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

[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

[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.

[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

[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