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.

[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.

[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.

[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