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

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

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

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

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

C. DECISION

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

XII. LINE CONDITIONING / REMOVAL OF BRIDGED TAPS

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

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

A. PARTIES' ARGUMENTS

Joint Petitioners witness Willis discusses four major points of dispute:

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

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

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

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

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

> Line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers. As noted above, incumbent LECs must make the routine adjustments to unbundle loops to deliver services with *parity* with how incumbent LECs provision such facilities for themselves.

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

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

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

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

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

B. ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

C. DECISION

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

XIII. NOTICE REQUIREMENT OF AUDIT

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

A. PARTIES' ARGUMENTS

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

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

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

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

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

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

B. ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. DECISION

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

XIV. AUDITOR AND SCOPE OF THE AUDIT

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

A. PARTIES' ARGUMENTS

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

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

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

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

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

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[52] Percentage Interstate Usage and Percentage Local Usage.

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

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

B. ANALYSIS

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

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

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

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

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

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

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

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

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

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

C. DECISION

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

XV. TANDEM INTERMEDIARY CHARGE

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

A. PARTIES' ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

B. ANALYSIS

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

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

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

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

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

[57] See TRO footnote 1640.

[58] *Id.* Virginia Arbitration Order.

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

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

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

C. DECISION

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

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

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

[61] Id. Section A16.1.2 B.

XVI. DISPUTES OVER ALLEGED UNAUTHORIZED ACCESS TO CSR

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

A. PARTIES' ARGUMENTS

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

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

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

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

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

B. ANALYSIS

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

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

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

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

C. DECISION

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

XVII. RATE FOR SERVICE DATE ADVANCEMENT

A. PARTIES' ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

B. ANALYSIS

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

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

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

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

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

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

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

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

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

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

C. DECISION

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

XVIII. PAYMENT DUE DATE

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

A. PARTIES' ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. ANALYSIS

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

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

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

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

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

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

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

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

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

C. DECISION

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

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

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

A. PARTIES' ARGUMENTS

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

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

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

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

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

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

B. ANALYSIS

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

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

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

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

C. DECISION

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

XX. DETERMINATION OF DEPOSIT

A. PARTIES' ARGUMENTS

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

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

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

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

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

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

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

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

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

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

BellSouth's proposed language for Section 1.8.3 reads:

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

B. ANALYSIS

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

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

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

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

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

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

C. DECISION

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

XXI. DEPOSIT IN RELATION TO PAST DUE AMOUNTS

A. PARTIES' ARGUMENTS

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

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

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

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

The Joint Petitioners' proposed language for Section 1.8.3.1 reads:

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

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

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

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

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

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

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

BellSouth's proposed language for Section 1.8.3.1 reads:

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

B. ANALYSIS

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

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

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

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

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

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

C. DECISION

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

XXII. POSSIBLE TERMINATION OF SERVICE

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

A. PARTIES' ARGUMENTS

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

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

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

The Joint Petitioners' proposed language for Section 1.8.6 reads:

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

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

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

BellSouth's proposed language for Section 1.8.6 reads:

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

B. ANALYSIS

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

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

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

C. DECISION

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

XXIII. CONCLUSION

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

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

Based on the foregoing, it is

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

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

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

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

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

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

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

By: _____
Kay Flynn, Chief
Bureau of Records

(SEAL)

JLS/KS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

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