materiality' disputes Ms. Blake claims exists."

B. ANALYSIS

We note that the TRO does not offer specific guidance on this issue. BellSouth finds a reference to the ILEC obtaining an auditor in ¶626 of the TRO. However, we submit that this sentence appears primarily to be about the ILEC being required to pay for the audit. We find the inclusion of the words "may obtain" does not necessarily afford an ILEC the unilateral right to select the auditor. Consequently, we have not relied on this argument for our decision.

We find that the Joint Petitioners' request that an auditor be chosen and agreed to in advance is, on the surface, equitable. The Joint Petitioners do have a substantial interest in the outcome of the audit and the importance of the independence of the auditor is clear. Allowing the Joint Petitioners to participate in the selection of an auditor seems appropriate.

Nevertheless, BellSouth makes a strong argument that allowing the Joint Petitioners to veto the selection of the auditor could delay the audit significantly. Witness Blake testifies, "There would be no reason for the Joint Petitioners to ever agree to an auditor if it is going to catch them not complying with the law." As stated in Section XIV, we find that disrupting the audit significantly undermines the FCC's TRO rules regarding the self-certification process and the audit process. We opine that these processes shall be strictly adhered to as set forth in the TRO in order to ensure the balance is maintained between the ILEC's need for compliance and the CLEC's need for unimpeded access. If the audit process is hindered by postponement of an audit, the CLEC could continue to improperly obtain access to nonconforming facilities at unbundled rates.

We find that neither proposal would avoid disputes. We agree that if a CLEC is noncompliant, it could attempt to avoid the audit by withholding their agreement to the auditor. However, we question whether BellSouth's proposal would not result in a similar state of affairs. As indicated by Hearing Exhibit 2, in the Georgia EEL audit BellSouth notified NuVox (one of

the Joint Petitioners) that it would like to conduct an audit and named a specific auditor that it would like to use. NuVox objected to the independence of that auditor, suggested a different auditor, and after 3 years, the audit results have not been released.[53] We find NuVox had a right to object, and the parties ultimately agreed to the auditor that NuVox suggested. This is an indication that neither of the parties' proposals will ensure that disputes and delays are avoided.

The parties appeared at one point to be agreeable to establishing a list of auditors, from which BellSouth could choose the auditor and to which the CLEC would not object. Although BellSouth witness Blake maintains that any auditor will probably be objected to, she agreed to such a proposal during her deposition located in Hearing Exhibit 6, stating, "We could come up with a list of acceptable auditors that we could pick from." BellSouth objects to the Joint Petitioners' proposal solely because of the possible delay that could ensue; however, this compromise proposal should alleviate BellSouth's concerns. When prompted about including an agreed upon list in the agreement, Joint Petitioners witness Russell responded, "That's an excellent suggestion, possibly listing a schedule of potential auditors that the parties could suggest may be appropriate ahead of time to conduct the audit." The Joint Petitioners submitted a list of ten auditors. The exhibits included KPMG, Deloitte & Touche, BearingPoint, Ernst & Young, and PricewaterhouseCoopers. However, the Joint Petitioners withdrew their agreement as to one of the auditors on this list shortly before the hearing. Nevertheless, we continue to believe that such a procedure is reasonable. During the hearing, Joint Petitioners witness Russell stated, ". . . we are still willing to consider that proposal and do that." Although the Joint Petitioners no longer support KPMG as an acceptable auditor, they are apparently willing to accept the nine that remain. BellSouth submitted a shorter list of audit firms in Hearing Exhibit 2 (KPMG, ACA,[54] and Grant Thornton) that it has used in the past or may use in the future.

Although the parties referred to nationally-recognized firms, a definition was not provided. Nevertheless, we find that the parties shall negotiate a list of auditors to be included in the interconnection agreement consisting of at least four nationally-recognized firms from which BellSouth may choose any firm to conduct future audits. None of the firms shall have any conflicts of interest with the Petitioners or BellSouth. We suggest four firms, because in Hearing Exhibit 2, the parties reference the "big four," "big five," "big six," or "big eight" firms. As four is the least of these numbers, we trust that the parties will be able to reach agreement. The Joint Petitioners shall submit a suggested list to BellSouth within ten days of the effective date of this Order. If BellSouth agrees to this list, it shall be included in the new interconnection agreement. If any disputes arise, the parties shall negotiate to arrive at an acceptable list of firms. The list shall be included in the interconnection agreement submitted to us for approval. If the parties are unable to agree, then the list will be: Deloitte & Touche, BearingPoint, Ernst & Young, and PricewaterhouseCoopers, as suggested by the Joint Petitioners.

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[53] *Order Granting in Part and Denying in Part BellSouth's Emergency Motion*, Document No. 82186, issued May 3, 2005, Docket No. 12778-U, In Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc., Georgia Public Service Commission, pp. 1 and 3.

[54] American Consultants Alliance. Joint Petitioner witness Russell objected to this auditor as not being AICPA compliant and not independent.

It is our understanding that even if BellSouth chooses one of the auditors on the list, the Joint Petitioners may still object to the auditor, invoking the dispute resolution procedures. Nevertheless, we find that this proposal constitutes a reasonable compromise between the parties' own proposals. We suggest that any objection to the selection of the auditor would be unfounded, since the Petitioners would have already agreed to the auditor. We find our decision minimizes this Commission's involvement and attempts to achieve an efficient and effective audit process.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that the audit shall be performed by an independent, third-party auditor selected by BellSouth from a list of at least four auditors included in the interconnection agreement. The list shall be developed as indicated in our analysis. Further, we find the audit shall be performed according to the standards of the American Institute of Certified Public Accountants (AICPA).

XV. TANDEM INTERMEDIARY CHARGE

BellSouth has agreed that it will provide the transit function. The transit function is the act of providing a transit service which is defined as local traffic originating on the Joint Petitioners' network that is delivered by BellSouth to a different telecommunications service provider's network for termination.[55] The disagreement lies in the rate that BellSouth seeks to charge for performing the transiting function. The Joint Petitioners argue that BellSouth is already being reimbursed through TELRIC pricing of tandem switching and the associated common transport and therefore should not be allowed to impose TIC. As reflected by Hearing Exhibit 2, BellSouth states that performing a transiting function is not a § 251 obligation subject to § 252 arbitration, is not recovered through TELRIC pricing, and as such the TIC is an appropriate "market rate."

A. PARTIES' ARGUMENTS

Witness Mertz states that there are three reasons the Joint Petitioners will not agree to BellSouth's proposed TIC. First, he claims BellSouth has developed the TIC to exploit its "monopoly legacy and overwhelming market power." He explains that BellSouth is the only carrier in a position capable of connecting all of the small and large carriers. He argues BellSouth has achieved this capability through its monopoly legacy and continued market dominance.

Second, witness Mertz alleges the TIC is more appropriately identified with "its insect namesake," that the charge is "parasitic and debilitating," and in its ballooning appearance purely

[55] See BellSouth General Subscriber Service Tariff A16.1.1.B and C.

"additive." He continues by stating that this Commission has never established a TELRIC-based rate for transit traffic. He contends BellSouth already collects "elemental rates for tandem switching and common transport to recover its cost associated with providing the transiting functionality." He also states BellSouth's TIC is simply another method to "extract additional profits over-and-above profit already received through the element rates." Witness Mertz elaborates that BellSouth fails to demonstrate that the elemental rates, that have been in effect for eight years, fail to provide for its cost recovery. In addition, he argues that if the rates are no longer adequate, BellSouth should conduct a TELRIC cost study and propose a new rate before this Commission in a generic pricing proceeding.

Third, he argues the TIC is discriminatory because BellSouth does not charge the TIC to all CLECs and in those instances where it does, it sets the rate at "whatever level it desires." Witness Mertz also alleges BellSouth threatened the Joint Petitioners with "nearly double" the proposed rate unless the Joint Petitioners agreed to it. He reasons that we "must find that the TIC proposed by BellSouth is unlawfully discriminatory and unreasonable."

Witness Mertz disputes BellSouth's argument that it incurs costs beyond those that the TELRIC rate recovers by stating that BellSouth for "nearly 8 years" has not claimed that the elemental rates it receives for tandem switching and common transport are not adequately providing for BellSouth's cost recovery. Additionally, it is "not economically rational and practical" for every carrier in the State of Florida to directly interconnect. He agrees with BellSouth witness Blake that CLECs use the BellSouth transiting functionality because it is more economical and efficient than directly interconnecting.

Witness Blake states that BellSouth has an obligation to interconnect with CLECs under § 251(c)(2) of the Act. However, BellSouth has no duty to provide "transit services" for other carriers. As supporting evidence, BellSouth cites to the FCC Wireline Competition Bureau's Memorandum Opinion and Order dated July 17, 2002, collectively known as the Virginia Arbitration Order.[56] In that Order, the Wireline Competition Bureau on delegated authority from the FCC, stated:

> We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit

[56] See In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, CC Docket No. 00-218, In the Matter of Petition of Cox Virginia Telecom Inc. Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Arbitration, CC Docket 00-249, and In the Matter of Petition of AT&T Communications of Virginia Inc. Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. CC Docket No. 00-251 Memorandum Opinion and Order dated July 17, 2002 (Virginia Arbitration Order).

> service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under 251(a)(1) of the Act to provide transit service would not require the service to be priced at TELRIC. (Emphasis added by BellSouth)

Witness Blake adds that footnote 1640 of the TRO does not require ". . . incumbent LECs to provide transiting." Should BellSouth agree to do so, it will be at "rates, terms and conditions" contained in separately negotiated agreements. Witness Blake also expresses that the CLEC can directly connect to other carriers but typically it elects to use the more efficient transiting function provided by BellSouth. The CLECs just want the functionality to be provided at TELRIC or "at no rate at all," she asserts.

In justifying the costs for the transiting functionality, witness Blake states that BellSouth incurs costs that are above and beyond those of the existing TELRIC price for tandem switching, because that price fails to recognize the cost of sending records identifying the originating carrier. Also, there are related costs BellSouth incurs while ensuring it is not being improperly billed regarding delivery of transit traffic to third-party carriers. Finally, witness Blake argues there is a cost associated with the resolution of billing disputes that are the result of the CLEC's failure to enter into "traffic exchange arrangements" with terminating carriers.

B. ANALYSIS

It is our understanding that transiting service is defined as local traffic originating on the Joint Petitioners' network that is delivered by BellSouth to a different telecommunications service provider's network for termination. As reflected by Hearing Exhibit 2, both parties have agreed that BellSouth will provide transit service in relation to calls that neither originate or terminate on BellSouth's network such that BellSouth acts as the intermediary. The Joint Petitioners and BellSouth, however, disagree as to whether BellSouth shall be allowed to assess a TIC for performing the transiting function.

The Joint Petitioners argue that the TIC is an additive charge. BellSouth acknowledged "this is an additive charge that gets applied in addition to the two TELRIC rates BellSouth already charges for transit service." BellSouth witness Blake explains that it will apply when the originating CLEC is not directly connected to the terminating carrier and therefore the CLEC elected to use BellSouth's transiting function. In this scenario, BellSouth argues it should be able to charge the Joint Petitioners (originating carriers) for that service. When BellSouth was queried on whether or not it had conducted any cost studies in support of the TIC, witness Blake responded that BellSouth had not. In addition, witness Blake said BellSouth does not believe it has an obligation to provide transit functionality at TELRIC pricing and that transit service is included in the interconnection agreement as a matter of convenience and could easily be pulled out and placed in a non-section 251 commercial agreement. The Joint Petitioners also question the basis for the costs associated with the TIC.

BellSouth asserts there is a cost associated with providing the billing records to the terminating carrier. The Joint Petitioners claim that they do not need the billing records BellSouth provides as part of the transit service because they have deployed sophisticated switches and signaling equipment which already provide that information when one of the Joint Petitioners is the terminating carrier. The fact the Joint Petitioners may not require the records would appear only to be in those instances where they are both the originating and terminating carriers. Accordingly, we recognize that the Joint Petitioners may not need the records as they have indicated. However, in those situations where the Joint Petitioners are only the originating carriers, the records BellSouth provides form a basis for the terminating carrier to determine the originating carrier and assess it the applicable charges for terminating the call. This prevents BellSouth from being billed incorrectly as the originating carrier when it was acting as the transit service provider. Therefore, we agree there is a cost associated with providing the billing records when performing a transit service. For those calls involving other terminating carriers the provision of the associated billing records are costs that BellSouth incurs in transiting the call.

The Joint Petitioners' argument that BellSouth should not be allowed to impose the TIC because it has not been imposed for the previous eight years is unconvincing. We recognize that the record indicates that there were parties to this proceeding that either could not find any instance in which BellSouth had charged a TIC to them, or had objected to the charge and had it removed by BellSouth. However, we find that the basis for the TIC has existed for some time as evidenced by its appearance in BellSouth's other interconnection agreements. Also, it would seem that BellSouth has attempted to implement the TIC in the past, but elected to forego charging the Joint Petitioners on earlier occasions. BellSouth should not be penalized for deciding to pursue the charge on prior occasions. Further, we find the TIC is not required to be TELRIC-based and is more appropriately, in this instant proceeding, a negotiated rate between the parties. A TELRIC rate is inappropriate because transit service has not been determined to be a § 251 UNE.[57] We agree with the reasoning of the FCC Wireline Competition Bureau in rendering the Virginia Arbitration Order that found no precedent to require the transiting function to be priced at TELRIC under § 251(c)(2). The Bureau went further in saying that if there was a duty to provide transiting under § 251(a)(1), it did not have to be priced at TELRIC.[58]

The fact that the TIC is an additive is also noted, and we understand there are costs associated with providing a transiting function, such as providing billing records to the terminating carrier and the cost of reconciling improper billing by the terminating carrier when BellSouth is the intermediary or transiting carrier. We recognize that the Joint Petitioners have sophisticated switches and may not need the billing records that BellSouth provides to the terminating carrier and also that they do not support the TIC because it is an additional cost. However, the Joint Petitioners did not indicate that all of their traffic requiring transiting would

[57] See TRO footnote 1640.

[58] *Id.* Virginia Arbitration Order.

be terminated to one of the Joint Petitioners. Therefore, we find BellSouth's cost for providing the billing records that it indicated were not being recovered through tandem switching and common transport charges and the fact that some transiting calls may require reconciliation when third party carriers improperly bill BellSouth must be recognized.

In addition, we note that the FCC, in footnote 1640 of the TRO, discusses shared transport being used by CLECs to perform transiting. The FCC stated "[t]o date the Commission's rules have not required incumbent LECs to provide transiting. . . ." Also contained within the footnote is a comment that the FCC will address transiting service issues at a later date, and we note the FCC has issued a Further Notice of Proposed Rule Making in the matter of *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, when transiting service issues are to be addressed.[59]

Further, we note, as did both parties, that other state commissions have reached consistent decisions on the TIC. As Hearing Exhibit 2 reflects the Georgia Public Service Commission decided that the TIC shall not be TELRIC-based, and the Joint Petitioners submitted there are a "few state commissions that have determined that the TIC should be priced at TELRIC." The Joint Petitioners and BellSouth witness Blake state the current rate under negotiation is $.0015 per minute of use. We are aware that BellSouth has filed a tariff, which is presumed to be valid, and section A.16.1.3 Rates and Charges indicates the transit traffic service rate is $.003 per minute of use. [60] We are of the opinion BellSouth's General Subscriber Service Tariff A16 applies unless an agreement exists. We note that transit traffic is being negotiated by the parties and that the separate agreement "in lieu of the tariff will apply."[61] Reiterating, the parties indicated that current negotiations had the proposed rate for the TIC at $.0015 per minute of use.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, BellSouth shall be allowed to charge the CLEC a Tandem Intermediary Charge (TIC) for transport of transit traffic when CLECs are not directly interconnected to third parties. Parties are strongly encouraged to continue negotiations beginning at a rate of $.0015 per minute of use.

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[59] The record indicates that "third-party providers" exist offering CLECs alternatives to BellSouth's transit service.

[60] See BellSouth General Subscriber Service Tariff, A16.1 Transit Traffic Service. issued January 27, 2005, effective February 11, 2005.

[61] Id. Section A16.1.2 B.

XVI. DISPUTES OVER ALLEGED UNAUTHORIZED ACCESS TO CSR

Section 222 of the Act established customer proprietary network information (CPNI) privacy requirements and set restrictions on how telephone companies may use or disclose a customer's CPNI. CPNI includes personal data for each customer including Social Security number, address, phone number, and all features, services and products used by the customer. This data is typically found in a CSR. The associated FCC rule requires the protection of all CPNI and is structured to require the customer to "opt in" to the use of his/her private information for any purpose other than provision of the telecommunications service from which the CPNI is derived, or necessary related services. Both the Joint Petitioners and BellSouth have legal and contractual obligations to protect CPNI, and both parties have agreed to refrain from viewing and copying customer records without customer permission.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Falvey contends that disputes over alleged unauthorized access to CSR information should be handled in the same manner as other disputes arising under the General Terms and Conditions (GTC) of the Interconnection Agreement. According to the GTC, Falvey contends that if one party disputes the other party's assertion of noncompliance, the alleging party should notify the other party in writing of the basis for its assertion of noncompliance. If the alleged offending party fails to provide the other party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other party with proof sufficient to persuade the other party that it erred in asserting the non-compliance, the alleging party should proceed pursuant to the Dispute Resolution provisions set forth in the GTC of the Interconnection Agreement.

BellSouth witness Ferguson contends that BellSouth's proposed language balances the Joint Petitioners' right not to be suspended or terminated versus BellSouth's right to protect its network, information, and processes in the most expedient manner. According to witness Ferguson, BellSouth must be given the opportunity to protect the information that BellSouth is obligated to protect and to ensure that all of its CLEC customers have the nondiscriminatory access to operating support systems that BellSouth is obligated to provide. Moreover, witness Ferguson asserts that BellSouth needs to have necessary and timely recourse to limit a CLEC's access in order to protect BellSouth's customers and the customers of other CLECs, if BellSouth has reason to believe that a CLEC is abusing access to CSR information.

BellSouth is proposing to modify the Interconnection Agreement to ensure timely resolution of unauthorized access to CSR information. The proposed language allows for the suspension and eventual termination of CLEC services. The specifics of BellSouth's proposed modifications are: 1) If BellSouth alleges that a CLEC accessed CSR information without having obtained the proper authorization, BellSouth will send a written notice to the CLEC requesting an appropriate Letter of Authorization; 2) If, after receipt of the requested Letter of Authorization, BellSouth determines that the CLEC obtained CSR information without the proper authorization, or, if no Letter of Authorization is provided to BellSouth by the seventh

business day after the request, BellSouth will send a written notice to the CLEC specifying the alleged noncompliance; 3) In its written notice, BellSouth will state that it may suspend a CLEC's access to ordering systems by the fifth calendar day following the date of the notice of noncompliance if a CLEC fails to take corrective measures; and 4) At the same time, BellSouth would provide written notice that a CLEC's existing service may be terminated by the tenth calendar day following the date of the notice if unauthorized access to CSR information does not cease.

However, if, at any time, the offending CLEC disagrees or disputes the allegation of unauthorized access to CSR information, BellSouth agrees to proceed with the resolution of the dispute in accordance with the Agreement's GTC. Under the Agreement's GTC, BellSouth will continue to provide all services as were provided prior to the dispute. Further assurance is noted in BellSouth's response to one of our staff's interrogatories located in Hearing Exhibit 2. BellSouth stated that it would take no action to terminate the alleged offending party during any pending regulatory proceeding.

B. ANALYSIS

It is our understanding from Hearing Exhibit 2 that BellSouth is concerned about detecting and ceasing any pattern that demonstrates a proclivity for abusive or repeated unauthorized access to CSR information by a CLEC. If BellSouth is suspicious of a CLEC's ordering activity (i.e., accessing unauthorized CSR information), BellSouth may request a Letter of Authorization as proof. If no Letter of Authorization is provided, or if BellSouth believes the LOA is inadequate, BellSouth is proposing to add language to allow for the suspension or termination of a CLEC's access to pre-ordering and ordering systems.

BellSouth witness Ferguson claims that its proposed modified language to the Interconnection Agreement should have resolved this issue and further does not understand why the proposed language does not calm the Joint Petitioners' fears. We agree. The Joint Petitioners contend that BellSouth's proposed language is ambiguous. Witness Falvey testified that it is not clear whether BellSouth would get to "pull the plug" while a dispute is pending or whether the coercive pressure created by BellSouth's ambiguous language is all that it is seeking. As a result, the parties have failed to resolve this issue.

BellSouth's proposed modification to resolve disputes over unauthorized access to CSR information is essentially two-fold. The alleged ambiguity lies between BellSouth's proposed modification to preserve the right to suspend or terminate a CLEC's service, while at the same time, BellSouth is providing assurance that a CLEC's access to ordering systems would not be suspended or terminated while a dispute is pending. We agree with the Joint Petitioners' position that BellSouth is given the discretion to be the judge and "pull the plug" if it so elects; however, BellSouth also allows for a CLEC to dispute the allegation at any time and the CLEC's service will not be suspended or terminated while the dispute is being resolved. As asserted by BellSouth witness Ferguson, if the Letter of Authorization provided is disputed between the parties, the parties will bring the dispute before us for resolution, and service will not be terminated while the dispute is pending.

In sum, if access to CSR information is disputed and cannot be resolved, the parties agree to bring the dispute before a regulatory authority for resolution. The parties also agree that services will not be suspended while a dispute is pending. The parties disagree to BellSouth having the right to suspend or terminate a service if corrective action is not taken by the offending party. Under the scenario where an offending party does not dispute alleged unauthorized access to CSR information, BellSouth's proposed modifications to the Agreement's Dispute Resolution provisions seem fair and equitable to both parties and provide a viable option for settling disputes. We find BellSouth shall be permitted to suspend or terminate services if a CLEC fails to acknowledge a request for a Letter of Authorization and notice of noncompliance under the time lines proposed by BellSouth. However, if a CLEC disputes BellSouth's allegation, BellSouth does not have the right to suspend or terminate services.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we conclude that in the event that the alleged offending party disputes the allegation of unauthorized access to CSR information (even after the party's inability to produce an appropriate Letter of Authorization), the alleging party shall seek expedited resolution from the appropriate regulatory body pursuant to the dispute resolution provision in the Interconnection Agreement's General Terms and Conditions section. The alleging party shall take no action to terminate the alleged offending party during any such pending regulatory proceeding. If the alleged offending party does not dispute the allegation of unauthorized access to CSR information, BellSouth may suspend or terminate service under the time lines proposed by BellSouth.

XVII. RATE FOR SERVICE DATE ADVANCEMENT

A. PARTIES' ARGUMENTS

Joint Petitioners argue that, because UNE ordering and provisioning must be provided to wholesale customers at TELRIC rates, this same standard should also rightfully extend to requests by the CLECs to expedite service. Joint Petitioners witness Falvey asserts that all UNE ordering must be priced at TELRIC rates applied uniformly to service expedites as well as normal service order requests and that petitioners are entitled to access the local network and obtain elements at forward-looking, cost-based rates. Witness Falvey contends that, in the circumstance when access is required on an expedited basis to meet a particular customer's need, CLECs should not be subject to arbitrary, inflated, and excessive BellSouth fees not set by this Commission and which do not comport with the TELRIC pricing standard. To the extent there are substantiated added costs associated with providing expedites, those costs should be recovered through TELRIC-based prices, which Joint Petitioners are willing to pay according to Hearing Exhibit 2.

Joint Petitioners witness Falvey disagrees with BellSouth's stance that the issue is inappropriate for this proceeding. He asserts that setting prices and arbitrating terms and

provisions associated with section 251 unbundling are squarely within this Commission's jurisdiction and appropriately brought before this arbitration proceeding. Witness Falvey testifies that governance of the manner in which BellSouth provisions UNEs is solidly within section 251 of the Telecommunications Act and that petitioners are entitled to access the local network and obtain elements at TELRIC rates.

As Joint Petitioners witness Falvey stated, UNEs must be provisioned at TELRIC-compliant rates. BellSouth does not dispute this fact. Witness Falvey contends that an expedite order for a UNE should not be treated any differently.

Witness Falvey further testified that the parties have previously negotiated and agreed to language providing for expedites, so BellSouth cannot now argue that rates for service cannot be arbitrated. Witness Falvey's conclusion is that the BellSouth tariff rate of $200 per element, per day, for expedited provisioning constitutes an unreasonable, excessive rate harmful to competition and consumers.

Witness Falvey concludes that this Commission has clearly determined that an interconnection agreement may encompass rates, terms and conditions that extend beyond an incumbent's section 251 obligations. Therefore, even if BellSouth's contention that charges for expedites are outside the scope of section 251 is accepted, it is irrelevant in this instance because it would not supplant our determinations previously made on the subject. According to witness Falvey, the issue is still within the scope of already established interconnection agreements.

BellSouth witness Blake argues that although the incumbent does have an obligation under section 251 of the 1996 Act to provide certain services in nondiscriminatory ("standard") intervals at cost-based prices, there is no section 251 requirement to provide service in less than the standard interval. Moreover, there is no requirement for BellSouth to provide faster service to its wholesale customers than that which is provided to its retail customers. She also contends that because BellSouth is not required to provide expedited service pursuant to the 1996 Act, the Petitioners' request is not appropriate for a section 251 arbitration and it should not, therefore, be included in the Agreement. Because it is not a section 251 requirement, witness Blake argues that TELRIC rates should not apply.

In BellSouth witness Blake's rebuttal testimony, she notes that charges for BellSouth service expedites are found in the company's FCC Tariff No. 1 which has FCC approval. They are the same charges imposed on retail customers requesting service in less than the standard interval and are an accurate reflection of costs incurred when extraordinary services are provided.

BellSouth witness Blake concedes that the point at issue is not whether it will provide service expedites to CLECs but what rate will be charged for such services. The company proposes to charge $200 per circuit per day, a rate equivalent to charges currently imposed on its own retail customers.

Witness Blake concludes that, as a practical matter, if BellSouth were to impose no charge or only a minor charge for expedited service requests, it is likely that most, if not all,

CLEC orders would be requested as expedites. This, in turn, would cause BellSouth to miss standard provisioning intervals and its recognized obligation to provide nondiscriminatory access. Therefore, Witness Blake contends that BellSouth's position on this issue is reasonable and provides parity of service between how BellSouth treats CLECs and how it treats its own retail customers.

B. ANALYSIS

We find the central, predominant question at issue here is that of parity. While other considerations have been raised, they are peripheral and fall subordinate to parity.

An absence of parity in provisioning of service expedites would open the door for a reasonable, valid TELRIC-rate argument by the Joint Petitioners. Substantiation of parity closes it, firmly.

According to 47 C.F.R. 51.307(a), there exists a requirement for an ILEC to provide a requesting carrier with nondiscriminatory access to UNEs at any technically feasible point. In the section of 47 C.F.R. 51.311(a), entitled "Nondiscriminatory access to unbundled network elements," it states that the quality of the UNE access that an incumbent provides shall be the same for all telecommunications carriers requesting access to the network. 47 C.F.R. 51.311(b) further asserts that the quality of a UNE 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."

The Eighth Circuit opined that the phrase "at least equal in quality" leaves open the opportunity for parties to negotiate agreements for provision of access superior in quality to that which is normally provided, with the ILECs being compensated for the additional cost involved in providing superior quality. However, an ILEC is not mandated to provide such a standard.[62] With superior quality access as a standard rendered null and void, we hold that parity is the preeminent qualification.

Accordingly, where technical feasibility is not at issue, incumbents are required to provide access to UNEs *at parity* (as a minimum) to that provided to their retail customers. It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer requesting similar services. So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites, and there is no conflict with Rule 51.311(b). We reiterate that current regulations do not compel an ILEC to provide CLECs with access superior in quality to that supplied to its own retail customers.

We support the idea that, by their nature, service expedites are extraordinary and BellSouth witness Blake's contention that such expedites logically lead to a concomitant,

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[62] Iowa Utilities Bd. V. FCC. (Remand Decision) Nos. 96-3321 (and consolidated cases) issued July 18, 2000, p. 22. before the United States Court of Appeals for the Eighth Circuit

additional demand on resources is valid. Then, it follows that increased provider cost is a logical and reasonable by-product, one traditionally associated with improved or increased services. We agree with both parties that the service expedite rate BellSouth currently charges CLECs is identical to the tariffed rate imposed on its retail customers. In other words, parity exists. Additionally, there exists no requirement that an incumbent provide supportive evidence for its tariffed rates; tariffs are presumptively valid.

We find that services requested and provisioned to a superior standard (i.e. above parity) by the CLECs shall be compensated accordingly. There was no conclusive evidence provided by the Joint Petitioners that BellSouth routinely foregoes charges for its retail customers. If there had been such evidence, indicating discriminatory treatment, a TELRIC standard might be applicable.

BellSouth is treating CLECs and its own retail customers in an identical manner with regard to the pricing of service expedites. Parity exists, thus TELRIC simply does not apply in our opinion.

C. DECISION

BellSouth's tariffed rates for service expedites shall apply unless the parties negotiate different rates.

XVIII. PAYMENT DUE DATE

This issue examines the time frame the Joint Petitioners have for analyzing bills they receive from BellSouth and remitting payment. At issue is whether the time period for review should be based upon the date bills are issued (by BellSouth), or whether it should be based on date bills are received.

A. PARTIES' ARGUMENTS

Witness Russell asserts that the Joint Petitioners do not have adequate time to effectively and completely review the "enormous number of"[63] bills they receive from BellSouth. The witness contends the Joint Petitioners are seeking a full 30-day period from receipt of a complete and readable bill. As support for his position, the witness asserts that:

- BellSouth is consistently untimely in posting or delivering its bills;
- BellSouth's bills are often incomplete and sometimes incomprehensible;
- BellSouth issues numerous bills to the Joint Petitioners, bills that are often voluminous and complex; and

[63] In its brief, the Joint Petitioners claim that NuVox alone receives more than 1100 monthly bills from BellSouth.

- by the time a BellSouth bill is received, the period of time for review and remittance is only 19-22 days – a timeframe the Joint Petitioners believe is not typical, or commercially reasonable.

Witness Russell contends that it is imperative that the Joint Petitioners be given a full 30 days to review and pay their bills from BellSouth. In its brief, the Joint Petitioners cite to recent decisions from Georgia and Alabama that have some similarity with what the Joint Petitioners seek here. Witness Russell flatly rejects the claim of BellSouth's witness Morillo[64] that BellSouth has no way of knowing when a customer receives its bill, since tracking mechanisms that could be used by BellSouth are readily available. According to witness Russell, BellSouth has claimed that the configuration of its billing system cannot be modified on a customer-specific basis; he claims that BellSouth's assertion regarding its system limitations is not a reasonable justification for what he believes are unfair payment terms.

Witness Russell states that NuVox recorded when it received bills from BellSouth, and over a 12-month period, the results indicated it received its bills 3 to 30 days after the date printed on the bill. He states the average was 7 days. Because the date of receipt fluctuated, so too did the period of time that NuVox had to review the bill. A similar study was conducted by NewSouth and Xspedius, and the results were substantially similar, according to witness Russell. Witness Mertz, of KMC, testifies to first-hand knowledge that the date of receipt for BellSouth bills would fluctuate with KMC as well, although the company never formally collected data to quantify this as other Petitioners have. Although BellSouth presented evidence in the form of a performance report that showed excellent results,[65] witness Mertz contends that BellSouth's Service Quality Measurement (SQM) figures could be deceptive in that they reflect average results, and not the so-called "outliers." Consequently, witness Mertz believes average figures are likely to differ from individual results.

In practice, witness Russell states that the review and bill payment timeframes are "far from commercially reasonable." In its brief, the Joint Petitioners claim that BellSouth pays or disputes bills it receives based upon a 30-day cycle that begins upon receipt; the brief claims a disparity is evident because "BellSouth is not treating itself the way it seeks to treat Petitioners." In addition, witness Russell states that this Commission should consider how other state commissions in the BellSouth region have ruled on this topic, specifically in the context of BellSouth's arbitrations with ITC^DeltaCom.

Witness Russell believes the 30-day period of time from receipt of the bill that the Joint Petitioners are requesting is necessary, and notes the Joint Petitioners initially sought a 45-day interval, but revised their proposal to the current level in negotiations. A 30-day period

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[64] BellSouth witness Kathy K. Blake adopted the testimony filed by Carlos Morillo.

[65] BellSouth's Service Quality Measurement Plan (SQM) describes in detail the measurements produced to evaluate the quality of service delivered to BellSouth's customers both wholesale and retail. Hearing Exhibit 19 is a 2-page excerpt of the SQM that witness Mertz analyzed while testifying.

essentially represents a billing cycle, according to witness Russell. The witness believes the language BellSouth has offered is not reasonable and states:

> BellSouth's proposed language provides that payment . . . must be made on or before the next bill date. This language is inadequate in that it does not account for the fact that there is typically a long gap between the time a bill is 'issued' and the date upon which it is made available to or delivered to a Petitioner. BellSouth's language makes no attempt to mitigate the problems caused in circumstances when its invoices are incomplete and/or incomprehensible. When this occurs, the CLEC already has a late start in paying the invoice and then may also need to spend extraordinary amounts of time attempting to reconcile . . . such invoices. Therefore, under BellSouth's proposal, Petitioners are not getting thirty (30) days to remit payment.

In practice, the short review window pressures the Joint Petitioners to pay on time, or face the financial consequence of being assessed late payment charges or requests for security deposits. Such pressures force CLECs to remit payment faster than almost any other business, according to the witness.

BellSouth witness Blake asserts that payment for all services that appear on a BellSouth bill should be due on or before the next bill date in immediately available funds. As indicated by Hearing Exhibit 2, the bill date is the date that appears on a bill, and the next bill date is essentially 30 days thereafter. In testimony and under cross-examination, BellSouth witness Blake briefly described how BellSouth's legacy billing systems function in producing and delivering bills. Witness Blake states that a bill release date usually follows the bill date by 3-4 days, since all of the account activity that occurred on or before the bill date is compiled for inclusion in that respective bill. Further in Hearing Exhibit 2, witness Blake also states that all retail and wholesale customers are billed in the same manner, and any sort of a rolling due date would be administratively cumbersome. The witness describes the bill generation process:

> When a bill is produced, there's a bill date on it. It is a set bill date. We pull the data onto the bill and it is the same each month. At the time we produce the bill its got the date on there, that same date. When it's released, whether electronically or manually, that date is already on the bill. And it's the same date every month; there's no guesswork. The Joint Petitioners as well as our customers will know what the due date is every month.

The BellSouth witness explains how bill payment impacts customer treatment (i.e., late payment charges), and also deposit-related issues. Witness Blake asserts that "the use of a constant bill date and payment due date is a standard business practice, and is consistent with BellSouth's billing practices that both this Commission and the FCC [approved of] in granting BellSouth long distance authority in Florida . . ." Those approvals were based on the respective findings that BellSouth's billing systems were nondiscriminatory. Witness Blake was also cross-examined on BellSouth's own payment history for invoices it receives from the Joint Petitioners, although in its brief, BellSouth contends this is "irrelevant."

Witness Blake stresses that whether a customer elects to receive a bill in an electronic format or not, that choice of delivery will have no impact on the transmission of the bill; she states, "the bill already has a date posted, printed, included in it that cannot be modified at the point in time that we transmit the bill." In essence, witness Blake regards this issue as a parity issue. As also indicated in Hearing Exhibit 2, she contends the Joint Petitioners are requesting something over and above what BellSouth provides for its retail customers, and are not willing to pay for the billing system modifications that would be needed to meet their request. The witness believes that the Joint Petitioners' request is unreasonable for two main reasons:

- BellSouth's legacy systems cannot provide multiple due dates on a single bill since all due dates and treatments are generated in a similar manner; and

- A bill due date based upon the customer's date of receipt relies upon an unknown variable – BellSouth has no way to know when a customer receives a bill.

Witness Blake was cross-examined on Hearing Exhibit 19, the SQM Report for BellSouth's Mean Time to Deliver Invoices performance measurement. As indicated in Hearing Exhibit 19 the report provides 12 months of Florida-specific performance averages for wholesale bills that BellSouth issued between April 2004 and March 2005. Witness Blake acknowledged that "outliers" would not be specifically identified in this report, but notes that the report presents "average" results that meet the standard. The standard for this measure is whether BellSouth is providing service at parity with retail – which it overwhelmingly is, according to the data in Hearing Exhibits 2 and 19. In addition, if bill delivery issues were presented to BellSouth on a case-by-case basis, BellSouth is amenable to granting an extension of the payment due date.

We note that in its brief, BellSouth offers a proposal in an effort to resolve this issue. We are unaware as to whether the Joint Petitioners acted upon this proposal.

B. ANALYSIS

The Joint Petitioners are requesting 30 days from receipt of a complete and readable bill to review and remit payments to BellSouth. We find the Joint Petitioners do not want BellSouth's "bill assembly" period of time to reduce the time they have to review and make payment for bills received from BellSouth. According to BellSouth witness Blake, "bill assembly" usually takes 3-4 days, and thereafter, electronic transmission can proceed on the release date. Additionally, the witness avers that this issue is really about "parity," and that BellSouth prepares bills for its wholesale customers in the same timeframe and manner as it does for its retail customers. Importantly, any conventional mailing timeframes or delays would begin after the 3-4 day timeframe for assembly. Also, the "bill date" will generally fall on the same date each month – a time period of approximately 30 days. We agree with witness Blake's assertion that this is a "parity" issue.

Joint Petitioners witness Russell states that other state commissions in the BellSouth region have ruled on this topic; he specifically references BellSouth's arbitrations with ITC^

DeltaCom in Georgia and Alabama. In each case, ITC^DeltaCom's general position was consistent with what the Joint Petitioners are seeking here - that BellSouth's bill date shall not be considered the starting point for their review. However, we find the respective cases are only moderately germane to this case, since each decision was somewhat different from the specific position the Joint Petitioners assert in Florida. Additionally, the parties agreed to something other than what the respective state commissions ordered, according to BellSouth witness Blake. BellSouth witness Blake did not provide a detailed response on what the parties agreed to, but notes that in Georgia, what the parties agreed to "was not based upon receipt date." We note that although Hearing Exhibit 32 is an excerpt of an ITC^DeltaCom-BellSouth interconnection agreement from Alabama, the excerpt does not provide information that is on-point.

Although the Joint Petitioners' proposal appears to introduce a fixed level of certainty to the bill review and payment timeframe, we find the practical implication could instead result in a degree of uncertainty. In its brief, BellSouth appears to agree; the brief characterizes the uncertainty as "an ever extending payment due date," and affirmed the reservations of witness Blake on whether current systems could be modified to accomplish billing in this manner. If so, the costs would be substantial, according to witness Blake. Information on the feasibility or a cost/benefit analysis for such a project was not provided, and therefore we cannot render an opinion on whether such system enhancements are worthwhile. Cost would certainly be a factor in making system changes, and the Joint Petitioners have stated an unwillingness to be responsible for such costs, a point BellSouth echoes in its brief. Because performance data indicate that BellSouth overwhelmingly meets its wholesale bill delivery standard using its current legacy systems, we find BellSouth would have little or no incentive to assume the cost burden of enhancing its billing system platforms. We find the performance data shows that BellSouth is meeting its objective to deliver bills to its wholesale customers at "parity" with its retail customers, and as such, we do not endorse the Joint Petitioners' proposal.

We are concerned about a phrase extracted from the Joint Petitioners' statement of position, the phrase "upon receipt of a complete and readable bill." Not only is "upon receipt" somewhat of a variable, we find the text that follows it (i.e., "a complete and readable bill") could be subject to interpretation or dispute as well. We find delays would result if an interpretation were necessary, and resources would have to be expended to address delays or disputes. As such, we are uncertain how such issues would impact the entire bill issuance and remittance process.

Because the payment of charges is an important component of developing and maintaining strong business relationships, we find a degree of certainty shall be established or maintained. In addition, we find it is reasonable to expect the billed party to promptly remit payment to the billing party, or at a minimum, remit payment before a subsequent bill date in order to avoid late payment charges. In its brief, BellSouth states that NuVox proudly touts its timely payment history with BellSouth. BellSouth believes this undermines the assertions from the Joint Petitioners that they need a full 30 days to review and pay bills. We agree and believe the status quo represents a stable platform that meets the desired performance objectives.

We find BellSouth's current bill rendering practices are reasonable. As noted in Hearing Exhibit 2 and 19, BellSouth's SQM performance results indicate that, on average, BellSouth is

delivering bills to its wholesale customers at "parity" with its own retail customers. We find BellSouth shall not be ordered to make substantive changes to its billing systems on behalf of the Joint Petitioners, and at its own expense, in order to exceed "parity" performance. If individual instances of untimely wholesale performance occur, BellSouth has expressed a willingness to make accommodations upon request. If overall performance is substandard, BellSouth would be subject to SEEM[66] remedy payments.

For these reasons, we conclude that the payment of charges for service shall be payable before the next bill date. Although not tasked with proposing specific language, we find the language proposal that BellSouth proffered in its brief would aptly address this issue.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find payment of charges for service shall be payable on or before the next bill date.

XIX. PAST DUE AMOUNTS WITH REGARD TO NOTICE OF SUSPENSION OR TERMINATION

This issue has been characterized by the Joint Petitioners as a "pull the plug" measure and by BellSouth as a measure for protection from financial risk.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Russell believes that requiring CLECs to pay past due amounts in addition to the amount listed on the past due notice is "unfair and potentially abusive." He asserts that CLECs should only have to pay the amount posted on the notice. The witness states that in order to avoid suspension or termination of service some "magic number" determined by BellSouth would have to be paid.

Witness Russell asserts that the Joint Petitioners are also concerned that problems could arise because of a "shell game," due to the erroneous posting by BellSouth of payments or disputes. The witness explains an error in posting could result in suspension or termination of CLEC service with possible harm to customers in Florida. Witness Russell maintains that in the past BellSouth did not post payments or disputes in a timely manner. The witness also states that NuVox has received notices in error from BellSouth.

[66] SEEM is an acronym for "Self -Effectuating Enforcement Mechanisms." SEEM remedy payments are an integral part of BellSouth's SQM plan.

BellSouth witness Blake[67] argues that treatment notices only apply when a CLEC fails to pay for the services it received. The witness does not believe the due date of the notice should be viewed as an extension of the payment due date on the original bill.

Witness Blake asserts that the Joint Petitioners, as with all CLECs, are currently required to pay all undisputed amounts that are past due as of the due date of the notice. The witness explains that an aging report containing all additional undisputed charges that will become past due during the 15 days between the notice date and suspension of service date is currently included with the suspension notice. In addition, BellSouth explains that it has modified its original language in Section 1.7.2 of Attachment 7 of the proposed Agreement to include information to requesting CLECs on the additional past due charges. As reflected in Hearing Exhibit 2, witness Blake notes that the recent change made in the collection process was "that the collection letter will no longer include any disputed amounts in the total amount due." Witness Blake contends that "concerns about guesswork to determine the amount to pay to avoid suspension or termination are eliminated" based on this change.

Witness Blake asserts that another aspect of the collection process is communication, written and oral, between the parties to eliminate guesswork on the amount of undisputed charges that are due to prevent suspension or termination of service.

B. ANALYSIS

We understand that the recent change in BellSouth's collection process which applies to all CLECs has not added new requirements for paying past due charges, but instead has eliminated any disputed charges from the amount past due in the collection letter, as is the case with the accompanying aging report. From our perspective, these changes address any concerns about guesswork in determining the amount required to be paid.

We find that the Joint Petitioners fail to show how they have been harmed by the current collection process of BellSouth. Even though Joint Petitioners witness Russell testifies at hearing that errors were made in posting of payments and in sending notices to his company, he never mentions any suspension of service. To the contrary, he acknowledges, "We have not had any collection or treatment process transactions."

We do not believe the Joint Petitioners should view the due date of a treatment notice as an automatic extension of the payment due date on the original bill. In our view, the treatment notice does not alter the fact that the original due date is controlling; the treatment process is merely a vehicle for transitioning from a past due status to suspension or termination. On this basis, we find it is reasonable to require that any other past due undisputed amounts be paid as well by the due date on the treatment notice. This approach is consistent with current practice, and we cannot find a compelling reason why BellSouth must treat the Joint Petitioners differently from other CLECs.

[67] BellSouth witness Blake adopted witness Morillo's direct testimony.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that a CLEC shall be required to pay past due undisputed amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination.

XX. DETERMINATION OF DEPOSIT

A. PARTIES' ARGUMENTS

Witness Russell believes this issue is important to the Joint Petitioners because deposits represent capital that is tied-up and not available for other purposes. He asserts that due to the lengthy and established business relationships of the Joint Petitioners with BellSouth, it is reasonable to treat them differently from other companies that have not had a business relationship with BellSouth. Witness Russell explains that because of BellSouth's concerns regarding other CLECs adopting the proposed Agreement, the Joint Petitioners propose a dual approach to establish the maximum deposit: two months' estimated billing for new CLECs and one and one-half months' for existing CLECs.

As an alternative, witness Russell notes that the Joint Petitioners are willing to accept the maximum deposit limits BellSouth agreed to in the ITC^DeltaCom Agreement, which are one month's billing for services billed in advance and two months' billing for services billed in arrears. The witness points out that in Florida this is consistent with the maximum deposit amounts for retail end users, which are one month for local service and two months for toll service.

Witness Russell states that his company, NuVox, has a "stellar" payment history with BellSouth but that BellSouth continues to hold a deposit. The Joint Petitioners characterize BellSouth's proposal as "unreasonable, discriminatory and more than could possibly be justified."

The Joint Petitioners' proposed language for Section 1.8.3 of the most recent draft interconnection agreement reads:

> The amount of the security shall not exceed two (2) month's estimated billing for new CLECs or **one and one-half month's** actual billing **under this Agreement** for existing CLECs **(based on average monthly billings for the most recent six (6) month period)**. Interest shall accrue per the appropriate BellSouth tariff on cash deposits.

BellSouth witness Blake contends that having an existing business relationship does not reduce BellSouth's financial risk. She asserts, and reflected in Hearing Exhibit 3, that not all the Joint Petitioners have a "flattering" payment history. Witness Blake explains that last year all of the Joint Petitioners received suspension notices and one company's ordering access to LENS

was suspended. Hearing Exhibit 2 illustrates that payment arrangements were made with the Joint Petitioner and access was restored.

BellSouth witness Blake explains that a two-month deposit is necessary because it takes approximately 74 days from the first day of service to disconnection for nonpayment. She asserts that BellSouth is still providing service for two weeks that are not covered by a two-month deposit. This can also be seen in Hearing Exhibit 2.

Witness Blake notes that although BellSouth has agreed to different maximum deposit terms with ITC^DeltaCom, other billing and deposit sections of that Agreement have different provisions than the proposed Agreement. She explains that the Joint Petitioners were offered "the exact language we agreed with DeltaCom and they refused." Witness Blake further notes that Florida retail end users have a different deposit amount because of the rules of the Florida Public Service Commission regarding local end users.

BellSouth witness Blake explains that payment history is not the only criterion for determining whether a deposit is required, that other financial factors are involved, and that those factors have been agreed to by the parties and are not in dispute.

BellSouth's proposed language for Section 1.8.3 reads:

> The amount of the security shall not exceed two (2) month's estimated billing for new CLECs or actual billing for existing CLECs. Interest shall accrue per the appropriate BellSouth tariff on cash deposits.

B. ANALYSIS

The parties agree that BellSouth has the right to demand a deposit if a Joint Petitioner does not meet the deposit criteria of Section 1.8.5 of Attachment 7 of the proposed Agreement. There are several undisputed sections of Hearing Exhibit 7 concerning deposits in Attachment 7 of the proposed Agreement:

- Section 1.8 gives BellSouth the right to secure the accounts of existing and new CLECs;
- Section 1.8.2 provides that the security can be cash, irrevocable letter of credit, or surety bond;
- Section 1.8.5 establishes factors to determine when BellSouth can secure the account of an existing CLEC: payment record, liquidity status, and bond rating; and
- Section 1.8.10 addresses refunds of deposits.

As illustrated by Hearing Exhibit 2 the Joint Petitioners either have no maximum deposit or a maximum of two months billing in their agreements with BellSouth. With no maximum, BellSouth can ask for two months' average billing; however, Joint Petitioners witness Russell responds that his company's deposit with BellSouth is less than two months billing.

Joint Petitioners witness Russell states that the maximum deposit should be based on the most recent six-month period. BellSouth witness Blake agrees with using the most recent six-month period. We note that even though the parties agree with using the six-month period, both neglect to address it in their post-hearing briefs. However, footnote 47 of BellSouth's revised post-hearing brief states, "BellSouth is not opposed to using billing associated with the most recent six month period to establish the maximum deposit amount."

We note that the Joint Petitioners oppose BellSouth's proposal for this issue because it ties up capital; however, they do not explain how the proposal adversely affects their business operations. They also voice their objections to the deposit based on payment history, but we concur with the reasoning of BellSouth that payment record is only one of the agreed upon criteria of Section 1.8.5.

Even more persuasive to us is BellSouth witness Blake's statements regarding the 74-day period from commencement of service to physically disconnecting service. Given BellSouth's exposure over the period from service installation to potential termination if payment is not received, we find that BellSouth's proposal for a maximum two-months deposit is certainly justified. Finally, as mentioned above, the Joint Petitioners and BellSouth agree that the most recent six months of data should be averaged to calculate any required deposit.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that the maximum deposit shall not exceed two months' estimated billing for new CLECs or two months' actual billing for existing CLECs based on average monthly billings for the most recent six-month period.

XXI. DEPOSIT IN RELATION TO PAST DUE AMOUNTS

A. PARTIES' ARGUMENTS

Joint Petitioners witness Falvey asserts at hearing that because BellSouth's payment record is often poor, and that under the instant Agreement the deposit provisions are not reciprocal, a deposit offset is appropriate. The witness states that the offset should be the past due, "aged thirty (30) days or more," amounts BellSouth owes a CLEC. The witness also contends that if BellSouth is late paying its invoices, "CLECs have no remedy in the security deposit context."

Witness Falvey maintains that the deposit reduction is necessary and disagrees with BellSouth's response that late payment charges and the Joint Petitioners' ability to suspend or terminate service are protection for their credit risk due to BellSouth's poor payment history. The witness states that BellSouth could request an additional amount equal to the offset after the

company establishes a good payment record and that whatever credit risk BellSouth is trying to shield itself from is reduced by the past due charges owed to the CLECs.

Joint Petitioners witness Falvey insists that the offset calculation should include disputed and undisputed past due amounts. The witness argues that during 2004 BellSouth had disputed $2,008,048.09 in reciprocal compensation payments and $679,577.56 in interconnection transport payments, and during this time overbilled Xspedius over $2 million. The witness explains that under the Joint Petitioners' proposed language for this issue reflected in Hearing Exhibit 2, his company will not have to pay an additional deposit to BellSouth.

The Joint Petitioners' proposed language for Section 1.8.3.1 reads:

> **The amount of security from an existing CLEC shall be reduced by amounts due [CLEC] by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in Section 1.8.5.1, and subject to the standard set forth in Section 1.8.5.** (emphasis in original; disputed language in bold)

BellSouth witness Blake[68] asserts that deposits are collected due to a risk of non-payment, not a risk of slow payment. The witness believes that the appropriate action for a CLEC to take in response to past due charges owed by BellSouth is the assessment of late payment charges or suspension/termination of service. Witness Blake notes that BellSouth is required to provide service to any requesting CLEC and must protect itself from risk, while the Joint Petitioners have no such obligation.

In response to Joint Petitioners' statements that BellSouth has a poor payment history, witness Blake asserts that it has paid 100% of its bills from Xspedius and 80% of its bills from KMC within 30 days of receipt for a recent six-month period. The witness explains that the delays in payment to KMC are due to problems KMC has in providing its invoices. The witness states that there are very few bills with NuVox and NewSouth because of the bill and keep provisions in their agreements.

Under cross-examination and as illustrated in Hearing Exhibit 21, Joint Petitioners witness Falvey acknowledges that the approximately $2.6 million for reciprocal compensation and transport were disputed charges in two April 2004 bills and that in the April 2005 bills BellSouth is approximately 99% current on the transport bill and owes $111,494.84 for reciprocal compensation, which includes $82,340.29 in current charges.

Witness Blake explains that even though BellSouth does not agree that a reduction is appropriate, the company is willing to reduce its deposit request by the undisputed past due

[68] BellSouth witness Blake adopted witness Morillo's direct testimony.

charges pursuant to Attachment 3 of the instant Agreement, provided that once the undisputed past due charges are paid by BellSouth the Joint Petitioner will pay an additional deposit amount for a total deposit equal to the original deposit request. Witness Blake argues, however, that such an offset provision is "confusing and cumbersome from both accounting and operational perspectives."

BellSouth's proposed language for Section 1.8.3.1 reads:

> The amount of the security due from **[CLEC]** shall be reduced by **the undisputed** amounts due **to** [CLEC] by BellSouth **pursuant to Attachment 3 of this Agreement that have not been paid by the Due Date at the time of the request by BellSouth to [CLEC] for a deposit. Within ten (10) days of BellSouth's payment of such undisputed past due amounts to [CLEC], [CLEC] shall provide the additional security necessary to establish the full amount of the deposit that BellSouth originally requested.** (emphasis in original; disputed language in bold)

B. ANALYSIS

We find that reducing the deposit BellSouth requires from the Joint Petitioners by past due amounts owed by BellSouth is not appropriate. First, we recognize that the parties would have a difficult time agreeing on the details of such an approach. As noted previously, in an effort to compromise, BellSouth offered a deposit reduction offset proposal. However, the Joint Petitioners did not agree with BellSouth excluding disputed amounts from the CLEC offset. In addition, the parties disagree on when the offset amount should be paid. The Joint Petitioners' proposal requires BellSouth to establish a good payment record as defined in the Agreement before the offset is paid, while BellSouth's proposal requires the CLEC to pay the offset within ten days of receiving the undisputed past due amount.

Second, we find that the offset proposal could increase disputes between the parties and be administratively burdensome to administer. In response to our staff's interrogatory contained in Hearing Exhibit 2, BellSouth stated:

> . . . Mr. Falvey's testimony suggesting that security deposits be adjusted for BellSouth bills "aged thirty (30) days or more" could most certainly cause conflicts and disputes over deposit amounts, not to mention the confusion surrounding the accounting and classification of this on-going exchange of funds.

In response to one of our staff's interrogatory contained in Hearing Exhibit 3, the Joint Petitioners disagree and note that they do not believe there will be conflicts because deposit requests are made and generally negotiated only once or twice a year, and the appropriate offset or return of such offset would be established at those times. Just because this issue may only be raised once or twice a year does not necessarily lead to fewer disputes or conflicts. Again, given the fact the parties cannot agree on how an offset proposal could be implemented, even though it appears that there have been concessions and ongoing negotiations, we cannot assume that the

disputes would be eliminated going forward just because this matter would only be addressed once or twice a year.

Third, and perhaps most important, we find that requiring a deposit from the Joint Petitioners and the dispute of charges or late payments made by BellSouth are separate issues. A deposit required under the interconnection agreement is intended to protect the ILEC from the financial risk of non-payment for services provided to the CLEC. If BellSouth has a billing dispute or is late paying one of the Joint Petitioners, it should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount of services provided to the Joint Petitioners. Moreover, there are other remedies in place which address past due payments (disputed and undisputed) such as late payment charges, and suspension/ termination of service. As such, the amount of the deposit BellSouth requires from a Joint Petitioner shall not be reduced by past due amounts owed by BellSouth to CLEC.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that the amount of the deposit BellSouth requires from CLEC shall not be reduced by past due amounts owed by BellSouth to CLEC.

XXII. POSSIBLE TERMINATION OF SERVICE

This issue has been characterized by the Joint Petitioners at hearing as a "pull the plug" measure and by BellSouth as a measure for protection from financial risk.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Russell asserts that BellSouth cannot bypass the dispute resolution provisions of the proposed Agreement by terminating CLEC services. He states that if the parties do not agree on a deposit request, then the proper recourse is the dispute resolution process; the Commission, not BellSouth, should resolve the dispute.

Witness Russell explains that termination of service is a drastic remedy and is only appropriate in two circumstances: 1) when the Commission orders the deposit and the CLEC does not pay it; and 2) when the CLEC agrees to the deposit and then does not pay.

Witness Russell also believes there could be occasions when a CLEC could dispute whether the deposit request was appropriate and that dispute could fall under Issue 103.

The Joint Petitioners' proposed language for Section 1.8.6 reads:

> In the event [CLEC] fails to remit to BellSouth any deposit requested pursuant to this Section **and either agreed to by [CLEC] or as ordered by the Commission** within thirty (30) calendar days **of such agreement or order**, service to [CLEC] may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to [CLEC]'s account(s). (emphasis in original; disputed language in bold) (BR JP-EXH A, p.19)

BellSouth witness Ferguson notes that the CLEC has 30 days to either dispute the request for a deposit, or pay the deposit. The witness does not believe that every deposit request that the CLEC does not agree with should have to go to this Commission, and sees the Joint Petitioners' proposal as a tactic to delay paying a deposit.

Witness Ferguson explains that the parties have agreed that BellSouth has a right to a deposit and have agreed on the criteria to determine the need for a deposit. The witness states that this provision only applies when a CLEC ignores a deposit request.

BellSouth's proposed language for Section 1.8.6 reads:

Subject to Section 1.8.7 following, in the event [CLEC] fails to remit to BellSouth any deposit requested pursuant to this Section within thirty (30) calendar days **of [CLEC]'s receipt of such a request,** service to [CLEC] may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to [CLEC]'s account. (emphasis in original; disputed language in bold)

B. ANALYSIS

It is our understanding that this issue only provides a recourse for BellSouth when a CLEC does nothing after receiving a request for a deposit.

We are concerned that the Joint Petitioners either do not understand the issue or have tried to expand the issue to include dispute resolution provisions. It is our understanding that the Joint Petitioners' proposal would require BellSouth to acquire either the CLEC's or this Commission's approval before asking for a deposit. This process is counter to the already agreed upon language in section 1.8 which gives BellSouth the right to secure accounts with deposits.

We find that 30 calendar days is sufficient time for a CLEC to decide to dispute or pay a deposit request. In order to make such a decision, a CLEC would need to review the undisputed deposit criteria of Section 1.8.5 of Attachment 7: payment record for past 12 months, liquidity status, and bond rating, all of which shall be accomplished in 30 days or less.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that BellSouth is entitled to terminate service to the CLEC pursuant to the above process for termination due to non-payment if the CLEC refuses to: (1) remit any deposit required by BellSouth; and (2) does not dispute the deposit request per Section 1.8.7 of the proposed Agreement, within 30 calendar days.

XXIII. CONCLUSION

We have conducted these proceedings pursuant to the directives and criteria of Sections 251 and 252 of the Act. We find that our decisions are consistent with the terms of Section 251, the provisions of FCC rules, applicable court orders and provision of Chapter 364, Florida Statutes.

The parties shall be required to submit a signed agreement that complies with this Order for approval within 30 days of issuance of this Commission's Order. This docket shall remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that the issues for arbitration identified in this docket are resolved as set forth within the body of this Order. It is further

ORDERED that pursuant to Order No. PSC-05-0443-PCO-TP, issued April 26, 2005, the resolution of the issues move from this docket to Docket No. 041269-TP are to be rolled back into Docket No. 040130-TP as if arbitrated. It is further

ORDERED that the parties are required to submit a signed agreement that complies with this Commission's decisions in this docket for approval within 30 days of issuance of this Commission's Order. It is further

ORDERED that this docket will remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

By ORDER of the Florida Public Service Commission this 11th day of October, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

JLS/KS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION
ARBITRATION PANEL

In the Matter of:

Joint Petition for Arbitration by NewSouth Communications, Corp., KMC Telecom V, Inc., KNIC Telecom III LLC, and Xspedius Communications, LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jackson, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc.

Docket No. 2004-AD-094

FILED

DEC 13 2005

MISS. PUBLIC SERVICE
COMMISSION

RECOMMENDATION OF THE ARBITRATION PANEL TO THE MISSISSIPPI PUBLIC SERVICE COMMISSION

The following Arbitrators participated in the disposition of this matter:
Marc Brand, Chairman,
Keith Howle, Arbitrator
Samuel J. Nicholas, Jr., Arbitrator,

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CASE HISTORY

NewSouth Communications Corp. ("NewSouth"), which during the course of this arbitration merged with NuVox Communications, Inc. ("NuVox") with the surviving entity being NuVox, and Xspedius Communications, LLC ("Xspedius") (collectively referred to as "Joint Petitioners")[1] filed a Petition for Arbitration ("Petition") pursuant to the Telecommunications Act of 1996 (the "1996 Act") with the Mississippi Public Service Commission ("Commission") on February 11, 2004. On March 8, 2004, BellSouth Telecommunications, Inc. ("BellSouth") filed its Response to the Petition. Initially, the Joint Petitioners asked the Commission to resolve 107 issues, excluding subparts. As a result of continued negotiations by the Parties and decisions by this arbitration panel duly assigned by the Commission ("Panel"), only 13 issues remain for the Panel's consideration.[2]

On July 16, 2004, the Parties filed a Joint Motion for Abeyance with the Panel in which the Parties asked for a 90-day abatement of the arbitration proceeding so that they could include and address issues relating to the D. C. Circuit's decision in *United States Telecom Ass 'n v.* FCC, 359 F.3d *554* (D.C. Circuit 2004) *("USTA II")* in this proceeding. The Panel granted the abeyance on July 20, 2004. During this 90-day abatement period, the Federal Communications Commission ("FCC") issued its *Order and Notice of Proposed Rule Making* in WC Docket No. 04-313, CC Docket No. 01-338 *("Interim Rules Order").* At the end of the abeyance period, on November 19, 2004, the Parties filed a revised Joint Matrix, which included Items 108-114 ("Supplemental

[1] Originally, KMC Telecom V, Inc. and KMC Telecom III LLC ("KMC") were also parties to this Arbitration along with the other Joint Petitioners. However, on May 27, 2005, KMC filed a Notice of Withdrawal With Prejudice with the Commission. Thus, KMC is no longer a Joint Petitioner.
[2] Pursuant to the Panel's June 14, 2005 Order, Issues 26, 36-38, and 51 have been moved to the Commission's Generic Proceeding (Docket No. 2005-AD-139) for consideration and resolution.

Issues"). These Items addressed *USTA II* and the *Interim Rules Order.*

On March 11, 2005, the FCC's Final Unbundling Rules in, FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) *("TRRO")* became effective. No issues in the arbitration substantively address the *TRRO* because that decision was not effective until March 2005 and thus after the time period for identifying issues to be arbitrated in this proceeding. Nevertheless, Issues 23, 108, 113 and 114 are similar if not identical to issues being addressed in the Commission's Generic Change of Law Proceeding (Docket No. 2005-AD-139) relating to changes of law resulting from the *TRO* and the *TRRO.* Consequently, the Parties jointly asked and the Panel agreed to move these issues to the Generic Change of Law Proceeding for consideration and resolution on June 8, 2005. Similarly, because the *TRRO* also rendered several arbitration issues relating to the *Interim Rules Order* moot, the Panel also found in its Order issued on June 8, 2005 that Issues 109, 110, 111, and 112 were moot and removed them from the arbitration. Finally, in its Order of June 14, 2005, the Panel moved Issues 26, 36-3 8, and 51 in the arbitration to the Commissions' Generic Change of Law Docket (Docket No. 2005-AD-139) for consideration and resolution because the Commission is considering similar, if not identical issues, in that proceeding.

The Evidentiary Hearing in this matter was held on June 15, 2005. At the hearing, BellSouth submitted the pre-filed testimony of Kathy Blake, Scot Ferguson, and Eric Fogle. The Joint Petitioners submitted the testimony of Hamilton Russell, James Falvey, Marva Johnson, John Fury, Robert Collins, and Jerry Willis.

As noted earlier, on May 27, 2005, KMC Telecom V, Inc. and KIVIC Telecom III, LLC ("KMC") filed a Notice of Withdrawal of Arbitration Petition with Prejudice. Thus, the KMC entities are no longer parties to this proceeding, their claims and arguments have been voluntarily dismissed with prejudice, and the Panel's rulings will not apply to the KMC entities.

LEGAL STANDARDS

Sections 251 and 252 of the 1996 Act encourage negotiations between Parties to reach local interconnection agreements. Section 252(a) of the 1996 Act requires incumbent local exchange carriers ("ILECs") to negotiate the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 25 1(c)(2)-(6). As part of the negotiation process, the 1996 Act allows a party to petition a state Commission for arbitration of unresolved issues.[3] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[4] The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the Parties with respect to those issues; and (3) any other issues discussed and resolved by the Parties."[5] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the Commission receives the petition.[6]

The 1996 Act limits a state commission's consideration of any petition (and any

[3] 47 U.S.C. § 252(b)(2)
[4] *See generally,* 47 U.S.C. §§ 252 (b)(2)(A) and 252 (b)(4)
[5] 47 U.S.C. § 252(b) (2)
[6] 47 U.S.C. § 252(b) (3)

response thereto) to the unresolved issues set forth in the petition and in the response.[7] Further, an ILEC can only be required to arbitrate and negotiate issues related to Section 251 of the 1996 Act, and the Commission can only arbitrate non-251 issues to the extent they are required for implementation of the interconnection agreement.[8] Issues or topics not specifically related to these areas are outside the scope of an arbitration proceeding. Importantly, Section 252 makes clear that the Arbitrators' role is to resolve the parties' open issue to "meet the ***requirements*** of Section 251, including the regulations prescribed by the [FCC]." 47 U.S.C. § 251(c)(1) (emphasis added).

[7] 47 U.S.C. § 252(b) (4)
[8] *Conserve Limited Liab. Corp. v. Southwestern Bell Tel.*, 350 F.3d 482,487 (5th Cir. 2003); *MCI Telecom., Corp. v. BellSouth Telecom., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

ISSUES

Issue 4: What should be the limitation on each Party's liability in circumstances other than gross negligence or willful misconduct?

Position of the Parties

Joint Petitioners: Liability for negligence should be limited to an amount equal to 7.5% of the aggregate fees, charges or other amounts billed for any and all services provided or to be provided pursuant to the Agreement as of the day the claim arose.

BellSouth: The industry standard bill credits should apply, which limits the liability of the provisioning party to a credit for the actual cost of the services or functions not performed or improperly formed.

Analysis and Findings: The Joint Petitioners seek to have each Party's liability limited to 7.5 percent of amounts paid or payable at the time the claim arose, subject to several caveats and conditions. Conversely, BellSouth's proposed language memorializes the standard in the industry as it limits each Party's liability for negligent acts to bill credits. For the following reasons, we adopt BellSouth's position and proposed language.

The Joint Petitioners' language exceeds the Federal Communications Commission's ("FCC") Wireline Competition Bureau's standard as to the scope of an ILEC's liability to a competitive local exchange carrier ("CLEC"). The FCC determined that an ILEC should treat a CLEC in the same manner that it treats its retail customers: "Specifically, we find that, in determining the scope of Verizon's liability, it is appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers." *In the*

Matter of Petition of WorldCom, Inc. Pursuant to Section 252 (E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission, CC Docket No. 00-2 18, 17 FCC Rcd. 27,039 (Jul. 17, 2002) *("Virginia Arbitration Order")* at ¶ 709 *See also, Sprint Communications, LP,* Case No. 96-102I-TP-ARB (Ohio P.U.C. Dec. 27, 1996), 1996 WL 773809 at *32 ("The panel does not believe that GTE's proposal to limit its liability to Sprint to the same degree it limits its liability to its own retail customers is unreasonable... In accordance with the Commission's award in 96-832, it is appropriate for GTE to limit its liability in the same manner in which it limits its liability to its customers."); *In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.,* Docket No. 05-BTKT-365-ARB, Kansas Corporation Commission at 102 (Feb. 16, 2005) (refusing to adopt the Joint Petitioners' and CLEC proposal for limitation of liability language that exceeded bill credits).

BellSouth's proposed language complies with this standard as it limits each Party's liability for negligence to bill credits, which is exactly the standard applied to BellSouth's retail customers and the same standard that has governed the parties' relationship for the last eight years. (FL Tr. at 182; 943; Exhibit 14 at § A2.5.1). The Joint Petitioners do not contest this fact and concede that the provision of bill credits is "probably the current practice" in the industry. *(See* Russell Depo. at 82-83; *see also* FL Tr. at 182).[9]

[9] Reference to "Russell Depo" and similar references to the other Joint Petitioner depositions means the depositions taken by the parties as part of the North Carolina proceeding and which have been entered into the record here. When referring to depositions taken by the Florida Staff, which are part of this record, the citation will read "Russell FL Staff Depo."

By contrast, the 7.5 percent language proposed by the Joint Petitioners is not the standard in the industry. The Joint Petitioners are aware of no interconnection agreement that contains language that is identical or similar to what the Joint Petitioners propose here. *See* Joint Petitioners Supplemental Response to Request for Production No. 6; Russell Depo. at 43. Indeed, the Joint Petitioners' current interconnection agreements limit each Party's liability to bill credits. (MS Tr. at 40). Although the KMC entities are no longer parties to this arbitration, it is illuminating on this issue to note that KMC is arbitrating with Sprint and SBC in several other states and KMC did not propose similar limitation of liability language in any of those proceedings. *See* Johnson Depo. at 54. Likewise, none of the Joint Petitioners have similar limitation of liability language in their tariffs or standard contracts with Mississippi consumers. (MS Tr. at 43; 69; FL Tr. 182, 184; KMC MS Tariff at § 2.I.4(A)(H); NuVox MS Tariff at § 2.1 .4(B)(C); Xspedius MS Tariff at § 2.1 .4(A)(H)). Instead, like BellSouth, the Joint Petitioners limit their liability to bill credits. *Id.* And, KMC and NuVox impose limitation of liability language on their Mississippi customers that actually exceeds BellSouth's language as they limit their liability even for claims resulting from gross negligence or willful misconduct. *See* Johnson Depo. at 62; KMC MS Tariff at § 2.1.4(H), NuVox MS Tariff at § 2.1.4(B). Accordingly, the Joint Petitioners' proposed language violates the standard established by the FCC's Wireline Competition Bureau and other state commissions and cannot be adopted. The Joint Petitioners are not entitled to greater limitation of liability rights against BellSouth than what BellSouth provides for its own customers and what the Joint Petitioners are willing to provide to their customers.

The Panel rejects the Joint Petitioners' reliance on an alleged Xspedius template

contract (XSP 00004-5) to support their claim. The Xspedius contract actually supports BellSouth's proposed language as it limits Xspedius' liability to ***bill credits*** for tariffed services. In particular, it provides that (1) the terms and conditions contained in the contract "supplement" those set forth in Xspedius' tariffs (XSP 00004, Preamble); (2) "[i]n the event of any conflict among the Agreement and its Addenda, Attachments, Service Order Forms, or the terms or rates of Xspedius' tariffs, ***the terms and rates of the tariff shall control*** if the service itself is tariffed"; (XSP 00004, Preamble) (emphasis added); (3) Xspedius' liability for the interruption of tariffed service is limited to bill credits (XSP 00004, § 6); and (4) the "[c]ustomer's exclusive remedies under this Agreement shall be (i) the termination of rights in section 6, and (ii) any credits for outages specifically set forth in the Agreement." (XSP 00004 1; § 15).[10] Thus, Xspedius' liability for the provision of tariffed services in the contract is limited to bill credits, which is the same standard in Xspedius' tariff, the same standard employed by BellSouth with its retail end users, and the same standard offered by BellSouth to resolve this issue.

Although the Panel finds merit in both BellSouth's and the Joint Petitioners' arguments, the Panel agrees with the reasoning of the FCC Wireline Competition Bureau regarding an incumbent local exchange company's (ILEC) liability when contracting with a competitive local exchange (CLEC). The FCC Wireline Competition Bureau, acting through authority expressly delegated from the FCC to stand in the stead of the Virginia State Corporation Commission, found that,

[10] It should be noted that Section 6 of the Xspedius contract does not address termination rights. Rather, this section refers to credits for interruption of tariffed services.

> Verizon has no contractual relationship with WorldCom's customers, and therefore lacks the ability to limit its liability in such instances, as it may with its own customers. As the carrier with a contractual relationship with its own customers, WorldCom is in the best position to limit its own liability against its customers in a manner that conforms with this provision.

See 17 FCC Rcd 27039, 27382 (FCC 2002). The Panel finds that in this instance, BellSouth and the Joint Petitioners are in the best position to limit their liability with their customers.

Conclusion: The Panel finds that a party's liability should be limited to the issuance of bill credits in all circumstances other than gross negligence or willful misconduct.

Issue 5: BellSouth Issue Statement: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks? Joint Petitioners' Issue Statement: Should each Party be required to include specific liability-eliminating terms in all of its tarrifs and End User contracts (past, present, and future), and to the extent that a Party does not or is unable to do so, should it be obligated to indemnify the other Party for liabilities not limited?

Position of the Parties

Joint Petitioners: Joint Petitioners should be able to offer commercially reasonable limitation-of-liability terms to their customers without being penalized by BellSouth by being forced to indemnify it. Joint Petitioners require this flexibility in negotiations in order to compete fairly with BellSouth in response to demands for custom contracts.

BellSouth: The purpose of this provision is to put BellSouth in the same position it would be in if a CLEC end user was a BellSouth end user. Accordingly, to the extent the Joint Petitioners decide not to limit their liability in accordance with industry standards to their end users, the Joint Petitioners should indemnify or reimburse BellSouth for any loss sustained by BellSouth.

Analysis and Findings: The exact language BellSouth proposes for this issue is in the Joint Petitioners' current agreement and has never been the subject of any dispute. (FL Tr. at 204-205). Further, the Joint Petitioners currently have limitation of liability language in their tariffs and contracts; they believe that their language is the maximum limit allowed by law; they have no plans to remove this language; their tariffs are in force and in effect today; and they intend to enforce tariff provisions limiting their liability. (FL

Tr. at 203; Russell Depo. at 87; Falvey Depo. at 61; Johnson Depo. at 8 1-82; NuVox MS Tariff at § 2.1.4; KMC MS Tariff at § 2.1.4; 2.1.6; Xspedius MS Tariff at § 2.1.4; 2.1.6). In fact, as conceded by NuVox witness Russell, having unlimited liability is not a prudent business move. (*See* Russell Depo. at 82).

Nevertheless, the Joint Petitioners object to BellSouth's language on the premise that the Parties cannot limit the right to third Parties via this contract. While the Panel agrees with this legal principle, it has no application here. BellSouth is not limiting the rights of any third party or dictating the terms by which the Joint Petitioners can offer service to their customers. Rather, BellSouth's language — language that has governed the Parties' relationship for the last several years — imposes obligations upon the Joint Petitioners in the event they make a business decision to not limit their liability within industry standards.

This problem is further compounded by the fact that the Joint Petitioners' end users are not purchasing services out of BellSouth's tariffs and are not under contract with BellSouth. (FL Tr. at 205). Accordingly, if the Joint Petitioners commit to providing a customer $1,000 if they fail to provision a loop within a specific time period and BellSouth misses the due date for the loop, the Joint Petitioners could seek to recover the $1,000 guaranteed to the customer from BellSouth through the indemnification language. (FL Tr. at 808). If, instead, that customer were a BellSouth customer, however, BellSouth's total exposure would be for bill credits. BellSouth should not be exposed to greater liability than otherwise contemplated simply because the end user is a CLEC end user rather than a BellSouth end user. The Minnesota Public Utilities

Commission addressed this exact scenario in rejecting similar indemnification language proposed by AT&T in arbitration with Qwest:

> Generally, the Commission regards indemnity clauses as means for allocating foreseen risks, not as means to induce Parties to insure one another against unanticipated and unbounded possibilities. Quest expressed concern that AT&T could advertise that it would not limit liability for consequential damage for service interruptions, knowing that Qwest would make AT&T whole if a claim ever arose. Whether or not this is a likely scenario, the indemnity language should not be drafted in a fashion to enable such a result.

In re: Petition ofAT&T Communications of the Midwest, Inc., Mm. P.U.C., Docket No. P-442, 421/IC-03-759, 2003 WL 2287903 at *18 (Nov. 18, 2003) ("*Minnesota Arbitration Order*"); *see also, In re: AT&T Communications of New York, Inc.*, N.Y. P.S.C., Case OI-C-0095, 2001 WL 1572958 at 12 (finding that AT&T should implement tariff and contract provisions to limit Verizon's potential liability to AT&T customers).

Each CLEC has the ability to limit its liability through its customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC should bear the resulting risk. The Panel notes that all parties to this proceeding currently limit their liability via their tariffs. The Panel finds that there is no compelling reason to deviate from such practice. The appropriate method of limiting liability is through the parties' tariffs. The Joint Petitioners and BellSouth currently have limitation of liability language in their tariffs and can enforce the tariff provisions limiting their liability. The Joint Petitioners concede that with regard to limiting liability, the provision of bill credits is probably the current practice in the industry. (Russell TR 182) The Panel does not believe deviating from the industry

standard is necessary or appropriate in this instance. However, even if this was not the case, the Panel notes that each of the parties to this proceeding has the ability to limit its liability to its customers through its own tariffs. If a party chooses not limit its liability through its own tariff, then the Panel believes it must assume the risk of liability.

Conclusion: The Panel finds that CLECs have the ability to limit their liability through their customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC should bear the resulting risk.

Issue 6: Bellsouth's Issue Statement: How should indirect, incidental or consequential damages be defined for purposes of the Agreement? Joint Petitioners' Issue Statement: Should limitation on liability for indirect, incidental, or consequential damages be construed to preclude liability for claims or suits for damages incurred by CLEC's (or BellSouth's) End Users to the extent such damages result directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance obligations set forth in the Agreement?

Position of the Parties

Joint Petitioners: The Agreement should be clear that damages to end users that result directly, proximately, and in a reasonably foreseeable manner from a party's performance do not constitute "indirect, incidental, or consequential" damages. Petitioners should not be barred from recovering such damages subject to the Agreement's limitation of liability for negligence.

BellSouth: As conceded by the Joint Petitioners, the language proposed by the Joint Petitioners is of no force and effect as a matter of law and also is unnecessary. In addition, adoption of the Joint Petitioners' language emasculates the already agreed upon concept that the Parties would be subject to some form of limitation of liability.

Analysis and Findings: Upon review of the record and the parties' arguments, the Panel is of the opinion that there is no need to define these terms in an interconnection agreement. The issue of whether particular damages constitute indirect, incidental or consequential damages is best determined, consistent with applicable precedents, if and when a specific damage claim is presented to the Commission or to a court. The

Panel is of the opinion that third-party claims that solely involve damages would more than likely fall outside the Commission's jurisdiction.

In *Southern Bell Tel. & Tel. Co. v. Mobile America Corp*, the court held that "Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, § 5(b), Fla.Const." 291 So.2d 199, 202 (Fla. 1974). In light of this decision, the Panel recommends not defining aforementioned damages. The Commission has previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to Section 364.162, Florida Statutes." *See* PSC Order No. PSC-04-0972-TP, issued October 7, 2004. However, in the event a dispute falls outside the Commission's or FCC's jurisdiction, then the claimant would likely seek relief in a court of competent jurisdiction. In that situation, it would then fall under the review of that court to define the terms based upon the applicable case law.

Conclusion: The Panel finds that the Commission should not define indirect, incidental or consequential damages for purposes of the Agreement. The decision of whether a particular type of damage is indirect, incidental or consequential should be made, consistent with applicable law, if and when a specific damage claim is presented to the Commission or a court.

Issue 7: What should the indemnification obligations of the parties be under this Agreement?

Position of the Parties

Joint Petitioners: The Party receiving services should be indemnified, defended and held harmless by the Party providing services against any claims, loss or damage to the extent reasonably arising from or in connection with the providing Party's negligence (subject to limitation of liability for negligence), gross negligence or willful misconduct.

BellSouth: The party providing service should be indemnified by the receiving party when the end user of the receiving party sues the providing party. Adoption of the Joint Petitioners' language results in (1) BellSouth having virtually unlimited indemnification obligations to the Joint Petitioners while the Joint Petitioners will have essentially no indemnification obligations to BellSouth; and (2) BellSouth having no indemnification rights against the Joint Petitioners even when sued by a Joint Petitioner end user solely because of the faults of the Joint Petitioner.

Analysis and Findings: Although we find merit in each of the parties' positions, we find a Party should be indemnified, defended and held harmless against claims, loss or damage to the extent reasonably arising from or in connection with the other Party's gross negligence or willful misconduct. While both BellSouth's and the Joint Petitioners' arguments are very persuasive, the Panel does not find a compelling reason to deviate from the usual practice of limiting liability through the use of its tariffs. We believe that neither party should be required to indemnify the other party for claims of negligence.

The Panel believes this issue only applies to instances of gross negligence or willful misconduct by a party to the Agreement.

Further, neither party has contractual relationship with the other party's customers and therefore cannot limit its liability through an agreement with those customers. In this instance, the Panel believes it is appropriate for BellSouth to limit its liability in its tariffs because it lacks the ability to directly limit its liability to third-party users. The Panel is reluctant to agree with the Joint Petitioners because interconnection agreements should not be construed like typical commercial agreements as the Joint Petitioners suggest.[11] The carrier with a contractual relationship with its own customers is in the best position to limit its own liability against that customer in instances other than gross negligence and willful misconduct.

Conclusion: The Panel finds that a Party should be indemnified, defended and held harmless against any claims, loss or damage to the extent reasonably arising from or in connection with the other Party's gross negligence or willful misconduct.

[11] "...interconnection agreements are 'not . . . ordinary private contract[s],' and are 'not to be construed as . . . traditional contract[s] but as . . . instrument[s] arising within the context of ongoing federal and state regulation.' *E.spire Communications, Inc., v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004); *see also Verizon Md., Inc. v. Global Naps*, Inc., 377 F.3d 355, 364 (4th Cir. 2004) (interconnection agreements are a "creation of federal law" and are "the vehicles chosen by Congress to implement the duties imposed in § 251"). *BellSouth Telcomms., Inc. v. Miss. PSC*, 368 F. Supp. 2d 557 (D. Miss., 2005)

Issue 9: BellSouth's Issue Statement: Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the Interconnection Agreement? Joint Petitioners' Issue Statement: Should a court of law be included among the venues available at which a Party may seek dispute resolution under the Agreement?

Position of the Parties

Joint Petitioners: No legitimate dispute resolution venue should be foreclosed to the Parties and either Party should be able to petition the Commission, the FCC, or a court of competent jurisdiction for resolution of a dispute. The Commission should decline BellSouth's invitation to unlawfully strip state and federal courts of jurisdiction.

BellSouth: As the expert agencies, the Commission or FCC should resolve disputes within their jurisdiction or expertise. If a dispute is outside the jurisdiction or expertise of the Commission or the FCC, the Parties should be able to bring disputes to a court.

Analysis and Findings: BellSouth takes the position that the Panel should order such a requirement but that, if the dispute is outside the jurisdiction or expertise of the Commission or FCC, the Parties can take the dispute to a court of law. (FL Tr. at 886; BellSouth Exhibit "A", GT&C at § 13.1). Conversely, the Joint Petitioners want to bring a dispute to any court of law.

We find that either party should be able to file a petition for resolution of a dispute in any available forum, but that the Commission should resolve matters that are within its expertise and jurisdiction. Interconnection agreements achieved through either

voluntary negotiations or through compulsory arbitration are established pursuant to Section 252 of the 1996 Act. Specifically, Section 252(e)(l) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the Commission for approval. As such, unlike a court, state commissions are in the best position to resolve disputes relating to the interpretation or enforcement of an agreement that it approves pursuant to the 1996 Act. (FL Tr. at 814; MS Blake Direct at 40).

The U.S. Court of Appeals for the Eleventh Circuit used this same rationale to find that state commissions have the authority under the 1996 Act to interpret interconnection agreements. *See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003). As stated by the court: "Moreover, the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance and to subject their determination to challenges in the federal courts." *Id.* (emphasis added). The FCC has also held that, "due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements." *Id.* (quoting *In re: Starpower*, 15 FCC Rcd at 11280(2000)).

The constitutional guaranty of due process demands that a party may petition a tribunal it deems to have jurisdiction over the claim. *See, Black's Law Dictionary, Fifth Edition*, p. 449, citing, *Di Aaio v. Reid*, 132 N.J.L. 17, 37 A.2d. 829, 830. It is our understanding that it would incumbent on that tribunal to either exercise its jurisdiction,

or to determine that it lacks jurisdiction. In light of this constitutional guarantee, the Panel finds that no tribunal should be foreclosed to the Parties, and either Party should be able to petition the Commission, the FCC or a court of competent jurisdiction.

However, we find that the Commission has primary jurisdiction over most disputes arising out of interconnection agreements, and is in the best position to resolve those disputes. For example, the Commission has previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to Section 364.162, Florida Statutes." *See*, PSC Order No. PSC-04-0972-TP, issued October 7, 2004. In the event the dispute falls outside the Commission's or FCC's jurisdiction, such as a claim for third-party damages, then the claimant could file in a court of competent jurisdiction.

The Panel finds no merit in Joint Petitioners' argument that litigating in State Commissions would force them into heavily discounted, non-litigated settlements with BellSouth. There is little, if any, efficiency gained in this position. The Joint Petitioners would still have to file a complaint in the state in which they sought relief. The Panel is of the opinion that the only difference would be that the litigation would be in the court system of a state, rather than in that state's Public Service Commission. Neither party should be foreclosed in a forum, thus the Agreement should not define a specific forum. However, this Panel strongly notes that the Commission has primary jurisdiction over most disputes arising from interconnection agreements.

Conclusion: In conclusion, we hold that either party should be able to file a petition for resolution of a dispute in any available forum. But, the Commission has primary jurisdiction over most disputes arising from interconnection agreements and that a petition filed in an improper forum would ultimately be subject to being dismissed or held in abeyance while the Commission addressed the matters within its jurisdiction.

Issue 12: Should the Agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?

Position of the Parties

Joint Petitioners: Consistent with Georgia contract law, nothing in the Agreement should be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, as defined in the Agreement, except in such cases where the Parties have negotiated an express exemption or agreed to abide by other standards.

BellSouth: The Parties agree that the interconnection agreement contains the Parties' interpretation of various FCC rules and decisions. The Parties also agree that the Parties should be confident as to the scope of their obligations and that the purpose in contracting is to be expressly clear. However, adoption of the Joint Petitioners' language results in the complete confusion of BellSouth's obligations and potential obligations. The Joint Petitioners' should not be allowed to use a new reading of "Applicable Law" to (1) take positions contrary to which they have already agreed or to create new obligations, not in existence in the agreement; or (2) impose state law obligations upon BellSouth that are not even referenced in the agreement and which could be preempted by federal law in this Section 252 interconnection agreement. Accordingly, when one party asserts that the other party has an obligation under substantive telecommunications law that is not addressed in the agreement and that obligation is disputed, the Commission should resolve the dispute and, if found applicable, the obligation should apply prospectively, only.

Analysis and Findings: BellSouth argues that this issue centers on how the Parties should handle disputes when one Party asserts that an obligation, right, or other requirement relating to telecommunications law is applicable even though such obligation, right, or requirements is not expressly memorialized in the interconnection agreement. The Joint Petitioners take the position that the law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise. (FL Tr. at 220; Russell Depo. at 142; 145).

The purpose of an agreement is to create specific obligations to do or not to do a particular thing. It is essential to have a document that contains specific terms and conditions. The Panel is of the opinion that a provision in the Agreement stating when explicit language would apply, and when it would not, could cause more confusion. While the parties raise arguments over applicable law, these arguments are premature. These arguments are more appropriately addressed on a case-by-case basis as the disputes arise.

Conclusion: The Panel holds that the Agreement should not explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties. A provision including such a statement could be subject to various interpretations in the context of a dispute. Instead, the contract should be interpreted according to its explicit terms if those terms are clear and unambiguous. If the contract language at issue in a dispute is deemed ambiguous, the terms should be interpreted in accordance with applicable law governing contract interpretation.

Issue 65: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

Position of the Parties

Joint Petitioners: BellSouth may not impose upon Joint Petitioners a new non-TELRIC, unjustified, and discriminatory Transit Intermediary Charge ("TIC") for transit traffic in addition to the TELRIC tandem switching and common transport charges the Parties already have agreed will apply to transit traffic. The TIC is a "tax" that is unlawful.

BellSouth: BellSouth has no 251 obligation to provide the transit function under the 1996 Act. However, BellSouth has agreed to provide this function, just not at TELRIC. The FCC in the TRO, the Wireline Competition Bureau of the FCC in the Virginia Arbitration Order, and other state commissions have all reached the same conclusion. Accordingly, the Panel should reach the same conclusion here, and the Panel cannot order otherwise because it involves a request that is not encompassed within Section 251.

Analysis and Findings: The panel hereby adopts the language found within the proposed order submitted by BellSouth in this matter for this issue. We agree that BellSouth has no obligation to provide a transit function under the 1996 Act. The FCC confirmed this legal principal in the *TRO*: "To date, the Commission's rules have not required incumbent LECs to provide transiting." *TRO* at ¶ 534, n. 1640. However,

BellSouth has agreed to provide the transit function to the Joint Petitioners, just not at TELRIC rates. The Georgia Commission already has determined that BellSouth does not have to provide the transit function at TELRIC prices and has ordered that CLECs pay a non-TELRIC transit intermediary charge ("TIC") of $.0025 as an interim rate. *See BellSouth's Petition for a Declaratory Ruling Regarding Transit Traffic,* Docket No. 16772-U, *Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies*, G.P.S.C. (Mar. 24, 2005).[12] We reach the same conclusion here. Such a decision is consistent with the decisions of the FCC's Wireline Competition Bureau in the *Virginia Arbitration Order*[13], the decision of the FCC in the *TRO*[14]; and the decisions of state commissions[15], all of which support the conclusion that the TIC should not be TELRIC-based because BellSouth has no 251 obligation to provide the transit function to the Joint Petitioners. Specifically, in the *Virginia Arbitration Order*, the FCC's Wireline Competition Bureau held:

> We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 25 1(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such duty. In the absence of such a precedent or rule, we decline, on delegated

[12] The Joint Petitioners argue that BellSouth did not offer a composite TIC rate in this arbitration and thus the Panel should disregard the Georgia Commission's decision. We disagree. Regardless of whether the TIC rate is a composite rate or a stand-alone rate, BellSouth never has wavered from its position that TELRIC rates do not apply to the TIC. (GA Tr. at 1104-05).

[13] *Virginia Arbitration Order* at ¶ 117.

[14] *Triennial Review Order*, FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("*TRO*") at ¶ 534, n. 1640 ("To date, the Commission's rules have not required incumbent LECs to provide transiting.")

[15] *See In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB at 102 (Feb. 16, 2005).

> Commission, to determine for the first time that Verizon has a section 25 l(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under section 25l(A)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.

Virginia Arbitration Order at ¶ 117.

In addition to the fact that BellSouth does not have any obligation under Federal law to provide the transit service at TELRIC rates (as confirmed by the TRO), BellSouth incurs costs in providing the transit service that are not recovered by TELRIC rates. Specifically, as part of the transit function, BellSouth sends call records to the terminating carrier so that it can bill the originating carrier or the CLEC. (MS Tr. at 167). If the Joint Petitioners do not want these records, which are part of BellSouth's service, they can directly interconnect with other carriers. (MS Tr. at 168). And, indeed they do, as confirmed by KMC witness Mertz:

> Q. All right. Now, you would agree with me that KMC could avoid using BellSouth's service by directly interconnecting with NuVox, correct?
>
> A. Correct.
>
> Q. And KMC actually does interconnect with several different carriers, is that right?
>
> A. Yes.
>
> **********
>
> Q. When you directly interconnect with the terminating carrier, you avoid the BellSouth transiting function?
>
> A. Yes, we do.

(FLTr. at 41 1-12).

Finally, we find that we have no jurisdiction to force BellSouth to provide this function at a TELRIC price. BellSouth only has an obligation to negotiate and arbitrate those issues listed in Section 251(b) and (c) of the 1996 Act. *See Consev*, 350 F.3d at 487. In addition, the Panel only has the authority under the 1996 Act to arbitrate non-Section 251 issues if the issue was a condition required to implement the agreement. *MCI Tel. Corp. v. BellSouth Tel., Inc.*, 298 F.3d at 1274.

Conclusion: As established by the cases cited above, there is no support for the proposition that BellSouth must provide this transit function under Section 251. Accordingly, we adopt BellSouth's position and language for this issue.

Issue 88: What rate should apply for Service Date Advancement (a/k/a service expedites)?

Position of the Parties

Joint Petitioners: Rates for Service Date Advancement (a/k/a service expedites) of Unbundled Network Elements (UNE), interconnection or collocation must be consistent with federal TELRIC pricing rules. Service expedites are required as part of the section 251(c)(3) obligation to provide non-discriminatory access to UNEs.

BellSouth: BellSouth has no 251 obligation to provide expedited services. If the CLEC wants this service, it can purchase it at BellSouth's tariff rate. Further, this issue is not appropriate for arbitration because the issue does not involve a 251 obligation.

Analysis and Findings: The Panel finds the central, predominant question at issue here is that of parity. While other considerations have been raised, they are peripheral and fall subordinate to parity.

An absence of parity in provisioning of service expedites would open the door for a reasonable, valid TELRIC-rate argument by the Joint Petitioners. Substantiation of parity closes it, firmly.

According to 47 C.F.R. 51.307(a), there exists a requirement for an ILEC to provide a requesting carrier with nondiscriminatory access to UNEs at any technically feasible point. In the section of 47 C.F.R. 51.311(a), entitled "Nondiscriminatory access to unbundled network elements," it states that the quality of the UNE access that an incumbent provides shall be the same for all telecommunications carriers requesting

access to the network. 47 C.F.R. 51.311(b) further asserts that the quality of a UNE 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."

The Eighth Circuit opined that the phrase "at least equal in quality" leaves open the opportunity for parties to negotiate agreements for provision of access superior in quality to that which is normally provided, with the ILECs being compensated for the additional cost involved in providing superior quality. However, an ILEC is not mandated to provide such a standard.[16] With superior quality access as a standard rendered null and void, the Panel holds that parity is the preeminent qualification.

Accordingly, where technical feasibility is not at issue, incumbents are required to provide access to UNEs *at parity* (as a minimum) to that provided to their retail customers. It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer requesting similar services. So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites, and there is no conflict with Rule 51.311(b). We reiterate that current regulations do not compel an ILEC to provide CLECs with access superior in quality to that supplied to its own retail customers.

The Panel supports the idea that, by their nature, service expedites are extraordinary. Then, it follows that increased provider cost is a logical and reasonable

[16] *Iowa Utilities Bd. V. FCC.* (Remand Decision) Nos. 96-3321 (and consolidated cases) issued July 18, 2000, p. 22. before the United States Court of Appeals for the Eighth Circuit

by-product, one traditionally associated with improved or increased services. The Panel agrees with the Florida record which indicates that both parties that the service expedite rate BellSouth currently charges CLECs is identical to the tariffed rate imposed on its retail customers. In other words, parity exists. Additionally, there exists no requirement that an incumbent provide supportive evidence for its tariffed rates; tariffs are presumptively valid. Services requested and provisioned to a superior standard (i.e. above parity) by the CLECs should be compensated accordingly. There was no conclusive evidence provided by the Joint Petitioners that BellSouth routinely foregoes charges for its retail customers. If there had been such evidence, indicating discriminatory treatment, a TELRIC standard might be applicable.

BellSouth is treating CLECs and its own retail customers in an identical manner with regard to the pricing of service expedites. Parity exists; TELRIC simply does not apply in the Panel's opinion.

Conclusion: BellSouth's tariffed rates for service expedites should apply unless the parties negotiate different rates.

Issue 97: When should payment of charges for service be due?

Position of the Parties

Joint Petitioners: Payment of charges for services rendered should be due thirty calendar days from receipt or website posting of a complete and fully readable bill or within thirty calendar days from receipt or website posting of a corrected or retransmitted bill, in those cases where correction or retransmission is necessary.

BellSouth: Payment should be due on or before the next bill date.

Analysis and Findings: This issue examines the time frame the Joint Petitioners have for analyzing bills they receive from BellSouth and remitting payment. At issue is whether the time period for review should be based upon the date bills are issued (by BellSouth), or whether it should be based on date bills are received.

The Joint Petitioners are requesting 30 days from receipt of a complete and readable bill to review and remit payments to BellSouth. The Panel believes the Joint Petitioners do not want BellSouth's "bill assembly" period of time to reduce the time they have to review and make payment for bills received from BellSouth. According to BellSouth witness Blake, "bill assembly" usually takes 3-4 days, and thereafter, electronic transmission can proceed on the release date. Additionally, the witness avers that this issue is really about "parity," and that BellSouth prepares bills for its wholesale customers in the same timeframe and manner as it does for its retail customers. Importantly, any conventional mailing timeframes or delays would begin after the 3-4 day timeframe for assembly. Also, the "bill date" will generally fall on the

same date each month – a time period of approximately 30 days. The Panel specifically agrees with witness Blake's assertion that this is a "parity" issue.

Joint Petitioners witness Russell states that other state commissions in the BellSouth region have ruled on this topic; he specifically references BellSouth's arbitrations with ITC^DeltaCom in Georgia and Alabama. In each case, ITC^DeltaCom's general position was consistent with what the Joint Petitioners are seeking here - that BellSouth's bill date should not be considered the starting point for their review. However, the Panel believes the respective cases are only moderately germane to this case, since each decision was somewhat different from the specific position the Joint Petitioners assert in Florida.

The Panel is concerned about a phrase extracted from the Joint Petitioners' statement of position, the phrase "upon receipt of a complete and fully readable bill." Not only is "upon receipt" somewhat of a variable, we believe the text that follows it (i.e., "a complete and fully readable bill") could be subject to interpretation or dispute as well. Delays would result if an interpretation was necessary, and resources would have to be expended to address delays or disputes. As such, the Panel is uncertain how such issues would impact the entire bill issuance and remittance process.

Because the payment of charges is an important component of developing and maintaining strong business relationships, the Panel finds a degree of certainty should be established or maintained. In addition, we believe it is reasonable to expect the billed party to promptly remit payment to the billing party, or at a minimum, remit payment before a subsequent bill date in order to avoid late payment charges.

The Panel finds BellSouth's current bill rendering practices are reasonable. As noted, BellSouth's SQM performance results indicate that, on average, BellSouth is delivering bills to its wholesale customers at "parity" with its own retail customers. (Blake TR 1047, 1051; EXH 2, BST-1, pp. 35, 173; EXH 19, pp. 1-2; BellSouth BR at 64) BellSouth should not be ordered to make substantive changes to its billing systems on behalf of the Joint Petitioners, and at its own expense, in order to exceed "parity" performance. If individual instances of untimely wholesale performance occur, BellSouth has expressed a willingness to make accommodations upon request. If overall performance is substandard, BellSouth would be subject to SEEM[17] remedy payments.

Conclusion: We hold payment of charges for service should be payable on or before the next bill date.

[17] SEEM is an acronym for "Self -Effectuating Enforcement Mechanisms." SEEM remedy payments are an integral part of BellSouth's SQM plan.

Issue 100: Should CLEC be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

Position of the Parties

Joint Petitioners: Petitioners should not be required to calculate and pay past due amounts in addition to those specified in dollars and cents on BellSouth's notice of suspension/termination for nonpayment in order to avoid suspension or termination. Otherwise, Petitioners will risk suspension or termination due to possible calculation and timing errors.

BellSouth: A CLEC should be required to pay all amounts that are past due as of the date of the pending suspension or termination action.

Analysis and Findings: This issue has been characterized by the Joint Petitioners as a "pull the plug" measure and by BellSouth as a measure for protection from financial risk. (Russell TR 174; Blake TR 739).

Joint Petitioners witness Russell believes that requiring CLECs to pay past due amounts in addition to the amount listed on the past due notice is "unfair and potentially abusive." (FL TR 151) He asserts that CLECs should only have to pay the amount posted on the notice. (FL TR 149, 265) The witness states that in order to avoid suspension or termination of service some "magic number" determined by BellSouth would have to be paid. (FL TR 151)

Witness Russell asserts that the Joint Petitioners are also concerned that problems could arise because of a "shell game," due to the erroneous posting by BellSouth of payments or disputes. The witness explains an error in posting could result in suspension or termination of CLEC service with possible harm to customers in Florida. (FL TR 70-73, 149-151, 174, 263-265) Witness Russell maintains that in the past BellSouth did not post payments or disputes in a timely manner. (FL TR 260, 280) The witness also states that NuVox has received notices in error from BellSouth. (FL TR 265).

BellSouth witness Blake[18] argues that treatment notices only apply when a CLEC fails to pay for the services it received. (FL TR 739) The witness does not believe the due date of the notice should be viewed as an extension of the payment due date on the original bill. (FL TR 905)

Witness Blake asserts that the Joint Petitioners, as with all CLECs, are currently required to pay all undisputed amounts that are past due as of the due date of the notice. The witness explains that an aging report containing all additional undisputed charges that will become past due during the 15 days between the notice date and suspension of service date is currently included with the suspension notice. In addition, BellSouth explains that it has modified its original language in Section 1.7.2 of Attachment 7 of the proposed Agreement to include information to requesting CLECs on the additional past due charges. Witness Blake notes that the recent change made in the collection process was "that the collection letter will no longer include any disputed

[18] BellSouth witness Blake adopted witness Morillo's direct testimony.

amounts in the total amount due." (FL EXH 2, BST-3-Response to Staff's 4th Set of Interrogatories, No. 117; FL TR 1059-1060) Witness Blake contends that "concerns about guesswork to determine the amount to pay to avoid suspension or termination are eliminated" based on this change. (FL TR 923)

Witness Blake asserts that another aspect of the collection process is communication, written and oral, between the parties to eliminate guesswork on the amount of undisputed charges that are due to prevent suspension or termination of service. (TR 1056, 1060-1061; EXH 3, CONF -2- BST Response to Staff's 4th Set of Interrogatories, No. 117)

The Panel understands that the recent change in BellSouth's collection process which applies to all CLECs has not added new requirements for paying past due charges, but instead has eliminated any disputed charges from the amount past due in the collection letter, as is the case with the accompanying aging report. The Panel observes that the Joint Petitioners fail to show how they have been harmed by the current collection process of BellSouth. Even though Joint Petitioners witness Russell testifies that errors were made in posting of payments and in sending notices to his company, he never mentions any suspension of service. To the contrary, he acknowledges, "We have not had any collection or treatment process transactions." (FL TR 265).

Conclusion: The Panel holds that a CLEC should be required to pay past due undisputed amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination.

Issue 101: How many months of billing should be used to determine the maximum amount of the deposit?

Position of the Parties

Joint Petitioners: The maximum deposit should not exceed two months' estimated billing for new CLECs or one and one-half month's actual billing for existing CLECs. Alternatively, the maximum deposit should not exceed one month's billing for services billed in advance and two months' billing for services billed in arrears (new DeltaCom/BST Agreement).

BellSouth: The industry standard of two-months billing should be the maximum deposit amount that can be requested.

Analysis and Findings: It is undisputed that BellSouth has a right to a deposit (or to demand an additional deposit) if any Joint Petitioner fails to meet the specific and objective deposit criteria set forth in Attachment 7, Section 1.8.5.[19] Further, it cannot be disputed that a deposit reduces BellSouth's potential losses if a Joint Petitioner (or any CLEC that adopts a Joint Petitioner's interconnection agreement) ceases to pay its bills. Specifically, a two months' deposit is necessary because BellSouth must wait over two months (74 days) before disconnecting service for non-payment under the provisions of this agreement. (FL Tr. at 907-908; BellSouth Response to FL Staff Interrogatory No.

[19] The agreed-upon deposit criteria terms takes into account a CLEC's payment history, and other objective financial measurements, such as liquidity status (based upon a review of EBITDA) and bond rating (if any). As such, BellSouth is at a loss as to why Issue 101 remains unresolved. In any event, the payment history for some of the Joint Petitioners is poor. An established business relationship that includes a poor payment history does not warrant a reduced maximum security amount nor does it reduce BellSouth's risk in providing service to such Joint Petitioners (or high-credit risk CLECs that may adopt a Joint Petitioner's interconnection agreement).

118; Blake Rebuttal at 68). The need for a two months' deposit is especially appropriate in Mississippi in light of the Commission's recent adoption of rules that require BellSouth to continue to provide service to a CLEC even after the CLEC has failed to pay its bill to BellSouth in order to protect the CLEC's end-user customers from being left without service. *See* MPSC Amended Order Adopting Rules Governing Discontinuance of Service by Competitive Local Exchange Carriers, dated June 26, '2003. (BellSouth MS Hearing Exhibit 5). Reserving the right to require a deposit of up to two months' billing is necessary and demonstrates sound business judgment, as recognized by Joint Petitioners adopting this same standard for their Mississippi customers.

The Panel recognizes that the Joint Petitioners oppose BellSouth's proposal for this issue because it ties up capital; however, they do not explain how the proposal adversely affects their business operations. They also voice their objections to the deposit based on payment history, but staff concurs with BellSouth that payment record is only one of the agreed upon criteria of Section 1.8.5.

Even more persuasive to us is BellSouth witness Blake's statements regarding the 74-day period from commencement of service to physically disconnecting service. Given BellSouth's exposure over the period from service installation to potential termination if payment is not received, staff believes that BellSouth's proposal for a maximum two-months deposit is certainly justified.

Conclusion: The Panel holds that the maximum deposit should not exceed two months' estimated billing for new CLECs or two months' actual billing for existing CLECs based on average monthly billings for the most recent six-month period.

Issue 102: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC?

Position of the Parties

Joint Petitioners: Because BellSouth's payment history with CLECs is often poor, the amount of deposit due, if any, should be reduced by amounts past due to CLEC by BellSouth. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in Agreement.

BellSouth: There should be no offset because a CLEC's remedy for slow payment by BellSouth is late payment charges or termination of service.

Analysis and Findings: The Panel agrees with BellSouth that as a general matter, a CLEC deposit should not be reduced by amounts owed by BellSouth to such CLEC. (FL Tr. at 913-914). The CLEC's remedy for addressing late payment by BellSouth should be suspension/termination of service and/or application of interest/late payment charges. Id. BellSouth is within its rights to protect itself against uncollectible debts on a non-discriminatory basis. Id. Deposits are needed to mitigate the risk that a CLEC may not be able to fulfill its financial obligations in the future. Id. BellSouth attempts to collect a deposit amount that is consistent with that risk. For BellSouth to do otherwise would not protect the interests of BellSouth's shareholders, employees, or other customers.

Additionally, the Panel finds that the Joint Petitioners' proposal on Item 102 is unreasonable and unacceptable as it fails to exclude amounts that are subject to a valid

billing dispute. (FL Tr. at 621). In support of their offset proposal, Joint Petitioners (i.e. Xspedius) rely on outdated and inaccurate information. Without providing any specifics, Joint Petitioners assert that the offset provision is necessary because, many years ago, BellSouth allegedly owed a now defunct CLEC (e.spire) millions for reciprocal compensation. (MS Tr. at 93-95). However, the specifics do not support the Joint Petitioners' position. Specifically, Mr. Falvey acknowledged that BellSouth is current in paying its reciprocal compensation bills (MS Tr. at 94-95; BellSouth MS Hearing Exhibit 2).

The Panel finds that reducing the deposit BellSouth requires from the Joint Petitioners by past due amounts owed by BellSouth is not appropriate. The parties would have a difficult time agreeing on the details of such an approach. The Joint Petitioners' proposal requires BellSouth to establish a good payment record as defined in the Agreement before the offset is paid, while BellSouth's proposal requires the CLEC to pay the offset within ten days of receiving the undisputed past due amount.

The offset proposal could increase disputes between the parties and be administratively burdensome to administer. In response to a staff interrogatory in the Florida proceeding, BellSouth stated:

> . . . Mr. Falvey's testimony suggesting that security deposits be adjusted for BellSouth bills "aged thirty (30) days or more" could most certainly cause conflicts and disputes over deposit amounts, not to mention the confusion surrounding the accounting and classification of this on-going exchange of funds.

(FL Tr. EXH 2, BST-1-Response to Staff's 2nd Set of Interrogatories, No. 50)

Finally, the Panel is of the opinion that requiring a deposit from the Joint Petitioners and the dispute of charges or late payments made by BellSouth are separate issues. A deposit required under the interconnection agreement is intended to protect the ILEC from the financial risk of non-payment for services provided to the CLEC. If BellSouth has a billing dispute or is late paying one of the Joint Petitioners, it should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount of services provided to the Joint Petitioners. Moreover, there are other remedies in place which address past due payments (disputed and undisputed) such as late payment charges, and suspension/ termination of service. As such, the amount of the deposit BellSouth requires from a Joint Petitioner should not be reduced by past due amounts owed by BellSouth to CLEC.

Conclusion: The amount of the deposit BellSouth requires from CLEC should not be reduced by past due amounts owed by BellSouth to CLEC.

Issue 103: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?

Position of the Parties

Joint Petitioners: BellSouth should be permitted to terminate services for failure to remit a requested deposit only if: (a) CLEC agrees that the deposit is required, or (b) the Commission has ordered payment the deposit. All deposit disputes must be resolved via the Agreement's Dispute Resolution provisions and not through "self-help." (emphasis in original)

BellSouth: Thirty calendar days is a reasonable time period within which the CLEC should have met its fiscal responsibilities as well as the already agreed-upon right for BellSouth to obtain a deposit.

Analysis and Findings: To protect its financial interests, BellSouth asserts that it should be able to terminate service if a Joint Petitioner fails to pay (or properly dispute) a deposit demand within thirty (30) calendar days. We agree. It is undisputed that BellSouth has a contractual right to a deposit. *See* Att. 7, § 1.8. It is undisputed that the parties have agreed to objective and specific criteria regarding deposits that govern BellSouth's right to demand a deposit. *See* Att. 7, § 1.8.5. Further, it is undisputed that if a Joint Petitioner satisfies the deposit criteria, then BellSouth will refund the deposit amount within 30 calendar days, plus accrued interest. *See* Aft. 7, § 1.8.10. Accordingly, it logically follows that if a Joint Petitioner fails to satisfy the objective and specific

deposit criteria, thereby triggering BellSouth's right to a deposit, then BellSouth should be permitted to terminate service if a Joint Petitioner refuses to respond to a deposit demand within thirty (30) calendar days. Termination for non-payment of a deposit is not a novel concept; it is expressly authorized by the Georgia and Florida Commissions (GA Tr. at 541; FL Tr. at *256-257);* the Mississippi Commission's own Rules governing discontinuance of service

Conclusion: The Panel holds and that BellSouth should be entitled to terminate service to the CLEC pursuant to the process for termination due to non-payment if the CLEC refuses to remit any deposit required by BellSouth and does not dispute the deposit request per Section 1.8.7 of the proposed Agreement, within 30 calendar days.

ABBREVIATIONS AND ACRONYMS

Act	Telecommunications Act of 1996
ASR	Access Service Request
BellSouth	BellSouth Telecommunications, Inc.
CABS	Carrier Access Billing System
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CO	Central Office
CPNI	Customer Proprietary Network Information
CSR	Customer Service Record
DA	Directory Assistance
DS0	Digital Signal, level Zero. DS0 is 64,000 bits per second.
DS1	Digital Signal, level One. A 1.544 million bits per second digital signal carried on a T-1 transmission facility.
DSL	Digital Subscriber Line
FCC	Federal Communications Commission
FPSC	Florida Public Service Commission
GTC	General Terms and Conditions
ICA	Interconnection Agreement
ILEC	Incumbent Local Exchange Carrier
ISP	Internet Service Provider
IXC	Interexchange Carrier
Joint Petitioners	Joint Petitioners
KMC	KMC Telecom V, Inc., KMC Telecom III, LLC
LEC	Local Exchange Carrier
LENS	Local Exchange Navigation System
LSR	Local Service Request
NewSouth	NewSouth Communications Corporation
NRC	Non-Recurring Charge
NuVox	NuVox Communications, Inc.
NXX	Central Office Code/Prefix
OSS	Operational Support Systems
TELRIC	Total Element Long-Run Incremental Cost
TRO	Triennial Review Order, FCC 03-36
TRRO	Triennial Review Remand Order, FCC 04-290
UNE	Unbundled Network Element

UNE-L	Unbundled Network Element-Loop
UNE-P	Unbundled Network Element-Platform
USOC	Universal Service Order Code
USTA II	DC Circuit Court of Appeals' TRO remand; *United States Telecom Ass'n. v. FCC,* 359 F.3d 554 (D.C. Cir. 2004)
xDSL	"x" distinguishes various types of DSL
Xspedius	Xspedius Management Co. Switched Services LLC and Xspedius Management Co. of Jacksonville LLC

THESE RECOMMENDATIONS are made to the Mississippi Public Service Commission on this the 12th day of December, 2005.

MARC E. BRAND, Commissioner

KEITH HOWLE, Arbitrator

SAMUEL J. NICHOLAS, JR., Arbitrator

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	)	RECOMMENDED
Corp. et al. for Arbitration with BellSouth	)	ARBITRATION ORDER
Telecommunications, Inc.	)	

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:

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For the Using and Consuming Public:

Robert B. Cauthen, Jr., Staff Attorney, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: This matter is before the Commission pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (TA96 or the Act), North Carolina General Statute 62-110(f1), and various Commission Orders, on a Joint Petition of NewSouth Communications Corp. (NewSouth), NuVox Communications, Inc. (NuVox), KMC Telecom V, Inc. and KMC Telecom III, LLC (together, KMC), and Xspedius Communications, LLC on behalf of its operating subsidiary, Xspedius Management Co. Switched Services, LLC (collectively Xspedius) (collectively, Joint Petitioners or Petitioners) requesting the Commission to arbitrate unresolved issues that arose in negotiations with BellSouth Telecommunications, Inc. (BellSouth) for interconnection agreements (Agreements or ICAs).

BACKGROUND

Section 251 of the Act requires each incumbent local exchange carrier (ILEC) to provide interconnection to requesting telecommunications carriers with the ILEC's network and unbundled access to network elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the ICA and Section 252. Section 252(b) provides for arbitration by state regulatory commissions of unresolved issues between ILECs and requesting carriers concerning ICAs and network elements.

FCC Proceedings

In its *Triennial Review Order (TRO)*[1], the Federal Communications Commission (FCC) made significant changes to the rules regarding ILECs' unbundling obligations. Because the *USTA II* decision vacated and remanded significant portions of the FCC's unbundling rules, the FCC took several steps to avoid excessive disruption of the local telecommunications market while it wrote new rules. On July 13, 2004, the FCC released an order that replaced the so-called "pick-and-choose rule" with a new "all-or-nothing rule" designed to facilitate commercial agreements between ILECs and competing local providers (CLPs).[2] On August 9, 2004, the FCC held that fiber loops deployed at least

[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17145, ¶ 278 (2003) (*Triennial Review Order* or *TRO*), *corrected by* Errata (*Errata*), 18 FCC Rcd. 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) *cert. denied*, 125 S.Ct. 313 (2004).

[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, 19 FCC Rcd. 13494 (2004).

to the minimum point of entry (MPOE) of multiple dwelling units (MDUs) that are predominantly residential should be treated as fiber-to-the-home (FTTH) loops for unbundling purposes, irrespective of the ownership of the inside wiring.[3]

On October 18, 2004, the FCC determined that fiber-to-the-curb (FTTC) deployments should be treated in the same manner as FTTH deployments for unbundling purposes so long as the fiber deployment is not farther than 500 feet from each customer premises reached from the serving area interface.[4] The *FTTC Reconsideration Order* clarified that ILECs are not required to build time domain multiplexing (TDM) capability into new packet-based networks or into existing packet-based networks without TDM capability. On October 27, 2004, the FCC released an order granting the four Bell Operating Companies (BOCs) forbearance relief from the requirements of Section 271 of the Act with regard to broadband elements to the same extent that unbundling relief was granted under Section 251.[5]

Another step was the August 20, 2004 release of the *Interim Order*[6] in which the FCC required carriers, for a limited period of time, to adhere to the commitments made in their interconnection agreements, applicable statements of generally available terms and conditions (SGATs) and relevant state tariffs in effect as of June 15, 2004. The FCC also set forth and sought comment on a transition plan under which, for the subsequent six months, if no final unbundling rules had been issued, the same commitments to provide network elements would apply to existing customers, but not new customers, at modestly higher rates than those available on June 15, 2004.

Finally, subsequent to the hearing in this docket, the FCC issued its *Triennial Review Remand Order (TRRO)* on February 4, 2005.[7] In the *TRRO*, the FCC put in place new rules applicable to ILECs' unbundling obligations with regard to mass market

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[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd. 15856 (2004) (*MDU Reconsideration Order*).

[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293 (2004) (*FTTC Reconsideration Order*).

[5] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd. 21496 (2004) (*Broadband 271 Forbearance Order*).

[6] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (2004) (*Interim Order*).

[7] *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. (*TRRO*).

local circuit switching, high-capacity loops, and dedicated interoffice transport. Paragraph 235 of the *TRRO* specifies that the rules implementing the Order became effective on March 11, 2005.

Instant Proceeding

On February 11, 2004, the Joint Petitioners filed a Petition requesting the Commission to arbitrate an interconnection agreement between them and BellSouth and waive its requirement that prefiled testimony be filed contemporaneously with the Petition because negotiations were proceeding and there was a realistic prospect of a reduction in the number of issues. On February 12, 2004, the Commission issued an Order setting dates for the filing of a response to the Petition and prefiling of testimony by the parties.

On February 23, 2004, BellSouth asked that the proceeding be severed into four separate arbitration proceedings (i.e., one for each CLP) or that the Joint Petitioners be required to proceed as if they constituted a single entity with regard to contested issues and presentation and cross-examination of witnesses. On March 3, 2004, the Joint Petitioners responded to BellSouth's motion, and on March 11, 2004, BellSouth replied. On March 22, 2004, the Commission denied the motion to sever and established procedural restrictions for the proceedings. On March 26, 2004, the Commission granted BellSouth's motion to revise the filing dates and hearing.

The Public Staff filed a Notice of Intervention on April 1, 2004.

On April 30, 2004, the Joint Petitioners filed the direct testimony of Raymond Chad Pifer, Marva Brown Johnson, and Brian C. Murdoch on behalf of KMC; John Fury on behalf of NewSouth; Jerry Willis and Hamilton Russell on behalf of NuVox; and James Falvey on behalf of Xspedius.

On May 4, 2004, BellSouth filed a motion for reconsideration of the Commission's March 22, 2004, *Order Denying Motion to Sever and Imposing Procedural Restrictions.* The Joint Petitioners responded to BellSouth's motion on May 7, 2004, and the Public Staff filed comments on the motion on May 10, 2004. On May 13, 2004, the Commission issued an Order denying BellSouth's motion and authorizing the presentation of the Joint Petitioners' testimony by a single panel made up of all of the Joint Petitioners' witnesses.

BellSouth filed the direct testimony of Carlos Morillo and Eddie L. Owens; P. L. (Scot) Ferguson and Eric Fogle; and Kathy Blake on June 4, 2004.

On July 12, 2004, BellSouth and the Joint Petitioners requested that the Commission hold the proceeding in abeyance for a period of 90 days, thereby suspending all pending deadlines and consideration of all pending motions until after October 1, 2004, and waiving until June 2005 the deadline under Section 252(b)(4)(C) of the Act for final resolution by the Commission of the issues in this arbitration. By

Order dated July 14, 2004 and *Errata Order* dated July 15, 2004, the Commission granted the motion. On October 1, 2004, the Commission granted the motion of the parties filed on September 29, 2004, for a further extension of filing dates.

BellSouth filed a Joint Revised Issues Matrix on October 15, 2004. Supplemental Direct Testimony of the Joint Petitioners witnesses Collins, Johnson, Pifer, Fury, Russell, Willis, and Falvey was filed on October 29, 2004. Supplemental Direct Testimony of BellSouth witnesses Blake, Ferguson, Fogle, Morillo, and Owens was filed on November 12, 2004. Rebuttal Testimony of the Joint Petitioners witnesses was filed on December 3, 2004.

On January 3, 2005, the Joint Petitioners provided notice that the testimony of witness Fury would be adopted by witness Willis in its entirety.

On January 10, 2005, the Joint Petitioners filed an Updated Issues Matrix and Direct and Rebuttal Testimony Errata.

This matter came on for hearing as scheduled beginning on January 11, 2005. The Joint Petitioners offered the testimony, supplemental testimony, rebuttal testimony, and exhibits of witnesses Pifer, Johnson, and Murdoch on behalf of KMC; Fury on behalf of NewSouth; Willis and Russell on behalf of NuVox; and Falvey on behalf of Xspedius. BellSouth offered the testimony, supplemental testimony, and exhibits of witnesses Morillo, Owens, Ferguson, Fogle, and Blake.

By stipulation of the Joint Petitioners and BellSouth, Matrix Item Nos. 23, 108, 109, 110, 111, 112, 113, and 114 would be addressed in the parties' briefs only. The parties waived cross-examination and redirect examination of those items.

On March 31, 2005, the Joint Petitioners and BellSouth filed a joint motion to move certain issues to the change of law proceeding.

By Order dated April 4, 2005, the Commission granted the parties' motion to find Matrix Item Nos. 109, 110, and 112 moot and to transfer Matrix Item Nos. 23, 108, 111, 113, and 114 to the change of law proceeding in Docket No. P-55, Sub 1549 for resolution, to be followed at the appropriate time by referral back to these dockets for incorporation in the arbitrated agreements.

After being granted an extension of time to file Briefs and Proposed Orders, on April 8, 2005, BellSouth filed its Post-Hearing Brief, the Joint Petitioners filed their Proposed Order and Post-Hearing Brief, and the Public Staff filed its Proposed Order in these dockets.

On May 10, 2005, at the request of the Commission Staff, BellSouth filed an amended Exhibit A to its Post-Hearing Brief.

On May 27, 2005, KMC filed its Notice of Withdrawal with Prejudice. KMC stated that it was notifying the Commission that it was withdrawing its participation in these dockets with prejudice. KMC stated that its withdrawal, with prejudice, applies only to KMC and does not apply to any of the other remaining Joint Petitioners in the arbitration proceeding. By Order dated June 2, 2005, the Commission allowed KMC's withdrawal from this proceeding, with prejudice.

Appendix A provides a list of the acronyms used in this *Recommended Arbitration Order (RAO).*

Based on the foregoing and the entire record in this matter, the Commission makes 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 found in Section 10.5 of their Appendix A should be approved.

7. The parties may seek resolution of disputes arising out of the Agreement from the Commission, FCC, or courts of law.

8. The Agreement should contain the language proposed by BellSouth as modified by the Conclusions in this issue.

9. BellSouth shall permit a requesting carrier to commingle an unbundled network element (UNE) or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that the 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.

10. The term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51.319(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.

13. Thirty to forty-five days advance notice of an audit provides a CLP with an adequate time to prepare. In its Notice of Audit BellSouth shall state its concern that the requesting CLP has not met the qualification criteria and set out a concise statement of its reasons therefore. BellSouth may select the independent auditor without the prior approval of the CLP or the Commission. Challenges to the independence of the auditor may be filed with the Commission after the audit has been concluded. BellSouth is not required to provide documentation to support its basis for an audit, as distinct from a statement of concern, or seek concurrence of the requesting carrier before selecting the audit's location.

14. BellSouth should not be permitted to charge a Tandem Intermediary Charge (TIC) when providing a tandem transit function for CLPs.

15. The Joint Petitioners' proposed language concerning how disputes over alleged unauthorized access to customer service record (CSR) information should be handled under the Agreement is reasonable and appropriate. Accordingly, the Commission adopts the Joint Petitioners' proposed language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement.

16. BellSouth must provide service expedites at total element long-run incremental cost (TELRIC)-compliant rates. BellSouth and the Joint Petitioners are instructed to negotiate in good faith an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

17. The payment due date should be 26 days from the date of receipt of the bill. Accordingly, the Commission requires the Joint Petitioners and BellSouth to properly amend the proposed language in the Agreement in Attachment 7, Section 1.4, in accordance with this decision.

18. It is appropriate to adopt the Joint Petitioners' proposed language concerning suspension or termination notices for Section 1.7.2 of Attachment 7 of the Agreement.

19. The deposit requirements specified in Commission Rule R12-4 are applicable and the language proposed by BellSouth should be incorporated into the Agreement.

20. The Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice.

21. The language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 is appropriate.

22. The language proposed by the Joint Petitioners on the need for or amount of a deposit to be included in Section 1.8.7 of the Agreement is appropriate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

ISSUE NO. 1 – MATRIX ITEM NO. 2: How should "End User" be defined?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners argued that the term "End User" should be defined as "the customer of a Party." The Joint Petitioners noted that the term "End User" will apply in numerous contexts in the Agreement. It will define customers that the Joint Petitioners may serve, including wholesale customers. BellSouth's definition is more lengthy and complex and hard to apply. It also appears to limit the term to a listing of specific entities, apparently motivated by concern on BellSouth's part that the Joint Petitioners will not use UNEs in accordance with the law, as well as the concept that certain services are not "qualified" for UNEs. Joint Petitioners pointed out that they are not limited in their use of UNEs, with the exception of enhanced extended links (EELs) and that the notion of "qualifying services" has been vacated under *USTA II*.

BELLSOUTH: BellSouth argued that the Joint Petitioners should not be permitted to use the definition of "End User" in a way that will result in their obtaining UNEs in a prohibited manner, including violation of the EEL eligibility criteria. BellSouth proposed three definitions that it maintained would meet both its own and the Joint Petitioners' concerns:

> "End User," as used in this Interconnection Agreement, means the retail customer of a Telecommunications carriers such as CLECs [competitive local exchange companies], ICOs [Independent Telephone Companies] and IXCs [interexchange carriers].
>
> "Customer," as used in this Interconnection Agreement, means the wholesale customer of a Telecommunications Service that may be an ISP [Internet service provider]/ESP [enhanced service provider], CLEC, ICO or IXC.

> "end user," as used in this Interconnection Agreement, means the End User or any other retail customer of a Telecommunications Service, including ISPs/ESPs, CLECs, ICOs, and IXCs, that are provided the retail Telecommunications Service for the exclusive use of the personnel employed by ISPs/ESPs, CLECs, ICOs and IXCs, such as the administrative business lines used by the ISPs/ESPs, CLECs, ICOs and IXCs at their business locations, where such ISPs/ESPs, CLECs, ICOs and IXCs are treated as End Users.

The first definition ("End User") is intended to distinguish between retail customers and wholesale customers/such as carriers. The second definition ("customer") is to be used where the provisions of service is to a carrier, such as a CLP or IXC. This would have particular relevance in relation to the eligibility criteria for EELs. The third definition ("end user") is meant to apply where a carrier is actually an end user in the traditional sense of the word.

PUBLIC STAFF: The Public Staff supported the Joint Petitioners' definition as being more straightforward and clear. Parties are obliged in any case to comply with all of the FCC's rules.

DISCUSSION

In this issue, the Commission is asked to decide whether to define "End User" as "the customer of a party," as advocated by the Joint Petitioners and Public Staff or whether to mandate the use of three terms – "End User" (with capitalized first letters), "customer," and "end user" (all lower case) – to express nuanced distinctions, ostensibly for the prevention of fraud, as advocated by BellSouth. The Commission agrees with the Joint Petitioners and the Public Staff that the BellSouth approach is more lengthy, overly complex, and difficult to apply consistently in a document as thick as an interconnection agreement. It also misses the mark. CLPs are already supposed to comply with applicable federal law and FCC rules and not to engage in fraud. The multiplication and complexification of definitions does not assist in this effort.

CONCLUSIONS

The Commission concludes that the definition of "end user" proposed by the Joint Petitioners should be included in the Agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

ISSUE NO. 2 – MATRIX ITEM NO. 4: What should be the limitation on each party's liability in circumstances other than gross negligence or willful misconduct?

POSITIONS OF PARTIES

JOINT PETITIONERS: In cases other than gross negligence and willful misconduct by the other party, or other specified exemptions as set forth in the Joint Petitioners'

proposed language, liability should be limited to an aggregate amount over the entire term equal to 7.5% of the aggregate fees, charges, and amounts paid or payable for any and all services provided or to be provided pursuant to the Agreement as of the day on which the claim arose.

BELLSOUTH: The industry standard limitation should apply, which limits the liability of the provisionary party to credit for the actual cost of the services or functions not performed or performed improperly.

PUBLIC STAFF: The Public Staff concurred with BellSouth's position.

DISCUSSION

This issue presents a choice between adoption of a "cap" of 7.5% of the amounts paid or payable for all services provided under the Agreement on the day the claim giving rise to liability arose, as advocated by the Joint Petitioners, or the payment of a credit for the actual cost of services or functions unperformed or performed improperly, as advocated by BellSouth.

The Joint Petitioners' proposal is that on a rolling basis, no party would incur liabilities that exceed a fixed percentage of the actual revenue amounts in the aggregate that it will have collected under the Agreement up to the date of the particular claim or suit. Thus, the 7.5% would be applied to the amount paid or payable by the party on the day the claim arose, with amounts yet to be billed excluded from the calculation. If, for example, BellSouth's negligence caused liability on the first day of the Agreement, BellSouth's liability would be zero even if the liability were not discovered until the last day of the Agreement. Conversely, if the event occurred at the end of the Agreement, the liability would be considerably greater.

The Joint Petitioners' central argument was that BellSouth's proposal would not make the Joint Petitioners whole when a wrong occurs. A breach in performance affects a carrier's customer relationships with losses greater than mere wholesale cost. The Joint Petitioners also maintained that their proposal does not seek to expose BellSouth to risk outside of the general commercial liability coverage afforded by the typical insurance policy. The Joint Petitioners argued that their approach is commercially reasonable.

BellSouth replied that the Joint Petitioners' proposal is flawed because it irrationally limits – or expands – damages based on the point in time that the event occurs. BellSouth also argued that the Joint Petitioners were attempting to shift financial responsibility for their business decisions to BellSouth. Interconnection agreements are not commercial agreements but are governed by different standards. In addition, BellSouth also pointed out on cross-examination that KMC, NuVox, and NewSouth all admitted that they limited their liability to customers to service credits.

The Commission finds that BellSouth's language is more appropriate. The FCC's *Virginia Arbitration Order* (July 17, 2002) reviewed a similar issue in an arbitration between Verizon Virginia, Inc. (Verizon) and WorldCom, Inc. (WorldCom). There, the FCC concluded that it was appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers. The FCC noted that Verizon has no duty to provide perfect service to its own customers, and it was unreasonable to place that duty on Verizon with respect to WorldCom. The FCC further observed that Verizon has no contractual relationship with WorldCom's customers, and it cannot therefore limit its liability with respect to them as it may with its own customers.

While the Commission believes that the parties may certainly negotiate a liability "cap" themselves, it would be imprudent to impose one on the parties in arbitration, especially where, as in this case, the amount of damages is related to the *timing* of the event rather than the event itself.

CONCLUSIONS

The Commission concludes that BellSouth's proposed language providing that liability with respect to this issue should be limited to service credits should be adopted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

ISSUE NO. 3 – MATRIX ITEM NO. 5:

Joint Petitioners' Issue Statement: Should each party be required to include specific liability-eliminating terms in all its tariffs and end user contracts (past, present, and future) and to the extent that a Party does not or is unable to do so, should it be obligated to indemnity the other Party?

BellSouth's Issue Statement: If the CLP elects not to place in its contracts with end users and/or tariff standard industry limitations of liability, who should bear the risks that result from this business decision?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners argued that they cannot limit BellSouth's liability in contractual arrangements where BellSouth is not a party. Moreover, the Joint Petitioners asserted that they will not indemnify BellSouth in any suit based on BellSouth's failure to perform its obligations under this contract or to abide by applicable law. BellSouth should not be able to dictate the terms of service between the Joint Petitioners and their customers by, among other things, holding the Joint Petitioners liable for failing to mirror BellSouth's limitation of liability and indemnification provisions in the CLP's End User tariffs and/or contracts. To the extent that a Party does not, or is unable to, include specific elimination-of-liability terms in all of its tariffs and End User contracts (past, present, and future), and provided that the non-inclusion of such terms is commercially reasonable, in the particular circumstances, that Party should not be

required to indemnify and reimburse the other Party for that portion of the loss that would have been limited had the first Party included in its tariffs and contracts the elimination-of-liability terms that such other Party was successful in including in its tariffs at the time of such loss.

BELLSOUTH: To the extent the Joint Petitioners decide not to limit their liability in accordance with industry standards, the Joint Petitioners should indemnify BellSouth for any loss BellSouth sustains as a result of that decision. BellSouth noted that the exact language it is proposing for this issue is in the Joint Petitioners' current agreement and has never been the subject of a dispute. In addition, the Joint Petitioners have limitation of liability language in their tariffs and contracts which are in force today. BellSouth's proposal is not a limitation of a right of third parties via this contract but rather imposes obligations upon the Joint Petitioners in the event they make a business decision not to limit their liability within industry standards. BellSouth should not be exposed to greater liability than otherwise contemplated simply because the end user is a CLP.

PUBLIC STAFF: The Public Staff agreed with BellSouth that, if a CLP elects not to limit its liability to its end users/customers in accordance with industry norms, the CLP should bear the risk of loss arising from its business decision.

DISCUSSION

The fundamental issue here concerns whether BellSouth can require the Joint Petitioners' to indemnify it if they do not limit their liability to their customers in their own tariffs and contracts and BellSouth suffers a loss as a result. BellSouth says "yes" and the Joint Petitioners say "no."

The gist of the Joint Petitioners' argument was that they cannot limit BellSouth's liability in contracts to which BellSouth is not a party and that BellSouth's language inhibits their ability to compete by reducing their ability to relax limitations on liability in order to contract with customers.

BellSouth replied that their language is not aimed at third-party contracts but at the contract between itself and the Joint Petitioners by requiring the Joint Petitioners to bear the risk of their business decisions. BellSouth argued that under the Joint Petitioners' proposal, the CLPs could promise their customers perfection and then hold BellSouth financially accountable when it does not deliver. BellSouth is only required to provide service to CLPs at parity to that it provides its own retail customers.

The Public Staff expressed concerns about the rights of consumers and about the BellSouth language allowing parties to limit their liability to end users and third parties for any loss, tort or contract, but stated that its concerns were allayed because the BellSouth language does not dictate the terms of the agreements between CLPs and customers but provides them the discretion to include such limitation of liability. The Public Staff noted that the Joint Petitioners have limitation of liability language in their own tariffs and contracts and that the current agreements contain the limitation on

liability contained here. There is no evidence the proposed language has caused a dispute or adversely affected a third party or that the CLPs have in fact relaxed their limitation of liability language to attract customers.

The Commission believes that the arguments advanced by BellSouth and the Public Staff are more persuasive for the reasons as generally stated by them, and the BellSouth contract language should therefore be adopted.

CONCLUSIONS

The Commission concludes that 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 this decision. Accordingly, BellSouth's proposed language in the Agreement, in the General Terms and Conditions, Section 10.4.2 should be adopted.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 4 AND 5

ISSUE NOS. 4 AND 5 – MATRIX ITEM NO. 6:

Joint Petitioners' Issue Statement: Should limitation or liability for indirect, incidental, or consequential damages be construed to preclude liability for claims or suits for damages incurred by CLP's (or BellSouth's) end-users to the extent such damages result directly and in a reasonably foreseeable manner from BellSouth's (or CLP's) performance obligations set forth in the Agreement?

BellSouth's Issue Statement: How should indirect, incidental, or consequential damages be defined for purposes of the Agreement?

POSITIONS OF PARTIES

JOINT PETITIONERS: The limitation of liability terms in the Agreement should not preclude damages that CLPs' End Users incur as a foreseeable result of BellSouth's performance of its obligations, including its provisioning of UNEs and other services. Damages to End Users that result directly, proximately, and in a reasonably foreseeable manner from BellSouth's (or a CLP's) performance of obligations set forth in the Agreement that were not otherwise caused by, or are the result of, a CLP's (or BellSouth's) failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage should be considered direct and compensable under the Agreement for simple negligence or nonperformance purposes.

BELLSOUTH: Parties should not be responsible or liable for indirect, incidental, or consequential damages except in cases of gross negligence or willful or intentional misconduct.

PUBLIC STAFF: The Public Staff agreed with BellSouth's position.

DISCUSSION

In support of their proposed provision on this issue, the Joint Petitioners explained that in any contract, each party should be liable for damages that are the direct and foreseeable result of its actions. This liability is appropriately borne by any service provider in a contract that envisions that the effect of such services will be passed on to ascertainable third parties related to the other party to the contract. Since this Agreement is a wholesale agreement, liability for injury to third parties must be covered by express language.

The Joint Petitioners claimed that BellSouth's proposed language is ambiguous. While BellSouth asserts that, "[e]xcept in cases of gross negligence or willful or intentional misconduct, under no circumstances shall a Party be responsible or liable for indirect, incidental, or consequential damages[,]" other provisions of the Agreement provide disclaimers of liability to end users predicted on specified circumstances. The Joint Petitioners wanted the Agreement to ensure that their end users' rights against BellSouth are not limited in any way. On cross-examination, however, the Joint Petitioners conceded that, pursuant to general contract law, the Agreement could not impact the rights of their end users and offered to delete their proposal on this issue from the Agreement, if BellSouth removes its proposal as well.

BellSouth maintained that indirect, incidental, and consequential damages should be defined according to state law. While the Joint Petitioners agreed that the contract should provide no liability for these types of damages, the Joint Petitioners then tried to include a "lengthy and confusing" set of circumstances where liability would attach, even if these damages are actually indirect, incidental, or consequential, thereby eviscerating the agreed-upon limitation of liability. In sum, BellSouth sought to exclude these damages completely, as defined by state law, without exception. Since case law defines these damages, there is no need to further negotiate. BellSouth further objected to the "qualifying" language proposed by the Joint Petitioners because it is extremely vague and unnecessary since the contract cannot extend rights to third parties.

The Public Staff concurred in BellSouth's position.

The Commission approves BellSouth's proposed version of Section 10.4.4 in the General Terms and Conditions of the Agreement. The Commission agrees that the language proposed by the Joint Petitioners is unnecessary and potentially confusing. The end users are not parties to this Agreement or arbitration and therefore their rights should be defined not by this Agreement, but rather pursuant to state contract law. As the Joint Petitioners themselves concede, this language cannot be used to extend the rights of their customers. As such, the Joint Petitioners' proposed language is superfluous and should be removed from the contract to avoid confusion. Furthermore, indirect, incidental, or consequential damages should be defined by state law.

CONCLUSIONS

The Commission concludes that the rights of end users should be defined pursuant to state contract law. The Commission further concludes that incidental, indirect, and consequential damages should be defined pursuant to state law. Therefore, the Commission believes BellSouth's proposed language for Section 10.4.4 should be adopted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

ISSUE NO. 6 – MATRIX ITEM NO. 7: What should the indemnification obligations of the Parties be under this agreement?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Party providing service under the Agreement should be indemnified, defended, and held harmless by the Party receiving services against any claim for libel, slander, or invasion of privacy arising from the content of the receiving Party's own communications. Additionally, customary provisions should be included to specify that the Party receiving services under the Agreement should be indemnified, defended, and held harmless by the Party providing services against any claims, loss, or damage to the extent reasonably arising from: (1) the providing Party's failure to abide by applicable law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent caused by the providing Party's negligence, gross negligence, or willful misconduct.

BELLSOUTH: Indemnification of the providing Party should be limited to two situations: (1) claims for libel, slander, or invasion of privacy arising from the content of the Party's own communications; or (2) any claim, loss, or damages claims by the "End User or customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations arising out of this Agreement." Thus, BellSouth's language is narrower and insures that the providing Party will be indemnified in the unique situation when the end user of the receiving Party sues the providing Party based on the receiving Party's use or reliance of services provided by the providing Party. BellSouth noted that in most cases the Joint Petitioners will be the receiving party and BellSouth will be the providing party.

PUBLIC STAFF: The Public Staff supported Joint Petitioners' proposed language.

DISCUSSION

While the parties agree that the receiving party should be indemnified for claims of libel, slander, or invasion of privacy, the Joint Petitioners contended that the providing party should undertake a heavier indemnity obligation, including reasonable and proximate losses to the extent it becomes liable due to the other party's negligence, gross negligence, willful misconduct, or failure to abide by applicable law. Their

language would ensure that each party will be indemnified to a third-party in the case the other party's failure to comply with applicable law, regardless of whether the party is receiving or providing service. The Joint Petitioners objected to BellSouth's proposal because it provides that only the party providing services is indemnified under the Agreement.

BellSouth contended that the Joint Petitioners go too far in contending that the party receiving services should be indemnified, defended, and held harmless by the party providing services against claims, losses, and damages. BellSouth also contended that an interconnection agreement is not a commercial agreement but is rather governed by the Act and subsequent arbitration. Services provided pursuant to Section 251 are priced according to TELRIC principles and do not include open-ended indemnification of the party receiving services. TELRIC pricing does not account for the level of risk BellSouth is being asked to assume. If the Joint Petitioners would limit their liability to their customers through their tariffs or contracts, there would be no issue here.

The Public Staff concurred in the Joint Petitioners' position.

The Commission notes that in Finding of Fact No. 3 above, the Commission approved BellSouth's proposal for Section 10.4.2. This proposal allows the Joint Petitioners to limit their liability to customers through their tariffs or contracts and protects BellSouth if they do not. This limitation of liability provision appears to remove BellSouth's objection to the Joint Petitioners' proposal. Without that objection, there appears to be no issue.

CONCLUSIONS

The Commission concludes that the Joint Petitioners' proposed language for Section 10.5 in the General Terms and Conditions of the Agreement should be approved.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

ISSUE NO. 7 – MATRIX ITEM NO. 9:

Joint Petitioners' Issue Statement: Should a court of law be included among the venues at which a Party may seek dispute resolution under the Agreement?

BellSouth's Issue Statement: Should a party be allowed to take a dispute concerning the interpretation or implementation of any provision of the Agreement to a court of law for resolution without first exhausting administrative remedies?

POSITIONS OF PARTIES

JOINT PETITIONERS: Either party should be able to petition the Commission, the FCC, or a court of law for a resolution of a dispute. No legitimate dispute resolution should be foreclosed to the parties. The industry has experienced difficulties in achieving efficient regional dispute resolution. Moreover, there is an ongoing debate as to whether state commissions have the jurisdiction to enforce agreements and as to whether the FCC will engage in such enforcement. Courts of law have the jurisdiction to entertain such disputes. Indeed, in certain circumstances, they may be better equipped to adjudicate disputes and may provide a more efficient alternative to litigating before up to nine different state commissions or to waiting for the FCC to decide whether it will or will not accept an enforcement role given the particular facts.

BELLSOUTH: The Commission or the FCC should initially resolve disputes as to the appropriate interpretation and implementation of the Agreement. There can be no question that the Commission should resolve matters that are within its expertise and jurisdiction. State commissions are in the best position to resolve disputes relating to the interpretation or enforcement of agreements it approves. The Eleventh Circuit has recognized this, noting that the power to approve or reject interconnection agreements implies the power to interpret and enforce those agreements in the first instance. The Joint Petitioners actually conceded that the state commissions have the authority to enforce and interpret interconnection agreements but they seek the ability to go to a single forum, such as a court, to address region-wide disputes and avoid bifurcated hearings. But bifurcated hearings may be unavoidable if, under the doctrine of primary jurisdiction, a court would resolve matters outside of the expertise of the state commissions, while the nine state commissions would resolve matters within their expertise. BellSouth's language gives the Joint Petitioners the ability to resolve a dispute in a single forum—namely, the FCC.

PUBLIC STAFF: The Public Staff supported the Joint Petitioners' language.

DISCUSSION

The nub of this issue is whether the parties should be allowed to seek resolution of disputes regarding their Agreement in courts of law before first seeking resolution before the Commission. The Joint Petitioners noted that their present agreements have such a provision and argued that it is unclear that the Commission may issue an Order approving agreement language which deprives a court of jurisdiction, since the subject matter of state courts is set by the Legislature and that of the federal courts is set by Congress. BellSouth indicated that it would only permit disputes to be adjudicated in a court of law for matters lying outside the jurisdiction of the FCC or the Commission.

The Public Staff was cautious about whether the Commission had the authority to issue an order approving agreement language which would, over the objections of a party, deprive a court of its jurisdiction.

The Commission shares the concerns of the Joint Petitioners and the Public Staff on this issue. The subject matter of the North Carolina courts is set by the Legislature pursuant to N.C. Constitution Art. IV, Sec. 1 and of the federal courts by Congress pursuant to U.S. Constitution, Art. III, Sec. 1. It would thus appear questionable whether the Commission could approve an agreement depriving either set of courts of their jurisdiction to hear claims from parties seeking dispute resolution. Whether a court of law has jurisdiction over any particular claim is a matter to be adjudicated by the petitioned tribunal, and this need not be determined at this point.

CONCLUSIONS

The Commission concludes that the language proposed by the Joint Petitioners for Section 13 in the General Terms and Conditions of the Agreement should be adopted.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

ISSUE NO. 8 – MATRIX ITEM NO. 12: Should the Agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the parties?

POSITIONS OF PARTIES

JOINT PETITIONERS: Nothing in the Agreement should be construed to limit a party's rights or exempt a party from obligations under applicable law, as defined in the Agreement,[8] except in such cases where the parties have explicitly agreed to a limitation or exemption. Moreover, silence with respect to any issue, no matter how discrete, should be construed to be such a limitation or exception. This is a basic legal tenet and is consistent with both federal and Georgia law (agreed to by the parties), and it should be explicitly stated in the Agreement in order to avoid unnecessary disputes and litigation that has plagued the parties in the past.

BELLSOUTH: BellSouth characterized the issue as being how the parties should handle disputes when one party asserts that an obligation, right, or other requirement arising from telecommunications law is applicable even if it is not expressly memorialized in the Agreement. The issue is not whether BellSouth intends to comply with applicable law; it has. The issue is about providing certainty in the Agreement as to the parties' obligations.

PUBLIC STAFF: The Public Staff supported Joint Petitioners' proposed language.

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[8] Section 32.1 defines "Applicable Law" as "all applicable federal, state, and local statutes, laws, rules regulations, codes, effective orders, injunctions, judgments and binding decisions and decrees that relate to the obligations under this Agreement."

DISCUSSION

Essentially, the Joint Petitioners have argued that the Agreement should state that a party's rights and obligations under all relevant law existing at the time of the contract should apply unless explicitly limited or exempted. In this Agreement, the relevant state law would be Georgia law. The Joint Petitioners contended that an express provision that existing law applies unless expressly excluded or exempted would reduce disputes and litigation between the parties.

The text of the Joint Petitioners' proposal is as follows: "*Nothing in this Agreement shall be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, except in such cases where the Parties have explicitly agreed to an exception to a requirement of Applicable law or to abide by the provisions which conflict with and thereby displace corresponding requirements of Applicable Law. Silence shall not be construed to be such an exemption to or displacement of any aspect, no matter how discrete, of Applicable Law.*"

BellSouth contended that the Joint Petitioners' position would create more uncertainty, and it believes that, if there is a disagreement over applicable law, after the dispute is resolved, the Agreement should be amended so that the new obligation applies only prospectively and not retroactively.

The text of BellSouth's proposal is as follows: "*This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right, or other requirement, not expressly memorialized herein, is applicable under this agreement by virtue of a reference to an FCC or Commission rule or order or, with respect to substantive Telecommunications law only, Applicable Law, and such obligation, right, or other requirement is disputed by the other Party, the Party asserting such obligation, right, or other requirement is applicable shall petition the Commission for resolution of the dispute and the Parties agree that any finding by the Commission that such obligation, right or other requirement exists shall be applied prospectively by the Parties upon amendment of the Agreement to include such obligation, right, or other requirement and any necessary rates, terms, and conditions, and the Party that failed to perform such obligation, right, or other requirement shall be held harmless from any liability for such failure until the obligation, right, or other requirement is expressly included in this Agreement by amendment thereto.*"

The Public Staff was supportive of the Joint Petitioners' language, believing that it would help to avoid controversies in the future. While it is unclear as to whether silence regarding the applicable law indicates that such law either does or does not apply, the Public Staff believes the Agreement should specifically address this matter to avoid potential litigation. The Public Staff further noted that BellSouth's proposed language allowing a party to seek Commission resolution if a disagreement arises over whether an applicable law, rule, or order applies to the Agreement and providing that

the Commission's decision applies prospectively, does not resolve the question of silence in the Agreement. The Public Staff criticized the fairness of BellSouth's view of applying the law prospectively, since this would give an incentive to adopt an extreme or untenable interpretation of applicable law and then allow the party adopting that view to escape fiscal responsibility for the delay it caused by necessitating litigation before the Commission over its proper interpretation.

The Commission believes that the language proposed by the parties is in both cases problematical. The purpose of a contract is to memorialize the parties' mutual agreement at a particular point in time for the term of the contract, and the general purpose of the typical applicable law provision in a contract is to ensure that the parties do not break the law. Thus, the specific terms of the contract are to have primary significance. If there are particular laws that the parties wish to provide terms, but which they do not want to rewrite or negotiate, these specific laws should be incorporated by reference.

The principal defect of the Joint Petitioners' language is that it purports to import the entirety of "Applicable Law," except where the parties have agreed otherwise. Silence as to that law is, so to speak, no defense. This amounts to a "roving expedition" for a party to seek out other law, "no matter how discrete," to supply terms for the Agreement. The Commission believes this goes too far and is out of harmony with what a standard applicable law provision is supposed to do.

The principal defect of BellSouth's language is that it inserts a "prospectivity" clause which, as the Public Staff points out, gives an incentive to extreme positions and posturing. "Prospectivity" is also out of harmony with what a standard applicable law provision is supposed to do. In any case, should the Commission interpret the parties' intent and the meaning of certain contractual provisions, the law generally holds that the Commission's interpretation should be applicable during the entire term of the contract unless there was language directly to the contrary.

Nevertheless, the BellSouth language is more susceptible to reform. BellSouth is on firmer ground when it states that the "Agreement is intended to memorialize the Parties' mutual agreement" and provides that, "where something is not expressly memorialized but is nevertheless argued to be applicable, the matter should be referred to the Commission for resolution." This language should in large measure be retained up to the point of the phrase "resolution of the dispute," with some modifications for greater clarity, and the balance of the language, which deals with "prospectivity" should be deleted. References to courts of law and the FCC should be added to be consistent with the decision in the Evidence and Conclusions for Finding of Fact No. 7 above.

The Commission is doubtful that any language can be framed that anticipates all possible disputes given the volume of laws, legal principles, and possible fact situations involved. If both parties dislike the language suggested by the Commission, they are free to negotiate something which seems better to them.

CONCLUSIONS

The Commission concludes that the BellSouth language should be adopted as modified to read: "*This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right, or other requirement, not expressly memorialized herein, is applicable under this Agreement by virtue of an FCC or Commission rule or order or, with respect to Applicable Law relating to substantive Telecommunications law only, and such obligation, right, or other requirement is disputed by the other Party, the Party asserting such obligation, right, or other requirement is applicable shall petition the Commission, a court of law, or the FCC for resolution of the dispute.*"

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

ISSUE NO. 9 - MATRIX ITEM NO. 26: Should BellSouth be required to commingle UNEs or combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

POSITIONS OF PARTIES

JOINT PETITIONERS: Yes. BellSouth should be required to commingle UNEs or combinations with any service, network element, or other offering that it is obligated to make available pursuant to Section 271 of the Act.

BELLSOUTH: BellSouth argued that this matter should be moved to the change of law docket for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum the Commission should defer resolution of this item until its decision in the change of law docket to avoid inconsistent rulings. Otherwise, BellSouth's view is that consistent with the FCC's *Errata* to the *TRO*, 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.

PUBLIC STAFF: The Public Staff recommended that the Commission conclude 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. This includes wholesale services obtained from any method, including those obtained as Section 271 elements.

DISCUSSION

The Commission notes that this issue involves whether BellSouth is required to commingle UNEs or combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to Section 271 of the Act.

The Joint Petitioners noted that the FCC specifically eliminated the temporary commingling restrictions that it had adopted on stand-alone loops and EELs and clarified that BellSouth is required to perform the necessary functions to effectuate such commingling in the *TRO*. Next, the Joint Petitioners contended that the FCC has concluded that Section 271 requires BellSouth to provide network elements, services and other offerings and that such elements are not provided pursuant to the unbundling requirements of Section 251. Therefore, the Joint Petitioners opined that the FCC rules require BellSouth to commingle a UNE or a UNE combination with any facilities or services that they may obtain at wholesale, pursuant to Section 271, from BellSouth.

BellSouth interpreted the FCC's decisions differently, and argued that pursuant to the *Errata* to the *TRO,* it is not required to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271. Unbundling and commingling are Section 251 obligations, so that when BellSouth provides an item pursuant to Section 271 only, BellSouth argued that it is not required to combine or commingle that item with any other element or service. However, BellSouth commented that it may agree to do so in a commercial agreement. BellSouth further contended that the *USTA II* decision is consistent with the FCC's decision finding no requirement to commingle UNEs or UNE combinations with services, network elements or offerings made available pursuant to Section 271.

BellSouth acknowledged that it does occasionally provide some Section 271 elements as wholesale services. For example, retail customers may buy certain Section 271 transport elements through BellSouth's special access tariff. However, BellSouth contended that switching is neither a wholesale service nor a retail service; it is a Section 271 obligation only. BellSouth agreed to commingle UNEs with tariffed services or resold services and it would commingle a Section 271 transport element. BellSouth maintained that it will not, however, commingle switching because it does not provide switching as a wholesale service.

The Public Staff explained that the FCC has defined commingling in Rule 51.5 to mean the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services. The Public Staff noted that, furthermore, Paragraph 579 of the *TRO* states that an ILEC shall permit a CLP to commingle a UNE or a UNE combination with one or more facilities or services that a CLP has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3). Thus, the Public Staff claimed that resolution of this issue depends on whether Section 271 elements, local switching in particular, are wholesale services.

The Public Staff believed that BellSouth's arguments that Section 271 elements are not wholesale services do not stand up to scrutiny. The Public Staff stated that *Black's Law Dictionary* defines wholesale as "[s]elling to resellers and jobbers rather

than to consumers. A sale in large quantity to one who intends to resell."[9] The Public Staff commented that Section 271 elements purchased by CLPs are used in the provision of service to others, namely end users. The Public Staff further commented, that is, CLPs are reselling the Section 271 elements obtained from BellSouth to provide a telecommunications service.

The Public Staff stated that its interpretation of the *TRO* and FCC Rule 51.5 reveals that the term wholesale is not limited to services offered by an ILEC through its tariffs. The Public Staff stated that Rule 51.5 simply requires that the telecommunications carrier obtain the service at wholesale. The Public Staff further stated that, while services obtained through tariffs are used as an example, the language does not suggest that this is the only type of wholesale service that ILECs must commingle. The Public Staff believed that the only limitation to commingling is that the service must be obtained at wholesale in a manner other than through the unbundling provisions of Section 251(c)(3) of the Act. The Public Staff suggested that since Section 271 elements are obtained in a manner other than through the provisions of Section 251(c)(3), Section 271 elements qualify as wholesale services subject to the commingling requirements of the FCC.

The Commission notes that in Paragraph 579 of the *TRO*, in which the FCC eliminates the commingling restriction applied to stand-alone loops and EELs, the FCC repeatedly references "*switched and special access services offered pursuant to tariff*" when using the term wholesale services. In describing wholesale services that are subject to commingling, the FCC refers to tariffed access services.[10] While the FCC references services obtained through tariffs as an example of wholesale services that ILECs must commingle, the FCC does not expressly define "wholesale services" in the context of the commingling obligation.

In Paragraph 579 of the *TRO*, the FCC has defined commingling as:

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

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[9] Black's Law Dictionary 823 (5th ed. 1983).

[10] *TRO*, ¶¶ 579 – 581, 583.

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), <u>as well as two-wire and four-wire loops conditioned to transmit the digital signals needed to provide digital subscriber line services</u>, 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*.

BELLSOUTH: BellSouth argued that this matter should be moved to the change of law docket for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum the Commission should defer resolution of this item until its decision in the change of law docket to avoid inconsistent rulings.

On the merits, BellSouth's view is that the Joint Petitioners are attempting to impose unnecessary conditions on BellSouth's EEL audit right in contravention of the *TRO* by seeking to limit its audit rights to those circuits identified in the Notice of Audit and for which sufficient documentation is produced to support the audit and by regulating BellSouth's choice of auditor.

PUBLIC STAFF: The Public Staff believes that the *TRO* sufficiently outlines the requirements for an audit. However, 30-45 days notice of the audit provides a CLP with adequate time to prepare. BellSouth should be able to select the independent auditor of its choice without prior approval from the CLPs or the Commission. Challenges to the independence of the auditor may be filed with the Commission only after the audit has been concluded. BellSouth should not be required to provide documentation to support its basis for audit or seek concurrence of the requesting carrier before selecting the audit's location.

DISCUSSION

(B) The first issue has to do with whether there is a notice requirement and, if so, what should the notice contain. The Joint Petitioners argued that BellSouth must send a Notice of Audit to a CLP when it chooses to invoke its limited right to audit the CLP's records to verify compliance with the high capacity EEL service eligibility criteria. They contended that the notice should include all supporting documentation forming the basis of the allegation of noncompliance and be delivered no less than 30 days prior to the audit's commencement. The Joint Petitioners maintain that a CLP is entitled to know the basis for the audit and needs sufficient time to evaluate the audit request and prepare for an audit. Conversely, BellSouth maintained that the *TRO* contains no requirement that it provide notice of an audit, identify the specific circuits to be audited, or provide supporting documentation justifying the audit 30 days prior to the its commencement.

Paragraph 622 of the *TRO* adopts certification and auditing procedures comparable to those previously established in the *Supplemental Order Clarification* (SOC). The FCC held in the *TRO* that an ILEC may conduct limited audits to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options. The FCC allowed audits to be conducted on an annual basis because this period appropriately balances the ILEC's need for usage information and a CLP's risk of costly and illegitimate audits. The Joint Petitioners admitted that the *TRO* does not include a specific notice requirement, but contended that this Commission may order such a requirement.

BellSouth is correct that the *TRO* does not require ILECs provide notice of an audit or supporting documentation. Paragraph 622, however, notes that CLPs should not be impeded from access to UNEs based upon self-certification, subject to later verification based upon cause. The FCC also recognized in Paragraph 625 that the "details surrounding the implementation of these audits may be specific to related provisions of the interconnection agreements or to the facts of a particular audit, and that the states are in a better position to address that implementation."

While the *TRO* does not require notice of the audit, advance notice of audit would afford a CLP the opportunity to compile the appropriate documentation to support its certifications. Additionally, 30 to 45 days notice of the audit represents an adequate amount of time to prepare for the audit.

As the *TRO* grants ILECs limited authority to audit compliance with the qualifying service criteria on no more than an annual basis, the Commission is satisfied that ILECs by virtue of this authority, need not supply requesting carriers with additional documentation to support their audit rights, *except that, as distinct from documentation, BellSouth should state its concern that the requesting carrier has not met the qualification criteria and should set forth a concise statement of the reasons therefor.* In any event, BellSouth has agreed to provide notice to a CLP stating the cause for the audit. The Commission finds this proposal to be reasonable.

(C) The second issue concerns who is to perform the audit and how the audit should be performed. The Joint Petitioners believe that BellSouth's proposed language is inadequate because it does not provide that (1) the independent auditor must be a third-party retained by BellSouth; (2) the parties must reach agreement on the independent auditor before an audit may commence; (3) the location of the audit will be mutually agreeable to the parties; (4) that the audit will commence no sooner than 30 calendar days after the parties agree on the auditor; and (5) the American Institute of Certified Public Accountants (AICPA) standards related to determining the independence of the auditor will apply. Further, the Joint Petitioners contended that BellSouth's refusal to accept these provisions is contrary to the FCC's EEL audit regulations.

BellSouth asserted that the requirements the Joint Petitioners are attempting to add do not appear in the *TRO*. Further the requirement for a "third-party, mutually agreed-upon, auditor" is only a delaying tactic. BellSouth cited the *TRO* to support its position that it may select and pay for an independent auditor to conduct the audit.

The Commission addressed the issue of auditor selection in Docket No. P-772, Sub 7, in its Order Granting Motion for Summary Disposition and Allowing Audit issued on August 24, 2004, and Order Denying Motion for Reconsideration issued on January 20, 2004. In these Orders, the Commission found that BellSouth must choose an independent auditor to conduct an audit of the CLP's EELs, but that BellSouth may select the auditor without the prior approval of the CLP or Commission. Further, the

Commission found it unnecessary to conduct a hearing to test the independence of BellSouth's selected auditor.

Paragraph 626 of the *TRO* concludes that an ILEC may obtain and pay for an independent auditor to audit compliance with the qualifying service eligibility criteria annually in accordance with the standards established by the AICPA. These standards require the auditor to perform an "examination engagement" and issue an opinion regarding the CLP's compliance with the qualifying service eligibility criteria. Paragraphs 627, 628, and 629 provide additional requirements for the auditor and the presentation of his findings. Paragraphs 627 and 628 specify that the ILEC must reimburse the audited carrier for its costs associated with the audit if the independent auditor concludes that the requesting carrier complied in all material respects with the eligibility criteria. Conversely, if the independent auditor concludes that the requesting carrier failed to comply in all material respects with the service eligibility criteria, the requesting carrier must reimburse the ILEC for the cost of the independent auditor. The FCC, however, does not specify the location of the audit or require that the parties agree to any particular location.

This Commission is not persuaded that the additional requirements suggested by the Joint Petitioners are necessary in light of the audit requirements in the *TRO*. The Commission agrees with BellSouth that the imposition of these superfluous requirements will serve only to delay the audit unnecessarily. The *TRO* clearly delineates the requirements for the audit and carefully assigns cost responsibilities based on the audit's findings.

CONCLUSIONS

The Commission concludes that the *TRO* sufficiently outlines the requirements for an audit. However, 30 - 45 days 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 therefor. The Commission further concludes 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 concludes that BellSouth is not required to provide documentation, as distinct from a statement of concern, to support its basis for audit or seek concurrence of the requesting carrier before selecting the audit's location.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

ISSUE NO. 14 - MATRIX ITEM NO. 65: Should BellSouth be allowed to charge the CLP a TIC for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

POSITIONS OF PARTIES

JOINT PETITIONERS: No. BellSouth should not be permitted to impose upon CLPs a TIC for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic. The TIC is a non-TELRIC based additive charge that exploits BellSouth's market power and is discriminatory.

BELLSOUTH: Yes. BellSouth is not obligated to provide the transit function and the CLP has the right pursuant to the Act to request direct interconnection to other carriers. Additionally, BellSouth incurs costs beyond those for which the Commission ordered rates were designed to address, such as the costs of sending records to the CLPs identifying the originating carrier. BellSouth does not charge the CLP for these records and does not recover those costs in any other form. Moreover, this issue is not appropriate for arbitration in this proceeding because it involves a request by the CLPs that is not encompassed within BellSouth's obligations pursuant to Section 251 of the Act.

PUBLIC STAFF: The Public Staff recommended that the Commission conclude that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs.

DISCUSSION

The Joint Petitioners argued that the TIC is a non-TELRIC based additive charge enabling BellSouth to exploit its market power. The Joint Petitioners asserted that only BellSouth is in a position to provide transit service capable of connecting all carriers of all sizes, due to its past monopoly and continuing market dominance. The rate appears to be purely additive, simply enabling BellSouth to extract additional profits over and above the profit it already receives through the elemental UNE rates. In addition, the Joint Petitioners claimed that the TIC charge is discriminatory, since BellSouth does not impose this charge on all CLPs. Further, BellSouth threatened to double the rate if two of the Joint Petitioners did not agree to it during negotiations. The Joint Petitioners contended that BellSouth has not shown that its existing rates for the transiting function, tandem switching and common transport, do not adequately provide for recovery of its costs. The Joint Petitioners argued that BellSouth can seek to modify its TELRIC-based rates in the next generic pricing proceeding if its rates do not recover its costs. Despite BellSouth's contention that this issue should not be included in this arbitration, the Joint Petitioners argued that this issue is properly before the Commission because transiting is an interconnection issue and has been included in BellSouth's interconnection agreements for nearly eight years.

BellSouth initially contended that it was not required to provide a transit traffic function because it is not a Section 251 obligation under the Act. Therefore, BellSouth argued that if it provides the transit traffic function, the rates, terms, and conditions should be contained in a separately negotiated agreement. If BellSouth includes the transit traffic function in its Agreement, BellSouth believed that it should not be penalized by imposing rates for a service that, pursuant to a separate agreement, to which the Commission would not even be privy.

BellSouth maintained that it should be able charge a TIC for local transit and ISP-bound transit traffic because it is not obligated to provide the transit function to a CLP and the CLP has the ability to request direct interconnection to other carriers. BellSouth argued that the TIC is not "purely additive" because some costs are not recovered in tandem switching and common transport charges, such as the fee BellSouth pays to Telcordia for all messages sent and received through the Centralized Message Distribution System (CMDS). Moreover, BellSouth argued that because the TIC is not a Section 251 requirement, the rate should not be subject to the TELRIC cost standards set forth in Section 252.

In cross-examination, BellSouth witness Blake acknowledged that BellSouth has offered to provide a tandem transit function in these Agreements, but stated that the crux of the dispute in this case is the rate. Witness Blake also modified her position concerning BellSouth's Section 251 obligations by agreeing that BellSouth had an obligation to provide a tandem transit function based upon the FCC's Virginia arbitration orders and the Commission's September 22, 2003 Order in Docket No. P-19, Sub 454 that found ILECs have an obligation to provide transit service. Witness Blake testified that the TIC is designed to cover not only the cost of sending records identifying the originating carrier, but the "value-added" nature of the service as well. The transit function eliminates the need for originating carriers to directly connect with terminating carriers. The TELRIC tandem rate covers the transit part, while the TIC reflects the value of not having to directly interconnect with carriers.

The Public Staff stated in its Proposed Order that there appears to be no dispute that BellSouth is obligated to provide transit service. Witness Blake acknowledged that the Commission has previously found ILECs have an obligation to provide transit service and that the FCC has found the tandem transit function is a Section 251 obligation. Therefore, the Public Staff believed that the question before the Commission is whether BellSouth should be permitted to charge a TIC in addition to the TELRIC-based tandem switching rate. Although BellSouth has conceded that the tandem transit function is a Section 251 obligation, it is unclear why BellSouth still maintains that this function is not subject to the pricing requirements set forth in Section 252. The Public Staff noted that the FCC has implemented specific rules to which the Commission must adhere in determining the appropriate rates for providing a tandem transit function.

The Commission can find no basis for permitting BellSouth to impose a TIC for the tandem transit function. The tandem transit function is a Section 251 obligation, and

BellSouth must charge TELRIC rates for it. As pointed out by the Commission in its September 22, 2003 Order in Docket No. P-19, Sub 454, the tandem transit function may also involve a billing intermediary function. While this may not be necessary for the parties to this proceeding, the rates for providing a billing intermediary function are not required to be TELRIC-based. The Commission concurs that the tandem transit function provides some value to CLPs by permitting them to avoid directly interconnecting with all of the LECs subtending BellSouth's tandem. However, the fact that CLPs receive value for this service is not grounds for disregarding the FCC's pricing rules.

CONCLUSIONS

The Commission concludes that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

ISSUE NO. 15 - MATRIX ITEM NO. 86(B): How should disputes over alleged unauthorized access to customer service record (CSR) information be handled under the Agreement?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners argued that if one party disputes the other party's assertion of noncompliance regarding access to CSR information, that party should notify the other party in writing of the basis for its assertion of compliance. The Joint Petitioners maintained that if the receiving party fails to provide the other party with notice that appropriate corrective measures have been taken within a reasonable time or fails to provide the other party with proof sufficient to persuade the other party that it erred in asserting the noncompliance, the requesting party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the parties should cooperatively seek expedited resolution of the dispute. The Joint Petitioners asserted that "self help", in the form of suspension of access to ordering systems and discontinuance of service, is inappropriate and coercive; moreover, it effectively denies one party the ability to avail itself to the Dispute Resolution process otherwise agreed to by the parties.

BELLSOUTH: BellSouth maintained that the Commission should adopt BellSouth's most recent proposed language for Matrix Item No. 86(b) (if the accused party fails to produce an appropriate letter of authorization (LOA) within the allotted time period, the requesting party will provide written notice via email to a person designated by the other party to receive such notice specifying the alleged noncompliance and advising that access to ordering systems may be suspended in five days if such noncompliance does not cease) as it addresses all of the Joint Petitioners' concerns as well as gives the parties sufficient recourse if a party refuses to comply with its legal and contractual obligations regarding the protection of CSRs.

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

DISCUSSION

The Parties disagree on the appropriate language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement, as follows:

Section 2.5.5.2 – Joint Petitioners
Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice to the other Party specifying the alleged noncompliance. The Party receiving the notice agrees to acknowledge receipt of the notice as soon as practicable. If the Party receiving the notice does not dispute the other Party's assertion of non-compliance, the receiving Party agrees to provide the other Party with notice that appropriate corrective measures have been taken or will be taken as soon as practicable.

Section 2.5.5.2 – BellSouth
Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice by email to the other Party specifying the alleged noncompliance.

Section 2.5.5.3 – Joint Petitioners
Disputes over Alleged Noncompliance. If one Party disputes the other Party's assertion of non-compliance, that Party shall notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. In such instance, the Parties cooperatively shall seek expedited resolution of the dispute. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

Section 2.5.5.3 – BellSouth
Disputes over Alleged Noncompliance. In it's written notice to the other Party the alleging Party will state that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by

the fifth (5th) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice by email to the person designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision of access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10th) calendar day following the date of the initial notice. If the other Party disagrees with the alleging Party's allegations of unauthorized use, the alleging Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

Joint Petitioners witnesses Collins, Russell, and Falvey stated in prefiled testimony that the Joint Petitioners' position on this issue is that if one party disputes the other party's assertion of noncompliance, that party should notify the other party in writing of the basis for its assertion of compliance. Witnesses Collins, Russell, and Falvey continued that if the receiving party fails to provide the other party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other party with proof sufficient to persuade the other party that it erred in asserting the noncompliance, the requesting party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the parties should cooperatively seek expedited resolution of the dispute. Witnesses Collins, Russell, and Falvey maintained that "self help", in the form of suspension of access to ordering systems and discontinuation of service, is inappropriate and coercive; moreover, it effectively denies one party the ability to avail itself of the Dispute Resolution process otherwise agreed to by the parties.

Witnesses Collins, Russell, and Falvey asserted that self help is nearly always an inappropriate means of handling a contract dispute. They maintained that disputes should be handled in accordance with the Dispute Resolution provisions of the contract and not under the threat of suspension of access to operations support systems (OSS) or termination of all services.

Witnesses Collins, Russell, and Falvey stated that BellSouth's proposed language is inadequate because it provides little more than the threat of suspension of access to OSS and the termination of all services regardless of its potential impact on its competition or consumers who have been disloyal to BellSouth. They argued that while BellSouth offers as window dressing that if the CLP disagrees with BellSouth's allegations of unauthorized use, the CLP must proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. However, the witnesses asserted, it is not clear whether BellSouth gets to pull the plug while the dispute is pending or whether the coercive pressure created by BellSouth's ambiguous language is all that it is seeking. Witnesses Collins, Russell, and Falvey maintained that in the end, neither CLPs nor their customers should be forced into such a precarious provision.

Witness Collins agreed on cross-examination that CSR information contains customer proprietary network information (CPNI) and that BellSouth and the Joint Petitioners have an obligation to protect CPNI. Witness Collins further agreed that BellSouth and the Joint Petitioners have decided not to view, copy, or otherwise obtain access to CSR information without the customer's permission. He also agreed that the language proposed by both the Joint Petitioners and BellSouth states that if there is a question about whether either party has obtained a customer's permission, then either party can request the other party to provide an appropriate LOA within seven business days or at least nine calendar days. Witness Collins agreed that under BellSouth's proposed language, if no LOA is provided within seven business days, then the party that made the request will notify the other party that it has five more days to produce the LOA or orders may be suspended or refused. He stated that BellSouth's proposed language is not ambiguous. He agreed that in the Joint Petitioners' proposed language, the other party will provide notice that appropriate corrective measures have been taken or will be taken as soon as practicable. Further, he agreed that, in the Joint Petitioners' proposed language, if the accused party or the offending party simply fails to respond to an assertion that such party is accessing CSR information without permission, then the accusing party has got to look to the dispute resolution provision. Witness Collins also stated that to his knowledge there has not been any prior termination or suspension of service because of unauthorized access to CSR information between BellSouth and KMC. Witness Collins further stated that he could not give one reason why KMC would need more than 14 days to produce a LOA.

Witness Russell stated on cross-examination that BellSouth and NuVox have had only one LOA dispute back in 1998 or 1999 and that the dispute was resolved when NuVox produced a LOA.

Joint Petitioners witness Falvey also testified during the hearing that he was not aware of any dispute within recent years between Xspedius and BellSouth regarding unauthorized access of CSR information. Witness Falvey asserted that the proposed provision is reciprocal but that the reality is that a CLP does not have any services to pull the plug on for BellSouth. He maintained that there are other ways to handle CSR disputes other than a pull-the-plug type measure. Witness Falvey agreed that violation of CPNI rules is a violation of federal law. Witness Falvey stated on cross-examination that this self-help issue is a matter of fundamental fairness and that the parties should go through dispute resolution.

The Joint Petitioners asserted in their Proposed Order that this item is about whether disputes over unauthorized access to CSR information should be excepted from the Agreement's dispute resolution provisions. The Joint Petitioners maintained that both parties agree that CSR information contains CPNI which may not be accessed without a LOA from the customer. The Joint Petitioners argued that BellSouth has proposed a menu of debilitating sanctions it would impose for any allegation by BellSouth of unauthorized access by the Joint Petitioners. The Joint Petitioners argued that under BellSouth's proposal, BellSouth could refuse to accept new orders, suspend

any pending orders, and suspend access to ordering and provisioning systems, thus, closing off the Joint Petitioners' ability to serve the needs of existing customers, as well as potential new ones. Ultimately, the Joint Petitioners stated, BellSouth could terminate all services provided to the Joint Petitioners, no matter how unrelated to the unproven allegations of unauthorized access to CSRs. The Joint Petitioners noted that BellSouth witness Morillo conceded on cross-examination that the suspension of access to BellSouth's OSS ordering systems could result in the loss of customers to the Joint Petitioners. The Joint Petitioners argued that the disruption of their business operations from such a sanction is obvious. The Joint Petitioners stated that they have proposed that the offended party first notify the other party of the alleged unauthorized access and that the parties attempt to resolve the matter themselves. If unsuccessful, the Joint Petitioners proposed, they ask that the Agreement's standard dispute resolution provisions apply.

The Joint Petitioners maintained that BellSouth has not met its burden of proof on this item. The Joint Petitioners argued that they can find no evidence to support the inclusion of the self-help remedy BellSouth has proposed and that they find no basis to deviate from the Agreement's standard dispute resolution provision here.

The Joint Petitioners recommended that the Commission conclude that disputes over unauthorized access to CSR information should be resolved by resorting to the standard dispute resolution provisions in the General Terms and Conditions section of the Agreement and that the language offered by BellSouth for this section of the Agreement should not be included.

BellSouth witness Ferguson stated in direct testimony that BellSouth's position is that the party providing notice of the impropriety concerning CSRs should notify the offending party that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth calendar day following the date of the notice. In addition, witness Ferguson noted, the alleging party may, at the same time, provide written notice to the person(s) designated by the other party to receive notice of noncompliance that the alleging party may terminate the provision of access to ordering systems to the other party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth calendar day following the date of the initial notice. Witness Ferguson maintained that if the other party disagrees with the alleging party's charges of unauthorized use, the other party should proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions of the Agreement.

Witness Ferguson argued that CLPs are well aware that BellSouth does not suspend or terminate access to OSS interfaces on a whim. Witness Ferguson asserted that BellSouth does not suspend or terminate access if there is a good faith dispute between the parties; however, he stated, if circumstances indicate a systemic problem with unauthorized CSR access, then the Joint Petitioners want BellSouth to file a complaint with the Commission, which could take a year or more to resolve. Witness

Ferguson maintained that BellSouth's proposed language, on the other hand, balances the Joint Petitioners' right not to be suspended except for good cause versus BellSouth's right not to have to endure protracted proceedings in order to correct the situation of unauthorized access.

Witness Ferguson stated in his summary that if BellSouth has a reason to believe that a CLP is engaged in abusive access to CPNI or is using methods that degrade the network access to that information, and the CLP refuses to acknowledge or cure the abuse, BellSouth must have the leeway to resolve such a situation in as timely a manner as necessary to protect BellSouth's customers, other CLPs, and the other CLPs' customers. He maintained that unless a CLP is engaged in, or is planning to engage in, such fraudulent activity, BellSouth's proposed language should not be a concern. Witness Ferguson noted that there is no evidence to suggest that the Joint Petitioners are predisposed to such activity, and BellSouth is not singling them out with the proposed language. However, witness Ferguson noted, the interconnection agreement signed by the Joint Petitioners and BellSouth could be adopted by other CLPs who are not as concerned with protection of CPNI. He noted that BellSouth has been forced to terminate access for CSR abuse only once to his knowledge in a case of both CPNI violation and access degradation.

Witness Ferguson agreed during cross-examination that BellSouth has proposed a series of sanctions for unauthorized access to CSRs: (1) refusals to accept new orders; (2) suspension of pending orders; and (3) denial of access to the system (i.e., no additional access to the CSR database would be possible). He asserted that it is a BellSouth capability and decision to impose these sanctions. He maintained that this issue is a business-impacting issue for the Joint Petitioners and BellSouth.

BellSouth stated in its Post-Hearing Brief that the crux of this issue is simple: how long does a party need to produce documentation establishing that it has complied with the law by obtaining a customer's authorization to review the customer's records prior to receiving such records? BellSouth commented that as conceded by the Joint Petitioners, two weeks is more than a sufficient amount of time for the parties to demonstrate compliance with their legal and contractual obligations.

BellSouth maintained that the Joint Petitioners conceded that CSR information contains CPNI and that BellSouth and the Joint Petitioners have an obligation under federal law to protect the unauthorized disclosure of CPNI. BellSouth argued that given such obligations, it is no surprise that the parties have agreed to refrain from accessing CSR information without an appropriate LOA from a customer and to access CSR information only in strict compliance with applicable laws. BellSouth stated that regarding LOAs, the parties have agreed that upon request, a party shall use best efforts to provide an appropriate LOA within seven business days.

BellSouth asserted that under its most recent proposed language, if the accused party fails to produce an appropriate LOA within the allotted time period, the requesting party will provide written notice via email to a person designated by the other party to

receive such notice specifying the alleged noncompliance and advising that access to ordering systems may be suspended in five days if such noncompliance does not cease. BellSouth further noted that if the accused party disputes the allegations of noncompliance, then the requesting party, prior to suspending or terminating service, would seek an expedited resolution of the CSR dispute from the appropriate regulatory body pursuant to the dispute resolution procedures. BellSouth noted that it offered this revised language during the Georgia hearing in an effort to compromise and address the Joint Petitioners' concerns about buried notices or pull-the-plug provisions. BellSouth stated that despite offering this language almost two months ago, the Joint Petitioners have failed to respond to BellSouth's modified language for Matrix Item No. 86(b).

BellSouth asserted that under its proposal, prior to any action being taken by the requesting party, the accused party has at least two full weeks to exercise best efforts to produce the LOA. BellSouth argued that two weeks is more than sufficient time to produce evidence that the Joint Petitioners are legally and contractually obligated to keep. BellSouth maintained that at the evidentiary hearing, the Joint Petitioners could not articulate one reason why any additional time beyond the two weeks would be needed to produce an appropriate LOA.

Additionally, BellSouth noted, it is unclear why the Joint Petitioners are so adamantly opposed to BellSouth's proposed language given the fact that with one exception, the Joint Petitioners cannot identify any prior disputes regarding unauthorized access to CSR information. BellSouth commented that it recalled one dispute which was immediately resolved when NuVox produced an appropriate LOA.

BellSouth recommended that the Commission adopt BellSouth's most recent proposed language for Matrix Item No. 86(b) as it addresses all of the Joint Petitioners' concerns as well as gives the parties sufficient recourse if a party refuses to comply with its legal and contractual obligations regarding the protection of CSRs.

The Public Staff stated in its Proposed Order that BellSouth's proposed language puts the burden of proof on the CLP. The Public Staff noted that despite BellSouth's assurances that it will not suspend access to ordering and provisioning functions on a whim, its proposed language gives it the discretion to do so. The Public Staff believes that suspension, prior to any dispute resolution process, would place undue pressure on a CLP to acquiesce in order to maintain access to critical ordering and provisioning functions.

The Public Staff agreed with the Joint Petitioners that BellSouth should not be able to unilaterally determine if an alleged case of noncompliance is sufficient to terminate access to its OSS and thereby severely hinder a CLP's ability to serve its customers. The Public Staff maintained that if the parties cannot informally resolve a dispute over noncompliance, the dispute resolution process is the appropriate recourse. Therefore, the Public Staff recommended that the language proposed by the Joint Petitioners for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement should be

adopted since it is fair and equitable to both parties and provides a viable option for settling disputes.

The Commission notes that all of the Parties agree that this issue is a business-impacting issue. Further, all of the Parties agree that violations of CPNI are not allowed based on federal law and that CSR information contains CPNI which may not be accessed without a LOA from the customer.

The substantive difference between the Parties on this issue concerns Section 2.5.5.3 – Disputes Over Noncompliance. Under both the Joint Petitioners' and BellSouth's proposed language in Section 2.5.5.2, a party asserting noncompliance (the alleging party) will notify the other party (the accused party) in writing.

Under the Joint Petitioners' language, if an accused party agrees with the alleged noncompliance, that party should provide notice that corrective measures have been taken as soon as practicable. If the accused party disputes the alleging party's assertion of noncompliance, the accused party would provide proof sufficient to persuade the alleging party that the alleging party erred in asserting noncompliance. If the accused party does not provide either a notice or proof as outlined above, then the alleging party should proceed pursuant to the dispute resolution provisions in the Agreement.

Under BellSouth's language, BellSouth may provide in its notice that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth calendar day following the date of the notice. In addition, at the same time, BellSouth may provide written notice by email to the person designated by the accused party to receive notices of noncompliance that the alleging party may terminate the provision of access to ordering systems to the accused party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth calendar day following the date of the initial notice. If an accused party disagrees with the alleged noncompliance, then the alleging party should proceed pursuant to the dispute resolution provisions in the Agreement.

The Commission agrees with the Joint Petitioners that it is unclear from BellSouth's proposed language whether BellSouth gets to pull the plug while a dispute concerning noncompliance is pending. Further, the Commission believes that suspension of access to OSS and the termination of all services is a severe consequence and agrees with the Joint Petitioners and the Public Staff that BellSouth should not be able to unilaterally determine if an alleged case of noncompliance is sufficient to terminate access to OSS. Therefore, the Commission finds it reasonable and appropriate to adopt the Joint Petitioners' proposed language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement.

CONCLUSIONS

The Commission concludes that the Joint Petitioners' proposed language concerning how disputes over alleged unauthorized access to CSR information should be handled under the Agreement is reasonable and appropriate. Accordingly, the Commission adopts the Joint Petitioners' proposed language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 16

ISSUE NO. 16 - MATRIX ITEM NO. 88: What rate should apply for Service Date Advancement (a/k/a service expedites)?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners argued that the rates for Service Date Advancement (a/k/a service expedites) related to UNEs, interconnection, or collocation should be set consistent with TELRIC pricing principles.

BELLSOUTH: BellSouth maintained that this issue is not appropriate for arbitration under Section 252 of the Act because BellSouth has no Section 251 obligation to expedite service orders.

PUBLIC STAFF: The Public Staff recommended that the Commission conclude that BellSouth must provide service expedites to CLPs at TELRIC rates. The Public Staff further recommended that if, after further negotiation, the parties cannot agree on an appropriate rate, BellSouth should submit a TELRIC cost study for Commission review and approval.

DISCUSSION

This issue concerns Section 2.6.5 of Attachment 6 of the Agreement. The Parties do not disagree on the appropriate language for Section 2.6.5, however they disagree on the appropriate rate.

Joint Petitioners witnesses Collins, Willis, and Falvey asserted in direct testimony that rates for service expedites related to UNEs, interconnection, or collocation should be set consistent with TELRIC pricing principles. They argued that where CLPs require access to UNEs on an expedited basis, which is often necessary in order to meet a customer's needs, CLPs should not be subject to inflated, excessive fees that were not set by the Commission and that do not comport with the TELRIC pricing standard.

Witnesses Collins, Willis, and Falvey maintained that BellSouth's position is that it is not required to provide expedited service pursuant to TA96. Therefore, they stated, BellSouth's proposed language states that BellSouth's tariffed rates for service date

advancements will apply; the tariffed rate is $200.00 per element, per day. They argued that this fee is unreasonable, excessive, and harmful to competition and consumers.

Witnesses Collins, Willis, and Falvey argued that this issue which concerns the manner in which BellSouth provisions UNEs is within the parameters of Section 251. They maintained that setting prices and arbitrating the terms and provisions associated with Section 251 unbundling are squarely within the Commission's jurisdiction and are appropriately resolved in this arbitration proceeding.

In rebuttal testimony, witnesses Collins, Willis, and Falvey maintained that BellSouth witness Morillo did not dispute that UNEs must be provisioned at TELRIC-compliant rates. They argued that an expedite order for a UNE should not be treated any differently. In addressing witness Morillo's claims that BellSouth's expedite charges are set forth in its FCC-approved FCC No. 1 Tariff, which are the same charges that BellSouth charges its retail customers, witnesses Collins, Willis, and Falvey asserted that the Joint Petitioners are not BellSouth retail customers. They stated that the Joint Petitioners purchase UNEs at TELRIC rates, whereas BellSouth retail customers do not. Consequently, they maintained, the corresponding charge to expedite an order for a UNE should also be a TELRIC rate set by the Commission, not the retail rate from BellSouth's FCC tariff.

Witnesses Collins, Willis, and Falvey noted that the dispute is not whether BellSouth will offer expedites in the Agreement since BellSouth has already agreed to do so; they maintained the dispute is over the appropriate rate. Witnesses Collins, Willis, and Falvey stated they are not convinced by witness Morillo's statement that if there were no charge or a minimal charge for expedites, it is likely that most CLP orders would be expedited, causing BellSouth to miss its standard intervals and its obligations to provide nondiscriminatory access. They argued that BellSouth should not be able to set an artificially high service expedite charge in order to keep its expedite ordering volumes at an artificially low level.

Witnesses Collins, Willis, and Falvey maintained that the Joint Petitioners remain optimistic that BellSouth will take them up on their offer to negotiate a reasonable rate for service expedites.

Witness Collins agreed on cross-examination that BellSouth is not obligated to provide service expedites. Witness Collins agreed that a service expedite request is not something unique to the telecom industry. He agreed that if someone wanted to mail a letter via first-class mail, it will cost 37 cents and that if someone wanted to send that same letter via overnight mail, it would cost substantially more than 37 cents. Witness Collins also stated that he could not cite any specific Commission or FCC order that says an expedite should be priced at TELRIC; he asserted that Section 251 of TA96 would require such a result.

Witness Collins also agreed on cross-examination that BellSouth's Service Quality Measurement (SQM)/Self-Effectuating Enforcement Mechanism (SEEM) plan is

designed to ensure that BellSouth continues to meet its Section 251 obligations, including its provisioning obligations and that the SQM/SEEM plan contains no provision measurements regarding BellSouth's ability to meet the service expedite request. He asserted that expedites, by nature, do not have a standard interval.

Witness Collins admitted on cross-examination that during his deposition, he stated that he was not aware of any state commission order, federal order, or any other authority for the position that a service expedite charge must be TELRIC based. He further stated that he had learned something since the time of his deposition: that Section 251 requires nondiscrimination. He stated that under Section 251 and nondiscrimination there is a right to a service expedite. When asked whether KMC charges its customers $250.00 for a service expedite, witness Collins stated that he would not be aware of the pricing.

The Joint Petitioners stated in their Proposed Order that TA96 requires that all UNEs be provisioned at rates that comply with TELRIC principles. The Joint Petitioners argued that the Commission is required to ensure that all Section 251 interconnection agreements comply with this standard. The Joint Petitioners maintained that because this issue regards the rates that apply to UNE provisioning, the Commission should find that it has jurisdiction to review it.

The Joint Petitioners stated that the sole dispute with respect to Section 2.6.5 of Attachment 6 of the Agreement is the price that should apply when BellSouth performs Service Date Advancements. The Joint Petitioners maintained that TELRIC principles should apply because Advancements involve UNE provisioning and, thus, are governed by the cost-based pricing of Section 252. Moreover, the Joint Petitioners argued, the work performed is no different than the work required to provision a UNE under a standard interval.

The Joint Petitioners also asserted that the general nondiscrimination requirements of TA96 require BellSouth to perform Service Date Advancements in the same manner as BellSouth performs them for itself. The Joint Petitioners argued that the record demonstrates that BellSouth performs Service Date Advancements for its own retail unit, which then provides the service to its retail customers.

The Joint Petitioners noted that BellSouth's proposed rate for Service Date Advancements is $200.00 per facility, per each day advanced. The Joint Petitioners stated that it is not clear that the wholesale provisioning arm of BellSouth imposes that same requirement on the BellSouth retail division. Thus, the Joint Petitioners stated, although the BellSouth end user customer may pay an expedite fee, the retail entity of BellSouth may not. The Joint Petitioners asserted that this Service Date Advancement fee thus appears to be a cost of doing business for the Joint Petitioners, but not for BellSouth itself.

The Joint Petitioners argued that all UNEs must be priced at cost. The Joint Petitioners noted that the FCC has implemented this mandate with the creation of the

TELRIC methodology. In addition, the Joint Petitioners stated, the FCC requires in Rule 51.501 that the methods of obtaining access to unbundled elements must be priced at TELRIC. The Joint Petitioners asserted that a Service Date Advancement is a means of obtaining a UNE and is part and parcel of provisioning a UNE, thus it is included in Congress' cost-based pricing mandate, and thus, TELRIC applies.

The Joint Petitioners maintained that the concepts of nondiscrimination and parity require that BellSouth treat the Joint Petitioners in the same manner as it treats its retail entity. Specifically, the Joint Petitioners commented, BellSouth must provide the same network access to the Joint Petitioners as its retail entity is provided. The Joint Petitioners argued that in this instance, it appears that BellSouth will perform Service Date Advancements for its retail entity without charge, but seeks to impose a $200.00 per facility, per day fee on the Joint Petitioners. The Joint Petitioners asserted that such a provision would violate the nondiscrimination and parity principles of Section 251.

The Joint Petitioners also argued that this regime would give BellSouth an unfair competitive advantage over the Joint Petitioners. The Joint Petitioners maintained that BellSouth's retail entity would be entitled to request Service Date Advancements at any time, without having to absorb any additional costs. The Joint Petitioners asserted that this result would not serve the public interest, as it would impede the Joint Petitioners' ability to compete in the North Carolina market and meet the needs of the customers it seeks to serve.

The Joint Petitioners noted that although BellSouth has not to date presented any cost justification for the Service Date Advancement fee, it is possible that in the future it may. For example, the Joint Petitioners stated, there may be costs associated with OSS maintenance and order management that are not incorporated in existing UNE provisioning rates. The Joint Petitioners recommended that the Commission review such costs if they are presented to the Commission and order the Joint Petitioners to adopt into the Agreement any TELRIC-compliant rates that the Commission establishes based on the costs.

In conclusion, the Joint Petitioners recommended that the Commission find that the charge for a Service Date Advancement must comport with the general pricing principles set forth in FCC Rule 51.503 and Section 252(d)(1) of TA96. Therefore, the Joint Petitioners recommended that the Commission find that BellSouth may charge only a TELRIC-based Service Date Advancement fee and reject BellSouth's proposed fee. The Joint Petitioners proposed that, in the event that BellSouth presents costing data to demonstrate the additional costs associated with Service Date Advancements, the Commission review them and set rates in accordance with TELRIC methodology that will apply to the Agreement on a going-forward basis after amendment.

BellSouth witness Morillo stated in direct testimony that BellSouth's obligations under Section 251 of TA96 are to provide service in standard intervals at cost-based prices. He maintained that there is no Section 251 requirement that BellSouth provide

service in less than the standard interval. Witness Morillo argued that because BellSouth is not required to provide expedited service pursuant to TA96, the Joint Petitioners' request on this issue is not appropriate for a Section 251 arbitration, and it should not, therefore, be included in the Interconnection Agreement. Witness Morillo asserted that if BellSouth elects to offer this service in the Agreement, it should not be penalized for doing so by having TELRIC rates apply to a function that is not even contemplated by the Act.

Witness Morillo noted that BellSouth's expedite charges are set forth in BellSouth's FCC No. 1 Tariff, Section 5. He stated that these are the same charges BellSouth's retail customers are charged when a retail customer requests service in less than the standard interval. Witness Morillo opined that to the extent that a CLP wants expedited service, the CLP should pay the same rates as BellSouth's retail customers. Witness Morillo stated that since BellSouth has no obligation under Section 251 to provide CLPs with expedited service, the cost-based pricing standards of Section 252(d) do not apply. Witness Morillo asserted that BellSouth's position on this issue is reasonable and provides parity of service between how BellSouth treats CLPs and how it treats its own retail customers.

Witness Morillo stated on cross-examination that BellSouth does not have an obligation under TA96 to provide service on an expedited basis. However, he also stated that he was not an attorney so this was not a legal opinion.

Witness Morillo observed that negotiations between the Joint Petitioners and BellSouth on the appropriate charge have not gone "anywhere". He also asserted that pricing expedites at TELRIC would be a penalty since it would force BellSouth to provide service at a price that BellSouth does not think is justifiable and commercially reliable. He stated that he was not aware of any cost studies that BellSouth had done with respect to its actual costs for service expedites.

BellSouth maintained in its Brief that compulsory arbitration under Section 252 of the Act should be properly limited to those issues necessary to implement a Section 251 interconnection agreement. BellSouth argued that expedite charges are not necessary to implement the agreement, especially since BellSouth meets its Section 251 obligations by providing service pursuant to standard provisioning intervals already established by the Commission. Accordingly, BellSouth maintained, the Commission should refrain from arbitrating this issue.

Indeed, BellSouth argued, it has a Section 251 obligation to provision interconnection services and UNEs within standard provisioning intervals. BellSouth asserted that the Commission recognized this obligation in establishing a performance measurement plan (the SQM/SEEM plan) for BellSouth in North Carolina in Docket No. P-100, Sub 133k. BellSouth maintained that the SQM/SEEM plan is designed to ensure that BellSouth continues to meet its Section 251 obligations and requires BellSouth to pay SEEM penalties if BellSouth fails to provision services within such standard intervals. BellSouth further noted that the SQM plan contains 17 provisioning

measures which are disaggregated into over 1,200 provisioning sub-measures. BellSouth further noted that, at the evidentiary hearing, the Joint Petitioners conceded that the SQM/SEEM plan contains no expedited provisioning measures. BellSouth asserted that this fact provides conclusive evidence that the expedited provisioning of a service order is a matter that is completely outside the scope of Section 251.

BellSouth commented that further buttressing this conclusion is the fact that the Joint Petitioners concede that BellSouth has no obligation to expedite service orders. Additionally, BellSouth maintained, the Joint Petitioners admit that if a service expedite request cannot be met by BellSouth, the Joint Petitioners can look to alternative measures to satisfy their customers' service request. BellSouth asserted that, clearly, if a service expedite was a Section 251 obligation, the Joint Petitioners would not concede that BellSouth has no obligation to provide it.

BellSouth maintained that with the exception of citing Section 251(c)(3) of the Act, the Joint Petitioners cannot cite any authority that supports their contention that a service expedite request should be priced at TELRIC. BellSouth commented that the words expedite or advancement do not appear in the text of Section 251(c)(3), and instead, BellSouth has, among other things, a nondiscriminatory obligation under Section 251(c)(3). BellSouth asserted that from a provisioning perspective, BellSouth satisfies such obligation by provisioning services within standard intervals and by charging CLPs the same service expedite rate that it charges its retail customers for purchasing services out of BellSouth's access tariff. BellSouth argued that the Joint Petitioners' assertion that they are not retail customers and, thus, should not be charged retail tariff rates misses the mark. BellSouth noted that at the hearing the Joint Petitioners acknowledged that CLPs buy services out of BellSouth's access tariff, such as special access, and when they do, they are charged the rates in the access tariff.

BellSouth stated that, as a practical matter, if there were a TELRIC-based service expedite charge, it is likely that many, if not most, CLP orders would be expedited, thus causing BellSouth to miss its standard intervals and its obligation to provide nondiscriminatory access. BellSouth also maintained that from a policy perspective, any requirement that forces BellSouth to price voluntarily-offered services at TELRIC prices will chill BellSouth's willingness to voluntarily offer services to CLPs.

BellSouth also argued that the special expedite rate reflects the value of the special expedite service being provided, and is no different from choosing to pay in excess of $10.00 to send a letter via overnight rather than paying 37 cents to send the same letter via first class mail. BellSouth asserted that at the evidentiary hearing the Joint Petitioners admitted that special pricing should govern special provisioning requests.

BellSouth concluded that the Commission should refrain from setting rates for voluntarily-offered services and should adopt BellSouth's position on Matrix Item No. 88, as it is reasonable and nondiscriminatory.

The Public Staff noted in its Proposed Order that FCC Rule 51.311(b) provides that if technically feasible an ILEC should provide a CLP with access to UNEs at least equal in quality to that which the ILEC provides to itself. The Public Staff stated that it believes that expediting service to customers is simply one method in which BellSouth can provide access to unbundled network elements. The Public Staff maintained that since BellSouth offers service expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section 251 and Rule 51.311(b).

The Public Staff argued that the rate BellSouth proposes is the rate it charges its large retail customers, but there is no cost support for this rate. Thus, the Public Staff maintained, it is unable to determine whether the rate is TELRIC compliant. The Public Staff stated that it believes that service expedites have costs not reflected in the normal nonrecurring charges for UNE installations, so a TELRIC cost study would likely show higher rates for service expedites than normal service installations. The Public Staff recommended that if the parties cannot come to agreement on a rate for service expedites, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

Overall, the Public Staff recommended that the Commission conclude that BellSouth must provide service expedites to CLPs at TELRIC rates. Further, the Public Staff recommended, if the parties cannot agree on an appropriate rate, BellSouth should submit a TELRIC cost study for Commission review and approval.

The Commission notes that Section 251(c)((3) of the Act states that telecommunications carriers must provide ". . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."

The Commission also notes that FCC Rule 51.311(b) states:

> 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. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element, or to provide access to the requested unbundled network element, at a level of quality that is equal to that which the incumbent LEC provides to itself.

Although Joint Petitioners witness Collins agreed on cross-examination that BellSouth is not required to provide service expedites, the Commission agrees with the Public Staff that since BellSouth offers service expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section 251 and Rule 51.311(b)

to the Joint Petitioners. This outcome is necessary in order to assure that BellSouth provides nondiscriminatory access to UNEs and does so at least equal in quality to that which BellSouth provides itself.

Further, the Commission notes that Joint Petitioners witnesses Collins, Willis, and Falvey maintained that they remained optimistic that BellSouth would take them up on their offer to negotiate a reasonable rate for expedites. The Commission finds it appropriate to require the Joint Petitioners and BellSouth to make a good faith effort to negotiate an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

CONCLUSIONS

The Commission concludes that BellSouth must provide service expedites at TELRIC-compliant rates. BellSouth and the Joint Petitioners are instructed to negotiate in good faith an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

ISSUE NO. 17 - MATRIX ITEM NO. 97: When should payment of charges for service be due?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners recommended that the Commission conclude that payment of charges for services rendered should be due thirty (30) calendar days from receipt or website posting of a complete and fully readable bill or within thirty (30) calendar days from receipt or website posting of a corrected or retransmitted bill in those cases where correction or retransmission is necessary for processing.

BELLSOUTH: BellSouth maintained that payment for services should be made on or before the payment due date (i.e., the next bill date) in immediately available funds.

PUBLIC STAFF: The Public Staff recommended that the Commission conclude that the payment due date should be 26 days from the date of receipt of the bill.

DISCUSSION

The Parties disagree on the appropriate language for Section 1.4 of Attachment 7 of the Agreement, as follows:

Section 1.4 – Joint Petitioners
Payment Due. Payment of charges for services rendered will be due thirty (30) calendar days from receipt or website posting of a complete and fully readable bill or within thirty (30) calendar days from receipt or website posting of a corrected or retransmitted bill in those cases where correction or retransmission is necessary for processing and is payable in immediately available funds. Payment is considered to have been made when received by the billing party.

Section 1.4 – BellSouth
Payment Due. Payment for services will be due on or before the next bill date (Payment Due Date) and is payable in immediately available funds. Payment is considered to have been made when received by the billing Party.

Joint Petitioners witnesses Johnson, Russell, and Falvey stated in direct testimony that payment for charges for services rendered should be due 30 calendar days from receipt or website posting of a complete and fully readable bill or within 30 calendar days from receipt or website posting of a corrected or retransmitted bill in those cases where correction or retransmission is necessary for processing. They argued that the Joint Petitioners need at least 30 days to review and pay invoices. Witnesses Johnson, Russell, and Falvey maintained that in other commercial settings in which parties have established business relationships, the payor may be afforded 45 days or more to pay an invoice. Furthermore, they asserted, it is not uncommon for parties to a contract to develop a course of dealings in which a party is not strictly held to a certain payment date. Nevertheless, witnesses Johnson, Russell, and Falvey stated, in order to try to settle as many billing issues as possible, the Joint Petitioners have agreed to BellSouth's proposal for a 30-day payment deadline (one billing cycle).

Witnesses Johnson, Russell, and Falvey maintained that it is the Joint Petitioners' experience that BellSouth is consistently untimely in posting or delivering its bills and those bills are often incomplete and sometimes incomprehensible. Therefore, the witnesses asserted, in effect BellSouth is actually giving the Joint Petitioners far fewer than 30 days to pay invoices, which is neither typical nor acceptable in a commercial setting, especially in this case, where the bills are numerous, voluminous, and complex.

Witness Russell stated that NuVox has tracked how long it takes BellSouth to post or deliver its bills. He asserted that on average it takes seven days after the issue date for NuVox to receive a bill from BellSouth. Witness Russell also noted that NuVox conducted a study of how long it takes NuVox to receive an electronic invoice from BellSouth using July 2002 through July 2003 data. He stated that although the times

recorded by NuVox varied from three days to over 30 days, the average time it takes BellSouth to deliver its electronic bills to NuVox is seven days.

Witness Falvey stated that he has tracked the difference between the date BellSouth posts on the bill and the date the bill is received by Xspedius. He noted that Xspedius began tracking this data in December 2003 and that their results demonstrate that it takes on average 6.45 days for Xspedius to receive a bill from BellSouth. He stated that although the average time is 6.45 days, they have traced bills that Xspedius has received from BellSouth in as little as two days and as long as 22 days.

Witness Russell stated that NewSouth's experience has been that, by the time it receives its bills from BellSouth, it has anywhere from 19 to 22 days to process bills for payment. He asserted that this amount of time is inadequate as it does not allow NewSouth to effectively and completely review and audit the bills it receives from BellSouth.

Witnesses Johnson, Russell, and Falvey stated that BellSouth's proposed language is inadequate since it provides that payment of charges for services rendered must be made on or before the next bill date. They argued that this language does not account for the fact that there is typically a long gap between the time a bill is issued and the date upon which it is made available to or delivered to a Joint Petitioner. Witnesses Johnson, Russell, and Falvey asserted that BellSouth's language also makes no attempt to mitigate the problems caused in circumstances when BellSouth's invoices are incomplete and/or incomprehensible.

Witnesses Johnson, Russell, and Falvey maintained that BellSouth is, in essence, using its monopoly legacy and bargaining position to force CLPs to either remit payment faster than almost any other business or in the alternative face substantial late payment penalties and increased security deposits.

Witnesses Johnson, Russell, and Falvey stated in rebuttal testimony that the Joint Petitioners should not be subject to unfair payment terms based on BellSouth's alleged systems limitations. They asserted that BellSouth makes two blanket statements with no justification: (1) due date requirements listed in its access tariff and contracts cannot be differentiated; and (2) all customer due dates and treatments are the same for all customers and cannot be differentiated. Witnesses Johnson, Russell, and Falvey maintained that neither assertion seems to be a valid reason for not providing the Joint Petitioners with reasonable payment terms.

Witnesses Johnson, Russell, and Falvey argued that the Joint Petitioners should not have to endure inconsistent and unfair payment terms because BellSouth would have to undertake modifications to make system changes to fix its systems to allow CLPs adequate time to pay invoices. They maintained that it is unreasonable for BellSouth to assert that its systems cannot be modified and improved or that it won't modify or improve them. Witnesses Johnson, Russell, and Falvey asserted that their request is reasonable, and BellSouth should not be able to hide behind its convenient

systems limitations arguments to avoid agreement on reasonable and fair payment terms.

Witnesses Johnson, Russell, and Falvey maintained that BellSouth's argument that it has no way to know when the customer actually receives the bill, thus it is not reasonable to expect that treatment could be based upon the date the customer receives the bill, is not persuasive. They asserted that there is no reason why BellSouth should not be aware when it sends and a customer receives an electronic or paper bill. Witnesses Johnson, Russell, and Falvey stated that it is easy to track on-line posting and receipt of mail – electronic and traditional. They noted that such posting and return receipt functions are basic components of internet-posting and electronic mail programs. They noted that courier services, such as UPS and FedEx, and the United States Postal Service have long provided return receipt or delivery confirmation services to their customers. They stated that it is surprising to them that BellSouth witness Morillo is unaware of such things and that nobody at BellSouth who reviewed his testimony bothered to point them out to him. Witnesses Johnson, Russell, and Falvey stated that because posting and receipt are easily tracked, it is certainly reasonable to tie payment due dates to the posting or receipt of bills.

Witness Russell stated in his summary that the Joint Petitioners were willing to accept the Commission's decision on due dates in the ITC^DeltaCom Communications, Inc. (ITC^DeltaCom)/BellSouth arbitration (Docket No. P-500, Sub 18) (i.e., 26 days after delivery of bill).

On cross-examination, witness Russell stated that during NuVox's seven years in existence it has paid all of its BellSouth invoices in a timely manner. He also stated that NuVox receives certain bills electronically. Witness Russell noted that NuVox's experience demonstrates that they usually receive bills from BellSouth six or seven days after the date posted on the bill. He agreed that BellSouth has incentive from the performance measurement plan perspective to deliver bills in a timely manner. Witness Russell stated that NuVox speaks to its BellSouth account representative on a regular basis about billing disputes, inaccuracies, and failure to deliver bills on time.

Witness Johnson stated on cross-examination that KMC receives most of its BellSouth bills electronically and that KMC receives its BellSouth bills in an average of about seven days.

Witness Falvey stated on cross-examination that Xspedius did a bill study that concluded that Xspedius receives all of its invoices from BellSouth in 6.45 days. He stated that while 30 days is the standard for good bills, given that the Joint Petitioners have problems with BellSouth in terms of the timing of bills and readability and intelligibility of the bills, the Joint Petitioners are asking for the Commission to allow the Joint Petitioners 30 days from the receipt of the bill to make sure they have enough time to go through the bills. He also agreed that if Xspedius found a bill to be confusing it could invoke the dispute resolution provision of the Agreement; however, he asserted it

takes a lot of time and energy and resources to invoke the dispute resolution provision. He also commented that Xspedius finds a fair amount of error in the bills.

On redirect, witness Russell stated that when BellSouth delivers a late bill to NuVox, it does not trigger a SEEM penalty payment on its on accord. He noted that SEEM penalties are based on an aggregate of BellSouth's performance and BellSouth's performance with regard to a number of metrics. He stated that simply because BellSouth delivers a bill late to NuVox does not necessarily trigger a SEEM payment directly to NuVox.

The Joint Petitioners stated in their Proposed Order that they recommend that Section 1.4 of Attachment 7 of the Agreement provide for payment of charges for services be due 30 calendar days from receipt or posting of a complete and fully readable bill. The Joint Petitioners noted that BellSouth proposed that payment be due on or before the next bill date in immediately available funds.

The Joint Petitioners noted that their witnesses testified that the Joint Petitioners: (1) receive a large number of bills from BellSouth monthly which are voluminous and complex; (2) these bills are often incomplete and sometimes incomprehensible; and (3) that there is often a long gap between the bill issue date and the date the BellSouth bill is actually posted or received by the Joint Petitioners. The Joint Petitioners stated that there was testimony that the Joint Petitioners do not receive their electronic bills from BellSouth for periods ranging from three to 30 days. The Joint Petitioners further maintained that their witnesses testified that it often takes several weeks to review the BellSouth bills because of their volume and complexity. The Joint Petitioners noted that BellSouth witness Morillo testified that BellSouth pays the bills it receives from the Joint Petitioners on receipt.

The Joint Petitioners maintained that the issue presented in this item is one familiar to the Commission. The Joint Petitioners noted that the same issue was presented in the last ITC^DeltaCom arbitration with BellSouth. The Joint Petitioners argued that nothing in the record of this arbitration gives the Commission a reason to change its decision on this issue. The Joint Petitioners stated that the evidence in this arbitration regarding the lag time between BellSouth's bill date and the issuance of its bills is consistent with the evidence in the ITC^DeltaCom/BellSouth arbitration. The Joint Petitioners recommended that the Commission find that a payment due date 26 days from the date of receipt is a reasonable interval within which the Joint Petitioners can review and pay their bills. The Joint Petitioners noted that as in the ITC^DeltaCom/BellSouth arbitration, the Commission should recognize that special circumstances may warrant an extension of the payment due date beyond this 26-day interval. The Joint Petitioners recommended that the Commission find that it expects BellSouth to grant such requests when reasonable. Finally, the Joint Petitioners noted that in the Joint Issues/Open Items Matrix, they stated that they would find the result in the ITC^DeltaCom/BellSouth arbitration on this issue acceptable.

The Joint Petitioners recommended that the Commission conclude that the payment due date should be 26 days from the date of receipt of the bill, and therefore, require the Joint Petitioners and BellSouth to amend the proposed language in Attachment 7 of the Agreement to conform to this decision.

BellSouth witness Morillo stated in his testimony that BellSouth's position on this issue is that payment for services should be due on or before the next bill date in immediately available funds. He stated that BellSouth has no way to know when a customer actually receives a bill, and thus, it is not reasonable to expect that treatment could be based upon the date the customer receives the bill.

Witness Morillo asserted that there is no legitimate reason to allow the Joint Petitioners a full 30 calendar days after receiving a bill to make payment. He noted that BellSouth invoices each CLP every 30 days, just as it does for its retail customers. He stated that the bill date is the same each month and each CLP is aware of its billing due date. Witness Morillo maintained that a CLP can elect to receive its bills electronically so as to minimize any delay in bill printing and receipt. He also asserted that to the extent a CLP has questions about its bills, BellSouth cooperates with that CLP to provide responses in a prompt manner and resolve any issue. Witness Morillo also noted that in a given month if special circumstances warrant a CLP may request an extension of the due date and BellSouth does not unreasonably refuse to grant such a request.

Witness Morillo explained that from the time an electronic bill goes out, generally four to six days after the bill period, the CLP generally has 22 days to review and pay its bill. He noted that paper bills will take longer. Witness Morillo also asserted that, regarding the Joint Petitioners' allegation of incomplete and/or incomprehensible bills, the CLPs do not support this allegation with examples or other factual evidence. He stated that if the CLPs would provide such evidence, BellSouth would be glad to investigate.

On cross-examination, witness Morillo agreed that BellSouth believes that payment should be due on or before the next bill date and the Joint Petitioners believe that the payment should be due 30 calendar days from the receipt of the bill or the website posting of an electronic bill.

Witness Morillo also agreed that he testified in his deposition that the Joint Petitioners all received electronic bills and that an electronic bill has a confirmation. He agreed that BellSouth pays bills from Xspedius, NuVox, and KMC within 30 days of receipt.

Addressing the decision in the ITC^DeltaCom/BellSouth arbitration, witness Morillo stated that BellSouth's policy remains to have the right to request a 30-day payment cycle. He stated that it is cumbersome for BellSouth to change all of its billing systems just to address three CLPs in North Carolina. He stated that BellSouth is

unwilling to accept the Commission's decision in the ITC^DeltaCom/BellSouth arbitration.

BellSouth argued in its Brief that the Joint Petitioners (like all CLPs that do business with BellSouth) have a set and constant bill issuance date for every invoice or bill that the Joint Petitioners receive. BellSouth noted that based on the bill date, the Joint Petitioners know the exact date when payment is due for each bill (i.e., it is by the next bill issuance date). For example, BellSouth stated, a NuVox invoice that is dated the 5th day of the month will always be dated the 5th day of the month and will always be due by the 5th day of the following month.

BellSouth asserted that in addition to knowing when their bills are due, the Joint Petitioners concede, as they must, that their monthly billings are reasonably predictable and that the Joint Petitioners are in the best position to predict or estimate their monthly billings. Further, BellSouth noted, NuVox unequivocally admitted during the evidentiary hearing to paying all of its BellSouth bills in a timely manner for seven years. BellSouth asserted that NuVox's uncontradicted testimony belies the Joint Petitioners' assertion that they need at least 30 days to review and pay their bills.

BellSouth also argued that it is difficult to reconcile the Joint Petitioners' own tariffs with their assertion that BellSouth's payment terms would be considered unacceptable in most commercial settings. BellSouth maintained that the Joint Petitioners' own end user tariffs or standard contract terms require North Carolina customers to pay on or before the payment due date.

BellSouth maintained that the Joint Petitioners' suggestion that, in BellSouth's testimony, BellSouth measured payment of bills received from the Joint Petitioners from the date of receipt is both irrelevant and a mischaracterization of BellSouth's testimony. BellSouth argued that it used the date it received the bills to provide a meaningful way to measure its payment history with the Joint Petitioners because certain Joint Petitioners have not been able to and presently cannot provide BellSouth with a timely bill. BellSouth maintained that the Joint Petitioners do not have the same concerns with bills they receive from BellSouth.

BellSouth argued that granting special payment terms to the Joint Petitioners is also contrary to the Act. Specifically, BellSouth maintained, under Section 251(c), BellSouth has, among other things, an obligation to provide interconnection services and UNEs on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. BellSouth noted that for billing purposes, BellSouth satisfies its nondiscrimination obligations by delivering bills to CLPs in the same time and manner that BellSouth delivers bills to its own retail customers. Additionally, BellSouth stated, it pays SEEM penalties if it fails to deliver CLP bills in a timely manner (i.e., at parity with the time it takes BellSouth to deliver bills to its retail customers). BellSouth noted that as Joint Petitioners witness Russell acknowledged on cross-examination at the evidentiary hearing, from a timeliness perspective, BellSouth has at least two practical

reasons (getting paid and avoiding SEEM penalties) for delivering bills to CLPs as soon as possible.

BellSouth asserted that to minimize any delay in receiving its bills, the Joint Petitioners can elect to receive their bills electronically. Indeed, BellSouth maintained, the Joint Petitioners receive bills electronically. BellSouth noted that, further, if any Joint Petitioner has billing questions, nothing precludes the Joint Petitioner from contacting BellSouth with such questions, and BellSouth will respond in a prompt manner. BellSouth asserted that Joint Petitioners witness Russell admitted that NuVox speaks with its BellSouth account representatives on a regular basis regarding billing matters. BellSouth noted that, additionally, Joint Petitioners witness Falvey admitted during the evidentiary hearing that nothing prevents the Joint Petitioners from exercising their rights under the agreed upon billing dispute resolution provision, if any Joint Petitioner receives a bill that appears incomplete or confusing.

BellSouth argued that it is reasonable for BellSouth to expect that payment will be made by the next bill date; BellSouth expects the same from its retail customers. Moreover, BellSouth maintained, if special circumstances warrant, a Joint Petitioner may request an extension of the payment due date, and BellSouth does not unreasonably refuse to grant such a request.

Finally, BellSouth asserted, the Joint Petitioners' proposal would result in an ever extending, revolving payment due date. BellSouth stated that, additionally, granting the Joint Petitioners' request for special payment terms would require modifications to BellSouth's billing systems and would involve substantial costs. BellSouth argued that incurring such costs to meet the special payment due date request of the Joint Petitioners is unnecessary and unwarranted given the fact that in granting BellSouth long distance authority in North Carolina, both the Commission and the FCC determined that BellSouth's billing practices are nondiscriminatory. BellSouth concluded that it has already been determined that BellSouth's existing billing practices give CLPs a meaningful opportunity to compete in the local market; accordingly, the Commission should reject the Joint Petitioners' request for special treatment and adopt BellSouth's proposed language on Matrix Item No. 97.

The Public Staff stated in its Proposed Order that the Commission, in its *March 2, 2004 Order* in Docket No. P-500, Sub 18 – the ITC^DeltaCom/BellSouth arbitration docket, agreed with the Public Staff's recommendation that a payment due date of 26 days from the date of receipt would be an appropriate amount of time. The Public Staff maintained that it had contended that this period represented the approximate amount of time a CLP has to review bills when BellSouth's billing systems are performing adequately and would allow adequate time for review of the bill as well as provide an incentive for BellSouth to render timely bills. The Public Staff noted that the Joint Petitioners indicate that they are willing to accept a payment due date of 26 days from receipt of a bill and this finding from Docket No. P-500, Sub 18 is reasonable and applicable to this proceeding as well. The Public Staff recommended

that the Commission conclude that the payment due date should be 26 days from the date of receipt of the bill.

The Commission notes that in its *March 2, 2004 Recommended Arbitration Order* in the ITC^DeltaCom/BellSouth arbitration docket, the Commission stated

> Based upon the foregoing, the Commission believes that the Public Staff's recommendation for the payment due date to be 26 days from the date of receipt is a reasonable interval of time in which ITC can review and pay its bills. In consideration that after the bill date, BellSouth then has to accumulate the traffic sensitive-type charges which according to BellSouth results in another three to five days before bills are electronically transmitted to ITC, which results in ITC typically having a payment due date that is 27 to 25 days after the date of receipt, or sometimes 23 days as ITC noted that it has even been seven days after the bill date before the bill is received, the Commission believes that establishing a specific payment due date of 26 days after receipt of the bill would be reasonable and fair to both ITC and BellSouth. The Commission infers from BellSouth's representation of its present process of a three- to five-day lag, that BellSouth is already rending its bills electronically to ITC, on average, within four days after the bill date, thus, the Commission does not believe that a 26-day requirement would result in any material system-wide change in BellSouth's billing systems. Furthermore, the Commission recognizes that when special circumstances warrant, ITC may request an extension of the payment due date; the Commission believes BellSouth should continue to grant such request, when reasonable.

The Commission further notes that BellSouth filed an Objection to this finding in the Commission's *March 2, 2004 Order*, however, by letter filed May 17, 2004, ITC^DeltaCom stated that it and BellSouth had successfully resolved the issue.

The Commission agrees with the Joint Petitioners and the Public Staff that the Commission's decision in the ITC^DeltaCom/BellSouth arbitration proceeding is reasonable and applicable to this proceeding as well. The Commission does not believe that BellSouth provided any compelling arguments why a 26-day billing period is not appropriate in this docket. Therefore, the Commission concludes that the payment due date should be 26 days from the date of receipt of the bill.

CONCLUSIONS

The Commission concludes that the payment due date should be 26 days from the date of receipt of the bill. Accordingly, the Commission requires the Joint Petitioners and BellSouth to properly amend the proposed language in the Agreement in Attachment 7, Section 1.4, in accordance with this decision.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

ISSUE NO. 18 - MATRIX ITEM NO. 100:

Joint Petitioners' Issue Statement: Should a CLP be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

BellSouth's Issue Statement: Should a CLP be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners stated that CLPs should not be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination. Rather, the Joint Petitioners noted, if a CLP receives a notice of suspension or termination from BellSouth, with a limited time to pay nondisputed past due amounts, a CLP should be required to pay only those amounts past due as of the date of the notice and as expressly and plainly indicated on the notice, in order to avoid suspension or termination. Otherwise, the Joint Petitioners maintained, a CLP will risk suspension or termination due to possible calculation and timing errors or the inability to predict posting of payment by BellSouth correctly.

BELLSOUTH: BellSouth maintained that the Commission should continue to allow BellSouth to protect its financial interest by allowing BellSouth to discontinue providing service to any Joint Petitioner that fails to timely pay for services rendered and therefore, should adopt BellSouth's proposed language on Matrix Item No. 100.

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

DISCUSSION

The Parties disagree on the appropriate language for Section 1.7.2 of Attachment 7 of the Agreement, as follows:

Section 1.7.2 – Joint Petitioners

Each Party reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the Due Date, the billing Party may provide written notice to the other Party that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, as indicated on the notice in dollars and cents, is not received by the fifteenth (15th) calendar day following the date of the notice. In addition, the billing Party may, at the same time, provide written notice that the billing Party may discontinue the provision of

existing services to the other Party if payment of such amounts, as indicated on the notice (in dollars and cents), is not received by the thirtieth (30th) calendar day following the date of the Initial Notice.

Section 1.7.2 – BellSouth
BellSouth reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the bill date in the month after the original bill date, BellSouth will provide written notice to <<customer_short_name>> that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, and all other amounts not in dispute that become past due subsequent to the issuance of the written notice ("Additional Amounts Owed"), is not received by the (15th) calendar day following the date of the notice. In addition, BellSouth may, at the same time, provide written notice that BellSouth may discontinue the provision of existing services to <<customer_short_name>> if payment of such amounts, and all other Additional Amounts Owed that become past due subsequent to the issuance of the written notice, is not received by the thirtieth (30th) calendar day following the date of the initial notice. Upon request, BellSouth will provide information to <<customer_short_name>> of the Additional Amounts Owed that must be paid prior to the time periods set forth in the written notice to avoid suspension of access to ordering systems or discontinuance of the provision of existing services as set forth in the initial written notice.

Joint Petitioners witnesses Johnson, Russell, and Falvey stated in direct testimony that it is their position that CLPs should not be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination. Rather, they asserted, if a CLP receives a notice of suspension or termination from BellSouth, with a limited time to pay nondisputed past due amounts, CLPs should be required to pay only those amounts past due as of the date of the notice and as expressly and plainly indicated on the notice in order to avoid suspension or termination; otherwise, a CLP will risk suspension or termination due to possible calculation and timing errors.

Witnesses Johnson, Russell, and Falvey asserted that if a Joint Petitioner receives a notice of suspension or termination from BellSouth, it will be the Joint Petitioner's immediate goal to pay the past due amounts included in the notice to avoid suspension or termination. They argued that if the Joint Petitioner must attempt to calculate and pay past due amounts in addition to those specified in BellSouth's notice, the Joint Petitioner unfairly will risk suspension or termination due to possible calculation and timing errors.

Witnesses Johnson, Russell, and Falvey explained that if one of their companies received a notice of suspension or termination from BellSouth, it would be nothing less than a "fire drill". They stated that whoever received the notice would immediately work to determine whether such payments were missing, not posted, disputed, or simply due

and, in the latter case, would arrange to deliver payment to BellSouth as fast as possible. Witnesses Johnson, Russell, and Falvey asserted that access to BellSouth's OSS is essential to the daily operation of a CLP and that they take the threat of suspension of such access very seriously as it would result in massive service outages across their North Carolina customer base.

Witnesses Johnson, Russell, and Falvey asserted that any time or resources that they would have to expend in trying to calculate any possible additional past due amounts that may become past due in the time period between the date on which BellSouth calculated the past due amount (which may or may not be known) and the date on which BellSouth would receive and post payment would be taken away from time needed to investigate and secure payment of the amount specified on the suspension or termination notice. But, they maintained, the more significant hindrance is the shell game that would ensue if the Joint Petitioner had to guess the precise amount that BellSouth calculated upon receipt and posting or payment that was needed to satisfy the payment of all amounts past due requirement BellSouth seeks to impose. Witnesses Johnson, Russell, and Falvey noted that under the circumstance, only BellSouth can know (and control) the answer to that calculation, as it knows the date upon which it first calculated the past due amount included in the notice and the date upon which it posts receipt of payment.

Witnesses Johnson, Russell, and Falvey stated that BellSouth's proposed language is inadequate because it places too much burden and risk on the Joint Petitioners who are forced to calculate possible past due amounts in addition to those included in the BellSouth notice to avoid suspension or termination of service. They maintained that BellSouth's proposal amounts to a high stakes shell game that could result in massive service outages for their North Carolina customers, if they fail to properly track, time, trace, and predict BellSouth behavior in a manner that allows them to arrive at a magic number needed to avoid suspension or termination. They argued that such terms and conditions are unreasonable in any setting and especially in this one where consumers' services hang in the balance.

Finally, witnesses Johnson, Russell, and Falvey stated that they disagree with BellSouth's proposed restatement of the issue as it ignores the critical aspect of the issue which is the danger that there could be a calculation error based on erroneous assumptions regarding timing, posted disputes, or some other factors.

In rebuttal testimony, witnesses Johnson, Russell, and Falvey stated that the Joint Petitioners' proposed language is appropriate because there is a substantial risk of calculation errors or disputes and customer impacting service outages inherent in BellSouth's proposal. They argued that BellSouth's proposal is too dangerous to be necessary and it seems intentionally designed to be that way. Witnesses Johnson, Russell, and Falvey maintained that the Joint Petitioners' proposal represents a reasonable and fair alternative that protects the interests of all parties, is not subject to abuse, and does not unduly threaten North Carolina customers' services.

During his summary, witness Russell stated that Matrix Item No. 100 is another provision in which BellSouth threatens to pull the plug on the Joint Petitioners and their North Carolina customers. Witness Russell stated that BellSouth is seeking to contractualize a shell game of sorts wherein it can terminate services if CLPs do not properly calculate time payment and predict BellSouth's own posting of payment amounts due in addition to those set forth on any late payment termination notice.

The Joint Petitioners stated in their Proposed Order that BellSouth, in its proposed language for Section 1.7.2 of Attachment 7, seeks the right to suspend or terminate a Joint Petitioner's service if they fail, after receiving a notice of suspension for nonpayment, to pay the amount due on the notice and any other amounts that may become past due after the date of the notice. The Joint Petitioners noted that, thus, if one account held by a Joint Petitioner is not paid within 31 days on the date of an invoice, the Joint Petitioner must within 15 days pay that amount, plus any other amount that may become late (which will not appear on the notice) within 15 days, in order to avoid suspension of ordering access. The Joint Petitioners commented that failure to pay all amounts within 30 days may result in outright termination of service.

The Joint Petitioners stated that their proposed language for Section 1.7.2 also requires them to remain current on invoices and includes provisions for suspension or termination of service, but requires that any notice state exactly the amount due in dollars and cents that must be paid. The Joint Petitioners noted that their proposed language contains the same deadlines proposed by BellSouth: failure to pay the amount due within 15 days may result in order suspension, and failure to pay within 30 days may result in service termination.

The Joint Petitioners noted that each of them hold many accounts with BellSouth. The Joint Petitioners maintained that each account, if not paid in 31 days, automatically generates a notice. The Joint Petitioners commented that BellSouth witness Morillo testified that any one notice will only state the amount due on the one account from which it is issued. The Joint Petitioners noted that the Joint Petitioner must then pay the amount on the notice, plus any additional amounts that have become past due, in order to avoid suspension or termination of services. The Joint Petitioners maintained that amounts due will not be consolidated in the notice. The Joint Petitioners argued that this situation requires them to calculate for themselves the exact amount due on any given date, and pay it promptly to avoid losing service. Yet BellSouth, the Joint Petitioners argued, as the creditor on all of these accounts, has the ability to calculate the amounts that it is owed.

The Joint Petitioners maintained that service termination is an extremely serious matter. The Joint Petitioners commented that carriers are prohibited by statute from terminating service to customers without the approval of the Commission or the FCC. The Joint Petitioners argued that if BellSouth terminates their service, then North Carolina consumers will necessarily lose service. The Joint Petitioners asserted that the Commission cannot give BellSouth the discretion to impose this penalty when it places on the Joint Petitioners the onus of calculating the amount on the notice, plus

any additional amounts that have become past due. The Joint Petitioners argued that this burden is unfair and carries too great of a risk of mistakes – resulting in service termination.

The Joint Petitioners opined that they have demonstrated a good payment history with BellSouth, according to BellSouth witness Morillo. The Joint Petitioners, therefore, recommended that the Commission find that BellSouth's proposed language is unnecessary to ensure that its invoices are paid. The Joint Petitioners maintained that BellSouth's proposal involves guesswork as to whether disputes will be properly and timely recognized, and as to when BellSouth will recognize receipt of payment. The Joint Petitioners argued that the opportunity for error and possible gamesmanship created by BellSouth's proposal is unreasonable, unacceptable, and contrary to the public interest. The Joint Petitioners maintained that their proposed language, which requires that BellSouth tell a Joint Petitioner exactly what it owes in dollars and cents, is a more equitable and sensible way to deal with late payments.

The Joint Petitioners recommended that the Commission adopt their proposed language for Section 1.7.2 of the Agreement.

BellSouth witness Morillo stated in supplemental direct testimony that BellSouth's position on this issue is that if a CLP receives a notice of suspension or termination from BellSouth as a result of the CLP's failure to pay timely, the CLP should be required to pay all amounts that are past due as of the date of the pending suspension or termination action. Witness Morillo asserted that by definition the collections process is triggered when a customer does not pay its bills according to the terms of the agreement. He noted that once in collections, the risk associated with the customer is higher, based on the customer's own behavior. Witness Morillo noted that under the Joint Petitioners' proposed language, BellSouth would be limited to collecting the amount that was stated in the past due letter regardless of the customer's payment performance for subsequent bill cycles. He argued that BellSouth has the right and responsibility to protect itself from the higher risk associated with nonpayment by insuring that customers are not allowed to continue to stretch the terms of the contract and increase the likelihood of bad debt.

Addressing the Joint Petitioners' statement that the past due amount should be expressly indicated on the notice, witness Morillo stated that he would clarify the collections process for past due amounts. Witness Morillo noted that for Integrated Billing System (IBS) billed services (non-designed, i.e., UNE-P, etc.), if a customer becomes past due and BellSouth sends a treatment letter (i.e., suspension letter) requiring the customer to pay a certain past due amount or lose access to BellSouth ordering systems, BellSouth will require that the customer pay that certain amount and any additional amounts for which the customer has received additional treatment letters, or lose access to ordering systems. He stated that BellSouth would not withhold access to ordering systems for amounts where a collections notice had not been made to the customer. Witness Morillo noted that if, however, the customer does not comply and access to ordering systems is denied, payment of all additional amounts that have

become past due will be required in order to restore access to the ordering systems. He maintained that the process for disconnection of service would work in a similar manner; BellSouth would not disconnect a customer if payment were made for all amounts for which a notice has been sent.

Witness Morillo maintained that Carrier Access Billing System (CABS) billed services (i.e., designed services) are collected differently. He stated that because the system does not have the capability to issue notices mechanically, the treatment process is more manual. Witness Morillo asserted that if a notice is sent to a customer for past due balances, and during that treatment process, additional payments become past due, BellSouth will require the customer to pay the amount on the notice, plus any additional amounts that have become past due in order to avoid suspension or termination of services.

Witness Morillo stated on cross-examination that the proposed provision allows BellSouth to suspend access and terminate service. He noted that the Joint Petitioners know when their BellSouth bills are due and that if they pay their bills on time this provision will never be invoked. Witness Morillo also noted that BellSouth has never suspended the Joint Petitioners for nonpayment.

Witness Morillo stated that it is probably correct under BellSouth's proposed language that there are circumstances where the Joint Petitioners would need to pay amounts in addition to those specified on the notice in order to avoid termination or suspension. He also agreed that potentially the Joint Petitioners may have to calculate an amount different from that specified on the termination notice in order to avoid termination. But, he asserted, the Joint Petitioners know if they did not pay a bill on time within 30 days and that there is no information that the Joint Petitioners would be missing.

Witness Morillo stated that the exact due date of payment will appear on the suspension or termination notice. He also agreed that in the case of two billing cycles, a Joint Petitioner may get fewer than 15 days to cure the past due amount. He also agreed that potentially with a third or fourth billing cycle within the notice timeframe the Joint Petitioners could have one day to pay the amounts. Witness Morillo also agreed that BellSouth could send out two flavors of a notice: one to pay all past due amounts and one to pay all amounts due.

Witness Morillo was asked about what counts as paying. He agreed that the concept of getting credit for paying the minute a CLP writes the check is analogous to the bill date on a BellSouth bill. Witness Morillo noted that he did not handle the posting of payments so he was not intimate with the process.

Witness Morillo explained that a treatment letter is a suspension letter.

On cross-examination by the Public Staff, witness Morillo agreed that he can make a distinction that the concept of a threat relates more to capability than to intent.

On re-direct, witness Morillo agreed that BellSouth's proposed language applies to only undisputed amounts owed. He also agreed that there was nothing that prevents the CLPs from invoking the billing dispute resolution provision of the Agreement.

BellSouth stated in its Brief that two important, agreed-upon contractual provisions should not be forgotten when deciding Matrix Item No. 100. First, Matrix Item No. 100 is limited to a Joint Petitioners' failure to pay undisputed amounts that are past due. Second, BellSouth noted, it will not commence any suspension or disconnection activity involving amounts that are subject to a billing dispute. BellSouth argued that given these circumstances, if a Joint Petitioner receives a notice of suspension or termination from BellSouth as a result of the Joint Petitioner's failure to timely pay amounts that are not subject to a billing dispute, the Joint Petitioner should be required to pay all undisputed amounts that are past due as of the date of the pending suspension or termination action. BellSouth asserted that the Joint Petitioners know when they receive bills, they know when the bills are due, and they admit that the amount of such bills can be predicted with a reasonable degree of accuracy. BellSouth further stated that nothing precludes the Joint Petitioners from contacting BellSouth with any questions they may have regarding amounts owed, and BellSouth stated that it will cooperate to promptly answer any billing related questions.

BellSouth maintained that the Joint Petitioners' apparent objection to BellSouth's proposed language for Matrix Item No. 100 is a concern about guessing what additional past due amounts must be paid to avoid suspension or termination. BellSouth noted that on March 21, 2005, BellSouth eliminated the Joint Petitioners' concern by revising its proposed language to remove the paranoia about perceived guesswork. BellSouth stated that, specifically, it is willing to agree that, upon request, BellSouth will advise of the additional undisputed amounts that have become past due since the issuance of the original notice of suspension or termination. BellSouth asserted that the Joint Petitioners have failed to respond to BellSouth's revised language on this Matrix Item.

BellSouth recommended that the Commission allow BellSouth to protect its financial interest by allowing BellSouth to discontinue providing service to any Joint Petitioner that fails to timely pay for services rendered and therefore, should adopt BellSouth's proposed language on Matrix Item No. 100. BellSouth asserted that ruling otherwise would be to allow the Joint Petitioners to have a revolving extension for payment of undisputed, past due amounts.

The Public Staff stated, in its Proposed Order, that it agrees with the Joint Petitioners that they should pay only the amount past due, expressly and plainly indicated on the notice as of the date of the notice. The Public Staff stated that it also believes that BellSouth's proposal would likely result in miscalculation of past due amounts, thereby potentially causing customer terminations. The Public Staff stated that it questions how BellSouth could require CLPs to pay an amount differing from the amount on the past due notice. The Public Staff maintained that it is unreasonable for

the CLPs to be required to research, calculate, and pay any charges that become past due after a notice of suspension or termination for nonpayment has been sent. The Public Staff noted that a CLP would be forced to make assumptions and calculations that should normally be done by BellSouth. Therefore, the Public Staff asserted that it believes that the Joint Petitioners should not be required to calculate and pay past due amounts in addition to those specified by BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination.

The Commission notes that the language in dispute for Matrix Item No. 100 concerns whether a notice of suspension or termination for nonpayment should include the exact dollar amount due to BellSouth in order to avoid the suspension or termination or whether, upon request, BellSouth will provide information to the Joint Petitioners of the Additional Amounts Owed not reflected on the notice of suspension or termination. The Commission believes that any of the possible sanctions for nonpayment including the refusal of additional applications for service, the incompletion of pending orders for service, and/or suspension of access to ordering systems are business-impacting and could potentially result in customer termination. The Commission agrees with the Joint Petitioners that customer service termination is an extremely serious matter. The Commission further agrees with and understands BellSouth's argument that any service disruptions or terminations under this provision would only occur when a Joint Petitioner has not paid undisputed amounts that are past due.

However, the Commission believes the potential sanctions for nonpayment are too severe to let the risk of calculation errors potentially occur. Further, the Commission does not believe that BellSouth's new proposed language allowing the Joint Petitioners to request additional information from BellSouth is sufficient when the potential for customer termination is still present.

Therefore, the Commission finds it appropriate to adopt the Joint Petitioners' proposed language for Section 1.7.2 of Attachment 7 of the Agreement. This language will require BellSouth to specify in dollars and cents the amounts due to BellSouth to avoid any of the sanctions which could include customer termination.

CONCLUSIONS

The Commission concludes that it is appropriate to adopt the Joint Petitioners' proposed language concerning suspension or termination notices for Section 1.7.2 of Attachment 7 of the Agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 19

ISSUE NO. 19 - MATRIX ITEM NO. 101: How many months of billing should be used to determine the maximum amount of the deposit?

POSITIONS OF PARTIES

JOINT PETITIONERS: The maximum amount of a deposit should not exceed two month's estimated billing for new CLPs or one and one-half month's actual billing for existing CLPs (based on average monthly billings for the most recent six month period). Alternatively, the maximum amount of deposit should not exceed one month's billing for services billed in advance and two months' billing for services billed in arrears.

BELLSOUTH: The average of two (2) months of actual billing for existing customers or estimated billing for new customers, which is consistent with the telecommunications industry's standard and BellSouth's practice with its end users.
PUBLIC STAFF: The Public Staff recommended that the Commission conclude that the deposit requirements specified in Commission Rule R12-4 are applicable and the language proposed by BellSouth should be incorporated into the Agreement.

DISCUSSION

The Joint Petitioners argued that being required to post excessive deposits places them at a competitive disadvantage. Deposits by their nature tie up capital, thus constrain Petitioners' ability to increase facilities deployment. The Joint Petitioners also argued that they have demonstrated a good payment history with BellSouth over the last several years, thus considerably decreasing BellSouth's risk, which they believe warrant a less onerous deposit policy.

BellSouth, through its witness Morillo, testified that service deposits are necessary to mitigate BellSouth's financial risk in the event a CLP does not or is unable to pay its bill. BellSouth has several criteria by which CLP deposit amounts are set, which includes payment history, liquidity, and bond rating. *See* Attachment 7, Section 1.8.5. BellSouth stated that these criteria are not in dispute.

The Public Staff pointed out that, in Docket No. P-500, Sub 18, the Commission addressed a similar issue and concluded that creditworthiness should be determined according to the principle set forth in Commission Rule R12-2(a)(2) for the establishment of credit for retail customers.[15] Commission Rule R12-4 is related to the principle set forth in Rule R12-2(a)(5). It limits the amount of the cash deposit to two-twelfths of the estimated charge for the service for the ensuing twelve-month period. The Public Staff believed that BellSouth's proposal to use the average of two month's of actual billing for existing customers or estimated billing for new customers is

[15] *In the Matter of Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* Recommended Arbitration Order, Pgs. 78-79 (March 3, 2004).

consistent with Commission Rule R12-4 and industry standards unlike the Joint Petitioners' proposal.

Having reviewed the record and the language proposed by the Parties, the Commission believes that the deposit requirements specified in Commission Rule R12-4 are applicable for these circumstances and the language proposed by BellSouth should be incorporated into the Agreement.

CONCLUSIONS

The Commission concludes that the deposit requirements specified in Commission Rule R12-4 are applicable for these circumstances. Therefore, the language proposed by BellSouth should be incorporated into the Agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 20

ISSUE NO. 20 - MATRIX ITEM NO. 102: Should the amount of the deposit BellSouth requires from a CLP be reduced by past due amounts owed by BellSouth to the CLP?

POSITIONS OF PARTIES

JOINT PETITIONERS: Yes. The amount of security due from an existing CLP should be reduced by amounts due CLP by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in the deposit provisions of Attachment 7 of the Agreement.

BELLSOUTH: No. The CLPs' remedy for addressing late payments by BellSouth should be suspension/termination of service or application of interest/late payment charges similar to BellSouth's remedy for addressing late payments by CLPs.

PUBLIC STAFF: The Public Staff recommended that the Commission conclude that the Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice.

DISCUSSION

The Joint Petitioners argued that the provision for a deposit offset is appropriate since the deposit provisions of the Agreement are not reciprocal and BellSouth's payment history with the CLPs is often poor. The Joint Petitioners proposed that their language is appropriate because any credit risk exposure that BellSouth seeks to protect itself from is offset by amounts that BellSouth does not pay in a timely fashion.

BellSouth contended that the CLPs' remedy for addressing non-disputed late payments by BellSouth should be the suspension/termination of service or assessment of interest/late payment charges similar to BellSouth's remedy for addressing late payments by CLPs. BellSouth disagreed with the Joint Petitioners' characterization of BellSouth's payment history, stating that it has paid or disputed 91% of the invoices received from Xspedius Communications and Xspedius Corporation within 30 days of receipt. Further, BellSouth stated that, since December 2003, it has paid or disputed 97% of the invoices received from NuVox within 30 days of receipt.

The Public Staff noted that, in Docket No. P-500, Sub 18, the Commission found that terms in an agreement regarding the amount of deposits as well as the collection of deposits must be consistent with Commission Rule R12-4, which states that deposit amount shall not exceed two-twelfths of the estimated service for the ensuing 12-month period. The amount of the deposit is based upon usage without consideration of other external circumstances such as poor payment history. The Public Staff further noted that Commission Rule R12-5, Refund of Deposit, permits a deposit offset only when service is terminated. Specifically, the rule allows the holder of the deposit to withhold the amounts of any unpaid bills before refunding the deposit and accrued interest. The Public Staff stated that the Joint Petitioners suggest that the deposit offset should be applied routinely and that any outstanding balances owed to them be charged against their deposit requirements to BellSouth.

Commission Rule R12-4 does not authorize offsetting outstanding balances to the deposit requirement to another carrier. Therefore, the language proposed by the Joint Petitioners is rejected. The Commission agrees with BellSouth that CLPs should utilize existing remedies including assessment of late charges and discontinuation or suspension of services after proper notice for non-payment.

CONCLUSIONS

The Commission concludes that CLPs should not be allowed to offset security deposits by amounts owed to them by another carrier. CLPs may exercise other options to address late payments including the assessment of interest or late payment charges, suspension of service, or disconnection after notice.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 21

ISSUE NO. 21 - MATRIX ITEM NO. 103: Should BellSouth be entitled to terminate service to a CLP pursuant to the process for termination due to non-payment if the CLP refuses to remit any deposit required by BellSouth within 30 calendar days?

POSITIONS OF PARTIES

JOINT PETITIONERS: No. BellSouth should have a right to terminate services to a CLP for failure to remit a deposit requested by BellSouth only in cases where: (a) the CLP agrees that such a deposit is required by the Agreement, or (b) the Commission

has ordered payment of such deposit. A dispute over a requested deposit should be addressed via the Agreement's Dispute Resolution provisions and not through "self-help".

BELLSOUTH: Yes. Thirty (30) calendar days is a commercially reasonable time period within which the CLP should have met its fiscal responsibilities.

PUBLIC STAFF: The Public Staff supported BellSouth's position.

DISCUSSION

The Joint Petitioners proposed the following language for Section 1.8.6 of the Agreement:

> 1.8.6 In the event [CLP] fails to remit to BellSouth any deposit requested pursuant to this Section and either agreed to by [CLP] or as ordered by the Commission within thirty (30) calendar days of such agreement or order, service to [CLP] may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to [CLP]'s account(s).

The Joint Petitioners contended that this language would prevent BellSouth from disconnecting service to a CLP if the parties disagreed on the amount of deposit required. Rather, BellSouth would be required to invoke the Agreement's Dispute Resolution process.

BellSouth proposed the following alternative language:

> 1.8.6 Subject to Section 1.8.7 following, in the event [CLP] fails to remit to BellSouth any deposit requested pursuant to this Section within thirty (30) calendar days of [CLP]'s receipt of such request, service to [CLP] may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to [CLP]'s account(s).

BellSouth's language gives a CLP 30 days to dispute a deposit requested by BellSouth. If the dispute is in writing, BellSouth must provide a written response explaining the basis for the deposit amount. Furthermore, a CLP would be required to place the deposit in escrow if the dispute took longer than 60 days to resolve. BellSouth argued that it has incurred losses in the past when a CLP failed to pay its bills, necessitating deposits to mitigate the risk of such losses.

The Public Staff stated in its Proposed Order that BellSouth must be allowed to bill reasonable deposits in accordance with Rule R12-4 in a timely manner for the provision of its services to customers, without the consent of either the billed party or

the Commission. The Public Staff noted that the language proposed by the Joint Petitioners would place BellSouth in the position of potentially having to seek advance approval from both a CLP and the Commission every time it requested a deposit from the CLP. The Public Staff believed that such an arrangement would place an untenable burden on BellSouth and expose it to significant, unpredictable losses.

The Commission believes that there are already sufficient protections in place, in the Agreement and in Chapter 12 of the Commission's Rules and Regulations to discourage BellSouth from abusing its authority to require customer deposits. Attachment 7, Section 2 of the Agreement ("Billing Disputes") contains provisions accepted by all parties that allow for billed deposits to be disputed within 30 days of billing. Section 2.1.6 gives the parties 60 days following the dispute notification date to resolve the dispute and sets forth the specific obligations of each party during this period. In the event they are unable to resolve the dispute amicably, either party may then petition the Commission for resolution, pursuant to Section 13 of the General Terms and Conditions ("Resolution of Disputes").

CONCLUSIONS

Accordingly, the Commission concludes that the language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 is appropriate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 22

ISSUE NO. 22 - MATRIX ITEM NO. 104: What recourse should be available to either Party when the Parties are unable to agree on the need for or amount of a reasonable deposit?

POSITIONS OF PARTIES

JOINT PETITIONERS: If the Parties are unable to agree on the need for or amount of a reasonable deposit, either Party should be able to file a petition for resolution of the dispute and both Parties should cooperatively seek expedited resolution of such dispute.

BELLSOUTH: If a CLP does not agree with the amount or need for a deposit requested by BellSouth, the CLP may file a petition with the Commission for resolution of the dispute and BellSouth would cooperatively seek expedited resolution of such dispute. BellSouth shall not terminate service during the pendency of such a proceeding provided that the CLP posts a payment bond for the amount of the requested deposit during the pendency of the proceeding.

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

DISCUSSION

The Parties proposed the following language regarding the reasonableness of deposits requested by BellSouth and the procedures to be followed during a complaint proceeding to challenge deposit requirements.

Joint Petitioners:

1.8.7 The Parties will work together to determine the need for or amount of a reasonable deposit. If the Parties are unable to agree, either party may file a petition for resolution of the dispute and both parties shall cooperatively seek expedited resolution of such dispute.

BellSouth:

1.8.7 The Parties will work together to determine the need for or amount of a reasonable deposit. If [CLP] does not agree with the amount or need for a deposit requested by BellSouth, [CLP] may file a petition with the Commission for resolution of the dispute and both Parties shall cooperatively seek expedited resolution of such dispute. BellSouth shall not terminate service during the pendency of such a proceeding provided that [CLP] posts a payment bond for the amount of the requested deposit during the pendency of the proceeding.

The Joint Petitioners maintained that BellSouth's proposal to require CLPs to post a payment bond for the pendency of the complaint proceeding would effectively put them in the position of losing a deposit dispute before the issues were properly adjudicated. BellSouth stated that during the past two years, there have been instances where a CLP filed for bankruptcy while a dispute relating to a deposit request was pending. Therefore, BellSouth argued that the bond posting requirement is necessary to minimize its financial risk.

BellSouth's testimony citing instances in which it unsuccessfully sought state assistance to resolve deposit disputes is insufficient to persuade the Commission that CLPs should be required to post bonds as a precondition to challenging BellSouth's deposit requirements in a Commission complaint proceeding. The Joint Petitioners' proposed wording, in combination with the provisions approved elsewhere in this order for "Billing Disputes" (Section 2 of Attachment 7) and "Resolution of Disputes" (Section 13 of the General Terms and Conditions), should be sufficient to protect the Parties from unnecessary financial risk during the pendency of complaints before the Commission.

CONCLUSIONS

The Commission concludes that the language proposed by the Joint Petitioners on the need for or amount of a deposit to be included in Section 1.8.7 of the Agreement is appropriate.

IT IS, THEREFORE, ORDERED as follows:

1. That the Joint Petitioners and BellSouth shall prepare and file a Composite Agreement in conformity with the conclusions of this Order as outlined in the Commission's November 3, 2000 Order Modifying Composite Agreement Filing Requirements issued in Docket No. P-100, Sub 133. Such Composite Agreement shall be in the form specified in paragraph 4 of Appendix A in the Commission's August 19, 1996 Order in Docket Nos. P-140 Sub 50, and P-100, Sub 133, concerning arbitration procedure (Arbitration Procedure Order) as amended by the November 3, 2000 Order.

2. That, not later than Thursday, August 25, 2005, a party to the arbitration may file objections to this Order consistent with paragraph 3 of the *Arbitration Procedure Order*.

3. That, not later than Thursday, August 25, 2005, any interested person not a party to this proceeding may file comments concerning this Order consistent with paragraphs 5 and 6, as applicable, of the *Arbitration Procedure Order*.

4. That, with respect to objections or comments filed pursuant to decretal paragraphs 2 or 3 above, the party or interested person shall provide with its objections or comments an executive summary of no greater than one and one-half pages, single-spaced, or three pages, double-spaced containing a clear and concise statement of all material objections or comments. The Commission will not consider the objections or comments of a party or person who has not submitted such executive summary or whose executive summary is not in substantial compliance with the requirements above.

5. That parties or interested persons submitting Composite Agreements, objections or comments shall also file those Composite Agreements, objections or

comments, including the executive summary required in decretal paragraph 4 above, on an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files created or saved in Word format.

ISSUED BY ORDER OF THE COMMISSION.

This the 26th day of July, 2005.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

bp072505.01

Glossary of Acronyms
Docket Nos. P-772, Sub 8; P-913, Sub 5; P-989, Sub 3; P-824, Sub 6; and P-1202, Sub 4

Act	Telecommunications Act of 1996
Agreement	Interconnection Agreement
AICPA	American Institute of Certified Public Accountants
BellSouth	BellSouth Telecommunications, Inc.
BOCs	Bell Operating Companies
CABS	Carrier Access Billing System
CLEC	Competitive Local Exchange Company
CLP	Competing Local Provider
CMDS	Centralized Message Distribution System
Commission	North Carolina Utilities Commission
CPNI	Customer Proprietary Network Information
CSR	Customer Service Record
DSL	Digital Subscriber Line
EEL	Enhanced Extended Link (Loop)
ESP	Enhanced Service Provider
FCC	Federal Communications Commission
FTTC	Fiber-to-the-curb
FTTH	Fiber-to-the-home
IBS	Integrated Billing System
ICA	Interconnection Agreement
ICO	Independent Telephone Company
ILEC	Incumbent Local Exchange Company (Carrier)
ISP	Internet Service Provider
ITC or ITC^DeltaCom	ITC^DeltaCom Communications, Inc.
IXC	Interexchange Carrier

Joint Petitioners	NewSouth, NuVox, KMC, and Xspedius
KMC	KMC Telecom V, Inc. and KMC Telecom III, LLC
LOA	Letter of Authorization
LSR	Local Service Request
MDUs	Multiple Dwelling Units
MPOE	Minimum Point of Entry
NewSouth	NewSouth Communications Corp.
NuVox	NuVox Communications, Inc.
OSS	Operations Support Systems
Public Staff	Public Staff – North Carolina Utilities Commission
RAO	Recommended Arbitration Order
RNM	Routine Network Modification
SEEM	Self-Effectuating Enforcement Mechanism
SGAT	Statement of Generally Available Terms and Conditions
SOC	Supplemental Order Clarification
SQM	Service Quality Measurement
TA96	Telecommunications Act of 1996
TDM	Time Domain Multiplexing
TELRIC	Total Element Long-Run Incremental Cost
TIC	Tandem Intermediary Charge
TRO	Triennial Review Order
TRRO	Triennial Review Remand Order
UNE	Unbundled Network Element
UNE-P	Unbundled Network Element – Platform
Verizon	Verizon Virginia, Inc.
WorldCom	WorldCom, Inc.
xDSL	Digital Subscriber Line
Xspedius	Xspedius Communications, LLC on behalf of its operating subsidiary, Xspedius Management Co. Switched Services, LLC

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.

7. The parties may seek resolution of disputes arising out of the Agreement from the Commission, the Federal Communications Commission (FCC), or courts of law.

8. The Agreement should contain the language proposed by BellSouth Telecommunications, Inc. (BellSouth) as modified by the Conclusions in this issue.

9. BellSouth shall permit a requesting carrier to commingle an unbundled network element (UNE) or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that the requesting carrier has obtained at wholesale from an incumbent local exchange company (ILEC) pursuant to a method other than unbundling under Section 251(c)(3) of the Telecommunications Act of 1996 (TA96 or the Act). However, this does not include services, network elements, or other offerings made available only under Section 271 of the Act.

10. The term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51.319(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 competing local provider (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.

13. Thirty to forty-five days advance notice of an audit provides a CLP with an adequate time to prepare. In its Notice of Audit BellSouth shall state its concern that the requesting CLP has not met the qualification criteria and set out a concise statement of its reasons therefore. BellSouth may select the independent auditor without the prior approval of the CLP or the Commission. Challenges to the independence of the auditor may be filed with the Commission after the audit has been concluded. BellSouth is not required to provide documentation to support its basis for an audit, as distinct from a statement of concern, or seek concurrence of the requesting carrier before selecting the audit's location.

14. BellSouth should not be permitted to charge a Tandem Intermediary Charge (TIC) when providing a tandem transit function for CLPs.

15. The Joint Petitioners' proposed language concerning how disputes over alleged unauthorized access to customer service record (CSR) information should be handled under the Agreement is reasonable and appropriate. Accordingly, the

Commission adopts the Joint Petitioners' proposed language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement.

16. BellSouth must provide service expedites at total element long-run incremental cost (TELRIC)-compliant rates. BellSouth and the Joint Petitioners are instructed to negotiate in good faith an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

17. The payment due date should be 26 days from the date of receipt of the bill. Accordingly, the Commission requires the Joint Petitioners and BellSouth to properly amend the proposed language in the Agreement in Attachment 7, Section 1.4, in accordance with this decision.

18. It is appropriate to adopt the Joint Petitioners' proposed language concerning suspension or termination notices for Section 1.7.2 of Attachment 7 of the Agreement.

19. The deposit requirements specified in Commission Rule R12-4 are applicable and the language proposed by BellSouth should be incorporated into the Agreement.

20. The Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice.

21. The language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 is appropriate.

22. The language proposed by the Joint Petitioners on the need for or amount of a deposit to be included in Section 1.8.7 of the Agreement is appropriate.

On September 1, 2005, BellSouth and the Joint Petitioners each separately filed their Objections to the *RAO*. The following chart indicates the issues for which a Motion for Reconsideration has been filed:

Finding of Fact No.	**Party filing Motion for Reconsideration/Clarification**
2	Joint Petitioners
3	Joint Petitioners
4 and 5	Joint Petitioners
6	BellSouth
8	Joint Petitioners
9	Joint Petitioners
10, 11, and 12	BellSouth

Finding of Fact No.	Party filing Motion for Reconsideration/Clarification
13	Joint Petitioners
14	BellSouth
15	BellSouth
16	BellSouth
17	BellSouth
18	BellSouth
19	Joint Petitioners
20	Joint Petitioners
21	Joint Petitioners

On September 8, 2005, the Commission issued an *Order* requesting comments and reply comments on the Objections filed concerning the *RAO*. On September 26, 2005, the Joint Petitioners filed a Motion for Extension of Time to File Initial Comments and to Consolidate Comment Cycle. On September 27, 2005, BellSouth filed a Response to the Motion. By Order and Errata Order dated September 28, 2005, the Commission retained the comment and reply comment cycles, but extended the due dates to October 14, 2005, and October 26, 2005, respectively.

Initial comments were filed on October 14, 2005 by BellSouth, the Joint Petitioners, and the Public Staff.

Reply comments were filed on October 26, 2005 by BellSouth, the Joint Petitioners, and the Public Staff.

On December 14, 2005, BellSouth filed a copy of the Recommendation of the Arbitration Panel to the Mississippi Public Service Commission (PSC) in its Joint CLP Arbitration as supplemental authority in this docket.

On January 11, 2006, BellSouth filed a copy of an Ohio PSC Order as additional supplemental authority in support of its comments.

On January 13, 2006, BellSouth filed a copy of an Indiana PSC Order as additional supplemental authority in support of its comments.

Following is a discussion, by Finding of Fact, of the outstanding Objections to the *RAO*. Appendix A provides a list of the acronyms used in this Order.

FINDING OF FACT NO. 2 (ISSUE NO. 2 – MATRIX ITEM NO. 4): What should be the limitation on each party's liability in circumstances other than gross negligence or willful misconduct?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth's language providing that liability with respect to this issue should be limited to service credits should be adopted.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 2 because they believed that the Commission's reliance on the FCC's *Verizon Arbitration Order* was misplaced and that, contrary to the Commission's view, their proposed "Day the Claim Arise" language is not imprudent.

Regarding the former, the Joint Petitioners argued that they are not seeking the "perfect service" sought by WorldCom, Inc. (WorldCom) in the *Verizon Arbitration Order* but only a small and reasonable measure of relief. They also maintained that BellSouth treats its retail customers more favorably than its wholesale customers in liability situations. Concerning the latter, the Joint Petitioners argued that their proposal captures and implements the concept of "risk versus revenue" and is thus commercially reasonable.

INITIAL COMMENTS

BELLSOUTH: BellSouth argued that the Commission's decision should be upheld. The *Verizon Arbitration Order* stands for the proposition that an ILEC's liability to a CLP should be the same as an ILEC has to its retail customers. Other state commissions have reached similar conclusions. BellSouth asserted that the Joint Petitioners can cite to no interconnection agreement containing language that is similar to what they propose. Contrary to the Joint Petitioner's assertions, BellSouth has not testified that it provides itself more favorable terms in customer contracts than it does to CLPs. BellSouth further argued that the Joint Petitioners' argument that their proposal is commercially reasonable is both repetitive and flawed. Interconnection agreements are not typical or ordinary commercial contracts and should not be construed as such. The Joint Petitioners' "Day Claim Arose" standard is one-sided and only benefits the Joint Petitioners.

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

PUBLIC STAFF: The Public Staff did not believe the objections of the Joint Petitioners on this issue warranted a change in the Commission's decision.

REPLY COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners repeated that both they—and BellSouth—find it commercially reasonable to negotiate for liability in excess of bill credits. The Joint Petitioners also maintained that the use of a constant of 7.5% of the amounts paid or payable for all service provided under the Agreement on the day the claim giving rise to liability arose, not contingent on the time the liability was incurred, was fair and reasonable.

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO* the Commission characterized this issue as presenting the choice between the adoption of a "cap" of 7.5% of the amounts paid or payable for all service provided under the Agreement on the day the claim giving rise to liability arose, as advocated by the Joint Petitioners, or the payment of a credit for the actual cost of services or functions unperformed or performed improperly, as advocated by BellSouth. The Commission concurred with BellSouth, which had, among other things, argued that the Joint Petitioners' proposal irrationally limited or expanded damages based on the point in time that the event occurred giving rise to the liability. The Commission noted that, while the parties may certainly negotiate a liability cap between themselves, it would be imprudent to impose a limit "related to the *timing* of the event rather than the event itself." (emphasis in original). Therefore, the Commission adopted BellSouth's proposal.

The arguments put forward by the Joint Petitioners on reconsideration are essentially repetitive of the arguments they have originally put forward and the Commission has rejected. The Commission is therefore not persuaded that Finding of Fact No. 2 should be reconsidered.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 2.

FINDING OF FACT NO. 3 (ISSUE NO. 3 – MATRIX ITEM NO. 5):

Joint Petitioners' Issue Statement: Should each party be required to include specific liability-eliminating terms in all its tariffs and end-user contracts (past, present, and future) and to the extent that a Party does not or is unable to do so, should it be obligated to indemnify the other Party?

BellSouth's Issue Statement: If the CLP elects not to place in its contracts with end users and/or tariff standard industry limitations of liability, who should bear the risks that result from this business decision?

INITIAL COMMISSION DECISION

The Commission concluded that, 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 that decision. Accordingly, BellSouth's proposed language in the Agreement in the General Terms and Conditions, Section 104.2 was adopted.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of the Commission's decision arguing that it hamstrings the Joint Petitioners' ability to compete, while their revised proposal is commercially reasonable.

INITIAL COMMENTS

BELLSOUTH: BellSouth argued that the Joint Petitioners' Motion for Reconsideration is devoid of merit and should be rejected. BellSouth stated that it was not seeking to dictate terms to the Joint Petitioners. In fact, BellSouth's language is the language that has governed the Parties' relationship for several years and has never been the subject of dispute. BellSouth should not be made to suffer any financial hardship as a result of the Joint Petitioners' business decision not to limit liability. Other state commissions, such as the Florida PSC and the Kentucky PSC, support the Commission's analysis of this issue. The Commission's decision does not impair the Joint Petitioners' ability to compete, and the Joint Petitioners have not shown factually how it does or might do so. The Joint Petitioners have revised their proposal to the extent of proposing language to include the words "to a commercially reasonable extent" (sic), but this does not cure the underlying problem with the Joint Petitioners' position.

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

PUBLIC STAFF: The Public Staff did not believe the objections of the Joint Petitioners warranted a change in the Commission's decision.

REPLY COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners argued that BellSouth's comments provide no basis for denying the relief sought herein by the Joint Petitioners. Both BellSouth's premises for argument and factual assertions are in error. The commercial

reasonableness standard proposed by the Joint Petitioners will allow the parties to compete fairly.

PUBLIC STAFF: The Public Staff reiterated its view that it did not believe that the Joint Petitioners' objections warranted reconsideration of this issue.

DISCUSSION

In the *RAO*, the Commission identified the fundamental issue here as being whether BellSouth can require the Joint Petitioners to indemnify it if they do not limit their liability to their customers in their own tariffs and contracts. The Commission noted that BellSouth said "yes", while the Joint Petitioners said "no". The Joint Petitioners maintained that they cannot limit BellSouth's liability in third-party contracts and that BellSouth's language impairs their ability to compete. BellSouth argued that its language was not aimed at third-party contracts but at the contract between itself and the Joint Petitioners. BellSouth maintained that its language simply required the Joint Petitioners to bear the risk of their business decisions. The Public Staff, while expressing concern about the rights of consumers and about the BellSouth language allowing the parties to limit their liability to end users and third parties for losses in contract or in tort, stated that its concerns were allayed because the BellSouth language does not dictate the terms of the agreements between CLPs and customers but provides them the discretion to include such limitation of liability. The Public Staff said there was no evidence of present or prospective harm.

The Commission stated that it believed that the arguments advanced by BellSouth were the more persuasive and that, therefore, its contract language should be adopted. Upon reconsideration, the Commission finds the arguments of the Joint Petitioners to be largely repetitive of arguments that have already been made and rejected. Accordingly, the Commission believes that Finding of Fact No. 3 should not be reconsidered.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 3.

FINDINGS OF FACT NOS. 4 AND 5 (ISSUE NOS. 4 AND 5 – MATRIX ITEM NO. 6):

Joint Petitioners' Issue Statement: Should limitation or liability for indirect, incidental, or consequential damages be construed to preclude liability for claims or suits for damages incurred by CLP's (or BellSouth's) end-users to the extent such damages result directly and in a reasonably foreseeable manner from BellSouth's or CLP's performance obligations set forth in the Agreement?

BellSouth's Issue Statement: How should indirect, incidental, or consequential damages be defined for purposes of the Agreement.

INITIAL COMMISSION DECISION

The Commission concluded that the rights of end-users should be defined pursuant to state contract law. The Commission further concluded that incidental, indirect, and consequential damages should be defined pursuant to state law. Accordingly, the Commission ruled that BellSouth's proposed language for Section 104.4 should be adopted.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of these issues. The Joint Petitioners argued that, contrary to the Commission's and BellSouth's suggestion, the language the Joint Petitioners proposed was neither unnecessary nor potentially confusing.

INITIAL COMMENTS

BELLSOUTH: BellSouth rejected the Joint Petitioners' view that the Joint Petitioners' proposed language was necessary and clear. BellSouth cited to NuVox witness Russell's testimony to the effect that the Joint Petitioners' language was to ensure that damages arising directly and proximately from "BellSouth's negligence, gross negligence or willful misconduct cannot be termed in this Agreement as incidental or consequential because we cannot contract to take away the rights of third parties." This construction has the effect of subverting the parties' agreement that no party would be liable to the other for indirect, consequential, and incidental damages. Both the Kentucky PSC and the Florida PSC, in similar arbitration proceedings, agreed with BellSouth's and this Commission's decision on these issues.

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

PUBLIC STAFF: The Public Staff did not believe the objections of the Joint Petitioners on these issues warranted a change in the Commission's conclusions.

REPLY COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners maintained that their position had always been clearly stated that parties should be responsible for damages that are direct and foreseeable. The Joint Petitioners said that there had been disagreement and confusion on this issue between the parties, for which both parties are responsible; but they urged that they had set forth the reasonable premise that direct and foreseeable damages are excluded from indirect, incidental, and consequential damages.

PUBLIC STAFF: The Public Staff reiterated its view that the objections of the Joint Petitioners do not warrant changing the Commission's conclusion on this issue.

DISCUSSION

In the *RAO*, the Commission found that the language proposed by the Joint Petitioners was unnecessary and potentially confusing. The Commission noted that end users are not parties to this Agreement or arbitration, and their rights should therefore be defined, not by the Agreement, but according to state contract law. As such, the Commission believed the Joint Petitioners' proposed language to be superfluous and indirect, incidental, and consequential damages should be defined by state law.

The Commission believes that its original decision on this issue was well-founded, and the arguments put forward by the Joint Petitioners to be not particularly compelling. Indeed, in a moment of comparative candor, the Joint Petitioners admitted that they had perhaps contributed to some of the confusion surrounding this issue. The Commission concurs but is not persuaded to adopt the Joint Petitioners' language.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Findings of Fact Nos. 4 and 5.

FINDING OF FACT NO. 6 (ISSUE NO. 6 – MATRIX ITEM NO. 7): What should the indemnification obligations of the Parties be under the Agreement?

INITIAL COMMISSION DECISION

The Commission concluded that the Joint Petitioners' proposed language for Section 10.5 in the General Terms and Conditions of the Agreement should be approved.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth sought reconsideration of this issue. BellSouth argued that the Joint Petitioners' language requires BellSouth to indemnify the Joint Petitioners in virtually all circumstances while imposing essentially no indemnification obligations on the Joint Petitioners. The language the Joint Petitioners endorse imposes greater obligations than the Joint Petitioners have placed in their own tariffs where they are the providing parties. Such expansive language runs counter to the holding in the FCC's *Verizon Arbitration Order*. By contrast, the Commission rejected the Joint Petitioners' expansive view regarding the definition of applicable law. Since the standard here relates to applicable law, the Commission should take a similar narrow view on this issue. Moreover, even when read together with the Commission's ruling on Issue No. 3 (Matrix Item No. 5), the Joint Petitioners' language regarding indemnification is still at issue and objectionable. BellSouth's proposed language complies with industry standards and requires the receiving party to indemnify the providing party in only two

limited situations: (1) claims for libel, slander, or invasion of privacy arising from the content of the receiving party's own communications; or (2) any claim, loss, or damage claimed by the "End User or customer of the party receiving services arising from such company's use or reliance on the providing party's services, actions, duties, or obligations arising under this Agreement."

INITIAL COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners argued that BellSouth's Motion for Reconsideration concerning this issue should be denied. The Joint Petitioners argued that the language adopted by the Commission does not violate the *Virginia Arbitration Order* or any state commission order. The clause at issue here is not a blanket indemnity provision such as that in the *Virginia Arbitration Order* but one more narrowly focused. The Joint Petitioners also denied that the Commission's decision here conflicted with its decision elsewhere – it does not redefine Applicable Law but rather includes it as defined. Moreover, consistent with their own tariffs, the Joint Petitioners do not require the receiving party to indemnify the providing party for the providing party's negligence, nor is the language cast in such a way as to benefit only the Joint Petitioners.

PUBLIC STAFF: The Public Staff did not believe that BellSouth's objections warranted a change in the Commission's conclusions on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth replied that the indemnification language adopted by the Commission is unique and is contrary to industry standards. BellSouth stated that the Kentucky PSC and the Florida PSC have already rejected such language in similar proceedings before them. In contrast to the *Virginia Arbitration Order*, the language adopted here is extremely broad and one-sided.

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

PUBLIC STAFF: The Public Staff reiterated its position that the objections of BellSouth did not warrant reconsideration of the Commission's decision.

DISCUSSION

This issue concerns the indemnification obligations of the parties. In the *RAO,* the Commission adopted the language proposed by the Joint Petitioners as follows: "The Party providing services hereunder, its Affiliates, and its parent company, shall be indemnified, defended, and held harmless by the Party receiving services hereunder against any claim for libel, slander or invasion of privacy arising from the content of the receiving party's communications. The Party receiving services hereunder, its Affiliates

and its parent company, shall be indemnified, defended and held harmless by the Party providing services hereunder against any claim, loss or damage to the extent arising from (1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent caused by the Providing Party's negligence, gross negligence or willful misconduct."

BellSouth's principal argument is that this provision unfairly opens it to potentially extremely expansive liability. However, the Commission in its Discussion in the *RAO* on this issue noted that the Conclusion in this issue must be read together with the Commission's adoption of Finding of Fact No. 3. Finding of Fact No. 3 was decided favorably to BellSouth concerning limitations on liability. This decision, upheld in this Order, provides that if a party elects not to place standard industry limitations of liability in its contracts with end users or its tariffs, that party shall indemnify for any loss resulting from this decision. The Commission found that this provision "appears to remove BellSouth's objection to the Joint Petitioners' proposals. Without that objection, there appears to be no issue."

Of course, it should be anticipated that a party whose language was not adopted may continue to argue that its language should be adopted, but this does not change the fact that the adoption of BellSouth's language with reference to Finding of Fact No. 3 substantially mitigates the exposure that BellSouth might otherwise have with reference to the language adopted here. BellSouth has not offered any new, much less persuasive, arguments for the Commission to reconsider its decision. The Commission, therefore, does not believe that its decision on this Finding of Fact should be changed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 6.

FINDING OF FACT NO. 8 (ISSUE NO. 8 – MATRIX ITEM NO. 12): Should the agreement explicitly state that all existing state and federal laws, rules, regulations and decisions apply unless otherwise specifically agreed to by the parties?

INITIAL COMMISSION DECISION

The Commission concluded that the BellSouth language should be adopted as modified to read: "This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right, or other requirement, not expressly memorialized herein, is applicable under this Agreement by virtue of an FCC or Commission rule or order or, with respect to Applicable Law relating to substantive Telecommunications law only, and such obligation, right or other requirement is disputed by the other Party, the Party asserting such obligation, right, or other requirement is applicable shall petition the Commission, a court of law, or the FCC for resolution of the dispute."

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration on the basis that the provision adopted by the Commission is potentially prejudicial and contrary to Georgia's contract law, inasmuch as Georgia law provides the "[s]ilence as to that law is, so to speak, no defense." According to the Joint Petitioners, the apparent obligation under the Commission's conclusion to reference all provisions incorporated appears to stand on its head the very contract law agreed to. If the Commission wishes to stand by its language, the Joint Petitioners asked to be given the opportunity to add to the document references and further requested for clarification and guidance in this regard.

INITIAL COMMENTS

BELLSOUTH: BellSouth characterized the Joint Petitioners' arguments on consisting of "rambling parentheticals and fragmented, erroneous critiques" of the Commission's conclusions. BellSouth denied the Joint Petitioners' description of this issue as requiring compliance with Georgia contract law. Simply stated, BellSouth will comply with applicable law, including Georgia law, to the extent applicable. The Joint Petitioners' language creates fertile ground for mischief and, by creating ambiguity and encouraging litigation, defeats the purpose of arbitrations. The Joint Petitioners' view that the law in effect at the time of execution of the Agreement should be automatically incorporated, unless the parties agree otherwise, is simply unworkable. Here again, in similar arbitration proceedings, the Kentucky PSC and the Florida PSC agreed with BellSouth's position and the Commission's decision. As for the Joint Petitioners' request to "add to the document references," the Joint Petitioners do not indicate what such references might be and their plea for guidance only serves to illustrate how unworkable their request is.

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

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the Commission's conclusions on this issue.

REPLY COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners noted that the parties have agreed to abide by Applicable Law and, to the degree they have not negotiated to the contrary, the predefined Applicable Law applies. Contrary to BellSouth's assertions, the Joint Petitioners cannot take a telecommunications rule or order that is contrary to how the parties address the issue and attempt to enforce it against BellSouth. The Joint Petitioners also argued that BellSouth's reliance on the Florida PSC and the Kentucky PSC decisions were misplaced. In both cases, the Joint Petitioners are intending or undertaking reconsideration or appeal.

PUBLIC STAFF: The Public Staff reiterated its view that the objections of the Joint Petitioners do not warrant a change in the Commission's conclusions.

DISCUSSION

In the *RAO*, the Commission viewed the original proposed language of both parties to be problematical. The Commission noted that the purpose of a contract is to memorialize the parties' mutual agreement as of a particular point in time for the term of the contract, and the general purpose of the typical applicable law provision in a contract is to ensure that the parties do not break the law. Thus, the specific terms of the contract are to have primary significance and, if there are particular laws which the parties wish to provide terms, but which they do not want to rewrite or negotiate, these specific laws can be incorporated by reference.

The principal defect that the Commission saw in the Joint Petitioners' language was that it purported to import the entirety of "Applicable law," except where the parties have agreed otherwise. The Commission feared that this amounted to a "roving expedition" for a party to seek out other law—no matter how discrete—to supply terms for the Agreement. The Commission believed this to be going too far and to be out of harmony with what a standard applicable law provision is supposed to be.

The principal defect that the Commission saw in BellSouth's language was the insertion of a "prospectivity" clause which, as the Public Staff pointed out, would give an incentive for the parties to engage in extreme positions and posturing. "Prospectivity" is also out of harmony with what a standard applicable law provision is supposed to do. Nevertheless, the Commission saw the BellSouth language as more susceptible to reform. The Commission therefore amended BellSouth's original language. BellSouth has not sought reconsideration of those amendments.

The Commission concluded by saying that it was doubtful any language could be framed that would anticipate all possible disputes given the volume of law, legal principles, and possible fact situations involved. If they are so disposed, the parties are free to negotiate something which seems better to them.

The Joint Petitioners' line of argument on reconsideration is essentially what they have argued from the beginning. While this may have the virtue of consistency, it has not added to its persuasiveness. The Joint Petitioners' default suggestion concerning further document references and detailed Commission guidance thereto is untimely and illustrates the difficulties, if not the unworkability, of the Joint Petitioners' proposal. If the Joint Petitioners wish to pursue that route, they may seek an amendment to the Agreement with BellSouth.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 8.

FINDING OF FACT NO. 9 (ISSUE NO. 9 – MATRIX ITEM NO. 26): Should BellSouth be required to commingle a UNE or UNE combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth shall permit a requesting carrier to commingle a UNE or UNE combination obtained pursuant to Section 251 with one or more facilities or services that the 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.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 9, arguing that the Commission has tentatively rejected the Joint Petitioners' language for Matrix Item No. 26 based on two incorrect findings: first, that the FCC held that its commingling rule does not apply to Section 271 elements; second, that BellSouth is correct in asserting that only tariffed elements are eligible for commingling. The Joint Petitioners contended that neither of these findings is supported by the *TRO,* and that their Brief demonstrated that the FCC made clear that it never intended to exclude Section 271 elements from commingling. Accordingly, the Joint Petitioners claimed that the Commission's tentative decision is not in keeping with federal law.

The Joint Petitioners argued that FCC Rules 51.309(e) and (f) give the Joint Petitioners the right to connect Section 251 UNEs with any element or service obtained at wholesale. The Joint Petitioners claimed that Rule 51.309 has no limitation and does not exclude any type of element or wholesale offering. The text of the *TRO* also does not contain the exception claimed by BellSouth and embraced in the *RAO*. The Joint Petitioners argued that their Brief further demonstrated that BellSouth's argument in attempting to exclude Section 271 elements from commingling was unsupported, was contrary to established telecommunications law and practice, and did not hold up to cross-examination.

The Joint Petitioners asserted that this is an issue of paramount importance for facilities-based competitors such as the Joint Petitioners, as application of the FCC's new impairment tests may result in the need to replace Section 251 UNEs, particularly dedicated transport, with network elements unbundled pursuant to Section 271. Notably, these elements will be the same, only under Section 271, a just and reasonable pricing standard applies instead of TELRIC. These Section 271 elements will be necessary to connect to UNEs, such as UNE loops, that are still available pursuant to Section 251 and that were previously used in combination with Section 251 transport (i.e. EELs). In this regard, the Joint Petitioners noted that they do not agree that tariffed special access satisfies the Section 271 checklist requirements, as such

offerings (which were available at the time the Act was enacted and, if indeed satisfactory, would have made the Section 271 checklist unnecessary) are not made pursuant to Section 252 interconnection agreements.

The Joint Petitioners maintained that the FCC did not hold that Section 271 elements are ineligible for commingling. The *RAO* quotes a passage from the *TRO* as grounds to reject the Joint Petitioners' language: "[w]e decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251." This passage appears in Footnote 1990 of the *TRO*. The Joint Petitioners contended that they do not support BellSouth's argument for two reasons. First, to combine is not the same mandate as to commingle. These terms of art refer respectively to the connecting of likes (combining of Section 251 elements with Section 251 elements, which is required, and combining of Section 271 elements with Section 271 elements, which is not required) and dislikes (commingling of Section 251 elements with any other wholesale offering, including those mandated by Section 271, which, pursuant to Section 251 and Section 201 is required). The rule requiring commingling of elements was promulgated under Section 251, as well as Sections 201 and 202, which prohibit unjust and unreasonable practices.[1] It was codified in a wholly separate rule - 47 C.F.R. § 51.309. The combinations rule is contained in 47 C.F.R. § 51.315. Thus, the Joint Petitioners asserted, the FCC's conclusion that ILECs need not combine Section 271 elements with Section 251 UNEs should not be read to mean something that the FCC did not say, in Footnote 1990 or anywhere else, that ILECs need not commingle these items with UNEs offered pursuant to Section 251 of the Act.

Further, the Joint Petitioners argued, though the *TRO* may "refer [] to tariffed access services" in the context of commingling, such references cannot be deemed to contravene the plain language of FCC Rule 51.309 that contains no such tariffing limitation. Indeed, the tariff references in the *TRO* are mere suggestions rather than commands. The Joint Petitioners stated that Paragraph 579 of the *TRO* states that ILECs must commingle Section 251 UNEs with "services (e.g., switched and special access services offered pursuant to tariff)." The Joint Petitioners contended that tariffed services were only one example, not an exhaustive list, of items to be commingled with Section 251 UNEs. Similarly, Paragraph 581 of the *TRO* states that ILECs must commingle UNEs with services "including interstate access services." The Joint Petitioners asserted that access services are tariffed and must be commingled, but this provision establishes a clear requirement and in no way purports to limit services that must be commingled. In summary, nothing in the *TRO* states that elements obtained at wholesale are exclusively those provided pursuant to a tariff.

INITIAL COMMENTS

BELLSOUTH: BellSouth stated that the Joint Petitioners' arguments in support of their objections are two-fold: (1) BellSouth has an obligation to commingle Section 251 and Section 271 services because commingling and combining are two different things; and

[1] *TRO*, at ¶ 581.

(2) the phrase "wholesale services" includes Section 271 services. BellSouth asserted that both of these arguments are incorrect and should be rejected.

First, BellSouth argued that the Commission correctly determined that BellSouth has no obligation to commingle Section 251 and Section 271 services. Contrary to the Joint Petitioners' attempt to distinguish commingling from combining, the FCC defined commingling in the *TRO* as the combining of a Section 251 element with a wholesale service obtained from an ILEC by any method other than unbundling under Section 251(c)(3) of the Act. BellSouth pointed out that the Joint Petitioners agreed at the hearing that commingling is the same as combining. BellSouth noted that, specifically, KMC witness Johnson testified that commingling means combining elements that are different in terms of their regulatory nature.

BellSouth maintained that it has no Section 271 obligation to combine Section 271 elements or to combine elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act.[2] Further, with the *TRO Errata Order,* the FCC deleted the only reference in the *TRO* that would have required ILECs to combine Section 251 and Section 271 services.[3] BellSouth stated, based on the above, that the Commission correctly determined that "the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements." The Florida PSC also recently reached this same conclusion in its recent arbitration proceeding involving the Joint Petitioners and BellSouth:

> . . . In Paragraph 584 of the *TRO,* the FCC said 'as a final matter we require the incumbent LECs to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to Section 271 and any services offered for resale pursuant to Section 251(c)(4) of the Act.' The FCC's errata to the *TRO* struck the portion of Paragraph 584 referring to '... any network elements unbundled pursuant to Section 271....' The removal of this language illustrates that the FCC did not intend commingling to apply to Section 271 elements that are no longer also required to be unbundled under Section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to Section 271. . . [4]

Thus, BellSouth maintained that the Commission correctly excluded Section 271 services from BellSouth's commingling obligations.

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[2] *See TRO* at ¶ 655, Footnote 1990. ("We decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251."); *United States Telecom Ass'n v. FCC,* 359 F.3d at 589 (D.C. Cir. 2004) *(USTA II).*

[3] *See TRO Errata Order* at ¶ 27.

[4] FPSC Order No. PSC-05-0975-FOF-TP at 19.

Second, BellSouth argued that the Commission cannot adopt the Joint Petitioners' proposed language, because the Commission has no jurisdiction to determine or enforce the terms and conditions under which BellSouth must provide elements pursuant to Section 271. On the contrary, Congress gave the FCC the exclusive right to enforce compliance with Section 271. 47 U.S.C. § 271(d)(6)(A). As the FCC explained, the Act grants "sole authority to the [FCC] to administer... Section 271."[5] BellSouth maintained that the only role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271 approval process.[6]

BellSouth asserted that a state commission's authority to arbitrate and approve interconnection agreements entered into pursuant to Section 251 is specifically limited by the Act to implementing Section 251 obligations, not Section 271 obligations.[7] Accordingly, BellSouth argued that Congress did not authorize a state commission to enforce Section 271 obligations, to establish any Section 271 obligations, to establish rates for any Section 271 obligation, or to otherwise regulate Section 271 obligations.[8]

BellSouth noted that the United States District Court for the Eastern District of Kentucky confirmed this bedrock jurisdictional prohibition in finding that "[t]he enforcement authority for Section 271 unbundling duties lies with the FCC and must be challenged there first."[9] Likewise, the United States District Court for the Southern District of Mississippi held that, "even if Section 271 imposed an obligation to provide unbundled switching independent of Section 251 with which BellSouth had failed to comply, Section 271 explicitly places enforcement authority with the FCC...." *BellSouth Telecommunications, Inc. v. Mississippi Public Ser. Comm 'n, 368 F.* Supp. 2d 557 (S.D. Miss. 2005). This court concluded by stating that "[t]hus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long-distance service." *Id* at 566 (emphasis added).

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[5] *InterLATA Boundary Order*, 14 FCC Rcd at 14400-01, ¶¶ 17-18; *see also*, *TRO* at ¶¶ 664, 665. ("Whether a particular checklist element's rate satisfies the just and reasonable standard of Section 201 and 202 is a fact-specific inquiry that the Commission will under take...."; "... 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. BellSouth stated, in particular, this section provides the Commission with enforcement authority where a BOC 'has ceased to meet any of the conditions required for such approval.'").

[6] 47 U.S.C. § 271(d)(2)(B); *see also Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n,* 359 F.3d 493, 497 (7th Cir. 2004) (state commission cannot "parley its limited role" in consulting with the FCC on a BOC's application for long-distance relief to impose substantive requirements under the guise of Section 271 after that application has been granted).

[7] *See* 47 U.S.C. § 252(c), (d); *see also Coserv Ltd. Liab. Co. v. Southwestern Bell Tel. Co.,* 350 F.3d 482, 487-88 (5th Cir. 2003) (ILEC has no duty to negotiate items not covered by Section 251); *MCI Telecomms. Corp, v. BellSouth Telecomms., Inc.,* 298 F.3d 1269, 1274 (11th Cir. 2002) (same).

[8] *See UNE Remand Order* at ¶ 470; *TRO* at ¶¶ 656, 664; *USTA II*, 359 F.3d at 237-38.

[9] *BellSouth Telecommunications, Inc. v. Cinergy Communications Co. ET AL.,* Civil Action No. 3:05-CV-16-JMH at 12 (Apr. 22, 2005).

BellSouth stated that to adopt the Joint Petitioners' arguments regarding commingling would be to determine or enforce the terms and conditions under which BellSouth must provide services pursuant to Section 271. As made clear above, BellSouth asserted that the Commission has no authority to do that. BellSouth noted that the Kansas Corporation Commission (Kansas Commission) made this expressly clear in a recent arbitration proceeding:

> The FTA's (the Act's) 271 provisions explicitly provide that a BOC, desirous of entering the interLATA marketplace, may apply to the FCC for authorization to do so (§ 271(d)(1)); the FCC determines the BOC's qualification for interLATA authority (§ 271(d)(3)); and, it is the FCC that possesses the sole authority to determine if the BOC continues to abide by the 271 requirements (§ 271(d)(6)). The only state participation in the 271 qualification inquiry is consultation with the FCC to verify BOC compliance with 271 requirements. The clear implication here is that there is no place for independent state action. The Commission concludes for the foregoing reasons, and those expressed by the Arbitrator, that the FCC has preemptive jurisdiction over 271 matters.[10]

Third, BellSouth maintained that the Commission should reject the Joint Petitioners' arguments because it results in effectively recreating UNE-P with Section 271 services in contravention of federal law. BellSouth argued that the FCC made clear in the *TRRO*, that there is "no Section 251 unbundling requirement for mass market local circuit switching nationwide."[11] BellSouth pointed out that this Commission has already determined that it "does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P."[12] Likewise, BellSouth noted that the New York PSC, as well as the Mississippi Federal District Court, have indicated that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to Section 271-based UNE-P arrangements.'"[13] Accordingly, BellSouth asserted that the regulatory landscape is now clear - UNE-P is abolished and state commissions cannot recreate it with Section 271 elements.

BellSouth further noted that the Florida PSC, in a sound analysis, used the elimination of UNE-P in the *TRRO* to adopt BellSouth's position on commingling in the Florida Joint Petitioner arbitration proceeding, as follows: "Further, we find that connecting a

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[10] *In the Matter of Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB, *et al.* at ¶¶ 13-14 (July 18, 2005) (emphasis added).

[11] *TRRO* at Paragraph 199.

[12] *In re: Complaints Against BellSouth Telecommunications, Inc., Regarding Implementation of the TRRO*, Docket No. P-55, Sub 1550 at 13 (April 25th 2005).

[13] *BellSouth v. Mississippi Public Serv. Comm'n,* Civil Action No. 3:05CV173LN at 16-17 (stating that the court would agree with the New York PSC's findings) (quoting *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y. P.S.C. (March 16, 2005)).

Section 271 switching element to a Section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential recreation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition."[14] BellSouth contended that this additional reason further supports the Commission's decision.

In any event, BellSouth noted that, as made clear by their objections, the Joint Petitioners want to commingle Section 251 loops with Section 271 transport. BellSouth provides Section 271 transport via its access tariff, and there is nothing in the Commission's decision that would prohibit the Joint Petitioners from commingling Section 251 loops with tariffed access services. Indeed, they could commingle those services today (if they were subject to a *TRO* and *TRRO* compliant agreement). Thus, BellSouth commented that it appears that the Joint Petitioners' objection with the Commission's decision is simply a rate issue, because they do not want to pay tariffed rates for transport. Such an objection does not support a reversal of the correct and well-reasoned decision of the Commission. This is especially true because only the FCC has jurisdiction to determine whether a rate under Section 201 is "just and reasonable." And, only the FCC or a federal court can address violations of Section 201.[15] Thus, BellSouth argued that the Joint Petitioners are not harmed by the Commission's decision, and any challenge to BellSouth's Section 271 transport rates must be made at the FCC and not before this Commission.

Fourth, BellSouth argued that the Joint Petitioners' reliance on the *TRO Errata Order* to Footnote 1990 of the *TRO* is misplaced. Specifically, the Joint Petitioners focus on the FCC's deletion of the last sentence of Footnote 1990 in the *TRO Errata Order*, which provided that ILECs have no obligation to commingle Section 251 with Section 271 elements. The FCC deleted this sentence because it held immediately prior that ILECs have no obligation to combine Section 271 services with services no longer required to be unbundled pursuant to Section 251 (Footnote 1990) and because of the FCC's deletion to the reference of Section 271 services in Paragraph 584 (*TRO Errata Order* ¶27). Thus, BellSouth maintained that there is nothing monumental about the FCC's *TRO Errata Order* regarding Footnote 1990. It was simply an attempt to remove redundant, unnecessary language.

Fifth, BellSouth further asserted that, contrary to the Joint Petitioners' arguments and as found by the Commission, Section 271 services are excluded from the definition of wholesale services as it relates to commingling. BellSouth stated that this conclusion is supported by the express wording of the *Supplemental Order Clarification* (*SOC)* released on June 2, 2000, the *TRO,* the *TRO Errata Order*, and the *TRRO*. Specifically, Paragraph 579 of the *TRO* states that the commingling obligations addressed in the

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[14] FPSC Order No. PSC-05-0975-FOF-TP at 19.

[15] *See* 47 U.S.C. §§ 201, 207; *Citibank v. Graphic Scanning Corp.,* 618 F.2d 222, 225 (6th Cir. 1980) ("This is so notwithstanding that the Act vests exclusive jurisdiction over claims for damages for statutory violations of the Act in federal courts or the FCC.") (Citations omitted).

TRO arose from the *SOC*.[16] The *SOC,* in turn, defined commingling as "i.e. combining loops or loop-transport with tariffed special access services...."[17] Thus, what the FCC changed in the *TRO* was the commingling obligation set forth in the *SOC*—the obligation to combine loops with tariffed special access circuits.

Moreover, BellSouth argued that, in the *TRO Errata Order*, the FCC deleted the only reference to Section 271 services in the entire commingling section of the *TRO.* The Joint Petitioners do not dispute this fact or the fact that the *TRO Errata Order* is in force and effect. In fact, contrary to the Joint Petitioners' interpretation of this issue, throughout the entire commingling section in the *TRO* the FCC limits its description of the wholesale services that are subject to commingling to tariffed access services.[18] BellSouth argued that these passages, in conjunction with the *TRO Errata Order*, make it clear that the FCC never intended for ILECs to commingle Section 271 elements with Section 251 elements.

Furthermore, BellSouth contended that the FCC confirmed that the phrase "wholesale services" does not include Section 271 services in the *TRRO.* Particularly, in addressing conversion rights, the FCC in the *TRO* used the same wholesale services phrase that it used in describing ILECs' commingling obligations.[19] In the *TRRO,* the FCC described its holding in the *TRO* regarding conversions to be limited to the conversion of tariffed services to UNEs: "We determined in the *TRO* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations ...." *TRRO* at ¶ 229. Thus, BellSouth asserted, the FCC has subsequently construed the phrase wholesale services to be limited to tariffed services, which is consistent with BellSouth's position.

Accordingly, BellSouth stated that to adopt the Joint Petitioners' argument would mean that the FCC meant for wholesale services to have two different meanings in the same order. BellSouth argued that such a finding is illogical and also in violation of basic statutory construction principles. BellSouth asserted that the only logical conclusion based upon the express wording of the *TRO,* as well as the *TRO Errata Order* (and the *TRRO),* is that BellSouth has no obligation to commingle Section 271 elements with Section 251 elements.

Sixth, and finally, BellSouth argued that the Commission should not be persuaded by the Joint Petitioners' argument that the manner in which BellSouth complies with its Section 271 obligations somehow undermines its commingling arguments. Specifically, the fact that BellSouth complies with its Section 271 obligations to provide loops and transport via its access tariff and its Section 271 switching obligation via a commercial agreement is of no consequence. The loop and transport access services in BellSouth's

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[16] *See TRO* at ¶ 529.

[17] (*SOC* at ¶ 28).

[18] *See TRO* at Paragraphs 579, 580, 581, 583.

[19] *See TRO* at Paragraph 585 ("We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations....").

tariffs were available well before the Act was implemented, and are generally available to BellSouth customers. The fact that these same services also happen to satisfy BellSouth's obligation to make available loops and transport elements under Section 271 neither eliminates BellSouth's obligation to commingle Section 251 elements with these access services, nor creates an obligation for BellSouth to commingle Section 251 elements with Section 271 elements that are not otherwise available from BellSouth. BellSouth argued that, regardless of how BellSouth complies with its Section 271 obligations, BellSouth has no obligation to commingle Section 251 elements with services provided only pursuant to Section 271.

For all of these reasons, BellSouth urged the Commission to confirm the Commission's decision that BellSouth has no obligation to commingle Section 251 services with services that BellSouth makes available only pursuant to Section 271.

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

PUBLIC STAFF: The Public Staff stated that the Joint Petitioners objected to the Commission's conclusions that the commingling rule does not apply to Section 271 elements and that only tariffed elements are eligible for commingling. The Public Staff noted that the Joint Petitioners discussed in their brief that FCC Rules 51.309(e) and (f) give them the right to connect Section 251 UNEs with any element or service obtained at wholesale. These rules are without limitation and do not exclude any type of element or wholesale offering. The Public Staff stated that it agrees with the Joint Petitioners; the rules are unambiguous, and their legality is unchallenged by any party.[20]

The Public Staff stated that it also believes that the *RAO* mistakenly equates the terms commingle and combine. The Public Staff opined that "combining" is the joining of like elements, such as two or more Section 251 UNEs. The Public Staff opined that "commingling" is the joining of two or more unlike elements, such as Section 251 UNEs and special access service, or, in the case at hand, Section 251 UNEs and Section 271 elements. Paragraph 579 of the *TRO* specifically defines commingling as:

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

The Public Staff opined that the FCC made a clear distinction between combining and commingling in Paragraph 572 of the *TRO* when it stated that it would address its "rules for UNE combinations, specific issues pertaining to EELs, the ability of requesting

[20] *See MCIMetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc.*, 352 F.3d 872, 881 (4th Cir. 2003) (construing 47 C.F.R. § 51.703(b) and finding that a state commission is bound by an FCC rule that is unambiguous and unchallenged).

carriers to commingle UNEs and UNE combinations with other wholesale services, [and] issues surrounding conversions of access services to UNEs."

In addition, the Public Staff stated that it believes that the Commission's conclusions fail to account for the FCC's intent regarding commingling of Section 271 elements. The Public Staff argued that this intent is demonstrated in the *TRO Errata Order* where the FCC removed the sentence, "We also decline to apply our commingling rule... to services that must be offered pursuant to these checklist items."[21] The Public Staff asserted that the removal of this language strongly supports the conclusion that the FCC did not intend to exempt Section 271 elements from the commingling requirement. The Public Staff argued that, had the FCC intended for Section 271 elements to be exempt from the commingling requirements, it would not have needed to remove this language.

The Public Staff further stated that the FCC also evinced this intent in Footnote 1787 of the *TRO*, where it stated that, "[i]n light of the determinations we make herein, we grant WorldCom's request to clarify that requesting carriers may commingle UNEs with other types of services." WorldCom had requested that the FCC clarify "that requesting carriers are entitled to access to UNEs in a fashion that allows them to commingle local and access traffic, or local and interstate traffic, for the efficient provision of telecommunications services."[22] The Public Staff averred that, although WorldCom did not specifically request commingling of Section 271 elements in its clarification motion, the FCC's grant of WorldCom's request for clarification indicated it contemplates more services to be commingled with Section 251 UNEs than just the LECs' tariffed access services.

The Public Staff commented that BellSouth's argument that the FCC means only tariffed services when it refers to wholesale services is somewhat misleading. At the time the *TRO* was issued, ILECs offered no alternatives to the loop, transport, and switching Section 251 UNEs other than their tariffed offerings. Thus, the only real examples that the FCC could use for wholesale services were the ILECs' tariffed services.

Further, the Public Staff asserted that, by specifying that tariffed services are merely examples of wholesale services in Paragraph 579 of the *TRO,* the FCC does not limit the term wholesale service to tariffed offerings. The Public Staff opined that, by spelling out that the commingling requirement is applicable generally to wholesale services, the FCC automatically included any future wholesale service, such as Section 271 elements, in this requirement without the constant revision of its rules.

The Public Staff recommended that the Commission reconsider its conclusions with regard to this issue and instead find that BellSouth should permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or

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[21] Footnote 1990 of the *TRO*.

[22] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Petition of MCI WorldCom, Inc. for Clarification, pp. 21-23, February 17, 2000.

more facilities or services that the 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.

REPLY COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners contended that the lack of an obligation to combine Section 271 elements with other Section 271 elements cannot lawfully be transformed into an exception to the FCC's unqualified requirement that ILECs provide for commingling of Section 251 elements with any other service provided on a wholesale basis. The Joint Petitioners opined that this obligation includes those made available only under Section 271.

The Joint Petitioners argued that, despite their clear explanation of the conceptual difference between commingling and combining elements, BellSouth continues to obfuscate. BellSouth's attempt to show that the Joint Petitioners made some fatal concession is misguided. First, BellSouth ignored the fact that witness Johnson stated that commingling involves the "combining [o]f elements that are different in terms of their regulatory nature". Thus, the Joint Petitioners opined that witness Johnson's testimony supports their assertion that the combining of Section 271 elements with other Section 271 elements (elements of the same regulatory nature) is different from commingling.

Second, the Joint Petitioners stated that BellSouth failed to disclose that witness Johnson precisely explained the differences between combining and commingling ("as defined in the *TRO* specifically, the FCC lifted its prohibition on combining wholesale services with UNEs in order to allow CLPs to commingle tariff services or wholesale services with Section 251 UNEs."). The Joint Petitioners opined that witness Johnson confirmed that Section 271 elements are wholesale services. Thus, the Joint Petitioners maintained that commingling of Section 251 elements with Section 271 elements and combining Section 271 elements with other Section 271 elements are different concepts. The Joint Petitioners argued that commingling Section 251 elements with other wholesale offerings, including those mandated by Section 271, is required by Section 251, as interpreted and implemented by the FCC.[23] The Joint Petitioners argued that the FCC's revision to Footnote 1990 of the *TRO* clarified that Section 271 elements are not subject to a Section 271 combinations rule, but are subject to the FCC's Section 251 commingling rule.

The Joint Petitioners asserted that BellSouth also mistakenly claimed that, by adopting the Joint Petitioners' language, the Commission will recreate UNE-P. The Joint Petitioners stated that UNE-P includes local switching elements and the local loop, all priced at TELRIC pursuant to Section 251. The Joint Petitioners argued that, on the other hand, a commingled arrangement replacing UNE-P would not include all elements

[23] *See* 47 C.F.R. §§ 51.309, 51.315.

priced at TELRIC. Thus, the Joint Petitioners argued, the two scenarios result in different pricing and therefore commingling does not result in the "all Section 251 UNE" combination commonly referred to as UNE-P.

Finally, the Joint Petitioners noted that BellSouth relied on the holding of the Florida PSC to support its claim that BellSouth is under no obligation to commingle Section 271 elements with Section 251 elements. The Joint Petitioners contended that the Florida PSC's decision creates an implied exception that cannot be squared with the second part of the FCC's *TRO Errata Order*, which deleted the FCC's Footnote 1990 sentence that had said "[w]e decline to apply our commingling rule... to services that must be offered pursuant to these checklist items." The Joint Petitioners opined that the Florida PSC made no attempt to read the *TRRO* as a whole and, as a result, reached an erroneous conclusion.

PUBLIC STAFF: The Public Staff recommended that the Commission reconsider its conclusions in the *RAO* such that Finding of Fact No. 9 should read 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 Telecommunications Act of 1996 (the Act), including those obtained as Section 271 elements.

The Public Staff disagreed with the Commission's conclusion that Section 271 services are excluded from the definition of "wholesale services" as it relates to commingling.

The Public Staff stated that the resolution of the commingling issue depends on whether Section 271 elements, local switching in particular, are wholesale services. The Public Staff opined that BellSouth provides Section 271 elements as wholesale services pursuant to the common definition of "wholesale" found in Black's law dictionary. The Public Staff maintained that, in the *RAO*, the Commission noted that, in Paragraph 579 of the *TRO* the FCC "repeatedly references 'switched and special access services offered pursuant to tariff' when using the term wholesale services. In describing wholesale services that are subject to commingling, the FCC refers to tariffed access services."

However, the Public Staff maintained that, on September 16, 2005, the FCC granted in part a petition for forbearance filed by Qwest Corporation (Qwest) seeking relief from statutory and regulatory obligations that apply to it as an incumbent telephone company. The Public Staff stated that, in the press release announcing the decision, the FCC stated the following:

> The Commission leaves in place other section 251(c) requirements such as interconnection and interconnection-related collocation obligations as well as *section 271 obligations to provide wholesale access to local loops,*

> *local transport, and local switching at just and reasonable prices.*" [emphasis added]

The Public Staff maintained that BellSouth acknowledged at the hearing that it provides certain Section 271 elements, such as transport elements, as wholesale services through its special access tariff. However, the Public Staff argued that Rule 51.5 does not qualify "wholesale" to mean only those wholesale services offered by an ILEC through its tariffs, and the FCC has used the term "wholesale" recently when referring to Section 271 obligations to provide access to local switching, local loops, and local transport, without limiting its meaning to "switched and special access services offered pursuant to tariff." Thus, the Public Staff asserted, the Commission may reconsider its Finding of Fact No. 9 in this docket based on the plain language of the rule and the evidence at the hearing.

DISCUSSION

After careful consideration, the Commission concludes that it should reconsider its decision in the *RAO* finding that services, network elements, or other offerings made available only under Section 271 of the Act should not be subject to commingling with Section 251 elements or combinations thereof. Instead, the Commission now believes that such commingling should be allowed for both legal and public policy reasons.

This has been an extraordinarily difficult issue to grapple with. All the parties have presented strong and cogent arguments, and reasonable persons can disagree about which arguments are better and more convincing. The task of decision has been complicated by the relative opaqueness of the FCC's pronouncements on the subject. This lack of clear FCC guidance has been a serious handicap for both the parties and the Commission. It is thus not surprising that, construing the same language, different State commissions have reached different conclusions on this issue and that no consensus appears evident. For its part, the Commission must examine this matter according to what it believes constitutes the better legal and public policy considerations.

In brief, the Commission has come to believe on reconsideration that Section 271 services, elements, or offerings constitute "wholesale services" within the meaning of the commingling rule and therefore that they should be made available on a commingled basis with Section 251 UNEs. The Commission has also come to believe that this is the sounder public policy choice, largely because it ensures the availability of Section 271 services, elements, and offerings in a more predictable and practically usable form to competitors. The Commission believes that this is consistent with the FCC's general stress on the continued *availability* of certain Section 271 services, elements, and offerings by RBOCs in a delisted Section 251 UNE environment, with due recognition that those Section 271 services, elements, and offerings, among other things, are subject to a different rate standard from their Section 251 counterparts.

Concerning the legal arguments, the Joint Petitioners filed a Motion for Reconsideration on this issue requesting that the Commission reconsider Finding of Fact No. 9 since, they argued, it was based on two incorrect findings: first, that the FCC held that its commingling rule does not apply to Section 271 elements; and second, that BellSouth is correct in asserting that only tariffed elements are eligible for commingling. The Joint Petitioners contended that neither of these findings is supported by the *TRO,* and that their Brief demonstrated that the FCC made clear that it never intended to exclude Section 271 from commingling. Accordingly, the Joint Petitioners claimed that the Commission's tentative decision is not in keeping with federal law.

The Public Staff filed initial comments and reply comments agreeing with the Joint Petitioners that the Commission's decision on Finding of Fact No. 9 should be reconsidered. The Public Staff stated that it agreed with the Joint Petitioners that the FCC's rules are unambiguous, and their legality is unchallenged by any party.

The Commission notes that FCC Rule 51.309(e) states:

> Except as provided in § 51.318, 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.

The Rule clearly states that commingling of UNEs or combinations of UNEs with wholesale services obtained from an ILEC shall be permitted, while not, in any way, limiting the type of wholesale service. In fact, as noted on Page 22 of the *RAO*, BellSouth acknowledged in this docket that it does occasionally provide some Section 271 elements as wholesale services. In particular, BellSouth stated that it agreed to commingle UNEs with tariffed services or resold services and that it would commingle a Section 271 transport element. However, BellSouth maintained, it will not commingle switching because it does not provide switching as a wholesale service. The Commission does not believe that FCC Rule 51.309(e) allows BellSouth to determine which Section 271 elements are indeed wholesale services and which Section 271 elements are not wholesale services.

The Commission further notes that in Paragraph 579 of the *TRO*, the FCC specifically stated that commingling involves the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services **that a requesting carrier has obtained at wholesale** from an ILEC pursuant to **any** method other than unbundling under Section 251(c)(3) of the Act. Specifically, Paragraph 579 of the *TRO* states, in its entirety:

> We eliminate the commingling restriction that the Commission adopted as part of the temporary constraints in the Supplemental Order Clarification and applied to stand-alone loops and EELs. We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (e.g., switched and special access

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

The Commission believes that Section 271 elements qualify as wholesale services that a requesting carrier can obtain from an ILEC under a method other than Section 251 unbundling.

The Commission also notes that Paragraph 579 of the *TRO* removes the commingling restriction that the FCC adopted as part of its temporary constraints in its *SOC*. However, further in Part VII.A(2)(c) of the *TRO*, specifically at Paragraph 584, the FCC states, as modified by the *TRO Errata Order*, that, "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to section 251(c)(4) of the Act." Therefore, the FCC's discussion on commingling in the *TRO* was **not** limited to the previous commingling restriction from the *SOC*; if it was, Paragraph 584 would not have been included in the *TRO.*

Further, the Commission believes that the FCC's *TRO Errata Order*, which eliminated the phrase "any network elements unbundled pursuant to section 271 and" from Paragraph 584, must be read in context and within the framework of the *TRO*. After the altered sentence, the remaining portion of Paragraph 584 discusses commingling and services offered pursuant to resale. Furthermore, the FCC dedicated a separate section of the *TRO* to Section 271 issues, specifically, Section VIII.A. It is within that section that the FCC states that a BOC's obligations under Section 271 are not

necessarily relieved based on any determination the FCC made under the Section 251 unbundling analysis (See Paragraph 655 of the *TRO*). Therefore, the Commission believes that the logical interpretation of the FCC's changes in the *TRO Errata Order* to Paragraph 584 was that the FCC would discuss Section 271 elements and commingling under its separate Section 271 part of the *TRO* (namely, Section VIII.A).

Turning to Section VIII.A of the *TRO* concerning Section 271 issues, the Commission notes that the FCC's *TRO Errata Order* also altered Footnote 1990 to delete the following sentence: "We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items." Footnote 1990 was attached to the following sentence in Paragraph 655 of the *TRO*: "As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis." The Commission believes that the fact of the matter is that if the FCC had intended to relieve BOCs of their obligation to commingle Section 251 elements with Section 271, wholesale elements, it would not have deleted the last sentence in Footnote 1990. Without the *TRO Errata Order*, the FCC would have declined to require BOCs to commingle Section 251 elements with Section 271 elements; with the removal of this language, the FCC clearly intended not to decline, or rather to continue to enforce, its requirement for BOCs to commingle Section 251 elements with Section 271 elements.

As the Public Staff noted, the ultimate question is whether Section 271 UNEs are wholesale services which must be commingled pursuant to FCC Rule 51.309(e). The Commission agrees with the Joint Petitioners and the Public Staff and believes that all Section 271 elements are wholesale services. In reaching this conclusion, the Commission is convinced by several references made by the FCC in its December 2, 2005[24] *Memorandum Opinion and Order* addressing a Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area (FCC 05-170; WC Docket No. 04-223; adopted on September 16, 2005), as follows:

> . . . Indeed, Qwest's section 251(c)(4) and **section 271(c) wholesale obligations** remain in place. . . [Paragraph 67 – Emphasis added.]
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> . . . We believe that in conjunction with the extensive facilities-based competition from Cox (both existing and potential), this competition that **relies on Qwest's wholesale inputs** – which must be priced at just, reasonable and nondiscriminatory rates and is subject to Qwest's **continuing obligations under section 251(c)(4) and section 271(c)** – supports our conclusion that . . . [Paragraph 68 with footnotes omitted and emphasis added.]

[24] The Commission notes that the FCC's *Qwest Order* was released after the *RAO*, Motions for Reconsideration, initial comments, and reply comments were filed in this docket.

> We deny Qwest's Petition for forbearance to the extent Qwest seeks relief from its section 271(c)(2)(B) obligations to provide access to loops, transport and switching in the Omaha MSA (i.e., checklist items 4-6). In contrast to checklist items 1 through 3 and 14, which incorporate by reference other provisions of the Act, checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide **wholesale access to loops, transport and switching**[25], irrespective of any impairment analysis under section 251 to provide unbundled access to such elements. . . [Paragraph 100 with footnotes omitted and emphasis added.]
>
> . . . The Commission also has explained that it is reasonable to conclude that section 251 and section 271 establish independent obligations because the entities to which these provisions apply are different – namely, section 251(c) applies to all incumbent LECs, while section 271 imposes obligations only on BOCs. . . [Footnote 246.]
>
> We conclude that Qwest has not demonstrated that sufficient facilities-based competition exists in the Omaha MSA to justify forbearance from **Qwest's wholesale access obligations under sections 271(c)(2)(B)(iv)-(vi)**. . . [Paragraph 103 – Emphasis added.]
>
> . . . Our justification for forbearing from Qwest's section 251(c)(3) obligations for loops and transport in certain areas depends in part on the continued applicability of **Qwest's wholesale obligation to provide these network elements under sections 271(c)(2)(B)(iv) and (v)**. . . [Paragraph 105 – Emphasis added.]

The Commission believes that if the FCC had intended to limit commingling to only switched and special access services offered pursuant to a tariff, the FCC would have, specifically and definitively stated that instead of continuously referencing services obtained at wholesale by a (or any) method other than unbundling under Section 251(c)(3) of the Act.

Finally, the Commission believes that, in addition to the legal analysis above, requiring commingling of Section 251 elements with Section 271 elements is better public policy. As previously noted, the Commission believes that reconsideration on this issue is appropriate to ensure the availability of Section 271 services, elements, and offerings in a more predictable and practically usable form to competitors. The entire reason for making Section 271 elements available is to allow a competitor to serve end-user customers. Placing limits on the manner in which a competitor can utilize Section 271 elements as advocated by BellSouth runs counter to this policy goal. The

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[25] The Commission notes that the FCC references wholesale access to Section 271(c)(2)(B) (the competitive checklist) and specifically to switching, which is checklist item 6. Therefore, BellSouth's position that it will not commingle switching because it does not provide switching as a wholesale service is unpersuasive and inconsistent with the FCC's recent *Qwest Order*.

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.
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> (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

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[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

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[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).
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> . . . . 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

provide documentation, as distinct from a statement of concern, to support its basis for audit or seek concurrence of the requesting carrier before selecting the audit's location.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration for several reasons. With respect to Matrix Item No. 51(B), the Joint Petitioners argued that a true "for cause" standard for audits is necessary for the auditors to be implemented in a meaningful, verifiable way. Audits are costly and intrusive, and the standards that trigger an audit should be higher than what the Commission has endorsed. With respect to Matrix Item No. 51(C), the Joint Petitioners argued that it is crucial that auditors be truly independent. BellSouth has already agreed to use mutually approved auditors in other contexts, and BellSouth's resistance in this case is puzzling. Conflicts involving auditors do occur and are better dealt with up front rather than after-the-fact.

INITIAL COMMENTS

BELLSOUTH: BellSouth argued that the Commission had correctly rejected the Joint Petitioners' proposals as unnecessary and illegal impediments to BellSouth's audit rights. With respect to Matrix Item No 51(B), BellSouth noted that it has no ability to challenge a CLP's EEL self-certification from the outset, so audit rights are provided to insure compliance with EEL eligibility. Additional conditions such as those the Joint Petitioners seek cannot be found in the *TRO* and should not be imposed. Furthermore, BellSouth argued that the Joint Petitioners' "costly and intrusive" argument regarding audits is a red herring. The Joint Petitioners are simply trying to erect more barriers to BellSouth's rightful exercise of its audit rights. With respect to Matrix Item No. 51(C), BellSouth argued that a requirement for mutual agreement for the selection of an auditor is not workable, as NuVox's position on KPMG illustrates. KPMG is NuVox's external auditor, yet NuVox argued that KPMG was not independent, even after BellSouth and NuVox had agreed to use KPMG. In any event, mutual agreement on an auditor is not sanctioned by the *TRO*.

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

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the Commission's decision on this issue.

REPLY COMMENTS

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

JOINT PETITIONERS: With respect to Matrix Item No. 51(B), the Joint Petitioners argued that BellSouth had presented little that was new. The Joint Petitioners stated that the *RAO* decision will not prevent litigation and that they would not cede to any attempt by BellSouth to gut or end-run the protections against abusive EEL audits established by the FCC. With respect to Matrix Item No. 51(C), the Joint Petitioners contended that BellSouth also had little to offer other than what the Joint Petitioners call

"blatant mischaracterization of the dispute over KPMG's independence." The Joint Petitioners said that KPMG "was caught providing certain information to BellSouth in violation of [a nondisclosure agreement] it executed with NuVox." Prior to this incident NuVox had only expressed opposition to a single auditor proposed by BellSouth, which the Georgia Public Service Commission (Georgia PSC) also found unfit.

PUBLIC STAFF: The Public Staff reiterated its view that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

Finding of Fact No. 13, which, in part, addresses Matrix Item No. 51(B), has to do with whether there is a notice requirement and, if so, what should the notice contain. While the Commission found that the *TRO* did not require notice of an audit, advance notice would afford the CLP the opportunity to compile appropriate documentation. The Commission held that the ILEC need not supply carriers additional documentation to support their request, but, as distinct from documentation, it should state its concern. Since BellSouth has agreed to provide notice to a CLP stating the cause for the audit, the Commission found this proposal to be reasonable.

Finding of Fact No. 13, which, in part, addresses Matrix Item No. 51(C), has to do with who performs the audit and how it should be performed. The Joint Petitioners insisted that the auditor should be an independent auditor mutually agreed upon, while BellSouth asserted that the requirements that the Joint Petitioners want added do not appear in the *TRO*. The Commission in the *RAO* noted that it had addressed the issue of auditor selection in Docket No. P-772, Sub 7, in its *Order Granting Motion for Summary Disposition and Allowing Audit* issued on August 24, 2004, and *Order Denying Motion for Reconsideration* issued on January 20, 2005. (This matter is currently on appeal in the U.S. District Court, Eastern District, Western Division). In accordance with its decisions in Docket No. P-772, Sub 7, the Commission rejected the additional requirements sought by the Joint Petitioners.

The Commission believes that these issues have been sufficiently addressed both in this arbitration and in Docket No. P-772, Sub 7. The Commission believes that it has carefully construed the applicable law regarding audits, and it is not persuaded by the Joint Petitioners' argumentation that it should reconsider its decisions on this Finding of Fact. So far the Joint Petitioners have had four bites of the apple on this issue in this venue, perhaps a few more courtesy of the Competitive Carriers of the South (CompSouth) in Docket No. P-55, Sub 1549, with no doubt even more being in store on the federal level, by which time the apple will have been thoroughly consumed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 13.

FINDING OF FACT NO. 14 (ISSUE NO. 14 – MATRIX ITEM NO. 65): Should BellSouth be allowed to charge the CLP a Tandem Intermediary Charge (TIC) for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth sought reconsideration of Finding of Fact No. 14 arguing that the Commission's decision is incorrect as a matter of law. BellSouth stated that, in contrast to the Commission's decision, the FCC has pronounced that, to date, the Commission's rules have not required ILECs to provide transiting. Similarly, the FCC's Wireline Competition Bureau (WCB) in the *Virginia Arbitration Order* declined to find that ILECs have an obligation to provide a transit function at TELRIC. BellSouth stated that the WCB subsequently reaffirmed these principles in denying AT&T's request for reconsideration, wherein it found that (1) it "did not find that Verizon had a legal obligation to provide transit service at TELRIC"; (2) it "did not agree with AT&T's assertion that the Virginia Commission would have been required to agree with AT&T that Verizon must provide transit service under the Act, nor do we agree that the Bureau was required to so conclude." BellSouth further stated that the Commission should not feel constrained by its decision in Docket No. P-19, Sub 454. In addition, BellSouth noted that decisions that are contrary to the *RAO* are not limited to the FCC, citing the Georgia and Florida PSC decisions on this issue. BellSouth urged the Commission to reconsider its previous decision or, at a minimum, avoid finding that BellSouth has a Section 251 obligation to provide the transit service until the FCC addresses the issue in the context of its *Intercarrier Compensation* rulemaking proceeding.

INITIAL COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners argued that the Commission should keep with its initial recommendation on this issue. The Joint Petitioners noted that in Paragraph 534, Footnote 1640 of the *TRO*, the FCC plans to address transiting in its pending *Intercarrier Compensation* rulemaking proceeding. The Joint Petitioners argued that, if transiting is determined by the FCC to be outside the scope of BellSouth's Section 251 and TELRIC pricing obligations, BellSouth can invoke the change of law provisions in the Agreement and it can petition the Commission to establish an appropriate rate. The Joint Petitioners conceded that, until the FCC opines on whether it believes transit service is a Section 251 obligation, it simply makes sense to maintain the status quo by adopting the Commission's initial recommendation on this issue.

PUBLIC STAFF: The Public Staff argued that BellSouth provided no basis for modifying the Commission's conclusion. The Public Staff stated that the Commission has considered this matter in great detail before in Docket No. P-19, Sub 454 and concluded that Verizon South Inc. has a legal obligation to provide tandem transit service under both state and federal law. The Public Staff noted that the Commission declined, however, to decide the appropriate rate to be charged for tandem transit service, and deferred the matter to Docket No. P-100, Sub 151. However, the Public Staff opined that Docket No. P-100, Sub 151 has not provided an answer to this question. Moreover, the Public Staff noted that the current appeal of the Commission's Order in Docket No. P-19, Sub 454, has been stayed pending negotiations between parties regarding the manner in which tandem transit traffic is to be routed and billed. The Public Staff stated that based upon recent filings in that docket, there appears to be some dispute as to the status of negotiations. The Public Staff contended that the issue of the appropriate rates, terms and conditions for BellSouth to charge for transit traffic from the Joint Petitioners is left to this proceeding. The Public Staff believes that the Commission appropriately concluded that BellSouth should not be permitted to charge a TIC.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that both the Public Staff and the Joint Petitioners argue that there is no FCC decision that expressly finds that BellSouth is not obligated to provide a transit service at TELRIC and, thus, the Commission can make such a finding in the absence of a contrary federal ruling. BellSouth asserted that this argument, however, does not reflect the fact that the FCC has repeatedly refused to find that ILECs have an obligation to provide transit service under Section 251 of the Act. BellSouth noted that the WCB refused to find such an obligation in the *Virginia Arbitration Order*, and the FCC stated in Paragraph 534, Footnote 1640 of the *TRO* that, "[t]o date, the Commission's rules have not required incumbent LECs to provide transiting." Thus, BellSouth argued that, while the FCC has not expressly held that ILECs do not have to provide the transit function at TELRIC, it is clear that the FCC has refused to make such a finding to date, notwithstanding many opportunities to do so. BellSouth maintained that, if the FCC decides differently in the *Intercarrier Compensation* rulemaking proceeding and finds for the first time that ILECs have a Section 251(c) obligation to provide the transit function at TELRIC, then the Commission can apply that ruling on a going-forward basis.

BellSouth urged the Commission to reconsider its decision and allow BellSouth to charge the TIC rate of $.0015. BellSouth suggested that, if the Commission still has concerns about the rate, the Commission could elect to follow the Georgia PSC's approach and order BellSouth's proposed rate until such time as a permanent rate is established. BellSouth further suggested that, even if the Commission rejects the $.0015 rate, the Commission should find that BellSouth is allowed to charge some interim rate or at least provide BellSouth with the ability to back bill the Joint Petitioners from the date a Commission-approved rate is established.

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

PUBLIC STAFF: The Public Staff did not provide any additional reply comments on this issue.

DISCUSSION

In the *RAO*, the Commission found that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs. As discussed above, in Docket No. P-19, Sub 454, the Commission held that ILECs have a legal obligation to provide the transit function under both state and federal law. As pointed out by the Commission in its *September 22, 2003 Order*, in Docket No. P-19, Sub 454, the tandem transit function may also involve a billing intermediary function, and the rates for providing this service are not required to be TELRIC-based.

On March 3, 2005, the FCC released its *Further Notice of Proposed Rulemaking in the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, FCC 05-33 (March 3, 2005) (*Further NPRM*). In this notice of proposed rulemaking, the FCC discusses intermediary carriers and the reciprocal compensation rules. The FCC's discussion in the *Further NPRM* is relevant to the decision at issue here.

In the *Further NPRM*, the FCC observes that it has not adopted rules governing the charges of intermediary (i.e. transiting) carriers. The FCC states the following:

> The reciprocal compensation provisions of the Act address the exchange of traffic between an originating carrier and a terminating carrier, but the Commission's reciprocal compensation rules do not directly address the intercarrier compensation to be paid to the transit service provider.[44]

The FCC states further,

> If rules regarding transit service are warranted, we seek comment on the scope of such regulation. Specifically, we seek comment on whether transit service obligations under the Act should extend solely to the incumbent LECs or to all transit service providers, including competitive LECs. [45]

And additionally,

> [W]e seek further comment on the appropriate pricing methodology, including the possibility of requiring that transit service be offered at the same rates, terms, and conditions as the incumbent LEC offers for equivalent exchange access services (e.g., tandem switching and tandem

[44] *Further NPRM*, at ¶ 120.

[45] *Further NPRM*, at ¶ 130.

switched transport) and how this option would be affected by our proposals to alter the current switched access regime.[46]

Based on the foregoing, the Commission finds it appropriate to uphold its decision until such time as the FCC addresses the issue in the context of the *Intercarrier Compensation* rulemaking proceeding.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 14.

FINDING OF FACT NO. 15 (ISSUE NO. 15 – MATRIX ITEM NO. 86(B)): How should disputes over alleged unauthorized access to customer service record (CSR) information be handled under the Agreement?

INITIAL COMMISSION DECISION

The Commission concluded that the Joint Petitioners' proposed language concerning how disputes over alleged unauthorized access to CSR information should be handled under the Agreement is reasonable and appropriate. Accordingly, the Commission adopted the Joint Petitioners' proposed language, as follows, for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement:

Section 2.5.5.2 – Joint Petitioners
Notice of Noncompliance. If, after receipt of a requested LOA [Letter of Authorization], the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice to the other Party specifying the alleged noncompliance. The Party receiving the notice agrees to acknowledge receipt of the notice as soon as practicable. If the Party receiving the notice does not dispute the other Party's assertion of non-compliance, the receiving Party agrees to provide the other Party with notice that appropriate corrective measures have been taken or will be taken as soon as practicable.

Section 2.5.5.3 – Joint Petitioners
Disputes over Alleged Noncompliance. If one Party disputes the other Party's assertion of non-compliance, that Party shall notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. In such instance, the Parties

[46] *Further NPRM*, at ¶ 132.

cooperatively shall seek expedited resolution of the dispute. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 15 stating that the Commission erred in adopting the Joint Petitioners' proposed language regarding how disputes over alleged unauthorized access to CSR information should be handled under the Agreement.

BellSouth maintained that, in adopting the Joint Petitioners' language, the Commission "agree[d] with the Joint Petitioners that it is unclear from BellSouth's proposed language whether BellSouth gets to pull the plug while a dispute concerning noncompliance is pending." BellSouth stated that its proposed language, however, clearly provides that disputes over unauthorized access to CSR information will be handled pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions section of the Agreement. BellSouth asserted that under the clear wording of the Dispute Resolution provision, access to ordering systems will not be suspended nor will services be terminated while such a dispute is pending. Accordingly, BellSouth argued that its proposal gives the Joint Petitioners exactly what they want.

In contrast, BellSouth maintained, the Joint Petitioners' proposal is unacceptable for many reasons. First, BellSouth argued, the Joint Petitioners' language is unduly vague. For example, BellSouth noted, under the Joint Petitioners' language the offending Party is required to undertake "appropriate corrective measures", which is subject to debate and cannot be reconciled with the Parties' contractual obligation "to access CSR information only in strict compliance with applicable laws." Second, BellSouth maintained, the Joint Petitioners do not impose any time period in which to cure any unauthorized access even though the Joint Petitioners concede that they can produce a LOA in as little as two business days. Third, and perhaps most importantly, BellSouth opined, the Joint Petitioners' proposal provides no remedy or recourse if the accused party ignores its legal and contractual obligations and thus fails to respond to a request to provide an appropriate LOA.

BellSouth argued that under its proposal, suspension and termination rights are triggered only if a Party: (1) disregards its obligation to produce an appropriate LOA upon request; and (2) thereafter fails to dispute (i.e. ignores) a notice that specifies the alleged CSR-related noncompliance. BellSouth maintained that suspension or termination of service based upon undisputed allegations that a party is engaging in unauthorized, unlawful, or fraudulent activity is not a new concept. In fact, BellSouth maintained, the Joint Petitioners retain the right to immediately terminate service provided to their North Carolina end users under similar circumstances.

For the foregoing reasons, BellSouth asserted, the Commission should modify its *RAO* to adopt BellSouth's proposed language for Matrix Item No. 86(B).

INITIAL COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners stated in initial comments that, although BellSouth claims otherwise, its language proposal with regard to unauthorized access to CSRs does not give the "Joint Petitioners exactly what they want." The Joint Petitioners stated that they have explained as much in their brief. The Joint Petitioners maintained that, despite assurances that BellSouth provides in its brief, BellSouth refuses to incorporate such assurances into its proposed language in North Carolina. Instead, the Joint Petitioners argued that BellSouth intentionally leaves its proposal unacceptably vague and leaves the Joint Petitioners and their customers dangerously exposed to potential coercion and manipulation (when BellSouth will rely solely on the language of the Agreement and not on its curious attempt to get the Commission to approve language that appears designed to provide potential for future coercion and manipulation).

The Joint Petitioners stated that they are fully committed to complying with all regulations regarding access to CSRs. Nevertheless, the Joint Petitioners maintained that their proposal for Matrix Item No. 86(B) ensures that their service is protected while disputes over unproven BellSouth allegations of CSR abuse are resolved by a neutral decision maker such as the Commission. The Joint Petitioners noted that they have agreed to provide a LOA upon request and have never given BellSouth cause for concern in the past. Yet, the Joint Petitioners opined, because disputes may still arise, even when a LOA is provided, the Joint Petitioners wish to remain protected from service suspension or termination unless it is proven they are in violation of the law. Even then, the Joint Petitioners stated they would, with the dispute resolved, prefer an opportunity to cure or correct the violation that does not impact their customers so adversely. The Joint Petitioners argued that BellSouth's language does not afford the Joint Petitioners that protection, but rather effectively entitles BellSouth to suspend or terminate all of the Joint Petitioners' services at its whim. The Joint Petitioners stated that they simply cannot live with the uncertainty and unpredictability in BellSouth's language. Moreover, the Joint Petitioners asserted that nothing in BellSouth's language assures the Joint Petitioners that a LOA will save them from suspension and termination.

The Joint Petitioners noted that, as support of its Objection, BellSouth asserted that the Joint Petitioners "retain the right to immediately terminate service provided to their North Carolina end users under similar circumstances." The Joint Petitioners maintained that this argument, for which BellSouth provides no citation to the NuVox and Xspedius "rights" it refers to, is in any event, fatally flawed. The Joint Petitioners opined that even if the Joint Petitioners retain similar rights as to an individual end user, the situation would not be analogous to the suspension and termination rights afforded BellSouth

under its proposed language. More specifically, the Joint Petitioners stated that BellSouth makes an apples-to-oranges comparison between a retail service offering and a wholesale service offering. In other words, the Joint Petitioners maintained that if the Joint Petitioners were to exercise that right, then only a single North Carolina customer would lose service; but if BellSouth were to exercise its right under its proposed language, then thousands of North Carolina customers would be deprived of service and for actions not any one of them had taken. In essence, the Joint Petitioners argued that BellSouth attempts to interrupt service to the Joint Petitioners' customers as a means of gaining an unfair competitive advantage.

The Joint Petitioners maintained that the Commission should affirm its decision for Matrix Item No. 86(B).

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that the Joint Petitioners filed comments to BellSouth's Objections as to the Panel's findings for Issue No. 15 (Matrix Item No. 86(B)) regarding disputes over unauthorized access to CSRs. BellSouth noted that, without citing any portion of BellSouth's proposed language, the Joint Petitioners continue to claim that BellSouth's proposal is "unacceptably vague and leaves Joint Petitioners and their customers dangerously exposed to potential coercion and manipulation." BellSouth argued that the Commission should disregard this argument. BellSouth stated that its proposed language clearly provides that disputes over unauthorized access to CSRs will be handled pursuant to the Dispute Resolution provisions in the General Terms and Conditions section of the Agreement. BellSouth noted that, under the clear wording of this provision, access to ordering systems will not be suspended nor will services be terminated while such a dispute is pending. Accordingly, BellSouth stated that its proposal gives the Joint Petitioners exactly what they want, insurance that "their service is protected while disputes over unproven BellSouth allegations of CSR abuse are resolved by a neutral decision maker such as the Commission."

BellSouth maintained that, in adopting BellSouth's proposed language, the Florida PSC recognized that the Joint Petitioners have an irrational fear of BellSouth's language. BellSouth noted that the Florida PSC stated "BellSouth witness Ferguson claims that its proposed modified language to the Interconnection Agreement should have resolved this issue and further does not understand why the proposed language does not calm the Joint Petitioners' fears. We agree." BellSouth asserted that the Commission should not be fooled by the Joint Petitioners' unsupported fears.

Again, BellSouth stated that under its proposal, suspension and termination rights are triggered only if a Party: (1) disregards its obligation to produce an appropriate LOA; and (2) thereafter fails to dispute (i.e. ignores) a notice that specifies the alleged

CSR-related noncompliance (*See* BellSouth Exhibit A, Attachment 6, §§ 2.5.5.2 and 2.5.5.3). For the foregoing reasons, BellSouth stated, the Commission should modify its *RAO* to adopt BellSouth's proposed language for Matrix Item No. 86(B).

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

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission notes that BellSouth asserted that the Joint Petitioners' proposed language is unacceptable for many reasons. First, BellSouth argued that the Joint Petitioners' language is unduly vague. The Commission notes that the Joint Petitioners also asserted that BellSouth's proposed language is unacceptably vague. The Commission does not agree with BellSouth that the Joint Petitioners' proposed language is unduly vague.

Second, BellSouth maintained that the Joint Petitioners' proposed language does not impose any time period in which a Party must cure any unauthorized access even though the Joint Petitioners concede that they can produce a LOA in as little as two business days. The Commission believes that this argument by BellSouth does have merit. The Commission believes that it is appropriate to impose time periods in the language. Therefore, the Commission concludes that it is appropriate to modify the Joint Petitioners' proposed language in this regard, as follows:

> **Section 2.5.5.2**
> Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice to the other Party specifying the alleged noncompliance. The Party receiving the notice agrees to acknowledge receipt of the notice as soon as practicable. If the Party receiving the notice does not dispute the other Party's assertion of non-compliance, the receiving Party agrees to provide the other Party with notice that appropriate corrective measures have been taken or will be taken ~~as soon as practicable~~ **within seven (7) business days**.
>
> **Section 2.5.5.3**
> Disputes over Alleged Noncompliance. If one Party disputes the other Party's assertion of non-compliance, that Party shall notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within ~~a reasonable time~~ **seven (7) business days** or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the

non-compliance **within seven (7) business days**, the requesting Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. In such instance, the Parties cooperatively shall seek expedited resolution of the dispute. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

Third, and perhaps most importantly, BellSouth opined, the Joint Petitioners' proposal provides no remedy or recourse if the accused Party ignores its legal and contractual obligations and thus fails to respond to a request to provide an appropriate LOA. The Commission believes that, under the Joint Petitioners' proposed language, if the accused Party ignores the request to provide an appropriate LOA or fails to respond to a notice of noncompliance, the other Party should proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions of the Agreement. The Commission believes that invoking the dispute resolution provisions sufficiently qualifies as a remedy or recourse for the accusing Party and is a more reasonable course of action in such circumstances.

The Commission believes that BellSouth has provided no new or compelling arguments, with the exception of not imposing specific time periods, which warrant the Commission to alter its decision to adopt the Joint Petitioners' proposed language. The Commission does, however, believe it is appropriate to alter the Joint Petitioners' proposed language to include specific time periods for action by an accused Party.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Motion for Reconsideration on this issue, thereby affirming its decision to adopt the Joint Petitioners' proposed language concerning disputes over alleged unauthorized access to CSR information. However, the Commission does find it appropriate to alter the Joint Petitioners' proposed language to include specific time periods for action by an accused Party, as follows:

Section 2.5.5.2
Notice of Noncompliance. If, after receipt of a requested LOA [Letter of Authorization], the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice to the other Party specifying the alleged noncompliance. The Party receiving the notice agrees to acknowledge receipt of the notice as soon as practicable. If the Party receiving the notice does not dispute the other Party's assertion of non-compliance, the receiving Party agrees to provide the other Party with notice that appropriate corrective measures have been taken or will be taken ~~as soon as practicable~~ **within seven (7) business days**.

Section 2.5.5.3
Disputes over Alleged Noncompliance. If one Party disputes the other Party's assertion of non-compliance, that Party shall notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within ~~a reasonable time~~ **seven (7) business days** or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance **within seven (7) business days**, the requesting Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. In such instance, the Parties cooperatively shall seek expedited resolution of the dispute. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

FINDING OF FACT NO. 16 (ISSUE NO. 16 – MATRIX ITEM NO. 88): What rate should apply for Service Date Advancement (a/k/a service expedites)?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth must provide service expedites at TELRIC-compliant rates. The Commission further ordered BellSouth and the Joint Petitioners to negotiate in good faith an appropriate rate for service expedites. The Commission concluded that if the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 16 stating that the Commission erred, as a matter of law, in arbitrating this issue as it involves a service that BellSouth is not obligated to provide under Section 251. Additionally, BellSouth maintained that the Commission erred, as a matter of law, in ruling that BellSouth must expedite service orders at TELRIC-compliant rates.

BellSouth stated that, as an initial matter, the Commission should refrain from arbitrating this issue. BellSouth noted that, as stated in its brief, this item is not appropriate for arbitration under Section 252 of TA96, because BellSouth has no Section 251 obligation to expedite service orders. BellSouth asserted that compulsory arbitration under Section 252 should be properly limited to those issues necessary to implement a Section 252 agreement. BellSouth argued that expedite charges are not necessary to implement the Agreement. As such, BellSouth commented that the Commission should reconsider its initial decision and decline to arbitrate Matrix Item No. 88.

BellSouth stated that, assuming *arguendo* that the Commission addresses the issue, the Commission should reconsider its *RAO* because it is incorrect as a matter of law. BellSouth noted that, in finding that BellSouth has an obligation to provide expedited

services at TELRIC, the Commission cited to Section 251(c)(3) of TA96 and FCC Rule 51.311(b). BellSouth asserted that Section 251(c) obligates BellSouth to provide "nondiscriminatory access" to UNEs. BellSouth noted that FCC Rule 51.311(b) requires such access to "be at least [equal] in quality to that which the incumbent LEC provides to itself." BellSouth argued that nothing in Section 251(c)(3) or in FCC Rule 51.311(b), however, requires or implies that an ILEC must provide services to a CLP that are superior in quality to those provided to a retail customer requesting similar services.

BellSouth maintained that its obligation under Section 251 is to provide service within standard provisioning intervals – intervals that have already been established by the Commission. Specifically, BellSouth noted, the Commission recognized the obligation to provide service in standard intervals in establishing a performance measurement plan (collectively, the Service Quality Measurement (SQM)/Self-Effectuating Enforcement Mechanism (SEEM) plan) in North Carolina. BellSouth stated that the SQM/SEEM plan is designed to ensure that BellSouth meets its Section 251 obligation to provide service to CLP customers on a nondiscriminatory basis by establishing certain time periods for the provision of service. Further, BellSouth maintained that the SQM/SEEM plan requires BellSouth to pay penalties if BellSouth fails to provision services within these established intervals. Significantly, BellSouth argued that the Joint Petitioners concede that the SQM/SEEM plan contains no "expedited" provisioning measures. BellSouth asserted that if service expedites were a Section 251 obligation, the Commission would have established an interval for them.

Rather, BellSouth maintained that the standard for service expedites is nondiscrimination. BellSouth asserted that it meets its nondiscrimination obligations by charging its retail and CLP customers the same service expedite rate - $200 per circuit per day - from its federal access tariff. BellSouth stated that by charging CLPs and its retail customers the same rate for this optional, voluntary service, BellSouth complies with all of its obligations regarding the provision of service expedites.

BellSouth argued that, tellingly, the Joint Petitioners cannot cite to any authority (state or federal) that specifically supports the proposition that an ILEC must expedite service orders at TELRIC. In contrast, BellSouth noted, a state commission recently addressed this issue by adopting BellSouth's position. Specifically, BellSouth stated, the Florida PSC refused to require BellSouth to provide expedites at TELRIC and held that BellSouth's tariffed rate should apply unless the parties negotiate different rates. In reaching this conclusion, BellSouth maintained, the Florida PSC cited to FCC Rule 51.311(b) and found that BellSouth meets its nondiscrimination obligation by charging identical service expedite rates to CLPs and its retail customers. Specifically, BellSouth maintained that the Florida PSC stated, as follows:

> Accordingly, where technical feasibility is not an issue, incumbents are required to provide access to UNEs *at parity* (as a minimum) to that provided to their retail customers. It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer requesting similar

> services. So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites, and there is no conflict with Rule 51.311(b).

BellSouth argued that, at its core, the Commission's ruling gives the Joint Petitioners something more than standard provisioning intervals priced at TELRIC without any legal or policy justification for doing so. Accordingly, BellSouth asserted that the Commission should refrain from setting rates for voluntarily-offered services, and should adopt BellSouth's position on Matrix Item No. 88, as it is reasonable and nondiscriminatory.

INITIAL COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners stated that BellSouth's objection to the Commission's ruling on service order expedites is comprised of two arguments, and neither argument is persuasive. The Joint Petitioners maintained that for the following reasons, the Commission should affirm its decision for this issue in its entirety.

The Joint Petitioners asserted that BellSouth's first argument that "the Commission should refrain from arbitrating this issue," for "this item is not appropriate for arbitration under Section 252 of the Act, because BellSouth has no Section 251 obligation to expedite service orders" is wrong in several ways. Most fundamentally, the Joint Petitioners argued that BellSouth errs in asserting that it has no Section 251 obligation to expedite orders for UNEs. The Joint Petitioners maintained that for the reasons set forth by the Commission in its initial decision and by the Joint Petitioners in their brief, BellSouth does indeed have a Section 251 obligation to provide access to UNEs on a nondiscriminatory basis at TELRIC rates. The Joint Petitioners opined that because BellSouth expedites the provision of analogous circuits for itself when providing services to its retail customers, BellSouth has a Section 251 obligation to expedite UNE orders upon request on a nondiscriminatory basis. The Joint Petitioners maintained that this functionality is part and parcel of UNE provisioning. The Joint Petitioners asserted that CLPs are not retail customers and they do not pay retail for such services; TA96 provides them with the ability to attain such services at TELRIC rates so as to provide them with a meaningful opportunity to compete.

The Joint Petitioners opined that BellSouth's argument also fails because it ignores the very fact that the parties voluntarily negotiated terms for this Section 252 interconnection agreement that provide for such expedites. The Joint Petitioners noted that the only issue not resolved through negotiation was the rate to be applied to such expedites. The Joint Petitioners stated that the Commission necessarily arbitrated that issue and the parties presented testimony and briefing on it. Indeed, the Joint Petitioners asserted that under the rationale of the *Coserve* case, which provides that state commissions in Section 252 arbitrations have the jurisdiction to arbitrate Section 251 obligations, as well as those issues voluntarily negotiated by the parties, there is no doubt that the Commission has jurisdiction to arbitrate this issue.

The Joint Petitioners maintained that BellSouth's erroneous assertion that the Commission's *RAO* on this issue is incorrect as a matter of law rests upon two sub-arguments, neither of which has merit. First, the Joint Petitioners noted that BellSouth claimed that because the Commission has set intervals for provisioning UNEs and those intervals do not include service expedites, there cannot be a Section 251 obligation to perform such expedites – otherwise, the Commission would have created an interval for service expedites. The Joint Petitioners maintained that this circular argument is flawed in several respects. The Joint Petitioners argued that BellSouth cannot deduce and attribute to the Commission a conclusion or rationale never supplied by the Commission in its performance measurements order. Obviously, the Joint Petitioners opined that the Commission does not agree with the rationale, as it has correctly declined to endorse BellSouth's unfounded assertion that its Section 251 obligations are limited to providing UNEs in certain intervals. In addition, the Joint Petitioners stated that service expedite requests do not lend themselves to the creation of standard intervals as they are themselves a request to obtain a UNE outside a standardized interval. Thus, the Joint Petitioners argued that BellSouth's assertion that there can be no Section 251 obligation because no interval has been set by the Commission is nonsensical.

Second, the Joint Petitioners stated that BellSouth suggested that the Commission's decision here somehow results in the provision of services to the Joint Petitioners that are superior in quality to those provided to BellSouth retail customers. The Joint Petitioners argued that in no way does the Commission's decision provide the Joint Petitioners with services that are superior in quality. Instead, the Joint Petitioners argued that they are simply assured that they get the same access BellSouth gets at the TELRIC rates they are entitled to under TA96. The Joint Petitioners asserted that the Commission's enforcement of TA96's nondiscriminatory access requirement in no way creates a superior service obligation; the Joint Petitioners get the same loops and the same opportunity to expedite as BellSouth gets in providing services to its retail unit and in turn to its retail customers.

The Joint Petitioners asserted that the Commission should affirm its decision for Matrix Item No. 88.

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that the Commission Panel erred, as a matter of law, in arbitrating this issue as it involves a service that BellSouth is not obligated to provide under Section 251. Additionally, BellSouth maintained that the Commission erred, as a matter of law, in ruling that BellSouth must expedite service orders at TELRIC.

BellSouth asserted that the Joint Petitioners take issue with BellSouth's Objections to the Commission's finding on Issue No. 16 (Matrix Item No. 88), wherein the Commission incorrectly concluded that BellSouth has an obligation to expedite service orders at TELRIC. BellSouth argued that, citing no authority other than the Commission's *RAO*, the Joint Petitioners proclaim that "BellSouth does indeed have a Section 251 obligation to provide access to UNEs [including expediting UNE orders] on a nondiscriminatory basis at TELRIC rates." BellSouth commented that, as an initial matter, the Kentucky and Florida PSCs have rejected the Joint Petitioners' arguments regarding this issue, finding that BellSouth's pricing of expedites is nondiscriminatory and that service expedites are not a Section 251 obligation. Accordingly, BellSouth maintained, there are two decisions directly on point that refute the Joint Petitioners' arguments and suggest that the Commission should modify its *RAO* and find in favor of BellSouth.

Next, BellSouth stated that the Joint Petitioners contended that because they "are not retail customers and do not pay retail rates for such services [expedites]; the Act provides them with the ability to attains (sic) such services [expedites] at TELRIC rates so as to provide them with a meaningful opportunity to compete." BellSouth argued that the Joint Petitioners' contentions are factually and legally incorrect. First, BellSouth opined that the Joint Petitioners currently do pay the same tariffed rates for service expedite requests that BellSouth's retail customers pay. Second, BellSouth maintained that the assertion that CLP status somehow automatically entitles the Joint Petitioners to TELRIC pricing for service expedites is simply wrong. Fundamentally, BellSouth argued that, in the absence of a finding of impairment (and there is none in this case), TELRIC pricing is inappropriate and impermissible. BellSouth noted that *USTA II*, 359 F.3d at 589 states, "we find nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment [under Section 251]". Accordingly, BellSouth asserted that the Commission should reject any argument that TELRIC pricing is applicable in any instance other than Section 251(c). BellSouth contended that, at its core, the Commission's ruling gives the Joint Petitioners something more than standard provisioning intervals priced at TELRIC without any legal or policy justification for doing so. Accordingly, BellSouth asserted, the Commission should refrain from setting rates for voluntarily-offered services and should adopt BellSouth's position on Matrix Item No. 88, as it is reasonable and nondiscriminatory.

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

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission does not believe that BellSouth provided any new or compelling arguments which warrant a change in the Commission's decision on this issue. The Commission continues to agree with the Public Staff that, if technically feasible, an ILEC should provide a CLP with access to UNEs at least equal in quality to that which the

ILEC provides to itself. The Commission also believes that expediting service to customers is simply one method by which BellSouth can provide access to UNEs and that, since BellSouth offers service expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section 251 and Rule 51.311(b). As noted by the Public Staff in its proposed order, the $200 per circuit, per day rate from BellSouth's federal access tariff that BellSouth proposes as its rate to the Joint Petitioners is the rate BellSouth charges its large retail customers. However, there is no cost support for the rate. Based upon the foregoing, the Commission finds it appropriate to uphold the *RAO* in this regard.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Objection to Finding of Fact No. 16, thereby affirming its initial decision that BellSouth must provide service expedites at TELRIC-compliant rates. In addition, BellSouth and the Joint Petitioners should negotiate, in good faith, an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

FINDING OF FACT NO. 17 (ISSUE NO. 17 – MATRIX ITEM NO. 97): When should payment of charges for service be due?

INITIAL COMMISSION DECISION

The Commission concluded that the payment due date should be 26 days from the date of receipt of the bill. Accordingly, the Commission required the Joint Petitioners and BellSouth to properly amend the proposed language in the Agreement in Attachment 7, Section 1.4, in accordance with the decision.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 17 stating that the Commission should clarify that its Payment Due Date ruling applies only to bills that are received electronically.

BellSouth stated that it seeks clarification regarding the Commission's Finding of Fact No. 17, as well as its conclusion with respect to Matrix Item No. 97. Specifically, BellSouth noted that the Commission concluded that "the payment due date should be 26 days from the date of receipt of the bill." BellSouth stated that it does not object to the Commission's ruling to the extent that it sets a payment due date of 26 days from receipt of the bill, for electronic bills only. BellSouth maintained that this clarification should not concern the Joint Petitioners because they receive most of their bills electronically. Further, BellSouth commented that this clarification is necessary because BellSouth does not know when bills that are sent via U.S. mail are received by the Joint Petitioners.

BellSouth noted that the Agreement that will ultimately be approved by the Commission will be available for adoption by other CLPs. BellSouth stated that, unlike the Joint Petitioners, such CLPs may not receive the majority of their bills in an electronic format (it is a CLP's choice as to whether it wants to receive bills electronically). BellSouth maintained that, for bills that are mailed, in addition to not knowing when such bills are received by a CLP, BellSouth has a concern that a CLP may abuse the "date received" standard in order to avoid the timely payment of bills. Accordingly, BellSouth respectfully requested the Commission to clarify that for electronic bills only, the payment due date should be 26 days from the receipt of such bills; in all other instances, the payment due date should be the next bill issuance date. BellSouth asserted that such clarification should have a minimal impact on the Joint Petitioners, and it will have no impact whatsoever if the Joint Petitioners elect to receive all bills electronically. Further, BellSouth argued, such clarification will protect BellSouth from abuse by CLPs that do not receive bills in an electronic format.

INITIAL COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners noted that BellSouth's Objection appears to be in the nature of a request for clarification, and yet it would vitiate a good portion of the Commission's finding. The Joint Petitioners maintained that BellSouth wants the Commission to clarify its decision to the extent that the 26-days from receipt payment period will apply only to bills received electronically. To support its request, the Joint Petitioners noted that BellSouth claimed: (1) that the clarification should not concern the Joint Petitioners because they receive most of their bills electronically; (2) that the clarification is necessary because BellSouth does not know when bills sent via U.S. mail are received; and (3) that other CLPs can adopt this Agreement and take advantage of the "date received" standard. The Joint Petitioners argued that these reasons for clarification are unconvincing and should not at all be considered as grounds for modifying the Commission's decision.

The Joint Petitioners asserted that BellSouth's claim that the Joint Petitioners should not be concerned with such a clarification is unduly presumptuous and should not be considered. The Joint Petitioners argued that they are indeed concerned because they do not receive all bills electronically. The Joint Petitioners argued that they need sufficient time to review bills, regardless of the format in which they are received. In addition, the Joint Petitioners noted, BellSouth's claim that it cannot determine the receipt date for bills sent by U.S. mail already has been disproven. As the Joint Petitioners have maintained, and as the Commission recognized in its recommendation, courier services – such as UPS and FedEx – and the United States Postal Service have long provided return receipt or delivery confirmation services to their customers. The Joint Petitioners also stated that, as for other CLPs taking advantage of the "date received" standard, this is an argument based upon nothing but unsupported speculation that other CLPs could, or somehow would, manipulate the date received standard, which is easily made transparent.

The Joint Petitioners argued that BellSouth presented no compelling reason why the Joint Petitioners' electronic and mailed bills should be treated differently. Accordingly, the Joint Petitioners asserted that the Commission should reject BellSouth's request and keep with its initial finding that the payment due date will be 26 days from bill receipt, regardless of the format in which the bill is delivered.

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth asserted that the Commission should clarify that its Payment Due Date ruling applies only to bills that are received electronically.

BellSouth maintained that it is disappointing, but not surprising, that the Joint Petitioners object to BellSouth's request for clarification regarding the Panel's findings as to Matrix Item No. 97 and the payment due date. BellSouth stated that, despite the fact that the Joint Petitioners receive most of their bills electronically and can choose to receive all bills electronically, the Joint Petitioners oppose BellSouth's request for the Commission to clarify that its payment due date ruling applies to electronic bills only. BellSouth argued that this clarification is necessary because BellSouth does not know when bills that are sent via U.S. mail are received by the Joint Petitioners. BellSouth noted that the Joint Petitioners appear to assert that BellSouth can (and should) incur the additional cost and time necessary to use delivery confirmation services to track receipt of mailed bills. BellSouth noted that the Joint Petitioners have not offered to pay for such additional costs, and imposing such additional costs is inappropriate given the fact that this Commission and the FCC have already found that BellSouth's billing practices are nondiscriminatory and provide CLPs with a meaningful opportunity to compete in the local market.

Accordingly, BellSouth requested the Commission to clarify that, for electronic bills only, the payment due date should be 26 days from the receipt of such bills; in all instances, the payment due date should be by the next bill issuance date. In the alternative, BellSouth maintained that the Commission should clarify that the Joint Petitioners are required to pay BellSouth for all costs associated with confirming delivery of mailed bills.

JOINT PETITIONERS: The Joint Petitioners did not address this issue in their reply comments.

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission notes that, in its *RAO*, it found that the Commission's decision in the ITC^DeltaCom Communications, Inc. (ITC^DeltaCom) / BellSouth arbitration proceeding was reasonable and applicable to this proceeding as well. The Commission noted that BellSouth did not provide any compelling arguments why a 26-day billing period, as was adopted in the ITC^DeltaCom/BellSouth docket, was not appropriate in this proceeding. The Commission does not believe that BellSouth has provided any new or compelling reasons for the Commission to alter its initial decision on this issue. The Commission's decision in the ITC^DeltaCom/BellSouth arbitration docket did not distinguish between electronic or mailed bills, and, therefore, it is not appropriate for the decision in this case to make such a distinction. Therefore, the Commission finds it appropriate to affirm its initial decision on this issue.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Objection to Finding of Fact No. 17, thereby affirming its initial decision that the payment due date should be 26 days from the date of receipt of the bill.

FINDING OF FACT NO. 18 (ISSUE NO. 18 – MATRIX ITEM NO. 100):

Joint Petitioners' Issue Statement: Should a CLP be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

BellSouth's Issue Statement: Should a CLP be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

INITIAL COMMISSION DECISION

The Commission concluded that it is appropriate to adopt the Joint Petitioners' proposed language, as follows, concerning suspension or termination notices for Section 1.7.2 of Attachment 7 of the Agreement:

> **Section 1.7.2 – Joint Petitioners**
> Each Party reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the Due Date, the billing Party may provide written notice to the other Party that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, as indicated on the notice in dollars and cents, is not received by the fifteenth (15th) calendar day following the date of the notice. In addition, the billing Party may, at the same time, provide written notice that the billing Party may discontinue the provision of

existing services to the other Party if payment of such amounts, as indicated on the notice (in dollars and cents), is not received by the thirtieth (30th) calendar day following the date of the Initial Notice.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 18 stating that the Commission erred in adopting the Joint Petitioners' proposed language. BellSouth argued that the Commission's ruling effectively gives the Joint Petitioners a rolling 15-day extension to pay undisputed billings.

BellSouth asserted that in adopting the Joint Petitioners' proposed language (and thus obligating BellSouth to provide service and access to ordering systems despite not being paid undisputed, past due, and previously billed charges), the Commission concluded that "the potential sanctions for nonpayment are too sever[e] to let the risk of calculation errors potentially occur." However, BellSouth stated that it has committed to advise the Joint Petitioners of the undisputed, past due, and previously billed amounts that must be paid to avoid suspension or termination of service.

Further, BellSouth maintained that the Joint Petitioners know when they receive bills, they know when the bills are due, and they concede that the amount of such bills can be predicted with a reasonable degree of accuracy. Moreover, BellSouth asserted that the Joint Petitioners presented no evidence that so-called "calculation errors" have ever resulted in suspension or termination action and did not produce one example of any suspension/termination notice that required the undertaking of any calculation on behalf of the Joint Petitioners. Moreover, BellSouth stated that Joint Petitioners witness Russell testified that NuVox has paid all BellSouth bills in a timely manner for seven years. BellSouth asserted that, to state the obvious, a CLP that pays its bills in a timely manner does not interact with BellSouth's collections organization. Accordingly, BellSouth argued that the Commission should disregard (or at least discount) the Joint Petitioners' hypothetical concerns about BellSouth's collections practices.

Accordingly, BellSouth maintained that there is no guess work involved in BellSouth's collections process and, thus, no potential for calculation errors. BellSouth argued that holding otherwise allows the Joint Petitioners to have a revolving extension of payment of undisputed, past due, previously billed amounts – a privilege not afforded to others similarly situated in the industry.

Finally, BellSouth asserted that termination of service for nonpayment is a universally accepted and straightforward principle. BellSouth stated that the financial risk BellSouth faces when CLPs do not pay for services rendered is no "game", but a stark reality of the telecommunications world. Accordingly, BellSouth maintained that the Commission should: (1) disregard the Joint Petitioners' unsupported assertion about collections "shell games"; and (2) allow BellSouth to protect its financial interest by giving BellSouth the right to discontinue providing service to any Joint Petitioner that fails to timely pay

for services rendered. BellSouth asserted that the Commission should reconsider its initial decision and adopt BellSouth's proposal for Matrix Item No. 100.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not address this issue in its initial comments.

JOINT PETITIONERS: The Joint Petitioners noted that BellSouth argued that the Commission's decision "allows the Joint Petitioners to have a revolving extension for payment of undisputed, past due, previously billed amounts – a privilege not afforded to others similarly situated in the industry." The Joint Petitioners argued that BellSouth's conclusion is nonsensical and unpersuasive. Accordingly, the Joint Petitioners recommended that the Commission should disregard BellSouth's argument and affirm its initial decision in the *RAO*.

The Joint Petitioners maintained that BellSouth provides no support for its "rolling 15-day extension" argument, as there is none. The Joint Petitioners asserted that the Commission's decision on this issue has nothing to do with when payment is due or at which point late payment charges will continue to accrue. The Joint Petitioners argued that by adopting the Joint Petitioners' position and language on this issue, the Commission's *RAO* is reasonably attempting to eliminate the potential for calculation errors that could result in suspension or termination – events that could have a hugely detrimental impact on the Joint Petitioners and their North Carolina customers. The Joint Petitioners stated that the Commission's decision also ensures that the Joint Petitioners will have a full 15 and 30 days within which to verify the amount demanded and make payment to BellSouth before the threat of suspension or termination arises and without the undue complexity and unfairness of aggregating and collapsing these 15 to 30-day notice periods for subsequent accounts that may become past due (for which a separate billing notice will be sent and the same straightforward process would apply).

The Joint Petitioners noted that in support of its objection, but not clearly related to its argument, BellSouth also pointed to its post-hearing offer to advise the Joint Petitioners of additional amounts due to avoid suspension and termination that are not included in the figure it provides with the notice. For the reasons explained in the Joint Petitioners' brief, the Joint Petitioners asserted that this commitment to provide additional unspecified information upon request and within an unspecified timeframe does not satisfactorily eliminate the potential for erroneous or even wrongful suspension or termination. To the contrary, the Joint Petitioners argued that it seems to add more uncertainty to the process, as the Joint Petitioners and this Commission have no grounds upon which they could conclude that such information will be timely, accurate, or reliable.

Accordingly, the Joint Petitioners recommended that the Commission affirm its finding on this item in its *RAO*.

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that the Commission Panel erred in adopting the Joint Petitioners' proposed language because there is no "guess work" involved with the Joint Petitioners knowing that they should timely pay undisputed amounts. BellSouth argued that the Commission's ruling effectively gives the Joint Petitioners a rolling 15-day extension to pay undisputed billings.

BellSouth noted that, in opposing BellSouth's Objections to the Commission's findings regarding Matrix Item No. 100, the Joint Petitioners asserted that the "Commission's decision on this issue has nothing to do [with] when payment is due" and that by adopting the Joint Petitioners' position the Commission "reasonably attempt[ed] to eliminate the potential for calculation errors that could result in suspension or termination [of service]." First, BellSouth stated that it agrees that this issue has nothing to do with the Joint Petitioners' obligation to timely pay previously billed amounts. Second, BellSouth noted, regarding supposed calculation errors, the Joint Petitioners provide no evidence in support of, or attempt to articulate how, such errors could occur given the fact that BellSouth has committed to advise the Joint Petitioners of the undisputed, past due, and previously billed amounts that must be paid to avoid suspension or termination of service. Indeed, BellSouth noted that the Florida PSC determined that BellSouth's language and practice takes any guesswork out of the collection process. BellSouth asserted that the Commission should reach the same conclusion here.

Accordingly, BellSouth argued that the Commission should reverse its prior ruling and find that there is no guesswork involved in BellSouth's collections process and find in favor of BellSouth. BellSouth asserted that holding otherwise allows the Joint Petitioners to have a revolving extension for payment of undisputed, past due, previously billed amounts – a privilege *not* afforded to others similarly situated in the industry. BellSouth noted that the Florida PSC found, "We do not believe the Joint Petitioners should view the due date of a treatment notice as an automatic extension of the payment due date of the original bill."

JOINT PETITIONERS: The Joint Petitioners did not address this issue in their reply comments.

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission notes that BellSouth has provided no new or compelling arguments concerning this issue. The Commission further notes that BellSouth's commitment to advise the Joint Petitioners of undisputed, past due, and previously billed amounts that must be paid to avoid suspension or termination of service relies exclusively on a request made by a Joint Petitioner (i.e., BellSouth will provide this information only upon request by the competitor).

The substantive difference between BellSouth's proposed language and the Joint Petitioners' proposed language concerns amounts not in dispute that become past due subsequent to the issuance of the written notice. Under BellSouth's proposed language, if a Joint Petitioner pays all past due, undisputed amounts within 15 days of a notice, but other amounts become past due subsequent to the issuance of the notice, then the Joint Petitioner will be subject to suspension or termination by BellSouth. The Commission continues to believe that the potential sanctions for nonpayment are too severe to let the risk of calculation errors potentially occur. Under the Joint Petitioners' proposed language, BellSouth must explicitly show the amount due, in dollars and cents, to avoid suspension or termination; the Commission continues to believe that this language is appropriate and reasonable.

Therefore, the Commission concludes that it is appropriate to deny BellSouth's Motion for Reconsideration concerning Finding of Fact No. 18, thereby affirming its decision to adopt the Joint Petitioners' proposed language for Section 1.7.2 of Attachment 7 of the Agreement.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Motion for Reconsideration concerning Finding of Fact No. 18, thereby affirming its decision to adopt the Joint Petitioners' proposed language for Section 1.7.2 of Attachment 7 of the Agreement.

FINDING OF FACT NO. 19 (ISSUE NO. 19 – MATRIX ITEM NO. 101): How many months of billing should be used to determine the maximum amount of the deposit?

INITIAL COMMISSION DECISION

The Commission concluded that the deposit requirements specified in Commission Rule R12-4 are applicable and the language proposed by BellSouth should be incorporated into the Agreement.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 19 arguing that the Commission recommended that the Agreement entitled

BellSouth to a full two-months' deposit on the ground that Commission Rule R12-4, which governs retail end-users' deposit obligations, requires this deposit standard. The Joint Petitioners have requested that the Agreement provide for either (1) the deposit requirement to which BellSouth agreed in the ITC^DeltaCom Agreement of one-month's deposit for services paid in advance and two-months' deposit for services paid in arrears, or (2) their initially proposed deposit of one-and-one-half month's deposit for the Joint Petitioners and two-months for new CLPs. The Joint Petitioners argued that this two-month deposit obligation, given the ITC^DeltaCom deposit language, contravenes the Act's nondiscrimination requirement, because there is no basis for distinguishing the Joint Petitioners from ITC^DeltaCom such that a larger maximum deposit provision should be imposed upon them. The Joint Petitioners stated that, in addition, it is based upon a rule that does not and should not apply to a Section 252 wholesale (as opposed to non-Section 252 retail) contract arrangement.

The Joint Petitioners claimed that BellSouth admittedly has agreed with ITC^DeltaCom to a less onerous maximum deposit provision than what it demands from the Joint Petitioners. The Joint Petitioners argued that this inequity is a clear case of discrimination, violating the principle of Section 251 that BellSouth must treat all CLPs in the same manner and must treat them in the same manner it treats itself. The Joint Petitioners asserted that given the Commission's commitment to ensuring parity, it should not permit BellSouth to demand a larger maximum deposit provision than that which it voluntarily agreed to with ITC^DeltaCom.

In addition, the Joint Petitioners stated that the Commission's reliance on Commission Rule R12-4, which applies to retail end-users, to set deposit language for a wholesale interconnection agreement is inappropriate. The Joint Petitioners argued that comparing a wholesale agreement to a retail agreement is misleading and ineffective. The Joint Petitioners asserted that the type of service, and more importantly, the amounts of money involved, in this Agreement are more complex and far more substantial than what is involved in simple retail service to end-user customers.

INITIAL COMMENTS

BELLSOUTH: BellSouth stated that the Joint Petitioners make the unsupported argument that the Commission's reliance on Rule R12-4 is misplaced, as it allegedly applies to retail end-users only. BellSouth asserted that the Commission's deposit rules make no distinction between wholesale and retail customers. In fact, the words "wholesale" and "retail" do not appear in the Commission's deposit rules. To the contrary, Commission Rule R12-1 provides that "[a]ny utility requiring a deposit shall apply a deposit policy in accord with these rules in an equitable and nondiscriminatory manner to all applicants for service and to all customers...." BellSouth stated that setting aside whether or not the Commission's deposit rules technically apply to the Joint Petitioners, BellSouth's maximum deposit-cap proposal is nondiscriminatory (as it applies to both retail and CLP customers) and it mirrors the Commission's maximum deposit rule (Rule R12-4(a)). Thus, BellSouth opined that, a maximum deposit amount equal to two-months' billing is in accord with the stated public policy of the Commission.

The Joint Petitioners have offered no credible reason why they should be afforded special treatment that is inconsistent with such public policy.

BellSouth stated that the Joint Petitioners make the unsupported and inaccurate claim that there is no basis for distinguishing the Joint Petitioners from ITC^DeltaCom for maximum deposit purposes. As an initial matter, the Commission's deposit rules, as well as the agreed-upon deposit criteria in the Agreement, recognize that the amount of deposit (if any) that may be required from a customer turns on the credit risk presented by such customer.[47] There is nothing in the record that establishes that ITC^DeltaCom and the Joint Petitioners pose the same credit risk to BellSouth. Thus, BellSouth asserted that, there is nothing to support the assertion that the Joint Petitioners should be treated the same as ITC^DeltaCom for deposit purposes.

In addition and more fundamental, BellSouth claimed that, the Joint Petitioners are not requesting the same treatment as ITC^DeltaCom. Rather, the Joint Petitioners want the ITC^DeltaCom deposit-cap language without the deposit criterion that accompanies the cap. Specifically, the deposit criterion contained in the BellSouth/ITC^DeltaCom interconnection agreement is much more stringent than the deposit criterion contained in the Agreement which is the subject of this arbitration. BellSouth pointed out that, not surprisingly, it offered the Joint Petitioners the same deposit language in its entirety that it agreed to with ITC^DeltaCom, but the Joint Petitioners rejected it. BellSouth argued that, because the Joint Petitioners are not seeking the complete ITC^DeltaCom deposit language, their claim of discrimination lacks any merit. Simply put, there is nothing discriminatory in the fact that different deposit criterion results in a different deposit-cap. To the contrary, BellSouth argued that, allowing the Joint Petitioners to "pick and choose" the ITC^DeltaCom maximum security deposit provision, while permitting them to throw out the associated ITC^DeltaCom deposit criterion, as well as rejecting the ITC^DeltaCom Agreement in its entirety, is inappropriate and impermissible, as it resurrects a "pick and choose" regime that the FCC abandoned in July 2004.

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

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the conclusions on this issue.

REPLY COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners stated that BellSouth, in an attempt to defend its discriminatory refusal to agree to the same maximum deposit provision that it agreed to with ITC^DeltaCom, mistakenly claims that the Joint Petitioners are trying to "pick and choose" deposit language from the ITC^DeltaCom Agreement. Contrary to BellSouth's misleading assertion, the Joint Petitioners are not trying to engage in "pick and choose" in contravention to the FCC's new rule implementing how Section 252(i) is

[47] Commission Rule R12-1; *see* Attachment 7, Section 1.8.5.

to be implemented. The Joint Petitioners stated, indeed, they have negotiated an entire Agreement and are now arbitrating it before the Commission. By doing so, the Joint Petitioners stated that, they obviously have chosen not to invoke their Section 252(i) rights in this context.

The Joint Petitioners claimed that, this diversionary tactic was employed by BellSouth because BellSouth is unable to supply a sound basis for defending its unlawfully discriminatory demand to impose a more onerous maximum deposit provision on the Joint Petitioners than it has agreed to impose on other CLPs. The Joint Petitioners stated that BellSouth, in an effort to defend its discriminatory conduct, claims that there is nothing in the record that establishes that ITC^DeltaCom and the Joint Petitioners pose the same credit risk to BellSouth. The Joint Petitioners maintained that there also is nothing to the contrary on the record. The Joint Petitioners argued that credit risk has no direct correlation to the establishment of a maximum deposit provision, but rather, is a factor in determining how much a carrier must provide up to the deposit maximum.

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO*, the Commission found that the deposit requirements specified in Commission Rule R12-4 are applicable for these circumstances and the language proposed by BellSouth should be incorporated into the Agreement. The Joint Petitioners have not offered any new or persuasive arguments for the Commission to reconsider its decision. The Commission, therefore, does not believe that its decision on this finding of fact should be changed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 19.

FINDING OF FACT NO. 20 (ISSUE NO. 20 – MATRIX ITEM NO. 102): Should the amount of the deposit BellSouth requires from a CLP be reduced by past due amounts owed by BellSouth to the CLP?

INITIAL COMMISSION DECISION

The Commission concluded that the Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 20 arguing that the Commission's reliance on Rule R12-4 is inapposite and unhelpful in the context of this wholesale interconnection agreement. The Joint Petitioners stated that the Commission reasons that because Commission Rule R12-4 does not have a provision by which a retail end-user may offset against a BellSouth deposit request, then Petitioners are similarly not entitled to such an offset. Yet, the lack of any offset provision in Commission Rule R12-4, rather than militating against the Joint Petitioners' proposal, only underscores the fact that the rule cannot be applied in the context of a Section 252 agreement. The Joint Petitioners argued that consumers do not need offset provisions; it is difficult to conceive of a situation in which BellSouth would owe a consumer fees for services rendered. Accordingly, the Joint Petitioners asserted that the Commission's application and reliance on Commission Rule R12-4 is improper in this context.

The Joint Petitioners commented that, by contrast, they are quite often owed considerable sums by BellSouth, often in the tens of millions of dollars. The Joint Petitioners argued that there is no legitimate reason that any CLP should pay a deposit when BellSouth is in essence holding that CLP's money already. The Joint Petitioners asserted that it is for this reason that two other state commissions, Kansas and Oklahoma, have held that deposit offsets are appropriate. The Joint Petitioners noted that these commissions found that requiring an offset is simply the fair and appropriate resolution to the ILEC's combined poor-payment history and large-deposit requests. The Joint Petitioners claimed that the rationale of these decisions applies to this case as well, as BellSouth has demonstrated a poor-payment history and a penchant for deposits. And, all BellSouth need do to avoid an offset is to comply with the same good payment history standard that applies to the Joint Petitioners.

The Joint Petitioners argued that because deposits have the potential to tie up so much of the Joint Petitioners' capital, they could hinder the Joint Petitioners' ability to deploy new products and services for North Carolina customers. This result is not ameliorated by the other options to address late payments that the Commission proposes—e.g. the assessment of late charges, the suspension of service, or the disconnection after notice (the latter two would threaten needlessly the small businesses that rely on the Joint Petitioners' services). The Joint Petitioners argued that late fees do not counterbalance the harm of carrying millions of dollars in uncollectibles while simultaneously devoting millions of dollars in deposits. The Joint Petitioners maintained that an offset is the only method for correcting this clear inequity to a meaningful degree.

INITIAL COMMENTS

BELLSOUTH: BellSouth stated that the Commission correctly concluded that Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by BellSouth. The Joint Petitioners objected to the Commission's decision by claiming that the Commission's deposit rules should have been disregarded when determining

this issue. Again, BellSouth argued that, the Commission's policy, as set forth in Commission Rule R12-1, plainly provides that "any utility requiring a deposit from its customers shall fairly and indiscriminately administer a reasonable policy... in accord with these rules, for the requirement of a deposit...." BellSouth asserted that, the Commission reasonably concluded that, since its rules do not provide for such an offset, it should not create one for the Joint Petitioners. BellSouth stated that, similar to Item No. 101 (maximum deposit amount), the Joint Petitioners have offered no credible reason why they should be afforded special treatment that is inconsistent with such public policy.

Moreover, BellSouth noted that the Commission's conclusion is the same conclusion reached by the Kentucky and Florida PSC. BellSouth commented that the rationale stated by the Florida PSC is particularly insightful:

> [P]erhaps most important, we find that requiring a deposit from the Joint Petitioners and the dispute of charges or late payment made by BellSouth are separate issues. A deposit required under the interconnection agreement is intended to protect the ILEC from the financial risk of non-payment for services provided to the CLEC. If BellSouth has a billing dispute or is late paying the Joint Petitioners, it should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount of services provided to the Joint Petitioners.[48]

Finally, BellSouth argued that, the Joint Petitioners claim that BellSouth has a penchant for deposits. However, the record demonstrates that BellSouth has actually lowered NuVox's deposit and that Xspedius' deposit is substantially less than two-months' billing. In summary, BellSouth maintained that neither the facts nor the Commission's Rules support a reversal of the Commission's ruling that a deposit offset provision is inappropriate.

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

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the conclusions on this issue.

REPLY COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners asserted that BellSouth offers no new arguments in its comments on this issue and does not offer anything to refute the Joint Petitioners' argument that the Commission's retail rules should not apply to this issue. Moreover, the Joint Petitioners stated, as demonstrated in the record, due to the

[48] FPSC Order No. PSC-05-0975-FOF-TP at 71.

less-than perfect payment history of BellSouth, there is a real need for the Joint Petitioners to protect themselves from past-due amounts. BellSouth refers to the Florida and Kentucky PSC decisions on this issue to support its comments. However, the Kentucky PSC decision does little to support BellSouth. The Joint Petitioners stated that, the Kentucky PSC did not adopt the Joint Petitioners' proposed language, noting BellSouth has agreed that in the event a deposit is requested of the CLEC, the deposit will be reduced by an amount equal to undisputed past due amounts, if any, that BellSouth owes the CLEC. The Joint Petitioners have sought reconsideration and clarification on this issue. With regard to the Florida PSC decision, the Joint Petitioners asserted that the Florida PSC was incorrect in holding that BellSouth's late payment should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount or services provided to the Joint Petitioners. The Joint Petitioners argued that this rationale is misguided because the amount of services BellSouth provides to the Joint Petitioners is not at issue; rather it is the amount of money that the Joint Petitioners are required to freeze in deposits while simultaneously being deprived of money due from BellSouth. The Joint Petitioners argued that it is patently unfair to require the Joint Petitioners to post deposits without tying such an obligation to BellSouth's establishment of a good payment record.

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO*, the Commission found that the Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice. The Joint Petitioners have not offered any new or compelling arguments for the Commission to reconsider its decision. The Commission, therefore, does not believe that its decision on this finding of fact should be changed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 20.

FINDING OF FACT NO. 21 (ISSUE NO. 21 – MATRIX ITEM NO. 103): Should BellSouth be entitled to terminate service to a CLP pursuant to the process for termination due to non-payment if the CLP refuses to remit any deposit required by BellSouth within 30 calendar days?

INITIAL COMMISSION DECISION

The Commission concluded that the language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 is appropriate.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 21 arguing that the Commission recommended the rejection of the Joint Petitioners' language that would protect them from complete service shut-down if they fail to comply with BellSouth's deposit demands within 30 days. The Joint Petitioners stated that the Commission reasoned that sufficient protections are in place—namely the billing dispute process—that would ensure that the Joint Petitioners are not abused through this provision. The Joint Petitioners argued that these protections are not in fact sufficient to protect either the Joint Petitioners or their North Carolina customers.

The Joint Petitioners commented that BellSouth should not be entitled to terminate service to a Joint Petitioner for failure to pay a deposit within 30 days unless (1) the Petitioner agreed to submit the requested amount, or (2) the Commission ordered the Petitioner to submit the requested amount. Suspension or termination of service is too grave a remedy for what amounts to a dispute over, or failure to agree on, the precise amount requested. And despite the fact that the parties agree on the general criteria for triggering deposits, the fact remains that legitimate disputes can often arise over the precise dollar amount that is reasonable based on the circumstances. The Joint Petitioners argued that they should not be forced, on pain of summary termination, to remit a deposit that has not been agreed to and may reasonably be determined to be excessive and unnecessary.

The Joint Petitioners stated that underlying the Commission's decision appears to be the idea that Joint Petitioners' language would require that BellSouth seek advance approval from both a CLP and the Commission every time it requested a deposit from a CLP. The Joint Petitioners argued that conclusion somewhat overstates the issue, as this scenario is not what the Joint Petitioners hope to accomplish with their proposed language. The Joint Petitioners argued that, simply put, they do not want BellSouth to have an unqualified right to terminate their services based on an unsatisfied deposit demand, which is markedly different than non-payment for services rendered. The Joint Petitioners conceded that, indeed, the Joint Petitioners and BellSouth always have been able to resolve deposit requests amicably through negotiation without Commission involvement and without the balance shifting threat of service business destroying and customer impacting termination. The Joint Petitioners stated that the Commission ought not to shift this balance now.

INITIAL COMMENTS

BELLSOUTH: BellSouth commented that the Commission correctly concluded that BellSouth should be able to terminate service because of non-payment of a deposit and that BellSouth's proposed language should be included in the parties' interconnection agreement. BellSouth stated that, in adopting BellSouth's language, the Panel found that sufficient protections were in place in the event there was a disagreement regarding a deposit demand. BellSouth commented that, indeed, the Parties have agreed to a specific deposit dispute provision. BellSouth noted that the Joint Petitioners curiously

failed to mention that the Parties have an agreed upon deposit dispute provision. Instead, BellSouth argued that the Joint Petitioners continue to confuse this straight-forward issue by asserting that legitimate disputes can arise regarding deposit demands. BellSouth stated that the Commission should disregard the Joint Petitioners' continued attempt to create confusion, as aptly observed by the Florida PSC:

> We are concerned that the Joint Petitioners either do not understand the issue or have tried to expand the issue to include dispute resolution provisions.[49]

Further, BellSouth noted that the parties have agreed upon criteria that governs when BellSouth may demand a deposit (Attachment 7, Section 1.8.5) and have criteria that governs when BellSouth must refund a deposit (Attachment 7, Section 1.8.10). BellSouth asserted that given these contractual provisions, and the undisputed fact that it takes BellSouth approximately 74 days to terminate service for non-payment under the Agreement, it is reasonable, appropriate, and necessary for BellSouth to have the ability to protect its financial interests and terminate service to a Joint Petitioner that ignores a deposit demand.

BellSouth urged the Commission to confirm the *RAO* and find that if a Joint Petitioner: (1) fails to remit a deposit demand, and (2) does not dispute such demand in accordance with Attachment 7, Section 1.8.7, then BellSouth may terminate service within 30 calendar days.

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

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the conclusions on this issue.

REPLY COMMENTS

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

JOINT PETITIONERS: The Joint Petitioners stated, as with its other comments on their objections, that BellSouth's opposition to the Joint Petitioners' objection on this issue relies principally on a mischaracterization of the Joint Petitioners' position. The Joint Petitioners have argued that suspension or termination is too grave a remedy to be imposed in the absence of an agreement or in the event of a dispute over a deposit. The Joint Petitioners consistently have refused to agree to allow for suspension or termination related to a deposit request in all but two straight-forward instances: (1) the Joint Petitioners and BellSouth have agreed on a deposit amount, and (2) the Commission has ordered payment of a deposit. The Joint Petitioners claimed that if they fail to deliver an agreed-upon or Commission-ordered deposit, they have agreed that suspension or termination should be an option.

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[49] Florida PSC Order No. PSC-05-0975-FOF-TP at 72.

The Joint Petitioners argued that BellSouth disingenuously has responded to this clarity with charges that the Joint Petitioners are confusing the issue by claiming legitimate disputes can arise regarding deposit demands. The Joint Petitioners' statement, however, is not a part of an effort by the Joint Petitioners to confuse; rather, it is part of an effort to clear-up confusion that BellSouth deliberately has tried to create. The Joint Petitioners have consistently maintained that the remedies proposed by BellSouth are too dire to impose in any circumstance other than the two set forth above. Thus, the Joint Petitioners stated that, a failure to agree and a dispute are two instances in which the Joint Petitioners believe that BellSouth should not be left to its own devices to threaten or impose draconian, customer-impacting remedies. The Joint Petitioners stated, to be sure, resolved Item No. 104 now properly refers deposit disputes to the standard dispute resolution process and no longer includes the burden shifting language originally proposed by BellSouth. However, the Joint Petitioners stated that it does not cover a failure to agree and they never have conceded that suspension or termination would be appropriate in that context.

The Joint Petitioners asserted that the Commission's tentative conclusion suggests that the Joint Petitioners will have an obligation to agree or to dispute within 30 days or expose themselves and their customers to dire consequences. The Joint Petitioners object to that conclusion as the Joint Petitioners' experience indicates that the 30-day timeframe is too tight. The Joint Petitioners contended that there may be a number of reasons for a failure to agree—usually these relate to information regarding payment of undisputed amounts and a host of other factors to be considered—and, while these reasons may eventually lead to a dispute, there is no guarantee that a dispute will be fully identified within a 30-day period. The Joint Petitioners explained, for there is no sliding scale for translating deposit criteria into precise deposit amounts, and BellSouth deposit requests historically have exceeded two-months' billings and have inevitably been based on faulty information reflecting inadequate BellSouth practices for posting payments and disputes. As explained previously, sorting this out often takes considerable amounts of time. Thus, the Joint Petitioners argued that there may be instances when a failure to agree exists beyond 30 days while the parties are exchanging information and negotiating resolution of a deposit request. Nevertheless, under the resolution proposed by the Commission, such failures to agree must (or will) be deemed disputes within 30 days, so as to provide adequate and necessary protection to the Joint Petitioners and their North Carolina customers.

Finally, the Joint Petitioners commented that BellSouth once again relies on the Florida PSC's Order. The Joint Petitioners asserted that the Florida PSC Order on this issue makes plain that the Florida PSC did not understand the issue, the language proposed by the Joint Petitioners on their position. Indeed, the Florida PSC determined that the Joint Petitioners' proposal would require BellSouth to acquire the CLP's or the Commission's approval before asking for a deposit. The Joint Petitioners stated that they never took that position; and it is not reflected in their language. The Joint Petitioner's asserted that it cannot suffice as the basis for reasoned decision making in Florida or anywhere else. By contrast, the Joint Petitioners believed that the Kentucky PSC's decision shows no confusion on this issue. In its arbitration order, the Kentucky

PSC held that BellSouth should not be permitted to terminate CLP services when the CLP has met all of its financial obligations to BellSouth with the exception of the demand deposit.

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO*, the Commission found that the language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 of the Agreement is appropriate. The Commission concludes that the Joint Petitioners have provided no new or compelling arguments for the Commission to reconsider its decision. The Commission, therefore, finds it appropriate to affirm its initial ruling on this issue.

CONCLUSIONS

The Commission finds that it is appropriate to affirm and uphold Finding of Fact No. 21, and finds that if a Joint Petitioner: (1) fails to remit a deposit demand, and (2) does not dispute such demand in accordance with Attachment 7, Section 1.8.7, then BellSouth may terminate service within 30 calendar days.

IT IS, THEREFORE, ORDERED as follows:

1. That, in accordance with the Commission's January 24, 2001 and November 3, 2000 Orders issued in Docket No. P-100, Sub 133, the Joint Petitioners and BellSouth shall jointly file a Composite Agreement by no later than Friday, March 10, 2006.

2. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

3. That the Commission denies all objections to Findings of Fact Nos. 2, 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, and 21, thereby upholding and affirming its original decisions regarding these issues.

4. That for Finding of Fact No. 9, the Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration. Therefore, Finding of Fact No. 9 is altered to read:

> 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.

5. That for Finding of Fact No. 15, the Commission finds it appropriate to deny BellSouth's Motion for Reconsideration, thereby affirming its decision to adopt the Joint Petitioners' proposed language concerning disputes over alleged unauthorized access to CSR information. However, the Commission does find it appropriate to alter the Joint Petitioners' proposed language to include specific time periods for action by an accused Party, as outlined hereinabove.

ISSUED BY ORDER OF THE COMMISSION.

This the 8th day of February, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Commissioner Robert V. Owens, Jr. dissents from the majority's decision on reconsideration on Finding of Fact No. 9.

bp020806.01

Glossary of Acronyms
Docket Nos. P-772, Sub 8; P-913, Sub 5; and P-1202, Sub 4

Act	Telecommunications Act of 1996
Agreement	Interconnection Agreement
BellSouth	BellSouth Telecommunications, Inc.
BOCs	Bell Operating Companies
CLEC	Competitive Local Exchange Company
CLP	Competing Local Provider
Commission	North Carolina Utilities Commission
CompSouth	The Competitive Carriers of the South
CSR	Customer Service Record
DSL	Digital Subscriber Line
EEL	Enhanced Extended Link (Loop)
FCC	Federal Communications Commission
ILEC	Incumbent Local Exchange Company (Carrier)
ISP	Internet Service Provider
ITC or ITC^DeltaCom	ITC^DeltaCom Communications, Inc.
Joint Petitioners	NewSouth, NuVox, and Xspedius
LOA	Letter of Authorization
NewSouth	NewSouth Communications Corp.
NPRM	Notice of Proposed Rulemaking
NuVox	NuVox Communications, Inc.
PSC	Public Service Commission
Public Staff	Public Staff – North Carolina Utilities Commission
RAO	Recommended Arbitration Order
SEEM	Self-Effectuating Enforcement Mechanism
SOC	Supplemental Order Clarification
SQM	Service Quality Measurement
TA96	Telecommunications Act of 1996
TELRIC	Total Element Long-Run Incremental Cost
TIC	Tandem Intermediary Charge
TRO	Triennial Review Order
TRRO	Triennial Review Remand Order

UNE	Unbundled Network Element
Verizon	Verizon Virginia, Inc.
WCB	Wireline Competition Bureau (of the FCC)
WorldCom	WorldCom, Inc.
xDSL	Digital Subscriber Line
Xspedius	Xspedius Communications, LLC on behalf of its operating subsidiary, Xspedius Management Co. Switched Services, LLC

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

in the course of this proceeding. To date, 19 issues remain to be arbitrated. The Commission's decision on these matters is due by September 26, 2005.

MOTION TO TRANSFER CERTAIN ISSUES TO GENERIC PROCEEDING

BellSouth requests that Issues 26, 36, 37, 38, and 51 be moved from this proceeding to the generic docket addressing change of law provisions.[1] BellSouth asserts that moving these issues will conserve the resources of the Commission Staff and the parties. The Joint Petitioners oppose BellSouth's motion to move certain issues to the generic proceeding. In support of their opposition, the Joint Petitioners cite 47 U.S.C. § 252(b)(1), which states that petitioners have a right to "petition a state commission to arbitrate any open issues."

The Commission is obligated to resolve "each issue" in a petition for arbitration and response thereto. Thus, we will not transfer issues from an arbitration proceeding to a generic proceeding over the opposition of petitioners or respondents. Such transfer would delay resolution of these issues beyond the decision date mandated by federal law.

ISSUE 4: WHAT SHOULD BE THE LIMITATION ON EACH PARTY'S LIABILITY IN CIRCUMSTANCES OTHER THAN GROSS NEGLIGENCE OR WILLFUL MISCONDUCT?

The Joint Petitioners ask that liability for negligence be limited to an amount equal to 7.5 percent of the aggregate fees, charges, or other amounts billed for services provided or to be provided pursuant to the agreement. According to Joint Petitioners, they have not been granted this minimal level of relief in their interconnection

[1] Case No. 2004-00427, Petition of BellSouth Telecommunications, Inc. To Establish Generic Docket To Consider Amendments To Interconnection Agreements Resulting From Changes of Law.

agreements. In response, BellSouth asserts that this limitation of liability is contrary to the industry standard and would result in the competitive local exchange carriers ("CLECs") having greater rights against BellSouth than BellSouth furnishes to its own customers or than the Joint Petitioners furnished their customers. BellSouth also notes that this proposal would result in inequitable results. BellSouth cites the example that its liability to NuVox, one of the Joint Petitioners, would be capped at $8.1 million, while NuVox's liability to BellSouth would be capped at $2,700.[2]

BellSouth proposes that the liability of the provisioning utility be limited to a credit for the actual cost of services or functions performed improperly or not performed at all.

The Commission finds that BellSouth's proposal is reasonable. The Joint Petitioners can provide no rationale for why 7.5 percent of amounts paid is reasonable. Moreover, remedies which may be sought through a complaint from a Joint Petitioner against BellSouth are always available to the Joint Petitioners.

ISSUE 5: WHERE A PARTY DOES NOT INCLUDE SPECIFIC LIMITATION OF LIABILITY TERMS IN ITS TARIFFS AND CONTRACTS, SHOULD IT BE OBLIGATED TO INDEMNIFY THE OTHER PARTY FOR LIABILITIES NOT LIMITED?

Joint Petitioners and BellSouth cannot, as to Issue 5, even agree on how the unresolved matter should be framed. According to the Joint Petitioners, the issue is whether a party who does not include specific limitation of liability terms in its tariffs and contracts should be obligated to indemnify the other party for liabilities which were not so limited. However, according to BellSouth, the issue is who should bear risks resulting from a CLEC not utilizing in its contracts or tariffs the standard industry

[2] Transcript of Evidence ("T.E.") at 63-64.

limitation of liability. BellSouth believes that if a CLEC does not include this limitation of liability term, then the CLEC should bear the risk.

The Joint Petitioners assert that they should not have to indemnify BellSouth in a claim alleging BellSouth's failure to perform its obligations under the contract merely because the CLEC chose not to include a limitation of liability clause in its arrangement with the end-user. The joint CLECs contend that BellSouth's position amounts to a dictation of terms in a contract to which it is not a party. BellSouth, on the other hand, contends that CLECs should bear the risk of loss arising from their own business decision not to limit the liability of their customers. BellSouth believes that it is appropriate that it be placed in the same position in which it would have been if the customer were a BellSouth customer rather than a Joint Petitioner customer.

The provision in question which BellSouth desires to maintain in its interconnection agreement with the Joint Petitioners is in the current agreement and has never been the subject of a dispute.[3] Moreover, BellSouth asserts that the Joint Petitioners incorrectly view this matter as one of competitive harm. According to BellSouth, it does not use the limitation liability term as a negotiation point in its dealings with its own end-users. BellSouth seeks to limit its own exposure for the Joint Petitioners' failure to limit the liability with their end-users.

The Commission finds that the Joint Petitioners should use the industry standard limitation of liability in their relationship with their end-users to limit the exposure to which BellSouth would be subject in the absence of such industry standard language. If, on the other hand, the Joint Petitioners become aware that BellSouth is using this

[3] T.E. at 64-65.

language as a negotiation point, thereby holding the Joint Petitioners to a higher standard than BellSouth, the Joint Petitioners are free to petition this Commission for redress.

ISSUE 6: HOW SHOULD INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES BE DEFINED FOR PURPOSES OF THE AGREEMENT?

The parties disagree regarding what is the appropriate definition of "indirect, incidental or consequential damages." Joint Petitioners believe that any damages to end-users which directly, proximately, or in a reasonably foreseeable manner result from a party's performance do not constitute indirect, incidental, or consequential damages. BellSouth contends that the types of damages that constitute direct, incidental, or consequential damages and who may be entitled to recover them are matters of state law and should not be dictated by either party. Moreover, BellSouth asserts that the Joint Petitioners are attempting to use the arbitration process to preserve rights that their customers may have against BellSouth. The parties agree that neither party can affect the rights of a third party end-user through this interconnection agreement and that nothing in BellSouth's proposed language seeks to limit either party's liability to any end-user.[4]

Based on the above, the Commission finds that the language proposed by the Joint Petitioners is not necessary and should not be placed in the interconnection agreement. Interested persons who may be affected by the differing definitions proposed by the parties appear to have redress in courts of general jurisdiction.

[4] T.E. at 65-66.

ISSUE 7: WHAT SHOULD THE INDEMNIFICATION OBLIGATIONS OF THE PARTIES BE UNDER THIS AGREEMENT?

Joint Petitioners assert that the party receiving services should be indemnified, defended, and held harmless by the party providing services against any claims reasonably arising from the providing party's gross negligence or willful misconduct. In support of their assertion, Joint Petitioners state that a party failing to abide by its legal obligations should incur the damages arising from such conduct. BellSouth, on the other hand, asserts that the Joint Petitioners' proposal is not the standard in the industry.[5]

BellSouth proposes that the receiving party indemnify the providing party in two situations: (1) claims for libel, slander, or invasion of privacy arising from the content of the receiving party's own communications; or (2) any claim, loss, or damage claimed by the end-user of the receiving party's services arising from such utility's use or reliance on the providing party's services.[6]

The Commission finds that BellSouth's language should be adopted. The Joint Petitioners' proposal is too broad and too vague. In addition, it appears that both parties can take appropriate steps to limit their liability in a commercially reasonable way with their own end-users.

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[5] T.E at 158.

[6] BellSouth Post-hearing Brief at 23.

ISSUE 9: SHOULD A COURT OF LAW BE INCLUDED IN THE VENUES AVAILABLE FOR INITIAL DISPUTE RESOLUTION FOR DISPUTES RELATING TO THE INTERPRETATION OR IMPLEMENTATION OF THE INTERCONNECTION AGREEMENT?

The Joint Petitioners assert that no venue for dispute resolution should be foreclosed to the parties. Either party disputing the interpretation or implementation of the interconnection agreement should, according to the Joint Petitioners, be authorized to petition the state commission, the Federal Communications Commission ("FCC"), or a court of general jurisdiction for a resolution of any dispute. BellSouth, on the other hand, contends that this Commission or the FCC should resolve disputes between the parties that relate to matters which are normally considered to be within the expertise of the state commission or the FCC. It should be permissible, according to BellSouth, for matters which lie outside of such regulatory expertise to be brought in courts of general jurisdiction.

It is beyond dispute that state commissions are authorized to interpret and to enforce interconnection agreements which are approved pursuant to 47 U.S.C. § 252(e)(1).[7]

The Commission finds that this Commission has primary jurisdiction over issues regarding the interpretation and implementation of interconnection agreements approved by this Commission. As such, disputes arising under such interconnection agreements must be brought before this Commission before they proceed to a court of general jurisdiction.

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[7] See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 317 F.3d 1270, 1277 (11th Cir. 2003).

ISSUE 12: SHOULD THE AGREEMENT STATE THAT ALL EXISTING STATE AND FEDERAL LAWS, RULES, REGULATIONS, AND DECISIONS APPLY UNLESS OTHERWISE SPECIFICALLY AGREED TO BY THE PARTIES?

Joint Petitioners seek a section in their interconnection agreement which states that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the parties. According to Joint Petitioners, this contract term will ensure that parties meet their obligations under applicable law. BellSouth disagrees, fearing that this contract term would result in issues being part of the contract when there had never been any meeting of the mind regarding their applicability. BellSouth proposes that any obligation not expressly memorialized in the agreement, but applicable under an FCC rule or state commission decision, when disputed would be submitted to the state commission for determination regarding the parties' obligations. The outcome would be applied on a prospective basis.

The Commission is concerned that adopting the Joint Petitioners' contract term would lead to a lack of understanding in the interconnection agreement. Both parties agree that applicable law is to be followed. However, the Commission wants to encourage actual meeting of the minds regarding the contracts. Accordingly, BellSouth's proposed language should be adopted. Applicable law should be followed, but any disputes regarding the same should be brought before this Commission rather than presuming that they are automatically incorporated in the existing contract. Changes proposed by either party should be addressed through the contract's "change of law" provisions.

ISSUE 26: SHOULD BELLSOUTH BE REQUIRED TO COMMINGLE UNES OR COMBINATIONS WITH ANY SERVICE, NETWORK ELEMENT OR OTHER OFFERING THAT IT IS OBLIGATED TO MAKE AVAILABLE PURSUANT TO SECTION 271 OF THE ACT?

The Joint Petitioners propose contract language which would require BellSouth to "commingle" unbundled network elements ("UNEs") or combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to 47 U.S.C. § 271. BellSouth contends, on the other hand, that it has no requirement to commingle UNEs or combinations of UNEs with services, network elements, or other offerings made available only pursuant to Section 271. In support of their position, the Joint Petitioners contend that 47 C.F.R. §§ 51.309(e) and (f) support their view. Rule 51.309(e) states that "an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC." Rule 51.309(f) provides that "upon request an incumbent shall perform the functions necessary to commingle [a UNE or UNE combinations] with one or more facilities or services obtained at wholesale from an incumbent." The Joint Petitioners assert that the language of the Triennial Review Order ("TRO") comports with these rules. The TRO provides that "we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities or services."[8] Special access resale and Section 271 obligations are examples of wholesale facilities and services.

[8] TRO at Paragraph 584.

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.

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[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.

interconnecting with terminating carriers instead of utilizing BellSouth's transit function.[17] BellSouth contends that it is only obligated to negotiate and arbitrate issues contained in Section 251(b) and (c). Transit traffic is not included.

Joint Petitioners assert that BellSouth has failed to justify the additive TIC rate and, as such, they should only be required to pay the previously agreed upon tandem switching and common transport rate in connection with transited traffic.[18]

The Commission has not been precluded by the FCC from requiring BellSouth to transit traffic under the circumstances requested by the Joint Petitioners. The Commission has previously required third party transiting by the incumbent based on efficient network use. The Commission will continue to require BellSouth to transit such traffic. The rates previously charged should be contained in the new interconnection agreements until and unless BellSouth can justify the TIC additive.

ISSUE 86: HOW SHOULD DISPUTES OVER ALLEGED UNAUTHORIZED ACCESS TO CSR INFORMATION BE HANDLED UNDER THE AGREEMENT?

The parties have differing views over how to address disputes that may arise about access to customer service record information. The Joint Petitioners believe that any dispute regarding unauthorized access should be addressed in the same manner as any other dispute arising under the interconnection agreement. BellSouth, however, contends that unauthorized use is a violation of federal law and that BellSouth must have the right to suspend and terminate service after notice and a specified period to cure the unauthorized use. Suspension of access to this ordering system and

[17] T.E. at 141.

[18] Joint Petitioners' Brief at 63.

discontinuance of service is, according to the Joint Petitioners, a draconian measure, and BellSouth should not be permitted to undertake this step without affording the Joint Petitioners an opportunity for Commission involvement.

The Commission finds that, due to the potential competitive harm which could be realized by discontinuance of access to this customer service record information and suspension of service, BellSouth should seek enforcement of Joint Petitioners' obligations by filing a complaint with the Commission. This step must be taken prior to disconnecting joint CLECs from the customer service record information when BellSouth alleges unauthorized access. Likewise, Joint Petitioners are free to file complaints regarding these issues. Should the need arise and should either party file a complaint, the Commission will address the matter expeditiously.

ISSUE 88: WHAT RATE SHOULD APPLY FOR SERVICE DATE ADVANCEMENT (A/K/A SERVICE EXPEDITES)?

The parties dispute what rate would be appropriate for BellSouth to assess the Joint Petitioners for expedited service, referred to as service date advancement. The Joint Petitioners contend that this expedited service must be provided at TELRIC pricing. BellSouth, on the other hand, argues that its tariffed rates for service date advancement should apply because BellSouth is not required to expedite service pursuant to the Telecommunications Act. The Joint Petitioners contend that expedited service is "part and parcel of UNE provisioning."[19] Thus, nondiscriminatory access to expedited service and cost-based pricing for expedited service must be provided.

[19] Joint Petitioners' Brief at 68.

However, BellSouth counters that standard provisioning intervals for service are required pursuant to 47 U.S.C. § 251.

The Commission agrees with BellSouth that expedited service is not a Section 251 obligation. However, the Commission is concerned that BellSouth may waive expedited charges to its own customers while not enabling waiver for CLEC customers. This practice would create a possible competitive disadvantage to Joint Petitioners.

ISSUE 97: WHEN SHOULD PAYMENT OF CHARGES FOR SERVICE BE DUE?

Joint Petitioners seek 30 calendar days from the receipt or Web site posting of a bill or 30 calendar days from receipt or posting of a corrected or resubmitted bill before payment is due. BellSouth asserts that payment should be due on or before the next bill date.

The Commission finds that BellSouth's proposed due date is reasonable. Joint Petitioners have been able to comply with this standard.[20] BellSouth described the difficult system changes which would be required should Joint Petitioners prevail. As the existing payment due date is adequate in most circumstances, the Commission finds that BellSouth's position should be adopted as commercially reasonable. Should conflicts regarding the payment due date arise, Joint Petitioners may file complaints with the Commission.

[20] T.E. at 175.

ISSUE 100: SHOULD CLECS BE REQUIRED TO PAY PAST DUE AMOUNTS IN ADDITION TO THOSE SPECIFIED IN BELLSOUTH'S NOTICE OF SUSPENSION OR TERMINATION FOR NONPAYMENT IN ORDER TO AVOID SUSPENSION OR TERMINATION?

The dispute between the parties arises from the circumstance in which BellSouth has calculated a specific past due amount which it included in a notice of suspension or termination for nonpayment. This notice also adds general language that says that the amount appearing on the notice must be paid and any additional amount that may become past due on the account in question and all other accounts in order to avoid service termination. Joint Petitioners argue that it is inappropriate that their service would be suspended when, in fact, they have paid the exact amount identified in BellSouth's written notice. The Commission agrees. BellSouth should calculate the exact amount due and the date by which the amount must be received in order to avoid suspension of service. If additional past due amounts are accrued, then BellSouth should send a written notice to the CLECs specifying such additional amounts.

ISSUE 101: HOW MANY MONTHS OF BILLING SHOULD BE USED TO DETERMINE THE MAXIMUM AMOUNT OF THE DESPOSIT?

The Joint Petitioners propose that a reasonable deposit amount should not exceed 2 months' estimated billing for new CLECs or 1½ months' actual billing for existing CLECs. Alternatively, the Joint Petitioners propose a maximum deposit amount not to exceed one month's billing for services billed in advance and 2 months' billing for services billed in arrears. Joint Petitioners note that BellSouth has agreed to this maximum deposit amount with other carriers. BellSouth, on the other hand, proposes that the maximum amount of deposit should be the average of 2 months' billing. Joint

Petitioners assert that they have "well-established business relationships with BellSouth" and thus should be afforded "a less onerous deposit policy."[21]

BellSouth expresses concern that the Joint Petitioners' proposal would curtail BellSouth's right to demand additional deposits if any Joint Petitioner fails to meet its payment obligations.

In an effort to weigh the balance between BellSouth's need to have assurance of payments and the Joint Petitioners' concerns about cash flow, the Commission will adopt the Joint Petitioners' position that the maximum deposit should not exceed one month's billing for services billed in advance and 2 months' billing for services billed in arrears. However, the Commission also agrees that BellSouth has a right to request an additional deposit from a Joint Petitioner who fails to meet its payment obligations.

ISSUE 102: SHOULD THE AMOUNT OF THE DEPOSIT BELLSOUTH REQUIRES FROM CLEC BE REDUCED BY PAST DUE AMOUNTS OWED BY BELLSOUTH TO CLEC?

Joint Petitioners seek to offset the amount of deposits required by BellSouth with the amount due to the particular CLEC from BellSouth. BellSouth responds that the Joint Petitioners have adequate remedies for addressing late payments by BellSouth, including termination of service or assessment of late payment charges.

The Commission finds that the issue of the amount owed by a CLEC to BellSouth and the amount owed to a CLEC by BellSouth are distinct issues and declines to accept the Joint Petitioners' position. However, BellSouth has agreed that, in the event a deposit is requested of the CLEC, the deposit will be reduced by an amount equal to

[21] Joint Petitioners' Brief at 83.

undisputed past due amounts, if any, that BellSouth owes the CLEC. The Commission finds that this addition is reasonable and that it should be adopted.

ISSUE 103: SHOULD BELLSOUTH BE ENTITLED TO TERMINATE SERVICE TO CLEC IF CLEC REFUSES TO REMIT ANY DEPOSIT REQUIRED BY BELLSOUTH WITHIN 30 CALENDAR DAYS?

Joint Petitioners argue that BellSouth does not have a right to terminate services to a CLEC for the CLEC's failure to remit a deposit requested by BellSouth, except when the CLEC has agreed to the deposit or when the Commission has ordered the deposit. If one of these conditions is not met, then a dispute over a requested deposit should, according to the Joint Petitioners, be addressed through the dispute resolution provisions in the interconnection agreement. BellSouth counters that it should be able to terminate service to a CLEC if the CLEC has failed to pay a requested deposit within 30 calendar days. BellSouth seeks this right to terminate for failure to pay a deposit in order to protect its financial interests.

The Commission finds that BellSouth should not be permitted to terminate CLEC services when the CLEC has met all of its financial obligations to BellSouth with the exception of the demand for deposit. It is inappropriate for BellSouth to terminate service when a Joint Petitioner has paid all bills except the request for a deposit. When such disputes arise between BellSouth and a Joint Petitioner, the dispute resolution provisions should be invoked.

The Commission HEREBY ORDERS that:

1. BellSouth's motion to move Issues 26, 36, 37, 38, and 51 to the generic proceeding, Case No. 2004-00427, is denied.

2. The parties hereto shall file their interconnection agreements no later than 30 days from the date of this Order, incorporating the decisions reached herein.

Done at Frankfort, Kentucky, this 26th day of September, 2005.

By the Commission

ATTEST:

Executive Director

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., and Xspedius Communications, LLC (collectively, "Joint Petitioners")[1] filed with the Commission a joint petition for arbitration seeking resolution of issues between the Joint Petitioners and BellSouth Telecommunications, Inc. ("BellSouth"). On September 26, 2005, the Commission issued an Order addressing the 19 issues which the parties were unable to resolve through negotiation.

[1] KMC Telecom V, Inc. and KMC Telecom III LLC, originally parties to this proceeding, withdrew their request for arbitration on May 31, 2005.

The Joint Petitioners and BellSouth petitioned the Commission for rehearing. Joint Petitioners asked the Commission to further consider issues 4, 5, 6, 7, 9, 12, 88, 97, and 102. They also asked the Commission to clarify determinations regarding issues 36 and 51. BellSouth asked that the Commission reconsider issues 26, 36, 37, 38, 51, 65, 86, 100, 101, and 103.

The Commission granted the motions and, on November 30, 2005, heard oral arguments regarding the legal issues in this proceeding.

The Commission also granted the parties' request that the interconnection agreement be submitted 30 days after the Commission rules on the parties' petitions for reconsideration. The Commission found this request reasonable, given the parties' prior agreement that they will continue operating under their current interconnection agreements until these matters are finally resolved by the Commission. The Commission herein addresses each of the issues discussed in the September 26, 2005 Order.

ISSUE 4: WHAT SHOULD BE THE LIMITATION ON EACH PARTY'S LIABILITY IN CIRCUMSTANCES OTHER THAN GROSS NEGLIGENCE OR WILLFUL MISCONDUCT?

The Joint Petitioners ask the Commission to reconsider its determination that liability in circumstances other than gross negligence or willful misconduct would be limited to a credit for the actual cost of services or functions performed improperly or not performed at all.

The Commission's decision is based on the principle that BellSouth's liability to its competitor should be the same as BellSouth's liability to its retail customers. BellSouth argues that should the Joint Petitioners prevail, the competitive local

exchange carriers ("CLECs") would have greater rights against BellSouth than either BellSouth or Joint Petitioners furnish to their respective customers.

The Joint Petitioners have raised no new arguments. BellSouth's proposal is reasonable, and its language should be used in the parties' interconnection agreement. Remedies which may be sought through a complaint from a Joint Petitioner against BellSouth remain available to the Joint Petitioners.

ISSUE 5: WHERE A PARTY DOES NOT INCLUDE SPECIFIC LIMITATION OF LIABILITY TERMS IN ITS TARIFFS AND CONTRACTS, SHOULD IT BE OBLIGATED TO INDEMNIFY THE OTHER PARTY FOR LIABILITIES NOT LIMITED?

The Joint Petitioners ask the Commission to reconsider its determination that the provision in the current interconnection agreement that requires limitation of liability from customers should likewise be in the new agreement. The Joint Petitioners, however, present no new arguments as to why they should not be required to limit liability in their relationship with their end-users and, thus, limit the exposure to which BellSouth would be subject. BellSouth asserts that it is merely seeking to have the Joint Petitioners bear the risk of loss arising from their business decisions not to limit the liability of their customers. The Joint Petitioners argue that they should not be so limited in their negotiations with customers over contract language. BellSouth asserts that it does not use the limitation-of-liability term as a negotiation point in dealing with its own end-users, and, therefore, it is not seeking to hold the Joint Petitioners to any higher standard than that to which BellSouth holds itself.

The Commission finds that the interconnection agreement between the parties must contain the same provision as in its current agreement. The Joint Petitioners and BellSouth must both be subject to the same standard. If the Joint Petitioners become

aware that BellSouth is not including this limitation-of-liability language in its agreements with customers, the Joint Petitioners are free to petition this Commission for redress.

ISSUE 6: HOW SHOULD INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES BE DEFINED FOR PURPOSES OF THE AGREEMENT?

The Commission initially found it unnecessary to insert into the agreement the Joint Petitioners' proposed language regarding damages to end-users which result from a party's performance. The Joint Petitioners requested rehearing but pointed to no error.

Neither party may affect the rights of a third-party end-user through this interconnection agreement. Accordingly, interested persons who may be affected by the way in which indirect, incidental, or consequential damages are defined may seek redress in courts of general jurisdiction. The language proposed by BellSouth for inclusion in the interconnection agreement should be adopted.

ISSUE 7: WHAT SHOULD THE INDEMNIFICATION OBLIGATIONS OF THE PARTIES BE UNDER THIS AGREEMENT?

Joint Petitioners ask that the Commission reconsider its decision to adopt BellSouth's language regarding indemnification obligations. After review of all arguments presented on rehearing, the Commission finds that reconsideration should be granted. BellSouth, as the providing party, should indemnify the Joint Petitioners as the receiving parties to the extent they become liable due to BellSouth's negligence, gross negligence, or willful misconduct Thus, the Commission finds that the Joint Petitioners' proposal is a commercially reasonable one to the extent that it covers indemnification for negligence, gross negligence, or willful misconduct. The

Commission accordingly reconsiders its earlier decision and holds that the Joint Petitioners should prevail to the extent described herein.

ISSUE 9: SHOULD A COURT OF LAW BE INCLUDED IN THE VENUES AVAILABLE FOR INITIAL DISPUTE RESOLUTION FOR DISPUTES RELATING TO THE INTERPRETATION OR IMPLEMENTATION OF THE INTERCONNECTION AGREEMENT?

The Joint Petitioners ask the Commission to reconsider its determination that disputes arising under interconnection agreements must be brought to this Commission before they proceed to a court of general jurisdiction. The Commission has primary jurisdiction over issues regarding the interpretation and implementation of interconnection agreements. See Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 642 (U.S.S.C. 2002) and BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 317 F.3d 1270, 1275 (11th Cir. 2003). BellSouth contends that the Commission should not reconsider its determination because the Commission should resolve disputes between parties that relate to matters normally considered to be within the expertise of the state commission. BellSouth asserts that for matters that lie outside of such regulatory expertise, parties may seek redress in courts of general jurisdiction. The Commission certainly has not attempted, in reaching this outcome, to deprive courts of matters within their jurisdiction. Matters over which this Commission has jurisdiction in the first instance should be addressed by this Commission. The Commission herein denies reconsideration of this issue. The parties should include BellSouth's language in their interconnection agreements.

ISSUE 12: SHOULD THE AGREEMENT STATE THAT ALL EXISTING STATE AND FEDERAL LAWS, RULES, REGULATIONS, AND DECISIONS APPLY UNLESS OTHERWISE SPECIFICALLY AGREED TO BY THE PARTIES?

The Joint Petitioners seek reconsideration regarding the inclusion of an "applicable law" provision in the interconnection agreement. The Joint Petitioners ask that their interconnection agreement with BellSouth state specifically that all existing laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the parties. BellSouth counters that such a contract term would result in issues being part of the written contract when there had never been any meeting of the minds regarding their applicability.

Despite agreeing with much of the Commission's initial decision, the Joint Petitioners assert that the Commission erred in adopting BellSouth's language. The Joint Petitioners have not addressed the Commission's concern that adoption of their proposal would result in one party's interpretation of applicable law being deemed incorporated into the contract without the other party having an opportunity to dispute its application. The Commission is not persuaded that it should change its original decision. Since it is paramount that both parties agree that applicable law should be followed, an actual meeting of the minds should occur regarding contract terms. When disputes arise, they may be submitted to the Commission for determination regarding the parties' obligations.

ISSUE 26: SHOULD BELLSOUTH BE REQUIRED TO COMMINGLE UNEs OR COMBINATIONS WITH ANY SERVICE, NETWORK ELEMENT, OR OTHER OFFERING THAT IT IS OBLIGATED TO MAKE AVAILABLE PURSUANT TO SECTION 271 OF THE ACT?

BellSouth seeks rehearing of the Commission's determination that BellSouth is required to "commingle" unbundled network elements ("UNEs") or combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to 47 U.S.C. § 271. The Joint Petitioners oppose reconsideration.

47 C.F.R. §§ 51.309(e) and (f) form the basis of the Commission's decision. Rule 51.309(e) states that "an incumbent LEC [local exchange carrier] shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC." Rule 51.309(f) provides that "upon request an incumbent shall perform the functions necessary to commingle [a UNE or UNE combinations] with one or more facilities or services obtained at wholesale from an incumbent." The question to be decided is whether a Section 271 obligation is a facility or service that is obtained at wholesale from an incumbent.

47 U.S.C. § 271(c)(2) lists the access and interconnection requirements which BellSouth had to fulfill in order to be granted entrance into the in-region interLATA market. The question presented by these parties seeking arbitration is whether those access obligations (i.e., the competitive checklist) constitute an ongoing obligation on BellSouth's part relating to availability of commingled wholesale services. The Joint Petitioners have asserted that BellSouth has an obligation to commingle elements which it is obligated to provide pursuant to Section 271 with other elements.

In the Triennial Review Order,[2] the Federal Communications Commission ("FCC") defined "commingling" as "the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC ["ILEC"] pursuant to any other method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services."[3] The Joint Petitioners seek to link UNEs or combinations of UNEs with local switching (checklist item 6). BellSouth asserts that, since local switching is no longer a UNE and is not a wholesale service, it has no obligation to commingle switching with elements otherwise required to be provided.

For reasons delineated herein, the Commission affirms its determination that Section 271 offerings constitute wholesale services within the meaning of the commingling rule. Accordingly, BellSouth remains obligated to make these Section 271 elements available to the Joint Petitioners on a commingled basis with Section 251 UNEs. While the Commission has carefully considered each of the arguments made by BellSouth on reconsideration, none of them are persuasive from a legal or a policy perspective.

BellSouth argues that Section 271 elements are not wholesale services. However, it can produce no law or order which reaches this same conclusion. The FCC has repeatedly framed the issue of commingling as that which "a requesting carrier has

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[2] 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, 18 FCC Rcd 16978 (2003) ("Triennial Review Order" or "TRO").

[3] TRO at ¶ 579.

obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c) (3) of the Act."[4]

BellSouth argues that in the TRO Errata order, the FCC eliminated certain phrases from the TRO. Originally, the FCC required that "incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act."[5] In the TRO Errata order, the FCC changed the sentence to eliminate the phrase "any network element unbundled pursuant to Section 271."[6] Although BellSouth argues that this deletion is dispositive, the Commission disagrees. This portion of the TRO addresses ILECs' resale obligations only. Network element unbundling was irrelevant to resale and thus was eliminated from this paragraph.

The TRO does address unbundling regarding Section 271 obligations. The TRO Errata order also deleted footnote 1990 from the section of the TRO addressing Section 271 issues.[7] The deleted sentence is: "We also decline to apply our commingling rule, set forth in part VII.A. above, to services that must be offered pursuant to these checklist items." The footnote was attached to Paragraph 655 of the TRO, which states, "As such, BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the Section 251 unbundling analysis." The deletion of

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[4] TRO at ¶ 579.

[5] TRO at ¶ 584.

[6] TRO Errata at ¶ 27.

[7] TRO Errata at ¶ 31.

footnote 1990 supports this Commission's determination that the FCC did not specify that Section 271 elements are not to be commingled with Section 251 elements. Without the TRO Errata order, the FCC would have declined to require this commingling obligation, but with the removal of this language, the FCC intended to continue to enforce the requirement that BOCs must commingle Section 251 elements with Section 271 elements.[8]

If the FCC's intent was that commingling obligations for wholesale service only referred to switched and special access tariffed services, it would not have used the language regarding wholesale obligations pursuant to Section 271. The FCC stresses that the commingling definition refers to any service obtained at wholesale by a method other than unbundling under Section 251.

The Commission's initial decision requiring BellSouth to commingle UNEs or combinations of UNEs with any element that competitive carriers receive at wholesale, including Section 271 elements, is affirmed. BellSouth cannot point to any law relieving it of its obligation to provide Section 271 elements at wholesale and commingling them pursuant to 47 C.F.R. § 51.309(e). The FCC nowhere prohibits the commingling of Section 271 elements. The FCC, instead, requires commingling with any element obtained through wholesale. The FCC does list tariffed services as examples of these elements but nowhere states that only tariffed services are available for commingling.

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[8] Despite BellSouth's contention that Section 271 elements are not wholesale obligations, the FCC in an Opinion and Order issued December 2, 2005, repeatedly uses the term "Section 271(c) wholesale obligations" and makes reference to "wholesale access to loops, transport and switching" pursuant to checklist items 4-6 as independent and ongoing obligations for BOCs, Qwest Communications International Inc.'s Petition for Forbearance under 47 U.S.C. § 160(c), at ¶¶ 68, 100, 103, and 105.

The very purpose of Section 271, which is to require BellSouth to provide access to local switching, local transport, and local loops, would be undermined by such a prohibition on commingling these elements with UNEs. Section 271 exists to require access to, and facilitate the competitive use of, these elements. Restricting commingling would undermine this competitive policy. Moreover, the network facilities used by BellSouth to provide access to its competitors pursuant to Section 271 are located within this Commonwealth and are used to provide in-state or intra-state service, and, as such, the Commission has jurisdiction over those facilities and services. Nothing in Section 271 or in any FCC order deprives the state commission of jurisdiction over the elements required to have been met as a condition of entry into the in-region long-distance market. The FCC has set pricing standards for Section 271 elements. The standard is just, reasonable, and nondiscriminatory rates.

BellSouth also argues that the matter of federal-only jurisdiction over Section 271 elements has been settled in Kentucky by BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al., Civil Action No. 3:05-CV-16-JMH (Apr. 22, 2005). That opinion states that "the enforcement authority for Section 271 unbundling duties lies with the FCC and must be challenged there first." This language of the Court properly notes that determining whether BellSouth should continue to be in the long-distance market or is acting in a manner such that it should be deprived of access to the long-distance market is squarely with the FCC's jurisdiction. The Court's order does not specify that the state commission has no authority over elements of BellSouth's obligations to its competitors and how those elements are to be priced. The Joint Petitioners are not asking that BellSouth be again excluded from the long-distance

market. If the Joint Petitioners were so asking, then this matter should be presented to the FCC rather than this state commission. The matters requested by the Joint Petitioners are appropriately contained in interconnection agreements and appropriately decided by this Commission.

Accordingly, reconsideration is denied. 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), including those elements obtained pursuant to Section 271.

ISSUES 36 – 38: HOW SHOULD LINE CONDITIONING BE DEFINED, AND WHAT SHOULD BELLSOUTH'S OBLIGATIONS BE WITH RESPECT TO LINE CONDITIONING? SHOULD THE AGREEMENT CONTAIN SPECIFIC PROVISIONS LIMITING THE AVAILABILITY OF LINE CONDITIONING TO COPPER LOOPS OF 18,000 FEET OR LESS? UNDER WHAT RATES, TERMS, AND CONDITIONS SHOULD BELLSOUTH BE REQUIRED TO PERFORM LINE CONDITIONING TO REMOVE BRIDGED TAPS?

These three issues 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. The Joint Petitioners assert that line conditioning should be defined by FCC Rule 51.319(a)(i)(III)(A). According to Joint Petitioners, line conditioning is a 47 U.S.C. § 251(c)(3) obligation which was expanded, not eliminated, by the TRO. The TRO states that "loop conditioning is intrinsically linked to the local loop and included within the definition of loop network element."[9] Moreover, the FCC

[9] TRO at ¶ 643.

indicates that "line conditioning does not constitute the creation of a superior network."[10] Instead, loop conditioning enables a requesting carrier to use the basic loop.[11]

BellSouth, on the other hand, asserts that it is obligated to perform line conditioning only on the same terms and conditions that it performs line conditioning to 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."[12] The Commission found that line conditioning is a routine network modification, not the creation of a superior network. As such, BellSouth was ordered to provide line conditioning when requested by the Joint Petitioners as specified in 47 C.F.R. § 51.319(a).

Similarly, BellSouth asks that the interconnection agreements limit the availability of line conditioning to copper loops of 18,000 feet or less. According to BellSouth, BellSouth has no obligation to remove load coils on loops in excess of 18,000 feet at total element long line incremental cost ("TELRIC") for the Joint Petitioners because BellSouth does not remove load coils on such long loops for its own customers. BellSouth asserts that, if it is requested to remove load coils on loops in excess of 18,000 feet, it would do so pursuant to special construction charges contained in its tariff. Despite indicating 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

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[10] Id.

[11] UNE Remand Order, 15 CC Record at 3775, ¶ 173.

[12] TRO at ¶ 643.

T1 circuits.[13] 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 found that, when requested by the Joint Petitioners, BellSouth should remove load coils on loops in excess of 18,000 feet at the existing TELRIC rates.

Finally, the Joint Petitioners propose that BellSouth perform line conditioning, including the removal of bridged taps at TELRIC rates. The Joint Petitioners, on the other hand, argue that BellSouth's attempt to assess tariffed rates for the removal of bridged taps beyond the combined level of 2,500 feet is contrary to federal law. According to the Joint Petitioners, pursuant to FCC Rule 51.319(a)(1)(III), BellSouth is required to perform line conditioning, including the removal of bridged taps at TELRIC rates. BellSouth contended that the removal of bridged taps is not required to preserve non-discrimination obligations. BellSouth asserts that line conditioning at TELRIC rates, including the removal of bridged taps, is only required to the extent that BellSouth provides such functions to itself. BellSouth does not routinely remove bridged taps that result in a combined level of less than 2,500 feet for its own customers; and, thus, according to BellSouth, such a request results in providing CLECs with a "superior network."

The Commission found 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 links is immaterial to the capability being sought by the Joint Petitioners. TELRIC rates, by definition, recover the incremental costs plus a profit for

[13] Transcript of Evidence at 248.

the function being performed. Therefore, BellSouth should be adequately compensated by these rates or these functions. Moreover, BellSouth offered no evidence to support its position that generic special construction rates were appropriate.

BellSouth has sought rehearing of these matters. However, after careful review of the parties' filings and arguments presented, the Commission affirms its earlier decisions. The Commission focused on the parity of the functionality which BellSouth provides to competitors with the functionality that BellSouth provides to itself. The Commission did not focus on the parity of the actual service rendered by BellSouth to its competitors. Thus, whether BellSouth provides line conditioning to copper loops greater than 18,000 feet for itself is not the focus, but rather whether BellSouth appropriately conditions copper loops in order to be able to provide service that its customers request. BellSouth routinely removes load coils and routinely terminates bridged taps for itself. Accordingly, the Commission appropriately determined that BellSouth must provide these functions for competitors as well.

The Commission's decision also focused on whether the modification to the network sought by the Joint Petitioners "is of the sort that the ILEC routinely performs, on demand, for its own customers." United States Telecom Ass'n v. FCC, 359 F.3d 554, 578 (D.C. Cir. 2004). The Commission appropriately focused on the functionality that BellSouth provides to its customers, rather than any specific service or specific condition of that functionality. The line conditioning obligations of BellSouth were not altered by the TRO, nor were the line conditioning rules or the routine network

modification rules altered by the Triennial Review Remand Order.[14] Thus, the Commission will not alter its initial determinations. Language proposed by the Joint Petitioners for these three issues should be incorporated into the parties' interconnection agreements.

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

In its September 26, 2005 decision, the Commission declined to address matters relating to the 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. As the Commission noted, NuVox Communications, Inc. ("NuVox") (one of the Joint Petitioners), BellSouth, and the Commission were involved in litigation which was pending at the time of the Commission's Order.[15] However, on November 1, 2005, the Court entered its Memorandum Opinion and Order. The Court upheld the Commission's determination that BellSouth had complied with its interconnection agreement regarding audit conditions, that BellSouth had demonstrated its concern by asserting that BellSouth remained the local service provider for 15 of NuVox's EELs, and that BellSouth had professed by affidavit the independence of its chosen auditor. The Court went on to determine that NuVox could point to no violation

[14] FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005).

[15] 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.

of its agreement or any FCC order to support its contention that the Commission should have required BellSouth to provide more evidence of its concern and should have undertaken greater efforts to ensure that BellSouth's auditor was independent.

The determinations of the Court guide the Commission's decision herein. BellSouth need only state that it has concern and give reasons why it has concern. It is unnecessary for BellSouth to provide actual documentation of that concern prior to initiating an audit. The CLEC may object to the audit after it has been performed but may not prevent its initiation once BellSouth asserts that it has adequate documentation to support an audit. BellSouth must merely state its cause for conducting the audit, but need not further justify the matter to the CLEC. BellSouth has a right to audit EELs to verify a CLEC's compliance with the significant local usage requirements pursuant to FCC order. Once BellSouth notifies a CLEC of its concern over the appropriate usage of the EELs, the CLEC should not be permitted to interfere with BellSouth's right to conduct the audit before the audit ever occurs. The audit should be limited to those circuits over which BellSouth initially raised concern. The findings of the audit, if disputed, probably will have to be addressed by the Commission. At that point, if the parties cannot agree, the Commission can determine the next appropriate steps to address additional concerns which may surface during the audit. Language incorporating the Commission's determinations should be included in the parties' interconnection agreements.

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

BellSouth has sought rehearing of the Commission's determination that the Commission has not been precluded by the FCC from requiring BellSouth to transit traffic under the circumstances requested by the Joint Petitioners. 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 that the parties have already agreed will apply. However, BellSouth asserts that it does not have a duty to provide this transit service at TELRIC rates. According to BellSouth, the Joint Petitioners have the option of directly interconnecting with terminating carriers instead of utilizing BellSouth's transit function.[16] BellSouth asserts that it is only obligated to negotiate and arbitrate issues contained in Section 251(b) and (c) and that transit traffic is not so included.

The Joint Petitioners assert that BellSouth has failed to justify the additional TIC rate and, as such, they should be required to pay only amounts previously agreed upon.

The Commission does not find BellSouth's arguments for rehearing to be persuasive. BellSouth has not demonstrated that the Commission is precluded by the FCC from requiring BellSouth to transit traffic. The Commission has previously required third-party transiting by the ILEC based on efficient network use. The Commission will continue to require BellSouth to transit such traffic. Transiting traffic in the

[16] Transcript of Evidence at 141.

circumstances requested by the Joint Petitioners is essential to the provision of service to rural Kentucky.

BellSouth contends that the FCC has recently determined that "Section 251(a)(1) does not address pricing" and, thus, the FCC is seeking comment on appropriate pricing methodologies to apply to transit services.[17] It may be that, during the course of this FCC proceeding, additional light will be shed on appropriate pricing for transit services. However, based on the Commission's previous determinations regarding third-party transiting, and because transiting uses intra-state facilities to provide an intra-state service, the Commission finds that it has jurisdiction over these matters until and unless the FCC specifically preempts the state commission. Accordingly, the Commission's determination is clarified to require BellSouth to provide this transit service at a TELRIC-based rate unless an additional TIC can be justified by BellSouth.

ISSUE 86: HOW SHOULD DISPUTES OVER ALLEGED UNAUTHORIZED ACCESS TO CSR INFORMATION BE HANDLED UNDER THE AGREEMENT?

Regarding how to address disputes over alleged unauthorized access to customer service record ("CSR") information, the Commission determined that BellSouth must seek enforcement of the Joint Petitioners' obligations by filing a complaint with the Commission rather than by discontinuance of access to the CSR information and suspension of service. BellSouth asserts that the Commission misunderstood its position and, thus, did not address this matter correctly. According to BellSouth, the parties agree that disputes regarding unauthorized use of CSR

[17] See In Re Matter of Developing a Unified Intercarrier Compensation Regime, FCC 05-33, CC Docket No. 01-92 at ¶ 132, quoted by BellSouth in a letter filed December 8, 2005.

information must be handled in accordance with the interconnection agreements' dispute resolution provision. However, the Joint Petitioners assert that BellSouth inappropriately fails to include in its agreement the provision that BellSouth will not suspend or terminate service during a dispute regarding access to CSR information. The Commission found that, due to the potential competitive harm which could be realized by discontinuance of access to this CSR information and suspension of service, BellSouth should not be permitted to discontinue without first filing a complaint with the Commission. The Commission affirms this determination and herein requires that BellSouth include language to this effect in its interconnection agreements with the Joint Petitioners. BellSouth has provided no reason why it should be permitted to discontinue access to the CSR information when a legitimate dispute about its use exists between the parties.

ISSUE 88: WHAT RATE SHOULD APPLY FOR SERVICE DATE ADVANCEMENT (A/K/A SERVICE EXPEDITES)?

In addressing what rate should apply for service date advancements (i.e., service expedites), the Commission determined that expedited service was not a Section 251 obligation. The Joint Petitioners contend that expedited service must be provided at TELRIC pricing. BellSouth, on the other hand, argues that the tariffed rate for the service date advancement should apply because BellSouth is not required to expedite service pursuant to the Telecommunications Act. The Joint Petitioners contend that expedited service is part and parcel of UNE provisioning. The Commission disagrees. Standard provisioning intervals for service are required pursuant to Section 251. BellSouth should also provide non-discriminatory access to expedited service, but

expedited service is not a Section 251 obligation. Accordingly, BellSouth's language regarding this issue should be included in the interconnection agreements.

ISSUE 97: WHEN SHOULD PAYMENT OF CHARGES FOR SERVICE BE DUE?

The Joint Petitioners have asked the Commission to reconsider its determination regarding when payment of charges for service should be due. The Joint Petitioners asked for 30 calendar days from receipt of a bill or from the Web posting of a bill, or 30 calendar days from receipt of a corrected or resubmitted bill, before payment would be due. BellSouth counters that payment should be due on or before the next bill date. Though Joint Petitioners have been able to comply with the existing standard,[18] they assert that BellSouth often takes an average of 7 days to deliver bills. BellSouth asserts that the most recently available data shows that it takes 3 or 4 days to deliver its bills.

Given the Joint Petitioners' arguments regarding their difficulties in complying with BellSouth's designated bill due dates, the Commission reconsiders its determination for this issue. In appropriately balancing the issues of timely payment to BellSouth and adequate time to render payment for the Joint Petitioners, the Commission finds that the Joint Petitioners should be permitted 30 calendar days from the issuance of BellSouth's bills before the bills are due. As the Joint Petitioners assert, BellSouth does not dispute that these bills are voluminous and require resources to be dedicated by the Joint Petitioners in order to timely pay them. Accordingly, interconnection agreements between BellSouth and the Joint Petitioners should include language stating that payments for charges for service rendered are due 30 calendar

[18] Transcript of Evidence at 175.

days after BellSouth's issuance of the bills. Issuance should be determined by either the bill's postmark or the Web site posting date.

ISSUE 100: SHOULD CLECS BE REQUIRED TO PAY PAST-DUE AMOUNTS IN ADDITION TO THOSE SPECIFIED IN BELLSOUTH'S NOTICE OF SUSPENSION OR TERMINATION FOR NONPAYMENT IN ORDER TO AVOID SUSPENSION OR TERMINATION?

BellSouth has asked for rehearing of this matter. The dispute between the parties arose from circumstances in which BellSouth calculated a specific past-due amount which it included in an official notice of suspension or termination for non-payment. This same notice also included general language saying that the amount appearing on the notice must be paid and any additional amount that may become past-due on the account in question and all other accounts in order to avoid service termination. The Joint Petitioners argued, and the Commission agreed, that it was inappropriate that the Joint Petitioners' service would be suspended when, in fact, they had paid the exact amount identified in BellSouth's written notice.

BellSouth has presented no new evidence which would cause the Commission to alter its determination. BellSouth must calculate the exact amount due and the date by which the amount must be received in order to avoid suspension of service. If additional past-due amounts accrue, then BellSouth should send a written notice to the CLECs specifying such additional amounts.

ISSUE 101: HOW MANY MONTHS OF BILLING SHOULD BE USED TO DETERMINE THE MAXIMUM AMOUNT OF THE DEPOSIT?

BellSouth has asked for rehearing of the Commission's determination that the maximum deposit should not exceed 1 month's billing for services billed in advance and

2 months' billing for services billed in arrears. BellSouth contends that, even though it had agreed to this maximum deposit amount, it did not dispute the deposit because of other, more stringent terms in that interconnection agreement. However, the basis of the Commission's decision was not merely that BellSouth had agreed to a similar deposit with another carrier. The Commission has looked at the filings of the Joint Petitioners and, weighing the balance, believes that its initial determination for a maximum deposit not to exceed 1 month's billing for services billed in advance and 2 months' billing for services billed in arrears is an appropriate outcome for this arbitration proceeding. The parties have provided, in their petitions for rehearing and responses thereto, differing interpretations of the Commission's determination that BellSouth has a right to request an additional deposit from a Joint Petitioner who fails to meet its payment obligations. Accordingly, the Commission herein clarifies failure to meet payment obligations to mean a failure to timely pay current bills. If the Joint Petitioners fail to timely pay their current bills, BellSouth may recalculate the deposit.

ISSUE 102: SHOULD THE AMOUNT OF THE DEPOSIT BELLSOUTH REQUIRES FROM CLECS BE REDUCED BY PAST-DUE AMOUNTS OWED BY BELLSOUTH TO CLECS?

The Joint Petitioners seek rehearing of the Commission's determination that the issue of the amount owed by a CLEC to BellSouth and the issue of the amount owed by BellSouth to a CLEC are distinct issues. Additionally, the Commission approved BellSouth's proposal that, in the event a deposit is requested of a CLEC, the deposit will be reduced by an amount equal to the undisputed past-due amounts, if any, that BellSouth owes the CLEC. The Joint Petitioners' request for rehearing presents nothing that has not already been considered by the Commission. Accordingly, the original

determination is affirmed. BellSouth's language shall be included in the parties' interconnection agreements.

ISSUE 103: SHOULD BELLSOUTH BE ENTITLED TO TERMINATE SERVICE TO A CLEC IF THE CLEC REFUSES TO REMIT ANY DEPOSIT REQUIRED BY BELLSOUTH WITHIN 30 CALENDAR DAYS?

BellSouth seeks rehearing of the Commission's determination that BellSouth should not be permitted to terminate a CLEC's services when the CLEC has met all of its financial obligations to BellSouth, with the exception of the demand for a deposit. The Commission determined that it is inappropriate for BellSouth to terminate service when a Joint Petitioner has paid all bills except for the request for a deposit. When such disputes arise between BellSouth and a Joint Petitioner, the dispute resolution provision should be invoked.

BellSouth has presented no basis for reconsideration of this decision. If a CLEC refuses to remit any deposit required by BellSouth within 30 calendar days, then either party may seek to resolve the dispute through dispute resolution provisions. The rehearing request presents no new information that has not been previously considered by the Commission. Accordingly, the parties' interconnection agreements shall include the contract language proposed by the Joint Petitioners for this issue.

The Commission HEREBY ORDERS that:

1. The Commission's September 26, 2005 Order is clarified as specified herein.

2. The parties herein shall file their interconnection agreements no later than 30 days from the date of this Order, incorporating the decisions reached herein.

Done at Frankfort, Kentucky, this 14th day of March, 2006.

By the Commission

ATTEST:

Executive Director

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G.P.S.C.

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DOCKET # 18409
DOCUMENT # 93636

Docket No. 18409-U

In Re: **Joint Petition for Arbitration of NewSouth Communications Corporation, et al of an Interconnection Agreement with BellSouth Telecommunications, Inc Pursuant to Section 252(b) of the Communications Act of 1934, as Amended**

Order on Unresolved Issues

BY THE COMMISSION:

On February 11, 2004, NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC (collectively "Joint Petitioners") petitioned the Georgia Public Service Commission ("Commission") to arbitrate certain unresolved issues in the interconnection negotiations between Joint Petitioners and BellSouth Telecommunications, Inc. ("BellSouth").

I. JURISDICTION AND PROCEEDINGS

Under the Federal Telecommunications Act of 1996 (the Federal Act), State Commissions are authorized to decide the issues presented in a petition for arbitration of interconnection agreements. In addition to its jurisdiction of this matter pursuant to Sections 251 and 252 of the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§ 46-5-160 *et seq.*, and generally O.C.G.A. §§ 46-1-1 *et seq.*, 46-2-20, 46-2-21 and 46-2-23.

The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

II. FINDINGS AND CONCLUSIONS

Item 4

What should be the limitation of each Party's liability in circumstances other than gross negligence or willful misconduct?

Positions of the Parties

BellSouth

BellSouth's position is that the parties' liability for negligent acts should be limited to bill credits. BellSouth states that its position is consistent with the standard applied to its retail customers and the standard that is included in the parties' current interconnection agreement. (BellSouth Brief, p. 7).

BellSouth requests that the Commission reject the position of Joint Petitioners, which would limit each party's liability to 7.5 percent of amounts paid or payable at the time the claim arose, subject to several caveats and conditions. (BellSouth Brief, p. 5). BellSouth criticizes Joint Petitioners' proposal on numerous grounds. First, BellSouth argues that the Joint Petitioners' proposal exceeds the scope of incumbent local exchange carrier ("ILEC") liability that the FCC Wireline Competition Bureau articulated in the *Virginia Arbitration Order*.[1] *Id.* at 6. Next, BellSouth contends that the proposal is one-sided in that it subjects BellSouth to a higher cap than it does Joint Petitioners. *Id.* at 8. BellSouth next argues that the proposal is unnecessary, unworkable and that it would impose costs on BellSouth not taken into consideration when establishing unbundled network element costs. *Id.* at 8-11. BellSouth also charges that Joint Petitioners did not credibly demonstrate that they deviate from the standard limitation of liability language in their contracts with end users. *Id.* at 11-13. Finally, BellSouth states that it is not relevant that comparable language is found in commercial agreements. *Id.* at 9.

Joint Petitioners

Joint Petitioners argue that holding parties liable for a maximum of 7.5 percent of the damages that result from their own negligence is reasonable. Joint Petitioners assert that their proposal is consistent with settled contract law and dispute BellSouth's contention that its proposal is the standard for the industry. (Joint Petitioner Brief, pp. 5-

[1] Memorandum Opinion and Order, *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration* CC Docket Nos. 00-218; *In the Matter of Petition of AT&T Communications of Virginia, Inc. for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.* 00-251. ("*Virginia Arbitration Order*")

6). Joint Petitioners respond to BellSouth's point that their tariffs limit liability for negligence to bill credits by stating that the tariffs are frequently not incorporated into end user contracts. *Id.* at 7. Joint Petitioners also contest BellSouth's position that TELRIC[2] does not cover the liability exposure from the 7.5 percent cap they are proposing. *Id.* at 10. Joint Petitioners cite to the testimony of BellSouth witness, Kathy Blake, for the position that shared and common costs address the costs of maintaining insurance. (Joint Petitioner Reply Brief, p. 7). Joint Petitioners also argue that liability should be marked from "the day the claim arose." (Joint Petitioner Brief, p 12). Such language allows the parties to identify a date certain for calculating damages and is consistent with the Uniform Commercial Code. *Id.*

Joint Petitioners also assert that the *Virginia Arbitration Order* does not bind the Commission, and that the Wireline Competition Bureau in that case did not contemplate a proposal comparable to the one Joint Petitioners put forward in this case. (Joint Petitioner Reply Brief, pp. 5-6). Joint Petitioners also argue that the positions of the individual petitioners are united. *Id.* at 8.

Staff Recommendation

The Staff recommends that the parties' liability for negligence be limited to bill credits. The Staff will address the main points raised in turn. First, the parties dispute whether limiting recovery to bill credits is the industry standard. BellSouth cited to the parties' current agreements as well as the arrangements with its end user customers, while the Joint Petitioners listed instances in which parties agreed upon significantly different terms. It is not evident from the argument and evidence in the proceeding that BellSouth's proposal is the standard in the industry, but it is apparent that it is far from unprecedented. In contrast, the evidence reflects that the Joint Petitioners are not aware of any interconnection agreements containing the provision that they propose for adoption. (Joint Petitioners Supplemental Response to Request for Production No. 6; Tr. 376-77; Russell Depo. at 43). BellSouth's proposal is at least more standard than that of the Joint Petitioners.

The lack of a track record with Joint Petitioners' proposal should not disqualify it from consideration, but rather, it means that compelling reasons need to support acceptance of the new direction. The Staff did not find Joint Petitioners' reasons compelling. First, the Joint Petitioners' proposal would expose BellSouth to substantially higher financial risk related to its negligence than any individual Joint Petitioner. It appears that this differential results from applying the 7.5 percent to the aggregate fees, charges or other amounts billed for any and all services provided pursuant to the parties' agreement. Such a methodology is not on its face discriminatory, but the application of the methodology, as pointed out in BellSouth's briefs, could lead to some unfair consequences. In addition, BellSouth's proposal is consistent with the decision in the *Virginia Arbitration Order*, that defined the scope of the ILEC's liability consistent with how it treats its own customers. (¶ 709). The Commission is not bound by decisions of

[2] "TELRIC" stands for "total element long-run incremental cost.

the Wireline Competition Bureau in the same way that it is bound by decisions of the FCC. However, it is certainly relevant to weigh its decisions when relevant to an issue in a Georgia arbitration.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 4.

Item 5

BellSouth Issue Statement: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks?

Joint Petitioner Issue Statement: To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future), should it be required to indemnify the other Party of liabilities not limited?

Positions of the Parties

BellSouth

The essence of BellSouth's position is that it should not be exposed to greater liability because an end user customer is a competitive local exchange carrier ("CLEC") end user as opposed to a BellSouth end user. (BellSouth Brief, p. 15). BellSouth argues that if a Joint Petitioner does not include in its end user contracts liability limitation provisions that are consistent with the industry standard, then Joint Petitioners should indemnify BellSouth for any losses as a result of that decision. *Id.* at 13. As with Issue 4, BellSouth asserts that its proposal is consistent with what is in the parties' current agreements. *Id.* In addition to changing the status quo, BellSouth argues that it is disadvantaged by Joint Petitioners' proposal because their indemnification proposal holds BellSouth accountable for a wider range of claims than the Joint Petitioners. (BellSouth Brief, p. 14). BellSouth relies upon a decision of the Minnesota Public Utilities Commission that rejected language similar to what is being proposed by Joint Petitioners on the grounds that indemnification provisions should not be drafted to attract customers by insuring one another against unforeseen possibilities. (BellSouth Brief, p. 15).

In addition, BellSouth challenges Joint Petitioners' claims that BellSouth's proposed language would hinder their ability to negotiate liability terms that vary from the standard. (BellSouth's Reply Brief, p. 9). BellSouth states that Joint Petitioners were unable to cite to any instance in which they needed to concede limitation of liability language to attract a customer. *Id.* 9-10. Moreover, BellSouth argues that it is not dictating the terms upon which Joint Petitioners can contract with their customers; but

instead, it is seeking to hold Joint Petitioners accountable for agreeing to terms that are different than the industry standard. *Id.* at 10.

Joint Petitioners

Joint Petitioners allege that BellSouth is seeking to obtain a competitive advantage by requiring CLECs to mirror its tariffed language on limitation of liability, even though BellSouth may negotiate such provisions to lure a customer away from a CLEC. (Joint Petitioner Brief, p. 14). A lot of Joint Petitioners' business is from individual agreements as opposed to tariffs. *Id.* BellSouth's proposed language would punish Joint Petitioners for agreeing to language that differed from what is in BellSouth's tariffs. *Id.* at 15.

Joint Petitioners also state that its proposal incorporates a reasonableness standard; therefore, they would not be able to attract customers by promising exorbitant payments to customers for minor service problems and then recoup that amount from BellSouth. (Joint Petitioner Reply Brief, p. 10).

Staff Recommendation

Staff recommends the Commission order that should Joint Petitioners not limit their liability in accordance with BellSouth tariffs that the Joint Petitioners should indemnify BellSouth for any loss BellSouth sustains because of that decision. Adoption of Staff's recommendation would not inhibit Joint Petitioners from negotiating alternative liability arrangements with customers. Rather, it would mandate that they indemnify BellSouth for any losses BellSouth would incur as a result of this decision. Joint Petitioners would not be at a competitive disadvantage because they would be free to negotiate alternative limitation of liability language in an effort to attract a customer. It would not be fair for BellSouth to be put at an increased risk as a result of a CLEC's business decision to offer an end user customer a more favorable limitation of liability provision in their service agreement.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 5.

Item 6

BellSouth Issue Statement: How should indirect, incidental or consequential damages be defined for purposes of the Agreement?

Joint Petitioner Issue Statement: Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customer/End Users resulting directly and in a reasonably foreseeable manner from BellSouth's

(or CLEC's) performance of obligations set forth in the Agreement are not indirect, incidental or consequential damages?

Positions of the Parties

BellSouth

BellSouth argues that Joint Petitioners' proposal has no effect as a matter of law because the parties agree that they cannot affect the rights of third-party end users through their interconnection agreements. (BellSouth Brief, p. 16). Further, BellSouth argues that it is unnecessary to include, as Joint Petitioners' propose, language to establish that the limitation of liability regarding indirect, incidental, or consequential damages does not impose "any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder . . ." (BellSouth Brief, quoting from Joint Petitioner Exhibit A at GTC § 10.4.4. BellSouth also argues that Joint Petitioners may use the proposed language to circumvent the limitation of liability provision by bringing a claim for damages "vis-à-vis its End Users." (BellSouth Brief, p. 17).

Joint Petitioners

Joint Petitioners argue that their proposed language clarifies the scope of their voluntary waiver of certain damage claims. This clarification includes language that expressly excludes from the description of "indirect, incidental and consequential damages" damages that "result directly and in a reasonably foreseeable manner . . ." (Joint Petitioner Exhibit A at GTC § 10.4.4). Joint Petitioners argue that their proposed language places an appropriate risk on the parties. (Joint Petitioner Brief, p. 17). Joint Petitioners also state that because BellSouth recognizes the distinction between direct, foreseeable damages and indirect, consequential damages, its argument that Joint Petitioners' proposal would gut the limitation of liability provisions in the agreement are false. (Joint Petitioner Reply Brief, p. 12).

Staff Recommendation

The Staff recommends that the Commission adopt the language proposed by Joint Petitioners with the following modification: "any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party ~~or by such other Party vis-à-vis its End Users~~ to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder . . ." BellSouth's objection that the language as a whole is unnecessary is not persuasive. The language places a clarification on the scope of indirect, incidental or consequential damages. Given that neither party disputes that these damages do not include direct and foreseeable damages, the inclusion of this clarification by itself should not work to either party's disadvantage.

BellSouth did raise a legitimate complaint that the language proposed by Joint Petitioners may allow them to circumvent other provisions in the agreement concerning the limitation of liability. Specifically, this concern relates to the language in the agreement related to limitations of liability elsewhere in Section 10. Joint Petitioners' proposal states that nothing in Section 10 would impose any limitation on the liability of a party for claims for damages incurred by the other party vis-à-vis its end users if those damages were direct and foreseeable. However, Section 10 contains provisions that limit the liability of parties for these types of damages. The effectiveness of those provisions are called into question if a CLEC may claim damages "vis-à-vis" its end users to bring a claim for damages that exceed the liability limitations elsewhere in Section 10. Therefore, the Staff recommends the Commission delete the phrase "by such other Party vis-à-vis its End Users" from Joint Petitioners' proposal.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 6.

Item 7

What should the indemnification obligations of the parties be under this Agreement?

Positions of the Parties

BellSouth

BellSouth argues that Joint Petitioners' proposal is one-sided because it would hold BellSouth, as the primary providing party, responsible for indemnifying a broader range of actions. Whereas the receiving party, under Joint Petitioners' proposal, would be responsible to indemnify the providing party only "against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications," the providing party would be required to indemnify the receiving party for "(1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with the Agreement to the extent caused by the providing Party's negligence, gross negligence or willful misconduct." (BellSouth Brief, p. 18, *quoting from Joint Petitioner Exhibit A GT&C at §10.5).*

BellSouth also states that Joint Petitioners' position contradicts the conclusion of the FCC Wireline Competition Bureau in the *Virginia Arbitration Order.* (BellSouth Brief, p. 19). The Wireline Competition Bureau held that Verizon did not have to provide "perfect service to WorldCom's customer and should not have to indemnify WorldCom for all claims made by WorldCom's customers against WorldCom. *Virginia Arbitration Order*, at 709. BellSouth alleges that Joint Petitioners' language would

require BellSouth to indemnify Joint Petitioners for essentially any type of claim. (BellSouth Brief, p. 19). BellSouth also argues that the broad indemnification language is not necessary because each of the Joint Petitioners has tariff language that protects it from liability for the actions of service providers. *Id.* at 20. In addition, BellSouth again argues that reference to what is done in commercial agreements is not relevant given the distinctions between commercial agreements and Section 252 interconnection agreements. *Id.*

BellSouth asserts that its proposed language limits indemnification to foreseen risks. (BellSouth Reply Brief, p. 16). It provides that the providing party shall not be indemnified against claims that result from its gross negligence or willful misconduct. (Joint Petitioner Exhibit A GT&C at §10.5). Further, the indemnification obligation extends to claims for "libel, slander or invasion of privacy resulting from the receiving Party's own communications" and "any claim, loss or damage claimed by the End User or customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations arising out of this Agreement." *Id.*

Joint Petitioners

Joint Petitioners argue that their language merely holds parties responsible for their own negligence. (Joint Petitioner Brief, p. 19). Joint Petitioners argue further that even in a regulated commercial arrangement it is not fair for CLECs to pay when BellSouth causes harm. *Id.* at 21. The Joint Petitioners dispute BellSouth's characterization of their position as hypocritical by pointing out that they indemnify their customers for their own negligence. (Joint Petitioner Reply Brief, p. 13).

Staff Recommendation

The Staff recommends that the Commission conclude that a Party should be indemnified, defended and held harmless against any claims, loss or damage to the extent reasonably arising from or in connection with the other Party's negligence, gross negligence or willful misconduct. Parties should be held responsible for their own negligence. The Staff's recommendation treats each party the same with regard to the types of actions for which they must indemnify the other party. Item 4 is relevant to this discussion. In Item 4, the Staff recommended that the Commission limit the parties' liability to bill credits for acts of negligence. Because the Commission adopted Staff's recommendation on Item 4, any burden resulting from Staff's recommendation on this item is reduced.

This recommendation is not inconsistent with the Staff's recommendation on Item 4. Item 4 addresses limitations on each party's liability for negligent acts. Both BellSouth and Joint Petitioners recommended some limitation of liability. The Commission adopted BellSouth's proposed limitation, which was lower than the limit recommended by Joint Petitioners. The basis for doing so, however, was not that parties should not be responsible for their own negligence. If that were the case, then

presumably Joint Petitioners would not recommend any limitation on liability for negligent acts. Rather, the Commission adopted a Staff recommendation that considered the industry standard, the relative exposure of the parties and the *Virginia Arbitration Order*. In the context of this Item, the Staff has recognized that the lower limitation on liability that the Commission adopted on Item 4 should reduce any burden from indemnifying, defending and holding harmless a party against claims, loss or damage to the extent reasonably arising from or in connection with the other Party's negligence, gross negligence or willful misconduct.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 7.

Item 9

BellSouth Issue Statement: Under what circumstances should a Party be allowed to take a dispute concerning the interconnection agreement to a Court of law for resolution first?

CLEC Issue Statement: Should a court of law be included in the venues available for initial dispute resolution?

Positions of the Parties

BellSouth

BellSouth's position is that in the event a dispute is within the jurisdiction or expertise of the Commission or the FCC, then the parties should be obligated to bring the complaint to the Commission or the FCC. (BellSouth Brief, p. 21). BellSouth asserts that the Commission is in the best position to resolve disputes under interconnection agreements given that it is the body that approves the interconnection agreements. *Id.* at 22. BellSouth cites to a decision of the Eleventh Circuit to support its position. In BellSouth Telecommunications, Inc. v. MCI metro Access Transmission Services, Inc., 317 F.3d 1270, 1277 (11th Cir. 2003), the Court stated that "the language of § 252 persuades us that in granting to the public service commission the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance and to subject their determination to challenges in the federal courts."

BellSouth also argues that Joint Petitioners' proposed language would not accomplish their goal of avoiding bifurcated hearings because a court could still refer these matters to the state commissions for resolution. (BellSouth Brief, p. 23). BellSouth's language, in contrast, would allow the parties to resolve a dispute in a single forum because either party may file a complaint with the FCC. *Id.*

Joint Petitioners

Joint Petitioners argue that they should not be forced to give up their right to resolve disputes in a court of law. (Joint Petitioner Brief, p. 21). Under BellSouth's proposed language, it could force all disputes to come before the Commission simply by not agreeing with a CLEC's claim that the Commission lacks jurisdiction. *Id.* at 22. Joint Petitioners further argue that the Commission lacks the authority to order in favor of BellSouth on this issue because to do so would be to strip state and federal courts of their constitutionally set jurisdiction. *Id.* at 23. In addressing BellSouth's concern that a dispute may be brought prematurely in a court of law and remanded to the appropriate body, Joint Petitioners emphasize that it is not BellSouth's decision to make whether claims may be heard in court. *Id.* at 24.

Joint Petitioners also state that they do not challenge the Commission's expertise, but cannot agree that all claims arising out of interconnection agreements must be heard by the Commission. (Reply Brief, pp. 15-16).

Staff Recommendation

Staff recommends that the Commission order that parties are not precluded from seeking to have disputes arising out of interconnection agreements resolved initially in a court of law. The Eleventh Circuit decision relied upon by BellSouth was issued on reconsideration *en banc* and described the initial panel's decision as finding "that there was no statutory authority for the GPSC to interpret and enforce these interconnection agreements in the first instance." BellSouth Telecommunications, Inc. v. MCI metro Access Transmission Services, Inc., 317 F.3d 1270, 1273 (11th Cir. 2003). The question before the Eleventh Circuit on reconsideration was whether the Georgia Public Service Commission had the authority to interpret and enforce the interconnection agreement between the parties. The court answered this question in the affirmative. *Id.* at 1279. The Eleventh Circuit did not decide the issue of whether parties were precluded from bringing disputes arising from interconnection agreements in a court of law.

The Commission has previously taken the opportunity to inform courts of its authority and expertise in resolving complaints arising from interconnection agreements as well as of its interest in setting state regulatory policy. The Staff recommends that the Commission continue to participate in appropriate cases through such means rather than precluding parties from initiating disputes in court.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 9.

Item 12

Should the Agreement explicitly state that all existing state and federal laws, rules, and regulations, and decisions apply unless otherwise specifically agreed to by the Parties?

Positions of the Parties

BellSouth

BellSouth's position is that parties should not be penalized for any ambiguity of silence in the agreement relating to the parties' obligations under telecommunications law, and that parties are not allowed to renegotiate provisions based on a new reading of "Applicable Law." (BellSouth Brief, p. 24). BellSouth states that while it does not disagree that the law in effect at the time of execution of the agreement is automatically incorporated into the agreement, unless otherwise agreed to by the parties, it objects to a party's use of this provision to renegotiate or ignore already agreed upon language. *Id.* at 26.

BellSouth states that its position is consistent with the position reached by the North Carolina Utilities Commission in the *Recommended Order* in Docket No. P-500, Sub 18, *In re: Petition for Arbitration by ITC^DeltaComs*. BellSouth also argues that adoption of Joint Petitioners' proposal would unlawfully require it to arbitrate issues that are not contained in Section 251(b) or (c) of the Federal Telecommunications Act. *Id.* at 28.

BellSouth further argues that under Joint Petitioners' proposal, the parties would have to maintain a list of every instance in which the parties expressly agreed to something other than the law. (BellSouth Reply Brief, p. 20). Finally, BellSouth argues that, under Joint Petitioners' proposal, BellSouth could be found in violation of state unbundling laws that were not referenced by the agreement, even if BellSouth no longer has such an obligation under federal law. *Id.* at 22.

Joint Petitioners

Joint Petitioners argue its position that all laws of general applicability that exist at the time of contracting will apply to the contract unless expressly repudiated via an explicit exception or displaced by conflicting requirements is consistent with Georgia contract law. (Joint Petitioner Brief, p. 25). As a practical matter, Joint Petitioners argue that it would not be reasonable for the parties to expressly incorporate all elements of generally applicable law into one contract. *Id.* at 26. Joint Petitioners respond to BellSouth's claim that under their proposal an interconnection agreement would not even be necessary. Interconnection agreements must be in writing to be approved by state commissions and to satisfy the Statute of Frauds. *Id.* at 27. In addition, Joint Petitioners argue that BellSouth's argument concerning preemption would be properly handled in a request for declaration of preemption. *Id.* at 30.

Staff Recommendation

The Staff recommends that the Commission adopt Joint Petitioners' proposed language for this item. Parties are presumed to contract with regard to existing law, unless expressly stipulated otherwise. Jenkins v. Morgan, 100 Ga. App. 561, 562 (1959); magnetic Resonance Plus, Inc. v. Imaging Systems, Int'l, 273 Ga. 525 (2001).

BellSouth's argument that Joint Petitioners' proposal would require the parties to make a list of every instance in which they would differ from Applicable Law is not persuasive. This argument necessarily presumes that there was a greement upon terms and conditions that deviate from existing law. In order for a contract to be binding, there must be a meeting of the minds. Dumas v. First Federal Savings and Loan Association, 654 F.3d. 359, 360 (5th Cir. 1981). It is not unduly burdensome for parties that reach this agreement to memorialize it. However, it would be unduly burdensome to require parties to list every instance in which the parties agree to abide by existing law.

The Staff does not find any merit in BellSouth's argument that Joint Petitioners, under their proposal, will be permitted to change its argument as to what Applicable Law was at the time the agreement. If the parties had an understanding at the time of the agreement about a given law, then that law obviously has some relevance to the agreement. If the parties knowingly deviate from the law in question, that deviation should be set forth in the agreement, or else pursuant to Georgia contract law, the parties will be presumed to contract in accordance with it. To the extent the concern is that one party may advance a new and self-serving construction of the law in question at some point after the execution of the agreement, then that party will still have to convince an adjudicating body that its self-serving construction is correct. This task may be made even more difficult if there is any evidence of the parties' intent at the time the agreement was executed.

Finally, the Staff does not agree with BellSouth's scenario that a CLEC could argue that under an Applicable Law provision that BellSouth is in violation of state law that has since been preempted by federal law. If there is a dispute over whether such preemption has taken place, then that dispute should be handled consistent with how any other such dispute would be resolved. If it is acknowledged that such state law is preempted, then the Joint Petitioners would not have any rights under that state law. "Applicable Law" is defined in the agreement as "all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, injunctions, judgments and binding decisions and decrees that relate to its obligations under this Agreement." (Section 32.1).

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 12.

Item 26

Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

BellSouth

BellSouth argues that it does not have any obligation under Section 271 to combine Section 271 elements or to combine elements that are no longer required to be unbundled under Section 251(c)(3) of the Federal Act. (BellSouth Brief, p. 29). BellSouth contends that Joint Petitioners are trying to "resurrect UNE-P" by requiring it to combine Section 271 switching with a UNE Loop. *Id.* at 30. In support of its position, BellSouth cites to the Errata to the *Triennial Review Order*[3], in which the FCC deleted the only reference to Section 271 in its discussion of commingling. *Id.* The FCC limits the discussion of BellSouth's commingling obligation to tariffed access services. *Id.* at 31.

BellSouth also argues that the *Triennial Review Remand Order*[4] supports its position. In the *TRRO,* BellSouth asserts that the FCC limited the discussion of commingling obligations to tariffed services. (BellSouth Brief, p. 32). The decisions of the Illinois and Utah utility commissions support BellSouth's interpretation of the FCC orders. *Id.* BellSouth also states that the Commission does not have jurisdiction over elements provided pursuant to Section 271. *Id.* at 33.

Joint Petitioners

Joint Petitioners rely upon the FCC Rule 47 C.F.R. § 309(e) and paragraphs 579-584 of the *Triennial Review Order* for their position that BellSouth is obligated to commingle Section 251 elements with Section 271 elements obtained at wholesale. FCC Rule 51.309(e) states that "an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC." Joint Petitioners' proposed language for Item 26 incorporates the FCC rules expressly. (Joint Petitioner Brief, p. 31).

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[3] 18 FCC Rcd 16978, 17145, *corrected by Errata,* 18 FCC Rcd 19020, *vacated and remanded in part, aff'd in part, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*"USTA II"), cert. denied,* 125 S. Ct. 313 (2004) (*"Triennial Review Order" or "TRO").*

[4] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005) (*"Triennial Review Remand Order" or "TRRO").*

Joint Petitioners also address the Errata issue raised by BellSouth. Paragraph 584 of the *TRO* states that ILECs are required to "permit commingling of UNEs and UNE combinations with other wholesale facilities and services including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act." Joint Petitioners reason that the Errata removed the reference to Section 271 because the paragraph as a whole is focused on resale. (Joint Petitioner Brief, p. 32). They cite to the testimony of BellSouth witness, Kathy Blake, in which she stated her belief that the errata did not impact the rule. *Id.* citing to Tr. 1079.

Joint Petitioners reject BellSouth's argument that its commingling obligation extends only to the tariffed services. Joint Petitioners state there is no basis for BellSouth's apparent position that it can avoid its commingling obligation for switching by offering it in a contract as opposed to its tariff. (Joint Petitioner Brief, pp. 33-34). Joint Petitioners further cite to Footnote 1990 of the *Triennial Review Order* and the corresponding Errata, which deleted the sentence that states "We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to [Section 271 checklist items 4-6 and 10." Joint Petitioners argue that this deletion clarifies that the commingling obligation pertains to Section 271 elements obtained at wholesale. (Joint Petitioner Brief, p. 34).

Staff Recommendation

The Staff recommends that the Commission resolve this issue consistent with its March 2, 2006 Order on Remaining Issues in Docket No. 19341-U. In that Order, the Commission provided the following summary of its decision on this issue:

> The Commission finds, consistent with CompSouth's position, that to the extent a Section 271 facility or service is obtained at wholesale, BellSouth should be obligated to commingle such facility or service with Section 251 UNEs or UNE combinations. The FCC has not been clear on this issue. To reach the position advocated by BellSouth appears to require changing the meaning of the plain language of an FCC order; whereas the position advocated by the CLECs does not involve the same obstacle. That is, the FCC has stated that the commingling obligation applies to facilities or services obtained at wholesale. It has not stated that Section 271 facilities or services obtained at wholesale are excluded from this obligation.
>
> This action should not be construed as the recreation of UNE-P. The pricing standard would be different from UNE-P, and adoption of the motion speaks only to the scope of BellSouth's commingling obligation. This action does not mean that this Commission has concluded that it would be prudent or appropriate to set just and reasonable rates under Section 271 for the elements that composed UNE-P.

(Order on Remaining Issues, p. 6).

Conclusion

In Docket No. 19341-U, the Commission addressed BellSouth's obligation to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act. The Commission thoroughly examined the issue in the context of Docket No. 19341-U. The parties did not raise any arguments that warrant modification or reversal of its conclusion from that case.

The Commission adopts the Staff recommendation on Item 26 to remain consistent with the conclusion it reached in Docket No. 19341-U on BellSouth's commingling obligations. The Commission incorporates into this order the entirety of the reasoning and conclusions from the March 2, 2006 Order on Remaining Issues in Docket No. 19341-U.

The Commission properly determined in Docket No. 19341-U that the FCC intended for state commissions to enforce any obligation that BellSouth had to commingle Section 251 and 271 elements. The Commission reasoned as follows:

> The *TRO* provides that restricting commingling would be inconsistent with the nondiscrimination requirement in Section 251(c)(3). ¶ 581. State commissions enforce Section 251(c)(3). The *TRO* also states that incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are connected, combined or otherwise attached to wholesale services. State commissions have jurisdiction to consider the unlawful denial of UNEs.

(Order on Remaining Issues, p. 33).

The Commission then turned to the question of whether the FCC intended to include Section 271 requirements within wholesale services. The *TRO* requires ILECs "to perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act." ¶ 579. The Commission observed that "Section 271 elements obtained at wholesale would fit within this description." (Order on Remaining Issues, p. 33).

In finding that the FCC intended for Section 271 elements to be included in the wholesale facilities or services required to be commingled, the Commission first compared the language of the *TRO* with the language of the *Supplemental Order Clarification*[5].

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[5] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005) (*"TRRO"*).

> In describing the types of services for which commingling with Section 251 elements is required, the *TRO* offers by way of example "switched and special access services offered pursuant to tariff." *TRO* ¶ 579. This language differs meaningfully from the FCC's treatment of commingling in the *Supplemental Order Clarification*. In its *SOC*, the FCC modified the term "commingling" with the following parenthetical "(i.e. combining loops or loop-transport combinations with tariffed special access services)." *SOC*, ¶ 28. In the *TRO*, issued three years later, the FCC eliminated the restrictions it placed on commingling in the *SOC*, and apparently adjusted its definition of commingling. Tariffed special access services went from being the only services at issue to an example of the services that could be at issue in commingling.

(Order on Remaining Issues, p. 33). The FCC stated that commingling with Section 251 elements is required for facilities and services obtained at wholesale, and identified tariffed services as only an example of a type of wholesale facility or service. The question then becomes whether the FCC excluded Section 271 facilities and services from the commingling requirement.

In support of its position that the FCC intended to exclude 271 checklist items from the commingling requirement, BellSouth cites the *TRO Errata* which deleted the phrase "including any network elements unbundled pursuant to section 271" from paragraph 584 of the *TRO*. Joint Petitioners make the argument that this deletion was merely deleting a "stray" reference to Section 271 in a paragraph addressing retail issues. The *TRO Errata* also deleted the sentence from footnote 1990 that expressly excluded Section 271 elements from the commingling requirement. Reviewing these two deletions together indicates that to the extent a Section 271 facility or service is obtained at wholesale, BellSouth should be obligated to commingle such facility or service with Section 251 UNEs or UNE combinations. The meaning of paragraph 584 of the *TRO* does not change as a result of the deletion, but the meaning of Footnote 1990 does.

> . . . while the specific inclusion was deleted, the general inclusion remains. That is, the sentence as modified still applies the commingling obligation to Section 271 elements obtained at wholesale. The *TRO Errata* removed a redundancy in paragraph 584, but it does not alter the plain meaning of the sentence. In contrast, the meaning of footnote 1990 does change as a result of the *TRO Errata*.

(Order on Remaining Issues, p. 34). Prior to the Errata, the *TRO* included conflicting statements. After the Errata, the conflict has been resolved, and the plain language of the FCC orders applies the commingling obligations to facilities and services obtained at wholesale, without any exception to this obligation made for Section 271 elements.

BellSouth also cites to portions of the *TRO* and the *TRRO,* in which the FCC uses tariffed services as an example of the types of services for which BellSouth's commingling obligation applies. The Commission properly addressed this argument in the context of Docket No. 19341-U.

> It cannot be disputed that the *TRO* requires ILECs to commingle Section 251 elements with other wholesale facilities and services. It is also the case that while the FCC used special access services as an example of a wholesale facility or service in the *TRO* it did not exclude other wholesale facilities or services. Finally, it is not disputed that Section 271 elements may be obtained at wholesale. So in the *TRO,* Section 271 elements were included as part of the commingling obligation. Had the FCC in the *TRRO* wished to exclude Section 271 elements from commingling or to clarify that the *TRO* excluded Section 271 elements from the commingling obligation, then it is reasonable to assume it would have stated that it was doing so. It did not make any such statement. Rather, it stated only that the *TRO* allowed CLECs to convert tariffed services to UNEs and UNE combinations, and that this decision was upheld on appeal. (*TRRO,* ¶ 229). Given that the plain language of the *TRO* applies to any facilities or services obtained at wholesale, and that the *TRRO* neither modifies nor clarifies the *TRO* on this issue, BellSouth's reliance on this paragraph is unavailing.

(Order on Remaining Issues, p.34). The Commission has not been presented with any arguments that would justify departing from the reasoning and conclusion set forth in the above-paragraph.

The Commission's interpretation of the *TRO* comports with the 47 C.F.R. § 51.5, which defines commingling as "the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services."

In conclusion, the Commission finds that to the extent a Section 271 facility or service is obtained at wholesale, BellSouth should be obligated to commingle such facility or service with Section 251 UNEs or UNE combinations. As the Commission noted in its Order on Remaining Issues, this action should not be construed as recreating UNE-P. The pricing standard would be different from UNE-P, and adoption of the motion speaks only to the scope of BellSouth's commingling obligation. This action does not mean that the Commission has concluded that it is prudent or appropriate to set just and reasonable rates under Section 271 for the elements that composed UNE-P. In fact, the Commission determined in its Order on Reconsideration of its Order Setting

Rates Under Section 271 that it was more appropriate not to set a just and reasonable rate for local switching at that time. (Order on Reconsideration, p. 2).

Item 36

(A) How should line conditioning be defined in the Agreement?

(B) What should BellSouth's obligations be with respect to line conditioning?

Item 37

Should the Agreement contain specific provisions limiting the availability of Line Conditioning to Copper loops of 18,000 feet or less?

Item 38

Under what rates, terms and conditions should BellSouth be required to perform Line Conditioning to remove bridge taps?

BellSouth

For Item 36, BellSouth argued that it is obligated to perform line conditioning on the same terms and conditions that it provides for its own customers. (BellSouth Brief, p. 37). The basis for an ILEC's obligation to perform line conditioning is established by its nondiscriminatory obligation under Section 251(c)(3). *Id.* at 38. Obligating BellSouth to perform line conditioning beyond what it provides for its own customers would require the construction of a "superior network" in violation of the *Triennial Review Order. Id.* The D.C. Circuit distinguished between "routine network modifications" and a "superior quality" alteration based on whether the ILEC routinely performs for its own customers. United States Telecom Ass'n v. FCC, 359 F.3d 554, 578 (D.C. Circuit 2004). BellSouth argues that it is immaterial that its current agreements contain TELRIC rates for line conditioning in excess of what BellSouth provides for its own customers because those agreements do not comply with the *Triennial Review Order.* (BellSouth Brief, p. 39).

For Item 37, BellSouth argues that it should not be required to remove load coils in excess of 18,000 feet at TELRIC for Joint Petitioners because it does not remove load coils on long loops for its own customers. (BellSouth Brief, p. 40). BellSouth stated that it would remove load coils on long loops for Joint Petitioners under its special construction pricing. *Id.*

Item 38 pertains to the removal of bridged taps between 0 and 2500 feet at TELRIC. BellSouth again argues that it does not perform this function for its own customers and should not be required to do so for Joint Petitioners at TELRIC. (BellSouth Brief, p. 42). It offers to remove bridged tap between 0 and 2500 feet at its special construction pricing. *Id.*

Joint Petitioners

On Item 36, Joint Petitioners request that the Commission adopt the definition in the FCC rule for line conditioning. (Joint Petitioner Brief, p. 35). Joint Petitioners argue that line conditioning of any length is provided for in their current interconnection agreements and the *TRO* did not circumscribe BellSouth's line conditioning obligations. *Id.* at 36. Joint Petitioners also argue that the rules for routine network modification do not limit line conditioning. A routine network modification is defined as "an activity the incumbent LEC regularly undertakes for its own customers." 47 C.F.R. § 51.319(a)(8). Joint Petitioners argue that this rule is distinct from the line conditioning rule and neither rule cross-references the other. (Joint Petitioner Brief, p. 38).

Joint Petitioners reason that taking BellSouth's argument to its logical extreme would allow BellSouth to eliminate all line conditioning completely based on what it decides is prudent for its own customers. (Joint Petitioner Brief, p. 40). Joint Petitioners state that adoption of BellSouth's position would negatively impact competition in Georgia. *Id.*

Joint Petitioners' stance on Item 36 essentially foretells its position on Item 37. Joint Petitioners argue that BellSouth should be required to condition loops of 18,000 feet and longer regardless of whether it does so for its own customers. Joint Petitioners point out that the Commission has already set TELRIC rates for line conditioning on loops of all lengths. (Joint Petitioner Brief, p. 43). Likewise on Item 38, Joint Petitioners argue that BellSouth must perform line conditioning on loops of less than 2,500 feet at TELRIC. *Id.* at 44.

Staff Recommendation

The Staff recommends that the Commission resolve this issue consistent with its March 2, 2006 Order on Remaining Issues in Docket No. 19341-U. In that Order, the Commission provided the following summary of its decision on Issues 26 and 27:

> **Issue 26: -- What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?**
>
> (1) 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.
>
> (2) The Commission should order BellSouth to permit inclusion of the CompSouth proposed language on routine network modifications ("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?**
>
> (1) 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.
>
> (2) The Commission finds 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.

(Order on Remaining Issues, p. 9).

Item 36(A), which discusses the definition of line conditioning, was not resolved in Docket No. 19341-U. BellSouth proposes that line conditioning be defined "as a RNM 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 speed switched wireline telecommunications capability, including xDSL service. Such devices include, but are not limited to; load coils, low pass filters, and range extenders." GTC § 2.12.1.

Joint Petitioners propose that line conditioning should be defined as it is in 47 C.F.R. 51.319(a)(1)(iii)(A), which states as follows:

> 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.

Staff recommends that the Commission adopt the definition proposed by Joint Petitioners. BellSouth has not provided adequate justification for varying from the federal regulation.

Conclusion

In Docket No. 19341-U, the Commission addressed BellSouth's obligation to perform line conditioning. The Commission thoroughly examined the issue in the context of Docket No. 19341-U. The parties did not raise any arguments that warrant modification or reversal of its conclusion from that case. The Commission did not adopt a definition of line conditioning as part of Docket No. 19341-U. The Commission adopts Staff's recommendation to define line conditioning consistent with the FCC Rule.

In Docket No. 19341-U, the Commission found that BellSouth is obligated to perform line conditioning in instances in which BellSouth is not providing advanced services to the customers in question. The Commission analyzed the *Triennial Review Order* as well as the *UNE Remand Order.*[6]

> 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).

(Order on Remaining Issues, p. 48). The Commission concluded from this authority that BellSouth was required to condition loops regardless of whether it was providing advanced services to those customers. The Commission's conclusion was reinforced by the following portion of the FCC's line conditioning rules:

> 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.

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[6] *In the Matter of 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 (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) *cert denied sub nom. WorldCom v. United States Telecom Ass'n,* 123 S.Ct 1571 (2003 Mem.)

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 Commission then focused on BellSouth's position that line conditioning does not constitute the creation of a superior network. The FCC has stated that line conditioning 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). The Commission read this language in the context of the remainder of the section in the *TRO* that addressed line conditioning, and concluded 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." (Order on Remaining Issues, p. 48). The FCC's conclusion in paragraph 643 of the *TRO* that "Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices" expands 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 Commission concluded its discussion with the following:

> 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.

(Order on Remaining Issues, p. 49). This provision of the order must be read consistent with the *Triennial Review Order*.

> 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. 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.

(*Triennial Review Order*, ¶ 643). The Commission adopts the Staff's recommendation and resolves the Issues 37 and 38 in this proceeding consistent with its determination in Docket No. 19341-U.

Item 46

BellSouth Issue Statement: Should the CLECs be allowed to incorporate any Commission decision that required BellSouth to provide FastAccess over UNE-P?

CLEC Issue Statement: (A) May BellSouth refuse to provide DSL services to CLEC's customers absent a Commission order establishing a right for it to do so?

(B) Should CLEC be entitled to incorporate into the Agreement, for the term of this Agreement, rates, terms and conditions that are no less favorable in any respect, than the rates terms and conditions that BellSouth has with any third party that would enable CLEC to serve a customer via a UNE loop that may also be used by BellSouth for the provision of DSL services to the same customer?

Positions of the Parties

BellSouth

BellSouth argues that the Commission should dismiss this issue because of the FCC's decision that a state commission requirement that required an ILEC to provide DSL over UNE-P would be inconsistent with federal law. *Memorandum Opinion and Order and Notice of Inquiry,* WC Docket No. 03-251, March 25, 2005.

Joint Petitioners

Joint Petitioners did not brief this issue.

Staff Recommendation

The Staff recommends that the Commission dismiss this issue. Since the filing of briefs in this case, the Commission vacated its orders in Docket Nos. 11901-U and 16583-U to the extent the Orders concern DSL over UNE-P. (Order Rescinding and Vacating Prior Commission Orders). The vacatur was subject to BellSouth's agreement to continue to provide DSL service to its then existing customer base being served via UNE-P who currently have BellSouth's DSL service, (but not to its then existing UNE-P customers who did not currently have its DSL service) until the conclusion of the transition period for UNE-P established in the *TRRO* on March 11, 2006. *Id.* at 1.

The Commission emphasized that it maintained its concern about the anticompetitive aspects of BellSouth's policy.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 46.

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 the Parties

BellSouth

With regard to Issue B, BellSouth complains that Joint Petitioners are attempting to unlawfully limit its audit rights to those circuits identified in the notice of the audit and for which sufficient documentation is produced to support the audit. (BellSouth Brief, p. 45). The *TRO* is silent on the contents of any notice requirement and does not limit BellSouth's audit right to those circuits identified in any notice. *Id.* at 46. BellSouth further contends that Joint Petitioners' proposal would allow an audited party to delay the audit by claiming that either the notice or the supporting documentation was insufficient. *Id.* at 47.

Joint Petitioners

Joint Petitioners argue that their position is consistent with the requirements in the *TRO* that grants ILECs "limited audit rights" to conduct audits "based upon cause." (*TRO*, ¶ 622). BellSouth's position that it should be permitted to audit all EEL circuits based upon a concern over a single EEL renders the language concerning "limited scope" meaningless. (Joint Petitioner Brief, pp. 47-48). Joint Petitioners agree that the initial scope of an audit may be expanded, but only upon agreement of the parties or order of the Commission. *Id.* at 48.

Staff Recommendation

The Commission held in Docket No. 19341-U that BellSouth must "have some cause prior to initiating an audit." (Order on Remaining Issues, p. 51). Although BellSouth is correct that the *TRO* does not include any express requirement for the contents of the notice, the *TRO* finds that states are better positioned to address the fact-specific issues related to the implementation of audits. (*TRO,* ¶ 625). The FCC, therefore, has left to the states some authority to include requirements that are not expressly stated in federal law. However, the Staff recommends that the Commission not

require BellSouth to provide notice of each circuit it intends to audit or to provide a specific amount of documentation along with the notice.

Staff's recommendation draws a distinction between what should be required during the interaction between the parties on the implementation of an audit, and what must be provided to the Commission to resolve a dispute between the parties over the implementation of an audit. BellSouth is obligated to "have" a concern. If a party disputes whether BellSouth has a concern, and the matter comes before the Commission, then BellSouth will likely be required to demonstrate that it has a reasonable concern. Initially, prior to any dispute over whether a concern exists, BellSouth should not be required to provide particular documentation. However, if the CLEC disputes whether BellSouth has a concern and the matter is brought before the Commission, then BellSouth will need to demonstrate to the Commission that it has a concern. Similarly, where there is no dispute over whether BellSouth has a concern, it is reasonable to allow BellSouth to conduct the audit without having to provide notice of each circuit it intends to audit. However, if the concern is disputed, the Commission should reserve the right to approve an audit of a particular scope that is commensurate with the concern that BellSouth has raised.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Items 51(B) and (C).

Item 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?

Positions of the Parties

BellSouth

BellSouth states that it will provide the transiting function, and that all that is at issue on Item 65 is the rate at which BellSouth will be allowed to charge to perform this function. (BellSouth Brief, p. 49). BellSouth cites to the *Virginia Arbitration Order* to support its position that it is not required to provide the transiting function at TELRIC rates. *Id.* BellSouth also relies upon the Commission's decision in Docket No. 16772-U, in which the Commission approved an interim transit intermediary charge ("TIC") of $.0025. *Id.* at 50.

BellSouth also argues that it is not required to provide the transiting function. (BellSouth Reply Brief, p. 37, citing to *TRO,* ¶ 534, fn. 1640). BellSouth maintains that its offer in this arbitration is the same rate that was ordered by the Commission in Docket

No. 16772-U. (BellSouth Reply Brief, p. 37). Finally, BellSouth argues that just because the Joint Petitioners have received this service for free in the past does not justify continued free service. *Id.* at 38.

Joint Petitioners

Joint Petitioners argue that BellSouth is asking to impose a TIC in addition to the TELRIC rates the parties already voluntarily agreed would apply to BellSouth's transit service. (Joint Petitioner Brief, p. 53). The TIC that BellSouth wishes to charge is not comparable to the composite TIC that was approved by the Commission in Docket No. 16772-U. *Id.* at 53-54. The parties agreed that BellSouth will provide transit service at TELRIC-compliant rates, but not to the $0.0015 per minute in addition to the agreed-upon TELRIC rates. *Id.* at 54.

Joint Petitioners urge rejection of BellSouth's proposed TIC because it is not cost-based and has never been imposed on any of the Joint Petitioners previously. (Joint Petitioner Brief, p. 54). Joint Petitioners also state that BellSouth's argument that Joint Petitioners can avoid the TIC by connecting directly with other carriers should not be given any weight because BellSouth is already obligated under the Agreement to transit the traffic. *Id.* at 56.

In their Reply Brief, Joint Petitioners argue that the Commission order adopted the $0.0025 transit rate was on an interim basis. (Joint Petitioner Reply Brief, p. 32). Further, Joint Petitioners argue that BellSouth is asking the Commission to adopt a rate that was neither litigated nor discussed prior to arbitration. *Id.* Joint Petitioners argue that state commissions "may only arbitrate issues that were negotiated by the parties and that implement, or are required for the implementation of, the obligations of the pro-competitive provisions of the 1996 Act." *Id.*

Staff Recommendation

The Staff recommends that the Commission approve a Transit Rate of $0.0025 consistent with its decision in Docket No. 16772-U. In their initial Post-Hearing brief, Joint Petitioners argue that BellSouth was proposing a charge beyond what was ordered in the prior Commission docket. In its Reply Brief, BellSouth appears to be asking for the same rate. Regardless of what action BellSouth is asking the Commission to take, the Staff recommends that the Commission approve the same rate that was adopted in Docket No. 16772-U.

In Docket No. 16772-U, the Commission noted that the FCC Wireline Competition Bureau determined that the rate for transiting service did not need to be TELRIC-compliant. (Commission Order, pp. 8-9). The Commission stated that it would continue to monitor the issue. *Id.* at 9. Should the Commission modify the transit rate in the future, then parties may avail themselves of the terms and conditions in the Commission order.

The Staff recommends rejection of Joint Petitioners' argument that the Commission is not authorized to arbitrate this issue because it was never negotiated by the parties. The record reflects that the parties agreed TELRIC rates would apply to the tandem switching and common transport components of the transit function. (Tr. 1104). However, the rate for the transiting function has always been a disputed issue in the arbitration. (Tr. 1104). While BellSouth previously listed the transport charge separately, its most recent offer to resolve the issue involved a composite rate that would cover tandem switching, common transport and the TIC. (Tr. 1104-05). It appears that BellSouth tried a new approach to resolve an existing dispute. It does not appear that the dispute, itself, is new, or that BellSouth is negating agreements previously reached by the parties.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 65.

Item 86B

How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?

Positions of the Parties

BellSouth

BellSouth's position is that Joint Petitioners should be required to produce a Letter of Authorization (LOA) verifying that the party had the right to review a customer service record within two weeks of the request. (BellSouth Brief, p. 51). Because customer service records contain customer proprietary network information, the parties have agreed not to access the records without an LOA from the customer. *Id.* The parties have further agreed that parties must use their best efforts to provide the appropriate LOA within seven (7) business days. *Id.* BellSouth proposes that if a request is not complied with by the end of the seven business days, that the requesting party will provide notice that ordering systems may be suspended in five (5) days. *Id.* at 52.

BellSouth argues that its proposal is reasonable, given the Joint Petitioners' admission that producing the LOA could take as short a period of time as two days. (BellSouth Brief, p. 52). In addition, because the Agreement requires parties to continue meeting their contractual obligations during the pendency of a dispute, there is not a legitimate concern that BellSouth would take corrective action before the dispute has been resolved. *Id.* at 53. BellSouth also criticizes the speculative nature of Joint Petitioners' concerns. *Id.*

BellSouth contends that it is providing Joint Petitioners with what they say they want in that matters are referred to the dispute resolution provisions in the General Terms

and Conditions of the Agreement, pursuant to which "each Party shall continue to perform its obligations under this Agreement." (BellSouth Reply Brief, p. 39, citing GTC § 13.2.) BellSouth further states that the proposed suspension and termination rights are triggered only if a carrier disregards a request to produce an LOA or fails to dispute a notice that alleges non-compliance related to customer service records. *Id.*

Joint Petitioners

With regard to disputes over unauthorized access to customer service records, Joint Petitioners do not see any reason to depart from the dispute resolution methodology present in the agreement. Joint Petitioners maintain that BellSouth's proposal includes "debilitating and extremely disruptive sanctions." (Joint Petitioner Brief, p. 58). Joint Petitioners further criticize BellSouth's proposal for being one-sided and for allowing BellSouth too much discretion in the imposition of sanctions. *Id.* at 59. Joint Petitioners acknowledge, however, that BellSouth has modified its proposal to provide that disputes would be resolved by a neutral decision-maker. *Id.* at 60.

Joint Petitioners argue that its proposed language would not absolve them from unlawful conduct, but rather it would protect them and their customers from unwarranted shutdowns of service. (Joint Petitioner Reply Brief, p. 35).

Staff Recommendation

The Staff recommends that the Commission order the following language for this issue:

> Disputes over Alleged Noncompliance. In its written notice to the other Party (with an additional copy to be sent by email to all notice recipients designated in the General Terms and Conditions), the alleging Party will state that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth (5th) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice (with an additional copy to be sent by email to all notice recipients designated in the General Terms and Conditions) to the person designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision o f access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10th) calendar day following the date of the initial notice. If the other Party disagrees with the alleging Party's allegations of unauthorized use, the alleging Party shall not invoke any remedy specified in this paragraph and shall instead proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary

> and Confidential Information Section in the General Terms and Conditions of this Agreement.

This language adopts Joint Petitioners' proposed language related to emailing notice to recipients designated in the General Terms and Conditions. This condition does not seem unduly burdensome, and has the potential to avoid delay. This language also adopts Joint Petitioners' proposed language related to not invoking any remedy specified in this paragraph if there is a dispute over the allegation, and instead, proceeding to the dispute resolution provisions in the Agreement. BellSouth has not explained why the dispute resolution procedures set forth in the General Terms and Conditions of the Agreement would not be sufficient to resolve disputes over alleged unauthorized access to customer service records.

The Staff recommends that the Commission strike Joint Petitioners' proposed language that would prohibit BellSouth from invoking any remedy unless its allegations pertain to systemic violations and unless notice is first given to the Commission. The language regarding "systemic" unauthorized access is ambiguous and destined to create disputes between the parties over the violations are systemic. Given the procedural protections afforded to Joint Petitioners under the Staff recommendation, notice to the Commission is unnecessary prior to BellSouth invoking any remedy under this section of the Agreement. If there is a dispute over the allegation, then under Staff's recommendation, BellSouth would have to proceed in accordance with the dispute resolution provisions in the Agreement.

Finally, Staff recommends that the Commission adopt BellSouth's proposed language that "the alleging Party <u>will</u> state that additional applications for service may be refused . . ." Because the ultimate action is still not a certainty, it is not necessary to state the alleging Party " . . . 'may' state . . ."

<u>Conclusion</u>

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 86(B).

Item 97

When should payment of charges for service be due?

Positions of the Parties

<u>BellSouth</u>

BellSouth asks the Commission to order that payment for services should be made on or before the Payment Due Date in immediately available funds. (BellSouth Brief, p. 56). Joint Petitioners are aware that the due date will always be by the next bill issuance date; therefore their monthly bills are predictable and the individual CLECs are in the

best position to predict their monthly billings. *Id.* at 56-57. This assertion is supported by the stellar pay performance that NuVox has achieved over the past two years. *Id.* at 57.

Joint Petitioners' claim that BellSouth's payment terms would be considered "unacceptable in most commercial settings" is belied by the terms and conditions of their own tariffs. (BellSouth Brief, p. 57 citing to Joint Petitioner Direct Testimony at 106). Joint Petitioners impose conditions on their own customers that they are unwilling to accept from BellSouth. (BellSouth Brief, p. 57). Moreover, BellSouth's proposal is consistent with the terms and conditions that it offers to its own customers. *Id.*

BellSouth also challenges the Joint Petitioners' assertions that it takes about seven days or more for BellSouth to deliver bills to CLECs. BellSouth claims the SQM billing data demonstrates that CLECs receive bills within three to four days on average. (BellSouth Brief, p. 58). Besides, BellSouth points out, Joint Petitioners receive their bills electronically. *Id.* BellSouth also argues that it satisfies the nondiscrimination requirements in the Federal Act by delivering bills to CLECs in the same manner that it delivers bills to its own retail customers. (BellSouth Brief, p. 59). To accommodate Joint Petitioners' request, BellSouth would be forced to incur substantial costs due to changes to its billing systems. *Id.*

In an effort to resolve the issue, BellSouth has offered to allow a Joint Petitioner CLEC thirty days from the date that the CLEC notifies BellSouth that it did not receive its electronic bills within eight days of the bill date. (BellSouth Brief, p. 60). BellSouth disputed Joint Petitioners' claims that they receive incomplete or incomprehensible bills by noting that not one such bill was produced at the hearing. (BellSouth Reply Brief, p. 45). In responding to Joint Petitioners' discussion of the ITC^DeltaCom Communications, Inc. ("DeltaCom") arbitration, BellSouth states that Joint Petitioners rejected the payment and deposit terms that were agreed upon by BellSouth and DeltaCom. *Id.* at fn 33.

<u>Joint Petitioners</u>

Joint Petitioners advocate for a requirement that "[p]ayment of charges for services rendered should be due thirty calendar days from receipt or website posting of a complete and fully readable bill or thirty days from receipt or website posting of a corrected or retransmitted bill, in those cases where correction or retransmission is necessary." (Joint Petitioner Brief, p. 67). The practical reason for why Joint Petitioners need this amount of time to pay their bills is that the bills are voluminous and complex. *Id.* It takes Joint Petitioners more than three weeks to review and process the bills for payment. *Id.* NuVox claims that the average time it takes for BellSouth to deliver its bills is seven days. *Id.* In addition, the bills are often incomplete or incomprehensible. *Id.*

Joint Petitioners also claim that BellSouth's proposal violates its parity obligations because it does not abide by the payment due date that it seeks to impose on

them. (Joint Petitioner Brief, p. 68). Joint Petitioners cite to the Commission's decision in Docket No. 16583-U[7] in which the Commission ordered BellSouth to allow ITC^DeltaCom to pay invoices 30 days "after the date of the bill is sent out by BellSouth." *Id.* at 69.

Joint Petitioners also explain their rejection of BellSouth's modified proposal regarding those instances in which electronic bills were not received within eight days of the invoice date. Under BellSouth's language to allow thirty days from a Joint Petitioners' notification of the late delivery of the electronic bill, any payment not received within 22 days would still be deemed "untimely." (Joint Petitioner Reply Brief, p. 37). Joint Petitioners urge the Commission to adopt either their proposal or the provision adopted as part of the DeltaCom arbitration. *Id.* at 38.

Staff Recommendation

The Staff recommends that the Commission adopt the same language that it approved for this issue in Docket No. 16583-U. In that arbitration, the Commission required bills would be due 30 days after the date the bill is sent out by BellSouth. Joint Petitioners provided credible testimony that it required a significant amount of time to review the vast number of bills that it receives from BellSouth. Regardless of whether BellSouth is delivering bills within three to four days on average or seven days on average, the logic employed by the Commission in Docket No. 16583-U still stands. That is, that the time it takes BellSouth to render a bill is out of the CLEC's control and should not infringe upon their time to review invoices. (DeltaCom Order, p. 15).

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 97.

Item 100

BellSouth Issue Statement: To avoid suspension or termination, should CLEC be required to pay additional amounts that become past due after the Notice of Suspension or Termination for Nonpayment is sent?

CLEC Issue Statement: Should CLEC be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

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[7] *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSoputh Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* Docket No. 16583-U.

Positions of the Parties

BellSouth

BellSouth's position is that "if a Joint Petitioner receives a notice of suspension or termination from BellSouth as a result of the Joint Petitioners' failure to timely pay amounts that are not subject to a billing dispute, the Joint Petitioner should be required to pay all undisputed amounts that are past due as of the date of the pending suspension or termination action." (BellSouth Brief, p. 61). This position is grounded in three components of the parties' Agreement. First, BellSouth may suspend or terminate service for nonpayment. Att. 7 § 1.7.2. Second, this issue only concerns undisputed amounts that are past due. *Id.* Third, BellSouth will not suspend or disconnect service over amounts that are in dispute. *Id.*

In an effort to address Joint Petitioners' concern about the lack of certainty regarding the amount due, BellSouth revised its proposal to state that, upon request, BellSouth will advise of any additional amounts that have become due since the issuance of the original notice of suspension or termination. (BellSouth Brief, p. 62). BellSouth argues that its proposal is consistent with Commission Rule 515-12-1-.06(f), which requires that a customer shall be notified and allowed a reasonable time to pay a bill before service is discontinued. (BellSouth Reply Brief, p. 47).

Joint Petitioners

Joint Petitioners argue that BellSouth's right to suspend or terminate service should be contingent upon identifying for the CLEC the exact amount owed. (Joint Petitioner Brief, p. 69). Joint Petitioners emphasize the unfairness of BellSouth's proposal to terminate service if any account becomes past due by pointing out that BellSouth refused to agree to make this right reciprocal. *Id.*

Joint Petitioners object to BellSouth's proposal to include in the Notice for payment past due that service may be terminated unless payment is made of all amounts that either are overdue or may become past due on that and any other account. (Joint Petitioner Brief, p. 71). A CLEC would have a maximum of 15 days to "process, dispute, calculate, and pay" these amounts prior to BellSouth rejecting new service orders, and only 30 days to pay before BellSouth may terminate all services. *Id.* To further complicate matters, BellSouth will not state the full amount due on all accounts in the Notice that it provides to the CLEC. *Id.* Therefore, the CLEC will not know how much it must pay in order to avoid the actions discussed above. Joint Petitioners argue that BellSouth's proposal is contrary to the public interest, and therefore the Commission would have authority under 47 U.S.C. § 252(e)(2)(A)(ii) to strike the provision. *Id.* at 72.

Joint Petitioners do not accept BellSouth's offer to provide information of the additional amounts owed upon request because there would still be inadequate notice and increased potential for error and confusion. (Joint Petitioner Brief, p. 73).

Staff Recommendation

The Staff recommends that the Commission reject BellSouth's proposal to include in the Notice amounts that become due in the interim between the time the Notice is issued and the overdue amounts must be paid to avoid the rejection of new orders or suspension or termination of service. Joint Petitioners raised legitimate concerns that there would be ambiguity and lack of notice about the precise amount owed. Even though BellSouth agreed to provide the exact amount due on request, the amount would not be included in the initial notice. The burden would then be on the CLEC not just to pay any additional amounts that become due, but to ascertain what BellSouth's assertion is of these overdue amounts, verify that BellSouth's assertion is correct and then make payment. BellSouth's proposal does not afford CLECs adequate protection.

There was some discussion about whether BellSouth's proposal is consistent with the Commission Rule 515-12-1-.06(f). This rule requires that customers receive notification and allowed a reasonable time in which to make payment before service is discontinued. The rule does not delineate what must be included in the notification. The question then is whether it is a reasonable construction of the rule to state that notice must include the exact amount owed. The Staff recommends that the Commission find that for notice to comply with the Commission Rule it must identify the amount due.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 100.

Item 101

How many months of billing should be used to determine the maximum amount of the deposit?

Positions of the Parties

BellSouth

BellSouth proposes that deposits should not exceed an average of two months of actual billing for existing customers or two months of estimated billing for new customers. (BellSouth Brief, p. 62). BellSouth defends its proposal by stating that it must wait at least two months after service is rendered before disconnecting for nonpayment. *Id.* at 63. Experience demonstrates that BellSouth does not impose the maximum deposit requirement on the CLECs. *Id.* The Joint Petitioner proposal to impose a lower maximum deposit on existing customers than new customers does not account for the fact that some new CLECs will be in a stronger financial position. *Id.*

Joint Petitioners

BellSouth has agreed to lesser deposit requirements with other CLECs so it should not be allowed to impose a two month deposit requirement on Joint Petitioners. (Joint Petitioner Brief, pp. 74-75). BellSouth has not demonstrated a legitimate concern over nonpayment that would necessitate the more onerous deposit policy. *Id.* at 75.

The deposit policy for Joint Petitioners should be the same as for DeltaCom. This policy allows for a maximum of one month's deposit for services paid in advance, and two months' deposit for services paid in arrears. (Joint Petitioner Brief, p. 76). In the alternative, Joint Petitioners propose that they be required to submit a deposit for one and one-half month's billings and any new customers that adopt the Agreement be required to remit a two month's deposit. *Id.*

Staff Recommendation

The Staff recommends that the Commission adopt a maximum deposit requirement equal to an average of two months of actual billing for existing customers or two months of estimated billing for new customers. This recommendation is consistent with the requirement that BellSouth must wait two months after service is rendered before it can disconnect service for non-payment. Allowing for a higher maximum deposit requirement would provide a balance for Item 100, in which adoption of the Staff's recommendation would place constraints on how quickly BellSouth may move to reject new orders or terminate service.

Finally, the evidence reflected that BellSouth does not usually assess the maximum deposit. If the evidence in future arbitration proceedings changes on this point, then the Commission may consider whether a different outcome is justified.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 101.

Item 102

Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC?

Positions of the Parties

BellSouth

When making a deposit demand or a request for an additional deposit, BellSouth will reduce its deposit demand by any undisputed amount past due that BellSouth owes to any Joint Petitioner for payments pursuant to Attachment 3 (Interconnection) of the

Agreement. (BellSouth Brief, p. 64). Once BellSouth paid the amount due, Joint Petitioners would be required to increase the deposit in an amount equal to such payments. *Id.* at 65.

BellSouth disputes Joint Petitioners' characterization of its payment history stating that the allegations of untimely payments are based on outdated and inaccurate information. (BellSouth Reply Brief, p. 51).

Joint Petitioners

Joint Petitioners argue that it is not fair for BellSouth to owe past due amounts to a CLEC, while at the same time demanding the maximum deposit from the CLEC. (Joint Petitioner Brief, pp. 76-77). Joint Petitioners propose that BellSouth "set off" past due amounts it owes against the deposit that Joint Petitioners must remit. *Id.* at 77. BellSouth's poor payment history with the Joint Petitioners increases their financial risk. *Id.* Under the Joint Petitioners' proposal, the set-off would be revisited on an annual or semi-annual basis, and restored once BellSouth demonstrates a good payment history as defined in the Agreement. *Id.* at 78.

By limiting the offset to undisputed amounts, BellSouth can dispute any amount in an effort to justify charging a higher deposit. (Joint Petitioner Brief, p. 79).

Staff Recommendation

The Staff recommends adoption of BellSouth's proposal. Reducing the requested deposit by the undisputed amount due from BellSouth to a Joint Petitioner addresses the unfairness cited by Joint Petitioners that BellSouth may request the maximum deposit at a time in which it owes past due amounts to Joint Petitioners.

There was discussion in the parties' briefs about decisions by utility commissions in Kansas and Oklahoma that Joint Petitioners allege found that an offset should take place whether the amount due is disputed or undisputed. As a preliminary matter, the Staff agrees with BellSouth that the excerpts from the decisions do not establish that an offset would apply regardless of whether the amount due is disputed. More importantly, it is not sound policy. The Commission is not bound by the regulatory decisions of other states. It is, of course, free to consider such decisions to determine whether the reasoning contained therein is persuasive. In this case, assuming Joint Petitioners accurately characterized the rulings, the Staff does not agree with the conclusion that a disputed amount should be used to offset a deposit.

Joint Petitioners imply that BellSouth may disingenuously dispute a bill for the purpose of avoiding an offset to its deposit. The converse seems equally likely. Joint Petitioners, under their proposed language, would have equal incentive to overcharge in order to reduce the deposit. Given that there is no basis for assuming either side has a monopoly on the potential for gamesmanship, the Staff recommends that the Commission determine the appropriate policy assuming reasonable good faith on the part of the

parties, and consider any future charges of bad faith at such time as a party raises such an issue before it.

If BellSouth seeks to impose a deposit that is within the amount permitted under the interconnection agreement, but is forced to reduce that deposit to account for an amount that it may not owe, then it is exposed to greater risk than is appropriate, based on the other provisions of the agreement.

Staff's recommendation to limit the offset to undisputed amounts is consistent with the treatment of other components in the interconnection agreement. Item 86B involved disputes over alleged unauthorized access to CSR information. Part of the supporting factual background for that item is that parties have to meet their obligations under the agreement during the pendency of a dispute. Item 100 involved the termination of service for nonpayment. Again, neither party disagreed with the premise that the notification for termination for nonpayment related only to undisputed amounts due. In Item 103, Joint Petitioners argue that service should not be terminated for failure to pay a deposit if the amount of the deposit is in dispute.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 102.

Item 103

Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?

Positions of the Parties

BellSouth

BellSouth's position is that it should be able to terminate service if a Joint Petitioner does not pay or properly dispute a deposit demand within thirty calendar days. (BellSouth Brief, p. 65). Termination for non-payment of a deposit makes sense given BellSouth's right to a deposit, and it is contemplated in Commission Rule 515-12-1-.06. *Id.*

BellSouth also points out that Joint Petitioners' end user tariffs authorize termination for non-payment. (BellSouth Reply Brief, p. 53).

Joint Petitioners

Joint Petitioners argue that BellSouth's ability to terminate service for non-payment of a deposit should be limited to those instances in which the Joint Petitioner does not dispute that the deposit is required or when such deposit has been ordered by the Commission. (Joint Petitioner Brief, p. 79). Any disputes over the appropriate deposit amount should be referred to the dispute resolution process set forth in the agreement. *Id.* at 80.

Staff Recommendation

The Staff recommends adoption of Joint Petitioners' proposed language. In BellSouth's brief, it argues that it would only terminate service for non-payment of a deposit if the Joint Petitioner did not "properly dispute" the deposit demand. However, the language BellSouth proposes as part of Section 1.8.6 does not recognize that qualification:

> Subject to Section 1.8.7 following, in the event ((customer_short_name)) fails to remit to BellSouth any deposit requested pursuant to this Section within thirty (30) calendar days of ((customer_short_name))'s receipt of such request, service to ((customer_short_name)) may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to ((customer_short_name))'s account(s).

To the extent that BellSouth intended to exclude its right to terminate service for non-payment of deposit amounts that are in dispute, adoption of Joint Petitioners' language should not disadvantage BellSouth.

Conclusion

For the reasons set forth in its recommendation, the Commission adopts Staff's recommendation on Item 103.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues that the parties presented to the Commission for arbitration should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 6th day of June, 2006.

Reece McAlister
Executive Secretary

Stan Wise
Chairman

7-6-06
Date

7-6-06
Date