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August 12, 2005

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
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Frankfort, KY 40602

Re: 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
PSC 2004-00044

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Post-Hearing Reply Brief.

Very truly yours,

Dorothy J. Chambers

Enclosures

cc: Parties of Record

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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 AND XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC	)	CASE NO. 2004-00044

BELLSOUTH TELECOMMUNICATIONS, INC.
POST-HEARING REPLY BRIEF

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BellSouth Telecommunications, Inc. ("BellSouth") submit this Reply Brief to the Post-Hearing Brief ("Brief" or "JP Brief") filed by NewSouth Communications Corp ("NewSouth"), NuVox Communications, Inc. ("NuVox"), and Xspedius Communications, LLC ("Xspedius") (collectively referred to as "Joint Petitioners"). For the reasons that follow, the Kentucky Public Service Commission ("Commission") should adopt BellSouth's positions and reject the Joint Petitioners' because BellSouth's positions are reasonable, comply with industry standards, and comply with the Telecommunications Act of 1996 (the "Act").

Item 4: What should be the limitation of each Party's liability in circumstances other than gross negligence or willful misconduct? (Agreement GT&C, Section 10.4.1)

The Commission's decision on this issue is simple: Should the Joint Petitioners be entitled to limitation of liability language that exceeds the standard governing BellSouth's end users, exceeds the standard governing the Joint Petitioners' end users, exceeds the standard governing the Joint Petitioners' in their current interconnection agreements with BellSouth, exceeds the standard established by the Federal Communications Commission's ("FCC") Wireline Competition Bureau and other state commissions,[1] and is not replicated in any other interconnection agreement?[2] As set forth in BellSouth's brief, the answer to this question is an

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[1] *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) ("*Virginia Arbitration Order*") at ¶ 709, the Wireline Competition Bureau of 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." *See also, Sprint Communications, LP*, Case No. 96-1021-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).

[2] 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; GA Tr. at 376-77; Russell Depo. at 43.

unequivocal "no" and the Joint Petitioners present no credible argument or evidence to the contrary.

First, contrary to the Joint Petitioners' claim (JP Brief at 7-8), there should be no dispute that BellSouth's language providing for bill credits is the standard in the industry. This standard applies to BellSouth's retail customers and is the same standard that governs the parties in their current interconnection agreements. (KY Tr. at 25; GA Tr. at 381; FL Tr. at 182, 943; Exhibit 14 at § A2.5.1). Likewise, the Joint Petitioners' tariffs and standard contracts limit their exposure to bill credits. (FL Tr. at 182, 184; FL Exhibit 15 at § 2.1.3(C); Russell Depo at 145-146). And, dispositive of the issue, the Joint Petitioners concede that the provision of bill credits is "probably the current practice" in the industry. *See* Russell Depo. at 82-83.

Further, the Joint Petitioners' reliance on a single sentence of the Xspedius template contract to support their argument is misplaced (JP Attachment 1; JP Brief at 8). In fact, the contract actually supports BellSouth's proposed language as it limits Xspedius' liability to ***bill credits*** for tariffed services. Specifically, the contract provides that (1) the terms and conditions contained in the contract "supplement" those set forth in Xspedius' tariffs (JP Attachment 1, 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"; (JP Attachment 1, Preamble) (emphasis added); (3) Xspedius' liability for the interruption of tariffed service is limited to bill credits (JP Attachment 1, § 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." JP Attachment 1; § 15.[3]

[3] 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.

Thus, while the contract in question does provide for alternative limitation of liability language in some regards for non-tariffed services, it is not clear when this language applies, if at all, given the express wording of the contract. Nevertheless, it is clear that 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. Consequently, the Commission should not be hood-winked by the Joint Petitioners' attempt to discredit BellSouth's argument by referring to an Xspedius contract that actually supports BellSouth.

Moreover, the Commission should also disregard the Joint Petitioners' reliance on the redacted excerpt of a NewSouth/AllTel Interconnection Agreement (JP Attachment 2; KY BellSouth Exhibit 1). AllTel is a rural ILEC that does not have a 251(c) obligation to provide UNEs at cost-based rates. Indeed, there is no UNE section in the agreement, the entirety of which BellSouth produced at the hearing. Thus, unlike BellSouth, AllTel is not restricted to TELRIC prices and, therefore, can charge NewSouth rates to allow it to recover the additional expenses that may be experienced by failing to limit its liability to bill credits.

Similarly, the Commission should reject the Joint Petitioners' attempt to misquote Ms. Blake to support their case. Contrary to their claims and partial quotations, Ms. Blake did not affirmatively testify in Georgia that BellSouth provides itself "more favorable liability terms in customer contracts." *See* JP Brief at 7-8. Rather, Ms. Blake did testify that BellSouth's standard is bill credits, that BellSouth is seeking to obtain this standard in the interconnection agreement, and that she ***did not know*** about the specifics for every single customer contract and whether BellSouth deviated from its standard.

> Q. So is it your testimony that BellSouth's limitation liability proposal is the industry standard, is that correct?

A. Yes. That's my understanding. That's what we offer to our end users or what's set forth in our tariffs and I believe that's what's in your clients' tariffs or templates as it was discussed.

Q. But as you sit here today, you cannot tell me that BellSouth's customer service contracts include different limitation of liability provisions, correct?

A. I can't speak to every contract service arrangement we have our there or any individual contract we have but I believe our – this is our template language we have with CLECs that enter in our agreement and I believe since '96 when the first agreement was done, this is the standard language that's been offered. It's no different that we offer to our retail customers, to our wholesale customers, out of the access tariff.

Q. And you don't know whether you negotiate that language with your retail customers, large access customers, et cetera?

A. I can't speak to the details of it and again, depending on the nature of those contracts, there may be other provisions in there that kind of justify accepting that additional risk. ***I don't know.***

(GA Tr. at 999-1000) (emphasis added). Accordingly, Ms. Blake did not testify as described by the Joint Petitioners, and there is no evidence to support their claim that bill credits are not the standard in the industry.

Second, the Joint Petitioners' attempt to explain as "hyperbolic" the undisputed ramifications that will result with the adoption of the Joint Petitioners' language is almost comical. *See* JP Brief at 10-11. It is undisputed that, after three years and based on the current billings between BellSouth and NuVox, BellSouth's liability to NuVox would be capped at ***$8,100,000*** while NuVox's liability to BellSouth would be limited to ***$2,700*** under the Joint Petitioners' proposed language. (FL Tr. at 180; KY Tr. at 63-64).

To further illustrate this point and using the Joint Petitioners' example of NuVox negligently disconnecting a DS3 transport trunk on Day 61 of the agreement (JP Brief at 6), NuVox's maximum liability to BellSouth for that negligent act would be ***$150***. (Ga Tr. at 374-75) (Russell agreeing that NuVox's liability would be $75 a month under current billings). Conversely, BellSouth's maximum liability to NuVox would be ***$490,000*** (and not the $112,500 stated by the Joint Petitioners) for the same act.

Taken further, and based on the actual testimony of NuVox witness Russell, if a NuVox employee caused over $8 million worth of damages to BellSouth by negligently causing a central office to explode after month 36 of the agreement, NuVox's maximum liability to BellSouth would be $2,700. On the other hand, if BellSouth performed the same act and caused the same damages to NuVox, NuVox would be able to recover all of its damages. These illustrations are not "hyperbolic". They present the actual ramifications of adopting the Joint Petitioners' language based on the actual billings of the parties, as conceded by the Joint Petitioners. Such a result is inherently unfair, not the standard in the industry, has never been replicated or employed in any other interconnection agreement, and only benefits the Joint Petitioners.

Third, the Joint Petitioners' continued, tired reliance on so-called concepts of commercial reasonableness, standards in the business world, and "settled principles of contracts law" is incorrect as a matter of fact and law (JP Brief at 6, 12). As found by courts and state commissions, a Section 252 agreement is not an ordinary or typical commercial contract and should not be construed or treated as such. *See In the Matter of BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp.*, Docket No. P-772, Sub at 6 (Jan. 20, 2005) ("*NewSouth Reconsideration Order*"); *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Comm'n, et al.*, Civil Action No. 3:05CV173LN at 13 (Apr. 13, 2005) (quoting *E.spire*

Communications, Inc. v. N.M. Pub. Regulation Comm'n, 392 F.3d 1204, 1207 (10th Cir. 2004)(citing *Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004). Accordingly, even if accurate, the concepts of "commercial reasonableness" espoused and relied upon by the Joint Petitioners have no application in a Section 252 agreement. If they did, then the parties would not be before the Commission asking it to decide basic business principles.

Fourth, the Joint Petitioners' claim that "BellSouth only would be liable for the amount of damages that a Petitioner actually incurred due to BellSouth's negligence – up to a 7.5% cap" (JP Brief at 10-11) is inaccurate based upon their actual language. Specifically, the Joint Petitioners language provides that the 7.5% limitation of liability cap, "shall not be deemed or construed as ... (B) limiting either Party's right to recover appropriate refund(s) of or rebate(s) or credit(s) for fees, charges or other amounts paid at Agreement rates for services not performed or provided or otherwise failing to comply (with applicable refund, rebate or credit amounts measured by the diminution in value of services reasonably resulting from such noncompliance) with the applicable terms and conditions of this Agreement." *See* Joint Petitioner Exhibit A. Stripped of its legalese, this provision means that the Joint Petitioners are seeking the ability to obtain bill credits ***in addition to*** 7.5% of amounts paid or payable on the day the claim arose for the same claim. Clearly, the Joint Petitioners should not be entitled to double credits and their refusal to acknowledge the import of their own language renders their entire position suspect.

For all of these reasons, the Commission should reject the Joint Petitioners' language and order the parties to comply with the standard of the industry that both BellSouth and the Joint Petitioners employ and have been governed by – the provision of bill credits for negligent acts.

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? CLEC 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? (GT&C, Section 10.4.2)

In contrast to the Joint Petitioners' arguments, this issue is not about (1) "BellSouth's insistence" that the Joint Petitioners use limitation of liability language with their end users that mirrors BellSouth's language (although they do currently use such language and in some cases the Joint Petitioners' limitation of liability language is more stringent than BellSouth's language, *see* BellSouth Brief at 8) (JP Brief at 15); or (2) punishing the Joint Petitioners for "competing with BellSouth" (JP Brief at 17); or (3) about BellSouth "want[ing] someone to pay" if it loses a customer. (JP Brief at 18). Rather, this issue is about putting BellSouth in the same position it would be in if the CLEC end user were a BellSouth end user. BellSouth should not suffer any financial hardship as a result of a Joint Petitioner business decision simply because BellSouth is the wholesale provider of the CLEC's underlying service. Accordingly, to the extent the Joint Petitioners decide not to limit their liability in accordance with industry standards, the Joint Petitioners should indemnify or reimburse BellSouth for any loss BellSouth sustains as a result of that decision. The Joint Petitioners' specific arguments, as discussed below, are based on inaccurate claims, incorrect assumptions, and camouflage techniques to disguise their absence of supporting facts. BellSouth's proposed language is reasonable and should be adopted.

First, the Joint Petitioners misconstrue the purpose of this provision – a provision that currently governs the parties in their present interconnection agreements and which has never been the subject of dispute. (FL Tr. at 204-05; KY Tr. at 64-65). Specifically, the Joint Petitioners contend that BellSouth seeks this provision because, "if BellSouth retained a

complete monopoly, it would limit its liability completely in its tariffs – and everybody would be served out of those tariffs." (JP Brief at 15).

Nothing could be farther from the truth. This provision is essential because (1) BellSouth no longer is the monopoly provider and is required as a matter of federal law to provide wholesale services to the Joint Petitioners; (2) BellSouth does not have contracts with the Joint Petitioner end users; and (3) the Joint Petitioner end users do not purchase services out of BellSouth's tariffs, which limit BellSouth's liability to bill credits. (FL Tr. at 205). Accordingly, if a Joint Petitioner provides a service guarantee that results in that Joint Petitioner providing a customer $1,000 if the Joint Petitioner fails to provision a loop within a specific time period and BellSouth misses the due date for the loop, that Joint Petitioner could seek to recover the $1,000 guaranteed to the customer from BellSouth through Joint Petitioner's indemnification language. (FL Tr. at 808). If that end user 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. Thus, this provision is not an attempt to "retain a complete monopoly" but results from the fact that BellSouth does not have a monopoly and must provide wholesale services to the Joint Petitioners and their end users.[4]

Second, there is no credible evidence to support the Joint Petitioners' claim that adoption of BellSouth's language would "punish" the Joint Petitioners because "[l]iability terms are frequently negotiated such that they are different from the template limitation of liability terms in Joint Petitioners' tariffs." (JP Brief at 17). For instance, in discovery, the Joint Petitioners could not identify a single, specific instance where they had to concede limitation of liability language

[4] Further, the scenario of the Joint Petitioners providing service guarantees is not a "ridiculous hypothetical" as Mr. Russell claimed at the Georgia hearing. (GA Tr. 403; JP Brief at n. 6). In fact, Mr. Russell testified in his deposition that NuVox currently offers service guarantees to its customers. (Russell Depo. at 78-81).

to attract a customer. *See* Joint Petitioners Response to Interrogatory No. 22. Additionally, in their depositions, each of the Joint Petitioners stated that they were not aware of a specific instance where an end user contract deviated from standard limitation of liability language. *See* Johnson Depo. at 29-30; Falvey Depo. at 33; Russell Depo. at 46.

And, while Mr. Russell now claims that 99 percent of NuVox's customers purchase services out of customer service agreements and not tariffs (JP Brief at 16), this fact, assuming it is true, does not equate to a finding that NuVox alters its tariffed limitation of liability provision in all of these contracts. In fact, Mr. Russell testified in his deposition that NuVox's contracts incorporate by reference NuVox's tariffs. He also testified that NuVox alters its limitation of liability language in its contracts "once in a while" and that he did not know how frequently these changes occurred. *See* Russell Depo. at 28-29; 84-85. Consequently, there is no credible evidence to support this claim.

Even if true, however, this issue is not about limiting the Joint Petitioners' ability to compete or punishing the Joint Petitioners for winning a customer. BellSouth is not 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 during which time the Joint Petitioners have competed with BellSouth (KY Tr. at 64-64) – merely imposes obligations upon the Joint Petitioners in the event Joint Petitioners make a business decision to not limit their liability within industry standards.

Such a scenario is unlikely given that 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, 91; Falvey Depo. at 61; Johnson Depo. at 61; *see also* JP Brief at 16, JP Attachment 1). Accordingly, the Joint Petitioners' claim that adoption of BellSouth's language will prevent them from competing against BellSouth is repudiated by the actual history of the parties and their own tariff and contract language.

Finally, the Joint Petitioners' contention that "it is all but certain that BellSouth, too, negotiates limitation-of-liability provisions when competing with CLECs for a custom contract customer" is based upon pure speculation. (FL. Tr. at 207). Indeed, although she was not aware of any specific Contract Service Agreements ("CSAs") that deviated from BellSouth's tariff language, BellSouth witness Blake did testify that CSAs differ predominantly in price only. (FL. Tr. at 947). Thus, the Joint Petitioners have no proof to support their argument. The Commission should recognize Joint Petitioner's effort to camouflage the lack of proof with Mr. Russell's quote that, "'when BellSouth has contract service arrangements, they frequently file those as trade secrets or under seal.'" (JP Brief at 15-16). Mr. Russell's claim not only is a smokescreen, but also is inaccurate. Prior to the hearing, this Commission determined in Case No. 2002-00456 that all of BellSouth's CSAs would be available to the public for inspection. Accordingly, the Joint Petitioners excuse for having no evidence to support their claim is no excuse at all.

The Commission should adopt BellSouth's proposed language because it is reasonable and insures that BellSouth's ultimate exposure to a CLEC end user is the same as it would be for a BellSouth end user.

Item 6: BellSouth Issue Statement: How should indirect, incidental or consequential damages be defined for purposes of the Agreement? CLEC Issue Statement: Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customers/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? (GT&C Section 10.4.4)

The Joint Petitioners' arguments on this issue fail to address the seminal dispute – is it appropriate to carve out certain end user damage claims in this interconnection agreement between BellSouth and the Joint Petitioners. Instead of addressing the issue, the Joint Petitioners now appear to be seeking certain types of damages against BellSouth for which they previously agreed neither party would have liability. The Joint Petitioners' arguments are nonresponsive and inappropriate.

Significantly, in attempting to change the parameters of the dispute, the Joint Petitioners completely ignore the testimony of their own witnesses. As testified by NuVox witness Russell in Florida , the purpose of the Joint Petitioners' language is to make sure that certain end user damage claims against BellSouth are not to be construed as incidental, consequential, or indirect damages.

> Q. So the purpose of your language is to make sure that nothing that NuVox and BellSouth says in this agreement restricts, impairs, or limits whatever rights and damage claims your end users may have; is that right?
>
> A. That's correct. So that NuVox is not left holding the bag for BellSouth's negligence.

(FL Tr. at 208). The Joint Petitioners also concede, as they must, that (1) neither BellSouth nor the Joint Petitioners can affect the rights of third-party end users through this interconnection agreement, as a ***matter of law***; and (2) the language proposed by BellSouth is limited to BellSouth and the Joint Petitioners. The BellSouth-proposed language does not even mention end users. (KY Tr. at 65-66; FL. Tr. at 209-10; Johnson Depo. at 5, 67, and 71). Thus, the Joint

Petitioners' position is of no force and effect as a matter of law and is based upon a non-existent concern. The Joint Petitioners offer no arguments to rebut this conclusion.

Instead of addressing these facts, the Joint Petitioners now argue that BellSouth should be liable to the Joint Petitioners (not their end users) for indirect, consequential, or incidental damages to the extent such damages are reasonably foreseeable (JP Brief at 19-20) ("So to the extent that the reasonably foreseeable damages contemplated by Petitioners' proposed language may be characterized as indirect, incidental or consequential, Petitioners, consistent with Georgia law, do not voluntarily agree to absolve BellSouth of these damages."). Amazingly, the Joint Petitioners make this argument after conceding that "neither party will be liable to the other" for indirect, incidental, or consequential damages. (JP Brief at 18; *see also*, JP Exhibit A stating that "[u]nder no circumstances shall a Party be responsible or liable for indirect, incidental, or consequential damages ...."; KY Tr. at 66).

The hypocrisy of the Joint Petitioners' new position, and their attempted abrogation, through double-speak of what the parties' already have agreed to is profound and very disappointing. The Commission should summarily reject this attempt by the Joint Petitioners to betray the parties' agreement that no party would be liable to the each other for indirect, consequential, and incidental damages. The Commission also should focus on the Joint Petitioners' testimony on this issue regarding its stated purpose and find that that the Joint Petitioners' language not only is legally unenforceable, but also is unnecessary because, as admitted by the Joint Petitioners, end user rights are not impacted by this agreement.

Item 7: What should the indemnification obligations of the parties be under this Agreement (GT&C, Section 10.5)

It is quite telling that, in their Brief, the Joint Petitioners do not cite to or even partially quote their proposed language for this issue. Instead, the Joint Petitioners use oversimplified,

inaccurate, and inexact descriptions and arguments designed to hide the ramifications and inequities that accompany their proposed language. What is readily apparent in their language, but ignored in their Brief, is that adoption of the Joint Petitioners' language results in BellSouth having virtually unlimited indemnification obligations to the Joint Petitioners while the Joint Petitioners will have essentially no indemnification obligations to BellSouth.[5]

There is nothing equitable about the Joint Petitioners' language, and, not surprisingly, it has never been replicated in any other interconnection agreement. *See* Russell Depo. at 119. Further, the Wireline Competition Bureau of the FCC and a state commission already have rejected similar, overly expansive indemnification language in the context of a Section 252 agreement. *Virginia Arbitration Order* at 709; *In re: Petition of AT&T Communications of the Midwest, Inc.*, Minn. P.U.C., Docket No. P-442, 421/IC-03-759, 2003 WL 2287903 at *17 (Nov. 18, 2003) ("*Minnesota Arbitration Order*").

In addition, the Joint Petitioners' reliance on their tariffs and template contracts do not support their one-sided, draconian limitation of liability language. (JP Brief at 22).[6] Instead, Joint Petitioners' tariffs and contracts prove that the Joint Petitioners' proposed language is limiting and unreasonable as they refuse to give BellSouth the same rights they already have agreed to give their end users. For instance, none of the Joint Petitioners' tariffs or contracts impose upon the Joint Petitioners (as the providing party) the same indemnification obligations that they seek from BellSouth. Indeed, NuVox's tariffs require end users to indemnify it for

[5] The Joint Petitioners ask this Commission to approve language that requires the Party providing service to indemnify the Party receiving service 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." *See* Joint Petitioner Exhibit A GT&C at § 10.5. Conversely, under their proposed language, 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." *Id.*

[6] Quite hypocritically, the Joint Petitioners rely on their tariffs to support their arguments with Issue 7 but in Issue 4, the Joint Petitioners argued that the Commission should disregard their tariffs. *See* JP Brief at 9.

"any act or omission" and do not require NuVox to indemnify the end user in any instance. *See* FL Tr. at 196; *see also*, NuVox Tariff at § 2.1.4.(L)(J); KMC Tariff at § 2.1.4(G).

Similarly, the NewSouth contract, referenced by the Joint Petitioners in their Brief (JP Brief at 22; Attachment 5), actually supports BellSouth case because NewSouth agrees to take on indemnification obligations in the contract that exceed what the Joint Petitioners are willing to do here. Likewise, the Xspedius contract referenced by the Joint Petitioners requires the customer or party receiving service to indemnify Xspedius for any loss "that arises out of, or is directly or indirectly related to, ... any act or omission of Customer." (JP Brief at 22; Attachment 1). Xspedius, however, is not willing to provide BellSouth with these same protections. And, unlike BellSouth's proposed language, Xspedius provides no indemnification rights to the end user as its contract states that "Xspedius will not be liable for ... (6) claims against Customer by any other party." *See* Attachment 1, § 15. Thus, the Joint Petitioners can find no solace in their own tariffs and contracts, proving once again that Joint Petitioners seek rights against BellSouth that they are not willing to provide to their own end users.

Moreover, the Joint Petitioners are incorrect when they state that "BellSouth's refusal to accept Joint Petitioners' language amounts to their foisting upon these CLECs the obligation to act as BellSouth's insurance carrier." (JP Brief at 23). Each of them has provisions in their tariffs and contracts that preclude the Joint Petitioners from sustaining any liability for the actions of service providers, like BellSouth. *See* NuVox Tariff at § 2.1.4(H); KMC Tariff at § 2.1.4(c); Xspedius Tariff at § 2.1.4.3; Russell Depo at 145-147; Johnson Depo. at 51. Thus, the Joint Petitioners cannot be BellSouth's insurance carrier because Joint Petitioners already insulate themselves from any potential liability that may result from BellSouth's actions.

Finally, the Joint Petitioners are incorrect in their statement that "BellSouth and Joint Petitioners agree that the party receiving service should indemnify the party providing service for damages caused by the receiving party's own unlawful conduct." (JP Brief at 22). The parties are not in such agreement and the Joint Petitioners failure to recognize this disagreement is either an intentional attempt to confuse the issue or the inability to understand their own language. Lest there be any confusion, and as reflected by Joint Petitioner Exhibit A, the parties agree only that the party receiving service will indemnify the party providing service for claims of libel, slander, or invasion of privacy arising from the content of the receiving party's own communication. *See* JP Exhibit A. This limited right is the only indemnification right that the Joint Petitioners have agreed to provide BellSouth as the providing party. As reflected by their own language, the Joint Petitioners have never agreed to indemnify BellSouth in any other scenario, including any general instance where BellSouth sustains "damages caused by the receiving party's own unlawful conduct." Accordingly, this Commission should recognize the Joint Petitioners' attempt to hide their unfair language behind inaccurate descriptions and reject it.

Instead, the Commission should adopt the fair and reasonable language proposed by BellSouth. BellSouth's proposed language for this issue requires the receiving party to indemnify the providing party in 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 damaged 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." *See* BellSouth Exhibit A, GT&C at § 10.5. This language is considerably narrower than the Joint Petitioners' proposal, which would require

BellSouth to indemnify the Joint Petitioners for all claims, regardless of whether the claims were brought by an end user. Therefore, the Commission should adopt BellSouth's language on this issue because it not only is fair and reasonable, but also is consistent with industry standards (including the Joint Petitioners' tariffs) and complies with the general concept that indemnification provisions should be limited to foreseen risks.

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? (GT&C Section 13.1)

The parties agree that this Commission has the authority and is an expert forum to address disputes arising out of interconnection agreements that it arbitrates and approves pursuant to the Act. (FL Tr. at 278, 281). The Eleventh Circuit and the FCC agree. These adjudicatory bodies have held that state commissions have the "power to interpret and enforce [interconnection agreements] ***in the first instance"*** and that state commissions are "well-suited to address disputes arising from interconnection agreements." *See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003) (emphasis added); *In re: Starpower*, 15 FCC Rcd at 11280 (2000)). In light of the Commission's recognized and unrefuted expertise, the Commission or the FCC should resolve disputes relating to the interconnection agreement. However, BellSouth also agrees 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).

Contrary to the Joint Petitioners' claims, BellSouth's language does not result in this Commission changing or limiting the jurisdiction of courts in violation of the Constitution. (JP Brief at 25). This claim is a red-herring, designed to mislead the Commission from properly preserving its authority and utilizing its expertise to address interconnection agreement disputes.

Simply stated, BellSouth's language in no way limits, strips, or restricts the jurisdiction of any court. Rather, with this arbitration issue, the Commission will identify the specific forums, all of which may have jurisdiction, that the parties will use to address specific interconnection agreement disputes. BellSouth submits that, for various telecommunications policy reasons (including expertise, efficiency, knowledge, expediency, resource constraints, etc. ...), this Commission or the FCC should be the initial forum to address interconnection agreement disputes that are within their jurisdiction and expertise. Making such a finding does not equate to the Commission stripping a court of its constitutional authority.

Additionally, the Joint Petitioners' reliance on Mr. Falvey's testimony on this issue (and reference to an antiquated reciprocal compensation dispute with BellSouth) establishes that the Joint Petitioners' reason for objecting to BellSouth's language is not to preserve the Constitution of this Commonwealth but rather is an effort to preserve the opportunity for forum shopping. (JP Brief at 26). Specifically, Mr. Falvey admits that his former company went to different forums (state commissions and alternative dispute resolution) to resolve the same dispute in different states. *Id.* If the Joint Petitioners' concern truly was to avoid piece-meal litigation and to preserve courts as an option, Mr. Falvey's former company would not have voluntarily initiated several different lawsuits in multiple forums.

Other than the Joint Petitioners' desire to engage in forum shopping, there is no other rationale explanation for the Joint Petitioners continued refusal to accept to BellSouth's reasonable language.

Item 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? (GT&C, Section 32.2)

This dispute is not about whether BellSouth will comply with the law. BellSouth already has so agreed and will do so. (GA Tr. at 427). Rather, this dispute is about providing the parties' certainty with respect to their obligations under this interconnection agreement. Importantly, as part of the negotiation and arbitration process mandated by the Act, the parties have been negotiating and defining their respective obligations in the agreement for over two years. (GA Tr. at 429). Moreover, the parties agree that the interconnection agreement contains the parties' interpretation of various FCC rules and decisions, that the Parties should be confident as to the scope of their obligations, and that the purpose in contracting is to be express clearly the parties' agreement. (Johnson Depo. at 87, 95; GA Tr. 428-29; 431-32).

However, with their language, the Joint Petitioners intend to use "Applicable Law" to alter already agreed upon concepts and language in the agreement. Mr. Russell left no doubt as to the Joint Petitioners' intentions at the hearing:

> Q. Now do you believe that when the parties agree to something in the agreement that there should be an opportunity through this provision to reargue what the law means?
>
> A. Not only should it be an opportunity but we've done that from time to time.

(GA Tr. at 435).[7] Thus, the Joint Petitioners intend to use their language to do exactly what BellSouth fears: review a telecommunications rule or order, interpret it in a manner that BellSouth could not have anticipated or is contrary to how the parties addressed the issue in the agreement, claim that such interpretation forms the basis of a contractual obligation (even though

[7] At least one former Joint Petitioner (KMC) agrees that Parties should not be able to use the Applicable Law provision to circumvent what the Parties agree to in this agreement. (Johnson Depo. at 87).

during the two years of negotiations the Joint Petitioners did not raise the issue), and then seek to enforce the obligation against BellSouth. The Joint Petitioners' approach is an invitation to on-going disputes rather than the certainty the parties reasonably should expect from an agreement.

The Joint Petitioners provide a prime example of how they intend to employ this strategy to undermine the entire negotiation, arbitration, and agreement process in their Brief regarding Issue 6. Prior to the parties filing briefs, it was undisputed that both parties agreed that neither would be liable to the other for indirect, consequential, or incidental damages. *See* JP Exhibit A; BellSouth Exhibit A. The Joint Petitioners confirmed this agreement in their brief and at the hearing. (JP Brief at 18) ("Item 6 is in large measure a definitional issue: how should indirect, incidental, and consequential damages be defined for purposes of the Agreement? These are damages for which neither Party will be liable to the other."); (KY Tr. at 66-67). However, after researching Georgia law regarding incidental and consequential damages for their Brief, the Joint Petitioners now take the position that "to the extent that the reasonably foreseeable damages contemplated by Petitioners' proposed language may be characterized as indirect, incidental, or consequential, Petitioners, consistent with Georgia law, do not voluntarily agree to absolve BellSouth of these damages." (JP Brief at 19-20). This new position is entirely inconsistent with the agreement previously reached and confirmed by the Joint Petitioners that no party would be liable to the other for indirect, incidental, or consequential damages.

In sum, the parties reached an agreement regarding this issue. The Joint Petitioners subsequently researched the issue under Georgia law for their Brief. And the Joint Petitioners now attempt to use their "Applicable Law" argument to take a position directly undermining and negating the already agreed-upon language as to indirect, consequential, and incidental damages. The Joint Petitioners' manipulation of the concept of "Applicable Law" is inappropriate,

emasculates the entire arbitration and negotiation process, and subjects the parties' to complete and utter uncertainty as to their respective obligations.

BellSouth's language protects both parties from such inappropriate behavior. It provides 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***, Applicable Law" and the other Party disputes such right, obligation, or requirement, the Parties agree to submit the dispute to dispute resolution before the Commission and agree that any finding that such right or obligation exists prospectively only. (*See* BellSouth Exhibit A, GT&C at § 32.2) (emphasis added). Clearly, if the Commission determined that the obligation should have applied retroactively, the Commission could include such a requirement in its order.

In addition, the Joint Petitioners' position that law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise, is unworkable. (GA Tr. at 440; Russell Depo. at 142; 145). In order to give this provision any effect and to prevent the Joint Petitioners from abusing it, there would need to be an exact list of every instance where the parties expressly agreed to something other than the law. Otherwise, the Joint Petitioners could argue that, notwithstanding the express wording of the agreement, they never intended to waive or not comply with "Applicable Law."

There is no such list and the Joint Petitioners acknowledge they are unaware of every instance where the parties have agreed to do something other than the law. (KY Tr. at 68; GA Tr. at 441; Johnson Depo. at 85-86). Accordingly, adopting their language results in the Joint Petitioners having the unfettered ability to take positions contrary to which they have already

agreed or to create new obligations, not in existence in the agreement, based upon some new reading of "Applicable Law."

Further, the Joint Petitioners' argument that BellSouth's language "injures its own interests" because the agreement does not specifically reference CPNI rules is erroneous. (JP Brief at 31). As an initial matter, the Parties have already agreed to procedures that protect CPNI consistent with those rules in Attachment 6 regarding Customer Service Records and Letters of Authorizations. Additionally, BellSouth's language is only applicable where there is a dispute as to the existence of an obligation not previously disclosed or set forth in the Agreement. Obviously, BellSouth does not dispute the existence of CPNI laws or that BellSouth is obligated to comply with them. Indeed, BellSouth is arbitrating Item 86(B), which deals with the rights the Parties should have when one Party violates CPNI laws relating to Customer Service Records.

Finally, the Commission should also reject the Joint Petitioners' feeble attempt to explain away BellSouth's preemption arguments. (JP Brief at 32). Contrary to the Joint Petitioners' claims, this Commission should not disregard this legitimate, legal issue because "[t]he question whether federal law preempts the law of any state is one that gets answered in response to a request for a declaration of preemption." (*sic*) (JP Brief at 32). How a question of preemption gets resolved is not determinative or even tangentially related to the issue.

The simple fact is that the Joint Petitioners believe that (1) state unbundling laws are automatically incorporated into this Section 252 agreement upon execution, unless expressly excluded; and (2) BellSouth could be found in breach of state unbundling laws, even though the agreement never referenced them. (FL Tr. at 221, 223; Russell Depo. at 142-43; Johnson Depo. at 90-92). The Joint Petitioners further contend that, even if federal law provides that BellSouth

no longer has an obligation to provide an unbundled element, and even though the agreement never referenced state unbundling law, BellSouth could still be obligated under state law to provide that element via this agreement. (FL Tr. at 224-25). Such a result conflicts with the entire rationale for entering into a Section 252 arbitration agreement as well as the doctrine of preemption. This is a very real scenario that the Commission must take into account in evaluating the ramifications if the Joint Petitioners' language were adopted. In contrast, BellSouth's language is reasonable and avoids the unfortunate "gaming" that Joint Petitioners' language could permit.

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? (Attachment 2, Section 1.7)

BellSouth has no obligation under the *TRO*[8] to commingle 251 elements with 271 services, and state commissions have no authority to rule otherwise.[9] The Joint Petitioners' entire argument rests on the supposition that 271 elements are "wholesale services" and thus BellSouth must commingle 251 elements with 271 elements per the FCC Rule and *TRO*. (JP Brief at 34). The Joint Petitioners are wrong. While 271 elements (switching, loops, and transport) can be considered wholesale services in the general sense when purchased by another carrier to provide service to the ultimate end user, the FCC's definition of "wholesale services" in this context specifically excludes 271 elements from any commingling obligation.

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[8] *Triennial Review Order*, FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("*TRO*").

[9] As stated in BellSouth's Brief, state commissions have no authority or jurisdiction to regulate 271 services, which is exactly what the Joint Petitioners are asking in this arbitration issues. Accordingly, for the reasons set forth in BellSouth's Brief and those presented in its Motion for Summary Judgment, or in the Alternative Declaratory Ruling and Response Brief filed in the Generic Docket (Docket No. 2004-00427), all of which are incorporated by reference herein, state commissions are without jurisdiction to adopt the Joint Petitioners' position because state commissions do not have jurisdiction over 271 elements. BellSouth does not repeat those arguments here because the Joint Petitioners failed to address this jurisdictional argument in their brief.

This conclusion is supported by the express wording of the *SOC*,[10] the *TRO*, the Errata to paragraph 584 of the *TRO*, and the *TRRO*.[11] First, paragraph 579 of the TRO specifically states that the commingling obligations addressed in the *TRO* arose from the *SOC*. *See* TRO at ¶ 529 ("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."). The *SOC*, in turn, defined commingling as combining loops or loop-transport combinations with tariffed special access services.

> We further reject the suggestion that we eliminate the prohibition on "commingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above. We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXC's solely or primarily to bypass special access services. We emphasize that the co-mingling determinations that we make in this order do not prejudice any final resolution on whether unbundled network elements may be combined with tariffed services. We will seek further information on this issue in the Public Notice that we will issue in early 2001.

SOC at ¶ 28. Thus, what the FCC changed in the *TRO* was the commingling obligation set forth in the *SOC* – specifically, the obligation to combine loops with *tarriffed* special access circuits.

Second, in the original paragraph 584 of the *TRO*, the FCC originally stated that "[a]s a final matter, we require 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." *TRO* at ¶ 584. In the Errata, the FCC deleted the phrase "unbundled pursuant to section 271." *See TRO* Errata at ¶ 27. Without this reference, there is no other

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[10] *Supplemental Order on Clarification*, FCC 00-183, CC Docket No. 96-98 (rel. June 2, 2000) ("SOC").
[11] *Triennial Review Remand Order*, FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*TRRO*").

discussion of 271 elements in the commingling section of the *TRO*. The Joint Petitioners do not dispute this fact nor the fact that the Errata is in force and effect. (Tr. at 446-448).

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. *See TRO* at ¶ ¶ 579, 580, 581; *see also TRO* at ¶ 583 ("Instead, commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services."). Tellingly, the FCC in the *TRO* even instructed ILECs how to implement the commingling obligation and in doing so limited these instructions to tariffed services: "For these reasons, we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations." *TRO* at ¶ 581. The FCC never instructed RBOCs in either the *TRO* or its rules to modify the manner in which ILECs provide 271 services in order to effectuate commingling. These passages, in conjunction with the Errata, make it clear that the FCC never intended for ILECs to commingle 271 elements with 251 elements.

Third, the FCC confirmed that the phrase "wholesale services" does not include 271 services in the *TRRO*. Particularly, in addressing conversion rights, the FCC in the *TRO* used the same "wholesale services" phrase that it uses in describing ILEC's commingling obligations. *See TRO* at ¶ 585 ("We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations ...."). 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 *Triennial Review Order* that competitive LECS may convert tariffed incumbent LEC services to UNEs and UNE

combinations ...." *TRRO* at ¶ 229. Thus, the FCC has subsequently construed the phrase "wholesale services" to be limited to tariffed services, which is consistent with BellSouth's position.

Accordingly, to adopt the Joint Petitioners' argument would mean that the FCC meant for "wholesale services" to have two different meanings in the same order. Such a finding is illogical and also in violation of basic statutory construction principles. *See e.g., Hunter v. United States*, 101 F.3d 1565, 1575 n.8 (11th Cir. 1996) ("It is a basic rule of statutory construction that identical words [even when] used in different parts of the same act are intended to have the same meaning."; *Cox. v. City of Dallas*, 256 F.3d 281, 294, n. 22 (quoting *Commissioner v. Lundy*, 516 U.S. 235, 250 116 S.Ct. 647, 133 L.Ed.2d 611 (1996) ("identical words used in different parts of the same act are intended to have the same meaning"). The only logical conclusion based upon the express wording of the *TRO* as well as the Errata (and the *TRRO*) is that BellSouth has no obligation to commingle 271 elements with 251 elements. At least two state commissions have reached this same conclusion.[12]

Moreover, the Joint Petitioners' claim that Ms. Blake's testimony "repudiates" BellSouth's arguments is inaccurate, at best. (JP Brief at 34). In her lay opinion, Ms. Blake testified in Georgia that, based on her review of the rules, TRO, and Errata, it is her opinion that the FCC excluded 271 elements from the definition of "wholesale services". As usual, the Joint

[12] *In re: XO Illinois, Inc.*, 04-0371 Ill. C.C., 2004 WL 3050537 at 15 (Oct. 28, 2004) ("SBC is not required to commingle UNEs and UNE combinations with network elements unbundled pursuant to Section 271. The FCC specifically removed that requirement from the *TRO* 584 when it issued its *TRO* Errata.") *In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone,* Docket Nos. 05-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 867 at ** 7-8 (July 18, 2005) ("271 commingling terms and conditions ha[ve] no home in [Section 251] successor agreements. The Commission notes that, if it did entitle Coalition members to 271 commingling under the successor agreements and SWBT refused to provide such commingling, it would have no enforcement authority against SWBT because that authority resides with the FCC."). The Illinois Commerce Commission subsequently reached a different conclusion in *In re: Metro Access Transmission Services, Inc.*, Docket No. 04-0469. In addition, upon information and belief, the state commissions of Washington, Utah, Texas, and Colorado also have reached a different understanding of an ILEC's commingling obligations.

Petitioner cite to a single portion of Ms. Blake's testimony and then take it out of context. However, as can be seen from the following excerpt, Ms. Blake's testimony is entirely consistent with BellSouth's positions.

> Q. Now the original wording of the rule is the wording that we're looking at here today on page 3 of this rules attachment to the Triennial Review, right?
>
> A. I was saying the original wording of the order and the way the errata is worded.
>
> Q. Oh, I see.
>
> A. It changed the wording of the Order.
>
> Q. But they didn't change the wording of the rule, did they?
>
> A. I don't believe the errata impacted the rule at all.
>
> Q. So if the errata didn't impact the rule at all, how is it that you are saying that wholesale services is to some extent limited?
>
> A. Because you have to read the rule in context with the order, and the order is very clear that through the errata, they took out the obligation to commingle 251 UNEs or UNE combinations with 271 elements.

(GA Tr. at 1079).

In addition, the Commission should not accept the Joint Petitioners' argument that the manner in which BellSouth complies with its 271 obligations somehow undermines its commingling arguments. (JP Brief at 36). Specifically, the fact that BellSouth complies with its 271 obligations to provide loops and transport via its access tariff and its 271 switching obligation via a commercial agreement is of no consequence. The loop and transport access services in BellSouth's tariffs were available well before the 1996 Telecommunications 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 251 elements with these access services, nor creates an obligation for BellSouth to commingle 251 elements with 271 elements that are not otherwise available from BellSouth. Regardless of how BellSouth complies with its 271 obligations, for the reasons stated above, BellSouth has no obligation to commingle 251 elements with 271 services.

Finally, the Commission should reject the Joint Petitioners' arguments relating to footnote 1990 of the *TRO* and the Errata. (JP Brief at 36). Specifically, the Joint Petitioners focus on the FCC's deletion of the last sentence of footnote 1990 in the Errata, which provided that ILECs have no obligation to commingle 251 with 271 elements. The FCC deleted this sentence because of the FCC's deletion to the reference of 271 services in paragraph 584. Thus, there is no hidden meaning in the FCC's errata to footnote 1990; rather, the deletion is simply the removal of redundant language that became unnecessary once the only reference to 271 services in the commingling section of the *TRO* was deleted.

As a result, the Joint Petitioners also are incorrect in their statement that the FCC was prohibited, as a matter of law, from substantively amending the FCC's Rules via the Errata. (JP Brief at 37). The FCC did not amend the commingling rules via the Errata. Rather, with the deletion of the sole reference to 271 services in paragraph 584, the FCC simply cleaned up "stray language" that it never intended to include. In sum, BellSouth never had an obligation to commingle 251 elements with 271 services. Thus, the Errata to paragraph 584 did not strip CLECs of any rights.

Moreover, even if the Joint Petitioners were correct, the FCC also would be without authority to strike the last sentence of footnote 1990, which affirmatively stated that BellSouth

had no obligation to commingle 251 elements with 271 services. Contrary to the "spin" the Joint Petitioners now try to use in an unsuccessful attempt to reconcile their irreconcilable position on this issue, if deleting the reference to 271 in paragraph 584 were impermissible as a matter of law because it stripped substantive rights from the CLECs, the deletion of the last sentence of footnote 1990 also would be improper because it stripped substantive rights from ILECs.

For all the reasons stated herein, the Commission should adopt BellSouth's position on this issue.

Item 36: (A) How should line conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to line conditioning? (Attachment 2, Section 2.12.1)

Item 37: Should the Agreement contain specific provisions limiting the availability of Line Conditioning to copper loops of 18,000 feet or less? (Attachment 2, Section 2.12.2)

Item 38: Under what rates, terms, and conditions should BellSouth be required to perform Line Conditioning to remove bridge taps? (Attachment 2, Sections 2.12.3 and 2.12.4)

The Joint Petitioners fail to acknowledge or address the fundamental dispute: Is BellSouth required under the Act to perform line conditioning that exceeds what BellSouth provides its own customers at TELRIC?[13] Both the *TRO* and the FCC Rules relating to line conditioning require that this question be answered in the negative. It is undisputed that BellSouth's line conditioning obligation is derived from its 251(c) duty to provide nondiscriminatory access. *TRO* at 643. Further, 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." *Id.* (emphasis added). As such, both the FCC Rules and the *TRO* require the Commission find

[13] This dispute permeates all three of the line conditioning issues. Specifically, regarding Issue 37, the Joint Petitioners want BellSouth to perform line conditioning on loops in excess of 18,000 feet even though it is undisputed BellSouth does not perform this type of line conditioning for its own customers. Similarly, regarding Issue 38, the Joint Petitioners want BellSouth to remove bridged taps between 0 and 2500 feet, even though (1) it is undisputed BellSouth does not perform this type of line conditioning for its own customers; and (2) the CLEC industry collaborative already has agreed to pay special construction rates for this service.

that BellSouth's line conditioning obligations are limited to what BellSouth provides to its own customers.

The Joint Petitioners refuse to acknowledge this basic principle because it is fatal to their argument, and instead adopt a position inconsistent with both the *TRO* and the rules. Specifically, they argue that BellSouth's line conditioning obligations are unlimited and that BellSouth must perform line conditioning at TELRIC for the Joint Petitioners even when such line conditioning exceeds what BellSouth provides itself. (FL Tr. at 803; JP Brief at 39). The Joint Petitioners' sole justification for this position is that Rule 51.319(a)(1)(iii)(a) does not expressly limit BellSouth's obligations in the manner BellSouth seeks. (JP Brief at 39).

The fallacy in the Joint Petitioners' argument is that it ignores the actual language of the very rules upon which they rely. In particular, the line conditioning obligations set forth in Rule 51.319(a)(1)(iii) expressly state that line conditioning applies to copper loops being requested "under paragraph (a)(1) of this section ...." 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." The obligation to provide nondiscriminatory access to the cooper 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: "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) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section." 47 C.F.R. § 51.319(a). Accordingly, BellSouth's 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 very rules that the Joint Petitioners rely upon.

Nondiscriminatory access is defined under the FCC Rules 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.
>
> (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 ....

47 C.F.R. § 51.311(a)(b). The Eighth Circuit, in vacating the FCC's prior "superior quality rules" for nondiscriminatory access,[14] which is exactly what the Joint Petitioners seek here, stated as follows regarding BellSouth's obligation to provide nondiscriminatory access:

> Subsection 251(c)(2)(C) requires the ILECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself ...." Nothing in this statute requires the ILECs to provide superior quality interconnection to its competitors. The phrase "a least equal in quality" establishes a minimum level for the quality of interconnection; it does not require anything more.

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. F.C.C., 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) (emphasis added). Accordingly, BellSouth's obligation to perform line

[14] Prior to the implantation 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, which is exactly what the Joint Petitioners are asking here. Specifically, this rule provided: "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.*" 47 C.F.R. § 51.311(c) (2001 ed.). This "superior in quality standard" **was struck down by the Eighth Circuit in *Iowa Util. Bd. v. FCC*.** Accordingly, **the FCC deleted this superior standard**, which forms the basis of the Joint Petitioners' request, with the issuance of its new rules in the *TRO*. Thus, contrary to the Joint Petitioners' claim, the parameters of BellSouth's obligation to provide line conditioning changed in the *TRO*, even if the definition of line conditioning did not.

conditioning for the Joint Petitioners is limited as a matter of law to its nondiscrimination obligation under the Act. This nondiscrimination obligation requires BellSouth to provide to the Joint Petitioners the same type of line conditioning that it provides to itself, nothing more.

The FCC memorialized this requirement in the *TRO,* wherein it found that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." *TRO* at ¶ 643. The FCC went on further 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." *Id.* (emphasis added).

Adoption of the Joint Petitioners' position violates BellSouth's nondiscrimination obligations under the Act and results in BellSouth performing line conditioning in instances where it does not provide line conditioning for its own customers. Accordingly, the only interpretation of both paragraph 643 of the *TRO,* as well as the FCC Rules, that gives effect to both provisions is BellSouth's interpretation. To hold otherwise, would be to ignore the FCC's express findings. BellSouth's nondiscrimination obligations do not require BellSouth to perform line conditioning at TELRIC for the Joint Petitioners that exceeds what BellSouth provides for its own customers. (Fl Tr. at 682).[15]

Further, the Commission should not be dissuaded from applying the law correctly because of the Joint Petitioners' specious argument that, by adopting BellSouth's language,

[15] The Joint Petitioners' reliance on footnote 1947 of the *TRO* where the FCC stated that in its *Line Sharing Order*, 14 FCC Rcd 20912, it held that the ILECs must condition loops of any length is of no consequence. The FCC's Line Sharing Order was issued in 1999, prior to the refinement of BellSouth's nondiscrimination obligations set forth in the *TRO,* as discussed above. Thus, by referencing this finding, the FCC was not reasserting this obligation; rather, it was providing a historical perspective as to how it has ruled on this issue in the past.

BellSouth could effectively prevent any line conditioning from occurring by deciding not to provide any line conditioning to itself. (JP Brief at 42-43). While technically possible, Mr. Fogle testified that this hypothetical was not very practical because BellSouth is "very interested in selling its DSL services." (GA Tr. at 817). Chairman Burgess of the Georgia Commission recognized the impractical nature of this argument as he stated that BellSouth's interest is to continue to perform line conditioning so that it can continue receiving revenue from DSL. (GA Tr. at 817).

Further, and more importantly, this hypothetical exists for all services BellSouth provides as UNEs, not jut line conditioning. For all such services, BellSouth's obligation is to provide UNEs to CLECs that are at least in quality to the services that it provides to itself. Thus, if BellSouth, in a surreal world, decided not to take retail orders anymore, BellSouth would have no obligation to provide access to its OSS to CLECs. Similarly, if BellSouth decided not to provision its own loops, it would have no obligation to provide loops to CLECs. These hypotheticals are no more real than the Joint Petitioners' implausible arguments and unfounded fears.

Accordingly, consistent with the *TRO* and the FCC Rules, this Commission should conclude that BellSouth's obligation to provide line conditioning at TELRIC is limited to the type of line conditioning BellSouth provides to itself. Any other finding exceeds BellSouth's obligations under the Act.

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?

(Issue 51b)

In evaluating the parties' respective arguments on this issue, the Commission should remember that the Joint Petitioners testified that they obtain Enhanced Extended Links ("EELs") in compliance with the law. (FL Tr. at 234; GA Tr. at 429). The Joint Petitioners also do not dispute that the *TRO* requires BellSouth to pay for the audit and for BellSouth to reimburse the CLEC for its costs associated with the audit if the auditor finds that the CLEC complied with the law in all material respects. (FL Tr. at 234, GA Tr. at 460-61). Given these concessions, the Joint Petitioners should not be seeking any of the audit impediments contained in their proposed language. All of these impediments violate the *TRO* and are designed solely to frustrate if not impede BellSouth's audit rights. Simply put, if Joint Petitioners are complying with the law and will recover any costs associated with the audit if they have complied with the law, then what are the Joint Petitioners so desperately afraid of?

The purpose of an EELs audit is to confirm that the CLEC is obtaining EELs in compliance with federal law. This audit right is necessary because the FCC has determined that CLECs are entitled to obtain EELs upon their certification to the ILEC that they are using the EEL in compliance with the law. *TRO* at ¶ 620, 624. Because BellSouth has no ability to challenge the CLEC's certification from the outset, the *TRO* provides BellSouth with audit rights to ensure CLEC compliance with the EEL eligibility criteria and to prevent gamesmanship by CLECs. (GA Tr. at 463; *TRO* at ¶ ¶ 621,624, n, 1900). The Joint Petitioners do not dispute this fact.

Q. Don't you think the FCC also recognizes that there are some CLECs who are improperly using EELs and that

based upon your self-certification, the only way to catch the CLEC is by the audit?

A. That's why they allow limited audit rights.

(GA Tr. at 463).

BellSouth already has agreed to conduct audits based upon cause. (JP Brief at 50). Nevertheless, the Joint Petitioners seek to add additional requirements to the audit process that are not supported by the *TRO* and that will only provide the Joint Petitioners with a means to delay BellSouth's audit rights. Specifically, the Joint Petitioners seek to limit BellSouth's audit rights to the circuits that BellSouth identifies in the notice of the audit and for which it provides supporting documentation. (FL Tr. at 231). The Joint Petitioners concede, however, that there is nothing in the *TRO* expressly requiring these additional conditions. (FL Tr. at 233-34). In fact, the *TRO* is completely silent on the contents of any notice requirement and does not limit BellSouth's audit right to those circuits identified in any notice.

The Joint Petitioners sole argument in support of these excessive obstacles to BellSouth's audit rights is that, by not identifying the circuits or providing documentation to support the cause, BellSouth is rendering the "for cause" or "limited right to audit" standard meaningless. (JP Brief at 50). This statement is simply not true. As stated above, BellSouth will only initiate an audit upon having cause, and BellSouth recognizes its "limited right to audit" as it will seek to audit no more than once a year and will pay for the independent auditor, as required by the *TRO*. *TRO* at ¶ 626. ("We conclude that incumbent LECs should have a limited right to audit compliance with the qualifying service eligibility criteria. 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."). Accordingly, there is absolutely no justification for Joint Petitioners to seek additional limitations or restrictions to BellSouth's audit

rights, which as evidenced by the behavior of NuVox at this Commission in relation to the current EEL audit dispute, will only be abused by CLECs to delay a finding that they are in violation of federal law.

To illustrate how the Joint Petitioners' proposal will lead to delay, one only has to look at Joint Petitioners' testimony. Joint Petitioners concede that (1) they alone would determine if the documents produced along with the notice were sufficient for the audit to proceed; and (2) if they disagreed that the documentation was sufficient, the parties would have to go to dispute resolution prior to the audit commencing. (FL Tr. at 232). Thus, all a Joint Petitioner would have to do to frustrate and delay an audit would be to challenge the identification and documentation provided by BellSouth. And, if an audit is going to establish that a CLEC is in violation of the law, there is no amount of identification or documentation that will appease such a CLEC to allow the audit to proceed and reveal the CLEC's malfeasance.

Further, while the Joint Petitioners contend that there may be instances in which the initial audit could be expanded (GA Tr. 456; JP Brief at 52), they refuse to unequivocally agree to such an expansion, even where there is an initial finding of systemic noncompliance. (FL Tr. at 237; Joint Petitioner Response to Staff Interrogatory No. 94(b) (stating that "BellSouth might then be entitled to expand the scope of the initial audit"). Indeed, when confronted with this issue, Mr. Russell refused to agree that a finding of 60 percent, 70 percent, or even 80 percent noncompliance would result in NuVox not objecting to the expansion of the initial audit. (FL Tr. at 236). Thus, BellSouth is faced with the very real possibility that, even if the initial audit reveals 80 percent noncompliance, the Joint Petitioners will object to any expansion of the audit. The Commission should not enable the Joint Petitioners to use this unilateral power to delay or prevent BellSouth's audit rights.

(Issue 51c)

The crux of the Joint Petitioners' argument on this issue is that adopting a requirement for mutual agreement as to the selection of the auditor "will avoid the protracted litigation that has ensued over this issue ...." (JP Brief at 54). Based on NuVox's actions in the current EEL audit dispute before this Commission, Joint Petitioners' statement is pure fiction.

Specifically, NuVox repeatedly has stated that it would not object to the selection of a nationally recognized accounting firm, like KPMG, as the auditor. (Russell Depo. at 200). This is not surprising given that KPMG is NuVox's external auditor. (JP Brief at 53, n. 22; FL Staff Depo. at 55; FL Tr. at 241). Nevertheless, NuVox has taken the position that KPMG is not independent, even though BellSouth and NuVox agreed to use KPMG in Georgia prior to the audit starting, NuVox then sued KPMG in South Carolina state court to prevent the audit in Georgia from being completed. *See Order On BellSouth's Motion for Commission Involvement*, GPSC Docket No. 12778-U; KY Tr. at 204.[16] Thus, NuVox's actions in relation to its own external auditor definitively establishes that mutual agreement of the auditor prior to the audit commencing will not avoid litigation, as claimed by NuVox.[17]

Further, there is no requirement in the *TRO* for mutual agreement in the selection of the auditor. Rather, the *TRO* simply states that the "independent auditor must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants ("AICPA") ...." *TRO* at ¶ 626. The Parties already have agreed to this standard.

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[16] The Joint Petitioners reference KPMG in its Brief by stating that the "auditor conducting the audit authorized by the Commission in Docket No. 12778-U recently acknowledged that its independence had been compromised. On its own volition, the auditor suspended work on the audit until it could proceed in compliance with AICPA standards." (JP Brief at 57). This statement is inaccurate. KPMG halted its audit of NuVox in Georgia because NuVox sued KPGM in South Carolina alleging that KPMG, its own external auditor, was not independent.

[17] The fact that the agreement requires mutual agreement for a PIU auditor is of no consequence. (JP Brief at 55). The history of the parties regarding EEL audits, as established above, proves that mutual agreement as to the auditor prior to the audit commencing does not avoid litigation of the issue and only engenders more litigation by NuVox in multiple forums to prevent the audit from proceeding.

(Tr. at 463). Accordingly, the mutual agreement requirement is not sanctioned by the *TRO*, and, in any event, the Joint Petitioners will not be prejudiced by complying with the *TRO* because they can raise any independence concerns in a complaint proceeding wherein BellSouth is attempting to enforce the findings of the audit. The Commission already has reached the same conclusion regarding the EEL audit dispute between NuVox and BellSouth under the current agreement: "NuVox may challenge the auditor's qualifications or bias and the veracity of any conclusions, along with the reasonableness of any remedies sought by BellSouth as a result of the audit, upon the filing of a Complaint by BellSouth . . . ." Case No. 2004-00295, April 15, 2005 Order.

In sum, the Commission should reject the Joint Petitioners' proposed language and adopt BellSouth's. To find otherwise would subject BellSouth to unnecessary conditions and obstacles designed to frustrate and delay BellSouth from exercising its audit rights. If a CLEC is in violation of the law, there is no type of notice, or any sufficient amount of documentation, or any auditor that will satisfy the CLEC such that it will agree to proceed with the audit and not use the Joint Petitioners' language as a means to delay the revelation of their malfeasance.

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? (Attachment 3, Section 10.8.1 (NCS/NVS), 10.13 (XSP))

BellSouth has no obligation to provide a transit function under the 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 tandem function to the Joint Petitioners, just not at TELRIC. The Georgia Commission already has determined BellSouth does not have to provide the transit function at TELRIC 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). [18] The Commission should reach the same conclusion here. Such a finding would be consistent with the findings of the FCC's Wireline Competition Bureau in the *Virginia Arbitration Order*,[19] the findings of the FCC in the *TRO*;[20] and the findings of state commissions.[21]

In addition to the fact that BellSouth does not have any obligation under federal law to provide the transit service at TELRIC (as confirmed by the *TRO*), BellSouth does experience 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. (Tr. at 206). As explained by Ms. Blake: "That's the function and the service we provide through our transit obligation. If the Joint Petitioners don't want our transit offering, they can directly interconnect with other carriers. . . ." (Tr. at 206-07). And, indeed they do, as confirmed by KMC witness Mertz:

> Q. Isn't it true, sir that KMC is directly connected with other carriers today?
>
> A. That is true.

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[18] The Joint Petitioners argue that BellSouth did not offer a composite TIC rate in this arbitration and thus the Commission should disregard the Georgia Commission's decision. This argument fails to distinguish the arbitration from the Georgia Commission's Docket No. 16772-U. The fact is that BellSouth offered Joint Petitioners the composite TIC rate of $.0025 in the hopes of resolving the issue in light of the Georgia Commission's decision in Docket No. 16772-U. Regardless of whether the TIC rate is a composite rate or a stand-alone rate, BellSouth never has waivered from its position that TELRIC rates do not apply to the TIC. (GA Tr. at 1104-05).

[19] *Virginia Arbitration Order* at ¶ 117 ("In the absence of such a precedent or rule, we decline, on delegated Commission, 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 section 251(A)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.").

[20] TRO at ¶ 534, n. 1640 ("To date, the Commission's rules have not required incumbent LECs to provide transiting.")

[21] *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).

Q. And, when you are directly connected with other carriers, isn't it also true that BellSouth does not perform the transit function to complete a call?

A. For the traffic exchange between the two carriers they perform no function for us.

(KY Tr. at 139).

The Joint Petitioners argue that this cost is "senseless" and that "Joint Petitioners should not pay for records that another party requests." (JP Brief at 62). The Commission should reject Joint Petitioners' argument because it is nothing more than an attempt by the Joint Petitioners to avoid paying for services received. Stated another way, with this argument, the Joint Petitioners' want (1) BellSouth's transit service for ***free***; and (2) the terminating carrier not to be able to identify Joint Petitioners as the originating carrier so that they can avoid paying reciprocal compensation and terminate calls for ***free***. The Joint Petitioners' attempt to get services from BellSouth and other carriers for ***free*** should be denied.

Finally, the Commission should disregard the Joint Petitioners' argument that the Commission should reject the TIC because it is "entirely new" as to them. (JP Brief at 61). BellSouth has charged other CLECs the TIC in the past, and, in any event, the fact that the Joint Petitioners may have been receiving service for free in the past (1) does not in any way establish that BellSouth must provide the function at TELRIC; and (2) is no justification that this free service should continue in the future.

Item 86B: **(B)** ***How should disputes over alleged unauthorized access to CSR information be handled under the Agreement? (Attachment 6, Sections 2.5.6.2 and 2.5.6.3)***

It is remarkable that Issue 86(B) remains unresolved. Joint Petitioners are adamant that "[d]isputes over CSR access should be handled pursuant to the Dispute Resolution provisions set forth in the General Terms of the Agreement." (JP Brief at 63). BellSouth agrees. Specifically,

BellSouth proposed language for Issue 86(B) provides in relevant part: ***"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."*** BellSouth Exhibit A, Att. 6, § 2.5.5.3 (emphasis added). Turning to the dispute resolution provision, the parties have agreed that while a dispute is pending before a Commission, that ***"each Party shall continue to perform its obligations under this Agreement."*** BellSouth Exhibit A, Gen T&Cs, § 13.2 (emphasis added).[22] This could not be more clear.

Rather than admit that BellSouth's language gives Joint Petitioners what they want, Joint Petitioners attempt to create an issue by erroneously asserting that there is some "apparent conflict between BellSouth's proposed language and the Dispute Resolution provisions in the General Terms of the Agreement." (JP Brief at 66). There is no conflict. Accordingly, the Commission should disregard the Joint Petitioners' baseless attempt to create unnecessary conflict and confusion.[23]

Joint Petitioners then complain that BellSouth's proposed language "inexplicably retains the debilitating pull-the-plug remedies and impossibly short response windows . . . ." (JP Brief at 60). What is inexplicable is the Joint Petitioners stubborn refusal to acknowledge that BellSouth's proposed suspension and termination rights are triggered only if a party (i) disregards its obligation to produce an appropriate letter of authorization ("LOA") upon request; and thereafter (ii) fails to dispute (i.e. ignores) a notice that specifies the alleged CSR-related

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[22] The same, agreed upon language appears in Joint Petitioners' proposed language for § 13.1 of the GT&Cs section of the Agreement.

[23] For example, in a futile effort to show that BellSouth's hearing testimony is somehow inconsistent with BellSouth's proposed language, Joint Petitioners truncate a response given by BellSouth witness Scot Ferguson. (JP Brief at 64) ("Contrary to Mr. Ferguson's testimony before Chairman Goss, BellSouth's proposed language **does not preclude** BellSouth from terminating services if a Petitioner files a dispute with the Commission.). The statement is misleading and inaccurate – Mr. Ferguson plainly testified that if there is a CSR-related dispute pending at the Commission, then neither party will terminate service while such dispute is pending. (KY Tr. at 224).

noncompliance. *See* BellSouth Exhibit A, Att. 6, §§ 2.5.5.2 and 2.5.5.3. 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, such termination rights are contained in the end user tariffs of BellSouth (GSST § A2.2.9) and the Joint Petitioners. *See* NuVox Tariff § 2.7.3.D; Xspedius Tariff § 2.5.6.5; KMC Tariff § 2.5.5(F). Further, such rights are necessary in the limited situation where a Joint Petitioner (or a CLEC that adopts this agreement) engages in the unauthorized access of CSR information and decides to continue such unlawful behavior.

Regarding the Joint Petitioners' assertion that Bellsouth has proposed "impossibly short response windows," it bears repeating that under BellSouth's proposed language, 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 an appropriate LOA.[24] Two weeks is more than sufficient time to produce documentation that the Joint Petitioners are legally and contractually obligated to keep.[25] This is particularly true here, given the fact that the Joint Petitioners' lead witness on this issue: (1) cannot identify any prior dispute regarding unauthorized access to CSR information (Falvey Depo. at 253); (2) acknowledges that producing an appropriate LOA is something that could take as little as two (2) business days (Falvey Depo. at 222-223); and (3) perhaps most importantly, cannot identify one reason why it would take more than two weeks to produce an appropriate LOA. (GA Tr. at 556-557).

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[24] The parties have agreed that upon request, a party "shall use best efforts" to provide an appropriate LOA within seven (7) ***business*** days. (Att. 6, § 2.5.5.1). Seven business days equates to at least nine (9) calendar days. Under BellSouth's proposed language, ***only after the expiration of at least nine (9) calendar days,*** if a party fails to produce an appropriate LOA, then the party requesting the LOA will provide written notice via email specifying the alleged noncompliance and advising that access to ordering systems may be suspended in five (5) days if such noncompliance does not cease. *See* BellSouth Exhibit A, Att. 6, §§ 2.5.5.2 and 2.5.5.3; FL Tr. at 629-630.

[25] Citing Mr. Falvey's testimony, Joint Petitioners' claim that "this issue is not simply about producing LOAs." (JP Brief at 65). To be clear, despite his testimony that he has "been doing this in 20 states for about 10 years," (KY Tr. at 115), Mr. Falvey admitted that the one example he gave regarding a dispute involving an "appropriate" LOA dispute, was "a hypothetical based on real-life examples." (KY Tr. at 115).

As with many issues, the Joint Petitioners' arguments regarding Issue 86(B) are based upon pure speculation and conjecture.[26] Accordingly, the Commission should adopt BellSouth's proposed language on Issue 86(B) as it addresses all of the Joint Petitioners' concerns, and it gives the parties sufficient recourse if a party refuses to comply with its legal and contractual obligations regarding the protection of CSR information.[27]

Item 88: What rate should apply for Service Date Advancement (a/k/a service expedites)? (Attachment 6, Section 2.6.5)

As stated in BellSouth's post-hearing Brief, this issue is not appropriate for arbitration under Section 252 of the Act because BellSouth has no Section 251 obligation to expedite service orders. Compulsory arbitration under Section 252 should be properly limited to those issues necessary to implement a Section 251 interconnection agreement. *See MCI v. BellSouth,* 298 F.3d 1269, 1274 (11th Cir. 2002). Expedite charges are not necessary to implement the agreement. Rather, BellSouth meets its Section 251 obligations by providing service pursuant to standard provisioning intervals already established by the Commission. (GA Tr. at 1109).

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[26] For example, Joint Petitioners misquote and mischaracterize Mr. Ferguson's testimony in an attempt to support the allegation that BellSouth has some sort of anti-competitive intent behind its proposed language for Issue 86(B). (JP Brief at 64, fn. 26). This allegation is meritless. Specifically, in response to a question about whether or not a CLEC end user could order additional lines from BellSouth in a situation where the CLEC's access to ordering systems had been suspended because of unauthorized access to CSR information, Mr. Ferguson simply stated: *"The end user is still the customer of the CLEC. If they chose to go away from the account set up that they had with the CLEC, they could order additional lines, yes."* (GA Tr. at 687). Contrary to Joint Petitioners' assertion, the question and response has nothing to do with service disruption. Unfortunately, and in addition to being inaccurate, footnote 26 is a typical example of the unfounded concerns, puzzling paranoia, and inaccurate statements that the Joint Petitioners express on a number of issues throughout their Brief.

[27] Joint Petitioners' updated language for Issue 86(B) is unacceptable for many reasons, including the fact that it: (i) undermines agreed upon language; (ii) is unduly vague, and (iii) is subject to abuse. Joint Petitioners have proposed limiting BellSouth's proposed remedies to allegations involving "systemic rather than isolated instances of unauthorized access to CSR information." Without a definition of "systemic" the proposal is unduly vague. If "systemic" is defined, then the proposal is subject to abuse as a party would know how many isolated incidents of unlawful activity could go unchecked. Finally, the proposal emasculates other contractual provisions, and in particular the fact 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." (GA Tr. at 552-553). In sum, a "free pass" for a certain limited number of unlawful activities cannot be squared with the parties' legal and contractual obligations regarding access to CSR information.

Further, under the performance measurement plan established by this Commission,[28] BellSouth must pay SEEM penalties if BellSouth fails to provision service within Commission-established performance standards. (GA Tr. at 1110). These standards take into account BellSouth's service intervals.

The touchstone of Issue 88 is parity. From a provisioning perspective, BellSouth meets its nondiscrimination obligations by charging its retail and wholesale customers the same tariffed service expedite rate. (GA Tr. at 1108-1111). BellSouth acknowledges that the provisioning of UNEs ***within standard intervals*** is subject to TELRIC-compliant pricing. However, absent a finding of impairment, there is no legal or policy basis for impermissibly extending TELRIC pricing to ***discretionary and optional*** non-251 service offerings that go above and beyond standard UNE provisioning.[29] Expedited service provisioning is such an offering.[30]

Joint Petitioners speculate, without any supporting evidence, that BellSouth may not assess its service expedite charges on a nondiscriminatory basis. Lacking any evidence, Joint Petitioners turn to mischaracterizing testimony to support claims like "BellSouth can make no representation that the $200 per circuit per day rate is the rate BellSouth uniformly charges – even to CLECs, and BellSouth cannot quantify the number of expedite requests it receives. Tr. at 119:12-21 (Blake)." (JP Brief at 71). Contrary to Joint Petitioners' assertions, a review of the cited portion of the Georgia transcript simply shows that Ms. Blake testified that she did not know what percentage of service orders are accompanied by a request for expedited treatment.

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[28] Kentucky follows the Georgia SQM/SEEM plan.

[29] Indeed, nothing in the text of Section 251(c)(3) or in associated FCC Rules (for example, 47 CFR 51.311(b)) requires or implies that an ILEC must provide services to a CLEC that are ***superior in quality*** to those provided to a retail customer requesting similar services. Accordingly, so long as the rates are identical for all requesting parties, parity exists in the provisioning structure for services expedites. BellSouth complies with its parity obligations by charging its retail and wholesale customers the same service expedite rate. (FL Tr. at 900-901; 1017-1019).

[30] Again, it is undisputed that BellSouth has an ***option*** as to whether or not to accept a service expedite request. *See* BellSouth Exhibit A, Att. 6, § 2.6.5; Collins Depo. at 59.

(GA Tr. at 1119). She further testified that charging CLECs the FCC tariffed rate for a service expedite request is a standard contract provision that is contained in numerous interconnection agreements. *Id.*

Most importantly, from a parity perspective, Ms. Blake reiterated that BellSouth treats its retail customers and CLECs in the same manner; and if a service expedite request is not met, the customer (retail or CLEC) is not charged a service expedite rate. *Id.* In contrast, Joint Petitioners presented no evidence that BellSouth routinely waives service expedite charges for its retail customers. In deciding this issue, the Commission should disregard mere supposition about how BellSouth treats its retail customers, and instead rely on the evidence presented by the parties.

Additionally, Joint Petitioners presented no evidence to support the assertion that BellSouth's service expedite rate is "usurious, unsupported and unacceptable." (JP Brief at 73). Instead, Joint Petitioners rely on an exaggerated hypothetical to support its inappropriate request for TELRIC pricing.[31] Relying on a hypothetical is particularly telling since the Joint Petitioner that is most vocal about this issue (Xspedius) charges its Kentucky customers an ***$800 service expedite charge*** and reserves the right to charge more in certain circumstances. (KY Tr. at 116-117; Xspedius Tariff § 12.4).

As a practical matter, if there were an artificially low (TELRIC) service expedite charge, it is reasonable to expect that CLEC demand for expedited service orders will substantially increase. Joint Petitioners construe this statement of the obvious as some indication that

[31] *See* JP Brief at 69 (claiming that BellSouth would charge $3,200 to expedite by two days an 8-line order placed by a small business owner). This hypothetical: (i) blithely assumes that the standard interval for installing a business line is three days or more (otherwise there could be no request to expedite such an order by two days); and (ii) ignores the fact that Joint Petitioners have asserted that they are primarily interested in provisioning intervals for DS1 circuits ordered by business customers. Of course, a DS1 circuit has the capacity for 24 voice grade lines. Thus, a more realistic view of the Joint Petitioners' hypothetical results in a $400 service expedite charge (one DS1 circuit with eight channels dedicated for voice lines expedited by two days).

BellSouth's service expedite charge "is expressly intended as a penalty for CLECs." (JP Brief at 71). This assertion lacks credibility as Joint Petitioners presented no evidence that BellSouth's service expedite rate has harmed the Joint Petitioners in any fashion. Further, if BellSouth's $200 per circuit/per day service expedite charge is somehow considered a penalty, then Xspedius' $800 service expedite charge defies description.

Item 97: When should payment of charges for service be due? (Attachment 7, Section 1.4)

Joint Petitioners should be required to pay their bills on or before the payment due date. BellSouth requires the same of its retail customers (i.e. payment for services should be made on or before the payment due date; *see* GSST, § A2.4.3), and Joint Petitioners impose the same or more stringent payment requirements on their retail customers -- NuVox requires its customers to pay their bills upon receipt (NuVox Tariff §§ 2.7.2.A & 2.7.2.B); Xspedius and KMC require payment within 30 days of bill invoice date. (Xspedius Tariff §§ 2.5.3.1 & 2.5.3.2; KMC Tariff §§ 2.5.2(A) & 2.5.2(B)). Joint Petitioners have offered no credible or compelling reason why they should be given special, preferential billing treatment. In support of extended and revolving payment terms, Joint Petitioners claim that it takes 6 or 7 days for BellSouth to deliver bills to Joint Petitioners, and that such bills are "voluminous and complex" and are "often incomplete and sometimes incomprehensible." (JP Brief at 73). As explained below, such claims lack merit.

First, regarding bill delivery, the Joint Petitioners ignore the fact that the most recent, reliable, and accurate data on this Issue (SQM results for billing invoice timeliness) shows that Joint Petitioners receive their bills, on average, in about 3 or 4 days. (FL BellSouth Exhibit 19;

KY BellSouth Exhibit 3).[32] Thus, the Joint Petitioners' statements, testimony, and outdated bill studies on this issue are simply not credible.

Second, in an attempt to side-step the relevant SQM data regarding the measurement for Billing Invoice Timeliness ("BIT"), Joint Petitioners suggest that there is some question as to whether the BIT measurement is stated in terms of days. The Commission can take administrative notice that BIT calculates the average interval, in terms of days, that it takes BellSouth to deliver bills to its retail and CLEC customers. Further, the Joint Petitioners new-found ignorance regarding the fact that BIT measures the average number of days it takes BellSouth to deliver bills (KY Tr. at 144-145) cannot be squared with Joint Petitioners' understanding of the BIT measurement in hearings that preceded the Kentucky hearing. *See* GA Tr. at 517-518; FL Tr. at 417-420.

Rather than focusing on testimony taken out of context (or feigned ignorance), the Commission should focus on the undisputed facts. It is undisputed that (1) BellSouth's SQM data definitively establish that the Joint Petitioners get BellSouth's bills within 3-4 days; and (2) NuVox witness Russell testified in his deposition and in several hearings that, for at least a two year period, ***NuVox has paid all of its BellSouth bills in a timely manner.*** (Russell Depo. at 231; FL Tr. at 264; GA Tr. at 513). The unrefuted SQM data and NuVox's self-proclaimed timely payment performance cannot be reconciled with Joint Petitioners' implication that they have insufficient time to review and pay their bills.[33] *See* JP Brief at 74. Thus, this argument should be rejected.[34]

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[32] Moreover, the SQM results show that BellSouth delivers bills to its retail and CLEC customers in essentially the same time frame. (GA BellSouth Exhibit 15; FL BellSouth Exhibit 19).

[33] NuVox receives over 1,100 bills per month from BellSouth. (KY Tr. at 47).

[34] Joint Petitioners cite excerpts from a Kansas arbitration ruling ("Kansas Decision") in support of their request for additional time to pay their bills. (JP Brief at 75 & Attachment 13 to JP Brief). Assuming for purposes of argument only that the Kansas Decision has any relevance whatsoever, the facts are materially different and thus the Kansas Decision has no application to the evidence presented in this arbitration. Specifically, in the Kansas Decision,

Third, despite claiming that they receive well over a thousand BellSouth bills a month, Joint Petitioners failed to produce one example of an incomplete or incomprehensible bill. Similarly, despite claiming that "[t]here is generally a long gap between the bill issuance date and the date the BellSouth bill is actually posted or received by Joint Petitioners," (JP Brief at 73-74), Joint Petitioners failed to produce one example of a bill that supported its "long gap" assertion. To the contrary, the only BellSouth bill the Joint Petitioners presented at any hearing to support their claim was a bill mailed to NuVox that NuVox actually paid early! (GA Tr. at 1123).

Third, the Joint Petitioners' assertion that BellSouth "measures timely bill payment based on date of ***receipt*** rather than bill issuance date" is not relevant to this inquiry. (JP Brief at 75-76). As Ms. Blake testified, BellSouth used the date it received bills to provide a meaningful way to measure its payment history with the Joint Petitioners because certain Joint Petitioners could not provide BellSouth with a timely bill. (GA Tr. at 1136). Regardless of when BellSouth measures payment of bills, BellSouth is subject to late payment charges if it fails to timely pay its bills. And, the Joint Petitioners even expect BellSouth to pay some of their bills ***within 20 days of the bill date***, notwithstanding the actual date those bills are received by BellSouth. (FL BellSouth Ex. 23 [Xspedius bill to BellSouth dated April 1, 2005, with payment due April 20, 2005]). Once again the standard imposed by the Joint Petitioners on their end users and even BellSouth is not acceptable to the Joint Petitioners.

The Commission should reject the Joint Petitioners' request for special treatment, and adopt BellSouth's proposed language on Issue 97.[35]

Xspedius claimed it received SWBT bills, on average, 16 days after the bill date. (Attachment 13). Here, Xspedius claims it receives BellSouth bills, on average, 6 days after the bill date (JP Brief at 74). Of course, the SQM data shows that Joint Petitioners (including Xspedius) receive their bills, on average, in 3 or 4 days.

[35] Joint Petitioners imply that they will accept the Georgia or Alabama rulings in the BellSouth/DeltaCom arbitration

Item 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? (Attachment 7, Section 1.7.2)

As stated in BellSouth's Post-Hearing Brief, BellSouth's right to suspend or terminate service for nonpayment is not in dispute, *see* BellSouth Exhibit A, Att. 7, § 1.7.2. BellSouth's proposed language is limited to a failure to pay undisputed amounts that are past due. *Id.* And, BellSouth will not commence any suspension or disconnection activity involving amounts that are subject to a billing dispute. *Id.* Indeed, Joint Petitioners acknowledge that "BellSouth has a right to terminate service for nonpayment." (JP Brief at 78). However, instead of conceding that termination of service for non-payment is a universally accepted and straightforward principle, Joint Petitioners claim--***without any explanation***--that BellSouth's proposed language is somehow inconsistent with the ***Georgia*** Commission's rule regarding service denial.[36] (JP Brief at 78). This assertion is nonsense and has no application here in Kentucky. In any event, Georgia Rule 515-1201-.06(f) provides that a "***customer*** shall be notified and allowed a reasonable time" to pay a bill before "service is discontinued for nonpayment of bill."[37]

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regarding payment due date. (JP Brief at 76). What the Joint Petitioners neglected to state is that they have rejected the payment and deposit terms that DeltaCom and BellSouth actually agreed upon and that are included in DeltaCom's interconnection agreement. See *infra* Issue 101.

[36] In any event, the parties have agreed to comply with applicable FCC and Commission rules and orders regarding suspension or termination of service. Att. 7, § 1.7.4. Again, Joint Petitioners have failed to articulate how BellSouth's proposed language runs afoul of such rules. In a similar fashion, Joint Petitioners citation to 47 U.S.C. § 214(a) is a red herring. (JP Brief at 78). 47 U.S.C. § 214(a) is a ***certification statute*** that provides that "No carrier shall undertake the construction of a new line . . .[without first obtaining] . . . a certificate that the present or future public convenience and necessity require or will require the construction [of such] line." The statute goes on to provide that in certain circumstances FCC authorization is required before a carrier discontinues providing service to a community. *Id.* ***Issue 100 has nothing to with FCC certification requirements for providing (or discontinue providing) service to a community.***

[37] Contrary to Joint Petitioners' Brief, the Georgia Commission's definition of "customer" does not include "carrier." Rule 515-12-1-.01(k). Of course, Joint Petitioners point out that they are not retail customers when it suits them—("Again, Joint Petitioners are not BellSouth retail customers" JP Brief at 72)—but request retail customer treatment for purposes of attempting to avoid having their service terminated for non-payment of undisputed amounts owed.

BellSouth's proposed language provides for written notice and a reasonable opportunity for Joint Petitioners to pay past due undisputed amount owed prior to service discontinuance.[38]

Joint Petitioners then make the unsubstantiated claim that "BellSouth builds into the [collections] 'game' guesswork as to whether disputes will be properly and timely recognized, and as to when BellSouth will recognize receipt of payment." (JP Brief at 79). There is no guesswork in BellSouth's collections process, and the financial risk BellSouth faces when CLECs do not pay for services rendered is no game. Specifically, the parties have agreed that "[p]ayment is considered to have been made when received by the billing party." Att. 7, § 1.4. Thus, there is no issue regarding when payment is made or recognized.

In another attempt to cloud this straightforward issue, Joint Petitioners claim that BellSouth has, in the past, failed to timely post payment. (JP Brief at 82). Timely posting of payment, however, is not one of the 107 issues that Joint Petitioners identified in its arbitration petition filed in February 2004 and there is no evidence to support this claim. Further, and similar to Joint Petitioners' testimony on many issues, Joint Petitioners offered no specific example of late posting of payments by BellSouth or how such alleged late posting harmed Joint Petitioners.[39]

Next, Joint Petitioners assert that BellSouth's proposed language for Issue 100, and specifically BellSouth's commitment to advise Joint Petitioners upon request of amounts that must be paid to avoid suspension of access to ordering systems or termination of service "does not solve[] the problem[]." (JP Brief at 81). There is no guesswork involved in BellSouth's collections process. Specifically, a CLEC that fails to timely pay undisputed

[38] BellSouth's proposed language is consistent with this Commission's rules regarding termination for non-payment. *See* 807 KAR 5:006, Section 14.

[39] Additionally, Joint Petitioners provided no evidence or examples to support their paranoia that BellSouth will exercise its collections and termination rights "in a coercive and inappropriate manner." (JP Brief at 78).

amounts owed is in constant communication with BellSouth's collections group and that the CLEC is provided with an aging report(s) that shows, by billing account number, current charges, past due charges, disputed charges, total past due amount owed less current charges and disputed charges, plus the ability to determine amounts that will become past due during the notice period.[40] Indeed, at the Florida hearing, Joint Petitioners witness Russell admitted that he had never seen a BellSouth aging report (FL Tr. at 267) and that his company had no recent interaction with BellSouth's collections process. (FL Tr. at 265). Not surprisingly, after reviewing the documents produced in Response to Interrogatory No. 117, Mr. Russell admitted that there is no guesswork involved in Bellsouth's collections process. (FL Tr. at 268-269).

Accordingly, the Commission should: (1) disregard Joint Petitioners' unsupported assertion about collections "shell games"; (2) allow BellSouth to protect its financial interest by giving BellSouth the continued right to discontinue providing service to any Joint Petitioner that fails to timely pay for services rendered. Holding otherwise would allow the Joint Petitioners to have an unjustified, revolving extension of time to pay undisputed, past due amounts.

Item 101: How many months of billing should be used to determine the maximum amount of the deposit? (Attachment 7, Section 1.8.3)

In support of its request for a maximum deposit amount that is less than an average of two months of actual billing, Joint Petitioners claim that "BellSouth has not attempted to assert, either in written testimony or at hearing, that [Joint Petitioners] have a payment history that somehow aggravates BellSouth's risk. (JP Brief at 83). This misleading assertion overlooks the fact that the BellSouth collections efforts (notice, aging reports, emails) that constitute

[40] In a feeble attempt to contradict the fact that BellSouth collections organization remains in constant contact with a CLEC that owes undisputed amounts past due, Joint Petitioners point to a $65 past due notice received by NuVox. (JP Brief at 80). Of course, the past due notice was presented by a witness (Russell) who has testified that NuVox timely pays all BellSouth bills and therefore has no contact with BellSouth collections organization. (FL Tr. at 264-265). In any event, the witness testified that the notice had been sent in error and had been resolved--apparently without any service disruption. (KY Tr. at 79). NuVox claims it receives over 1,100 bills per month (or over 13,200 per year).

BellSouth's Attachment to FL Staff Interrogatory 117 involves BellSouth's efforts to collect over $231,000 from one of the original Joint Petitioners. Further, all Joint Petitioners admitted receiving suspension notices for non-payment in 2004. *See* JPs Response to FL Staff Interrogatory 70. In short, it is disingenuous for Joint Petitioners to assert (or imply) that they deserve a lower maximum deposit amount based on their collective past history of timely payment.

Joint Petitioners then state that "[d]eposits tie up capital that could be used for other purposes." (JP Brief at 84). However, NuVox has no problem using capital to post bonds totaling $1.75 million in an effort to prevent BellSouth from exercising its EEL audit rights, even though NuVox claims that all of the EELs it orders comply with the law.[41] (GA Tr. at 462).

Further, 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. 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 it takes BellSouth approximately 74 days to disconnect a CLEC for non-payment under the provisions of the agreement. Morillo Rebuttal at 16 (adopted by Blake).

Additionally, the Joint Petitioners' assertion that BellSouth has agreed to a lesser deposit maximum with ITC^DeltaCom and that Joint Petitioners "should be eligible for the same maximum deposit provision." (JP Brief at 85). This statement is astounding given the fact that

[41] *NuVox and NewSouth v. North Carolina Utilities Commission and BellSouth*, No. 5:05-CV-207-BR(3), United States District Court, Eastern District of North Carolina, Order for Preliminary Injunction granted April 4, 2005 ("preliminary injunction will become effective only upon plaintiffs' posting of appropriate security in the amount of $1.5 million with the Clerk."); *NuVox v. BellSouth & Kentucky Public Service Commission*, C/A No. 05-41-KKC, United States District Court, Eastern District of Kentucky, Temporary Restraining Order granted July 1, 2005 ("As security for the issuance of this Order, Plaintiff NuVox is required to post a bond in the amount of $250,000").

during the Georgia hearing ***Joint Petitioners initially claimed no knowledge of the payment and deposit terms agreed to between DeltaCom and BellSouth and thereafter rejected such terms:***

> Q. Are the joint petitioners willing to agree to the payment and deposit provisions that were agreed upon between DeltaCom and BellSouth?
>
> A. I don't know what those provisions require or what the terms and conditions of that – I don't know what they are, so I can't answer that.
>
> Q. Are you willing to accept the – the contractual provisions agreed upon between DeltaCom and BellSouth in Georgia?
>
> A. I don't know what they are, so I can't say that I would agree to them or not.

(GA Tr. at 544). Upon further questioning, Mr. Russell confirmed that the payment and deposit provisions actually agreed upon between DeltaCom and BellSouth were unacceptable to the Joint Petitioners. (GA Tr. at 545).

And, although Joint Petitioners go to great lengths to point out that BellSouth has agreed to lesser maximum deposit amount with DeltaCom, it bears repeating that Joint Petitioners continue to attempt to hide the fact that NewSouth recently agreed to a ***three-month security deposit*** amount with AllTel. (KY Tr. at 74).

Next, the Joint Petitioners claim that "BellSouth's concerns about risk of nonpayment are of somewhat dubious origin." JP Brief at 84. Apparently, Joint Petitioners failed to review BellSouth's responses to FL Staff Interrogatories 88 and 89. BellSouth's responses (limited to CLECs operating in Florida), plainly establish that bankrupt or defunct CLECs owed BellSouth $23 million (after deducting deposits) in Florida.

Finally, the Joint Petitioners make the unsubstantiated assertion "that a 2-month deposit provision ordinarily is attached to provisions requiring full refund of the deposit upon

establishment of a good payment history." (JP Brief at fn. 34). Such so-called "ordinary" deposit provisions apparently do not apply to the Kentucky customers of Xspedius and KMC. Specifically, neither tariff requires the return of a customer's deposit upon the establishment of a good payment history. *See* Xspedius Tariff § 2.5.5; KMC Tariff § 2.5.4. In any event, Joint Petitioners' deposit refund complaint is irrelevant because the parties have agreed that BellSouth will refund, return, or release any security deposit within 30 calendar days of determining that a Joint Petitioners' creditworthiness indicates a deposit is no longer necessary. *See* Att. 7, § 1.8.10. Accordingly, the Commission should approve BellSouth's language for Issue 101.

Item 102: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC? (Attachment 7, Section 1.8.3.1)

As a general matter, a CLEC deposit should not be reduced by amounts owed by BellSouth to such CLEC. The CLEC's remedy for addressing late payment by BellSouth should be suspension/termination of service and/or application of interest/late payment charges. BellSouth is within its rights to protect itself against uncollectible debts on a non-discriminatory basis. Deposits are needed to mitigate the risk that a CLEC may not be able to fulfill its financial obligations in the future.

The basis for the Joint Petitioners' request for a deposit offset provision is their claim that "BellSouth is far from timely in paying CLEC invoices." (JP Brief at 86). To support this assertion, Joint Petitioners (i.e. Xspedius) rely on outdated and inaccurate information.[42] Without providing any specifics, Joint Petitioners assert that the offset provision is necessary because, many years ago, BellSouth allegedly owed a now defunct company (e.spire) millions for reciprocal compensation. (JP Brief at 86). Of course, and as with many issues, the specifics

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[42] Given the low level of NuVox billings to BellSouth (approximately $1,000 per month), the offset provision is effectively an Xspedius only issue.

do not support the Joint Petitioners' position. Specifically, BellSouth is current in paying its reciprocal compensation bills (in fact, the May 2005 reciprocal compensation bill shows that the total amount due ***exceeds*** current charges, which indicates a ***previous overpayment*** by BellSouth). (KY Tr. at 117-118; KY BellSouth Exhibit 2).

Joint Petitioners then claim that excerpts from arbitration rulings in Kansas and Oklahoma support the patently unreasonable proposition that an offset provision should include ***disputed*** amounts owed. As an initial matter, the quoted excerpts say no such thing: ("***If its position is accurate***..." [Kansas Decision Excerpt]; ("***If SBC owes Xspedius***...." [Oklahoma Decision Excerpt]). (JP Brief at 87). Assuming for purposes of argument only that these decisions should be considered by the Commission, they are irrelevant as there is no evidence that BellSouth owes any past due amount to Joint Petitioners. (KY Tr. at 117-118; GA Tr. at 548-549). In short, the ***2005 reciprocal compensation bills*** from Xspedius to BellSouth squarely and convincingly rebut Xspedius' tired, repeated, and grossly exaggerated claim that BellSouth has a poor payment history.

That said, in an effort to compromise, BellSouth is willing to agree that when BellSouth makes a deposit demand (or a request for additional deposit) BellSouth will reduce its deposit demand by the undisputed amount past due (if any) owed by BellSouth to any Joint Petitioners for payments pursuant to Attachment 3 of the Interconnection Agreement. Upon BellSouth's payment of such amount, Joint Petitioners would be required to immediately increase the deposit in an amount equal to such payment(s). The Commission should adopt BellSouth's language for Issue 102 as it represents a reasonable compromise.

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? (Attachment 7, Section 1.8.6)

To protect its financial interests, BellSouth should be able to terminate service if a Joint Petitioner fails to pay (or properly dispute) a deposit demand within 30 calendar days. 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* Att. 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 30 calendar days.

Joint Petitioners assert that BellSouth's proposed language is "far too onerous." (JP Brief at 88). Termination for non-payment of a deposit is not a novel concept. To the contrary, it is expressly authorized by this Commission's rules (807 KAR 5:006, Section 7; *see also* GA Rule 515-12-1-.06(g)). Additionally the end user tariffs of the Joint Petitioners expressly authorize termination for non-payment. (NuVox Tariff, §2.7.3; KMC Tariff §2.5.5; and Xspedius Tariff § 2.5.6). Again, given the time it takes BellSouth to terminate for non-payment (approximately 74 days) and the fact that the parties have agreed to specific and objective criteria as to when a

deposit is required (Att. 7, § 1.8.5), allowing BellSouth to terminate service in situations where a deposit demand is ignored is reasonable and necessary.

Respectfully submitted,

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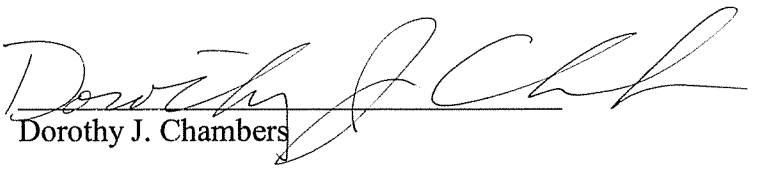
CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the individuals on the attached service list by mailing a copy thereof, this 12th day of August 2005.



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