EXHIBIT
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**STATE OF NORTH CAROLINA**
**UTILITIES COMMISSION**
**RALEIGH**

DOCKET NO. P-772, SUB 8
DOCKET NO. P-913, SUB 5
DOCKET NO. P-989, SUB 3
DOCKET NO. P-824, SUB 6
DOCKET NO. P-1202, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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| In the Matter of | | |
| Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc. | ) ) ) | RECOMMENDED ARBITRATION ORDER |

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on January 11 through 13, 2005

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Robert V. Owens, Jr., and Lorinzo L. Joyner

APPEARANCES:

For NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Management Co. Switched Services, LLC:

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For BellSouth Telecommunications, Inc.:

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For the Using and Consuming Public:

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

## BACKGROUND

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

### FCC Proceedings

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

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

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

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

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

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

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

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

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

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

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

[7] *Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, FCC 04-290, rel. February 4, 2005. (*TRRO*).

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

Instant Proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Based on the foregoing and the entire record in this matter, the Commission makes the following

## FINDINGS OF FACT

1. The term "End User" should be defined as "the customer of a party."

2. The industry standard limitation of liability limiting the liability of the provisioning party to a credit for the actual cost of services or functions not performed or improperly performed should apply.

3. If a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from its decision not to include the limitation of liability.

4. The rights of end users should be defined pursuant to state contract law.

5. The Agreement should state that incidental, indirect, and consequential damages should be defined pursuant to state law.

6. The proposal of the Joint Petitioners found in Section 10.5 of their Appendix A should be approved.

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

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

9. BellSouth shall permit a requesting carrier to commingle an unbundled network element (UNE) or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that the requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act. However, this does not include services, network elements, or other offerings made available only under Section 271 of the Act.

10. The term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51.319(a)(1)(iii)(A). BellSouth should perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii).

11. The line conditioning activity of load coil removal on copper loops should not be limited to copper loops with only a length of 18,000 feet or less.

12. Any copper loop ordered by a CLP with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. Line conditioning orders that require the removal of other bridged tap (bridged tap between 0 and 6,000 feet) should be performed at the BellSouth UNE rates previously adopted by the Commission.

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

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

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

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

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

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

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

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

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

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

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

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

### POSITIONS OF PARTIES

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

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

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

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

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

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

**DISCUSSION**

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

**CONCLUSIONS**

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

**EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2**

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

**POSITIONS OF PARTIES**

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

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

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

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

## DISCUSSION

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

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

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

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

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

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

## CONCLUSIONS

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

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

**ISSUE NO. 3 – MATRIX ITEM NO. 5:**

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

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

## POSITIONS OF PARTIES

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

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

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

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

**DISCUSSION**

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

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

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

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

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

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

## CONCLUSIONS

The Commission concludes that if a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from this decision. Accordingly, BellSouth's proposed language in the Agreement, in the General Terms and Conditions, Section 10.4.2 should be adopted.

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

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

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

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

## POSITIONS OF PARTIES

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

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

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

## DISCUSSION

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

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

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

The Public Staff concurred in BellSouth's position.

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

## CONCLUSIONS

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

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

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

## POSITIONS OF PARTIES

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

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

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

## DISCUSSION

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

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

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

The Public Staff concurred in the Joint Petitioners' position.

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

## CONCLUSIONS

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

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

**ISSUE NO. 7 – MATRIX ITEM NO. 9:**

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

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

## POSITIONS OF PARTIES

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

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

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

## DISCUSSION

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

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

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

## CONCLUSIONS

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

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

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

## POSITIONS OF PARTIES

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

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

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

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

## DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

## CONCLUSIONS

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

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

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

## POSITIONS OF PARTIES

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

**BELLSOUTH:** BellSouth argued that this matter should be moved to the change of law docket for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum the Commission should defer resolution of this item until its decision in the change of law docket to avoid inconsistent rulings. Otherwise, BellSouth's view is that consistent with the FCC's *Errata* to the *TRO*, there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.

**PUBLIC STAFF:** The Public Staff recommended that the Commission conclude that BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act. This includes wholesale services obtained from any method, including those obtained as Section 271 elements.

## DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

[10] *TRO*, ¶¶ 579 – 581, 583.

Further, in the Section 271 Issues section of the *TRO*, the FCC states:

> We decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251. Unlike Section 251(c)(3), items 4-6, and 10 of Section 271's competitive checklist contain no mention of "combining" and ... do not refer back to the combination requirement set forth in Section 251(c)(3).

The Commission believes that the foregoing shows that the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements. After careful consideration, the Commission finds that there is no requirement to commingle UNEs or combinations with services, network elements or other offerings made available only under Section 271 of the Act.

## CONCLUSIONS

The Commission concludes that BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act. However, this does not include services, network elements or other offerings made available only under Section 271 of the Act.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

**ISSUE NO. 10 - MATRIX ITEM NO. 36:** How should line conditioning be defined in the Agreement; and what should BellSouth's obligations be with respect to line conditioning?

## POSITIONS OF PARTIES

**JOINT PETITIONERS:** The Joint Petitioners asserted that line conditioning should be defined in the Agreement as set forth in FCC Rule 51.319(a)(1)(iii)(A); and BellSouth should perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii).

**BELLSOUTH:** BellSouth maintained that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide digital subscriber line (xDSL) services to its own customers; and BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers.

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

## DISCUSSION

According to the Joint Petitioners' Petition for Arbitration and the Joint Petitioners' Exhibit A, this issue relates to the matter of the appropriate contract

language to be included in Section 2.12.1 of Attachment 2 (Network Elements and Other Services) to the Agreement.

The Joint Petitioners asserted that the term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51.319(a)(1)(iii)(A). That paragraph of the Rule states:

> Line conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders.

The Joint Petitioners also contended that BellSouth should perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii). That paragraph of the Rule states:

> Line conditioning. The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop. If the incumbent LEC seeks compensation from the requesting telecommunications carrier for line conditioning, the requesting telecommunications carrier has the option of refusing, in whole or in part, to have the line conditioned; and a requesting telecommunications carrier's refusal of some or all aspects of line conditioning will not diminish any right it may have, under paragraphs (a) and (b) of this section, to access the copper loop, the high frequency portion of the copper loop, or the copper subloop.

BellSouth argued that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers. BellSouth contended that its line conditioning obligations should be limited to what BellSouth routinely provides for its own customers.

The specific language proposed to be included in the Agreement in Attachment 2, Section 2.12.1 is as follows, with the differences between the Joint Petitioners' proposal and BellSouth's proposal being denoted with underlined text:

***Joint Petitioners' Version –***

> BellSouth shall perform line conditioning in accordance with FCC 47 C.F.R. 51.319(a)(1)(iii). Line Conditioning is as defined in FCC 47 C.F.R. 51.319(a)(1)(iii)(A). Insofar as it is technically feasible, BellSouth shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.

***BellSouth's Version –***

> Line Conditioning is defined as a RNM [Routine Network Modification] that BellSouth regularly undertakes to provide xDSL services to its own customers. This may include the removal of any device, from a copper loop or copper sub-loop that may diminish the capability of the loop or sub-loop to deliver high-speed switched wireline telecommunications capability, including xDSL service. Such devices include, but are not limited to; load coils, low pass filters, and range extenders. Insofar as it is technically feasible, BellSouth shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.

In their Proposed Order, the Joint Petitioners stated that line conditioning is a Section 251(c)(3) obligation of the ILECs. The Joint Petitioners observed that in its *UNE Remand Order*[11], the FCC clarified its unbundling rules to require that ILECs condition copper loops to provide advanced services; and FCC Rule 51.319(a)(3)[12] was

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[11] FCC 99-238, CC Docket No. 96-98, released on November 5, 1999.

[12] In the *UNE Remand Order*, the FCC's Rule 51.319(a)(3), including subsections, was worded as follows:

> Line conditioning. The incumbent LEC shall condition lines required to be unbundled under this section wherever a competitor requests, whether or not the incumbent LEC offers advanced services to the end-user customer on that loop.
>
> (A) Line conditioning is defined as the removal from the loop of any devices that may diminish the capability of the loop to deliver high-speed switched wireline telecommunications capability, including xDSL service. Such devices include, but are not limited to, bridge taps, low pass filters, and range extenders.
>
> (B) Incumbent LECs shall recover the cost of line conditioning from the requesting telecommunications carrier in accordance with the Commission's forward-looking pricing principles promulgated pursuant to section 252(d)(1) of the Act.
>
> (C) Incumbent LECs shall recover the cost of line conditioning from the requesting telecommunications carrier in compliance with rules governing nonrecurring costs in § 51.507(e).
>
> (D) In so far as it is technically feasible, the incumbent LEC shall test and report trouble for all the features, functions, and capabilities of conditioned lines, and may not restrict testing to voice-transmission only.

promulgated with the *UNE Remand Order* to effect the clarification stated in the Order. Further, the Joint Petitioners pointed out that pursuant to that rule, the Commission addressed the issues surrounding line conditioning in its *Recommended Order Concerning all Phase I and Phase II Issues Excluding Geographic Deaveraging*, issued June 7, 2001, in Docket No. P-100, Sub 133d. The Joint Petitioners noted that in that docket, the Commission established rates for removing load coils on loops less than 18,000 feet and for loops 18,000 feet and greater; and it established rates for bridged tap removal. The Joint Petitioners commented that, thereafter, BellSouth signed interconnection agreements incorporating these services at rates prescribed by the Commission.

Further, the Joint Petitioners maintained that they found no basis for BellSouth's position that its line conditioning obligations were changed by the FCC's *TRO*, as the line conditioning rules were readopted in the *TRO*. The Joint Petitioners pointed out that even BellSouth witness Fogle conceded on cross-examination, that the FCC's definition of line conditioning in the *TRO* was virtually identical to the definition in the *UNE Remand Order*. The Joint Petitioners also observed that they found it persuasive that there is no mention in the line conditioning rules of the routine network modification rules, much less a limitation on the former by the latter.

In addition, the Joint Petitioners argued that BellSouth's reliance on a single sentence in the *TRO*, at Paragraph 643 is misplaced. That sentence reads as follows: "Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." The Joint Petitioners asserted that there is no conflict between the subject sentence in Paragraph 643 and the routine network modification rules on the one hand and the line conditioning rules on the other hand.

Furthermore, the Joint Petitioners commented that KMC witness Johnson explained the relationship between the two sets of rules. In particular, witness Johnson stated that the way to reconcile the second sentence in Paragraph 643 of the *TRO* and the rule from the *TRO*, is to recognize that there is an intersection between two separate and distinct functions. Witness Johnson testified that the first function is line conditioning and even in the *TRO*, in Footnote 1947, the FCC recognized that conditioning is an obligation to cover loops of any length, to recognize the potential degradation of analog voice service, and to enable ILECs to charge for conditioning loops. As a point of further clarification, witness Johnson stated that the FCC provided two distinct definitions – one for line conditioning, which is set forth in Part iii, Letter A of the Rule, and then the second for routine network modifications. Witness Johnson remarked that the FCC recognized that there may be some subset of line conditioning activities that are routine network modifications. Witness Johnson stated that the subject sentence in Paragraph 643 references one type of line conditioning function known as routine network modifications. Witness Johnson contended that the definition set forth by the FCC in its line conditioning rule is what the FCC intended the definition to be, which is "Line conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver

high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders." In addition, witness Johnson testified that "[i]t's important to note that the line conditioning definition focuses on the removal of these types of gadgets and equipment from lines. Whereas, if you look at the routine network modifications definition, it focuses on the addition of whatever devices are required in order to make sure that the quality of the line functions. So, I believe that the FCC intended and clearly set forth two separate and distinct functions line conditioning and routine network modifications, and [Paragraph] 643 just references one type of line conditioning." Further, witness Johnson illustrated her position with a Venn diagram which was identified as Joint Petitioners Redirect Exhibit 1, which showed two intersecting circles, with the intersection of the circles representing those activities common to both definitions.

The Joint Petitioners contended that under BellSouth's interpretation, the exception would swallow the rule. The Joint Petitioners remarked that on questioning by Commissioner Kerr, BellSouth witness Fogle conceded that BellSouth's conditioning obligations would be entirely dependent upon BellSouth's sole discretion as to what activities were or were not routine for BellSouth. The Joint Petitioners opined that they did not believe the FCC had any such intention, when it adopted its line conditioning and routine network modification rules, since such a result would effectively eliminate line conditioning.

In its Brief, BellSouth maintained that for the same reasons as discussed in its comments for Matrix Item No. 26, the Commission should move Matrix Item No. 36 to the change of law docket (Docket No. P-55, Sub 1549) for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum, BellSouth asserted that the Commission should defer resolution of this item until its decision in the change of law proceeding to avoid inconsistent rulings.

However, in the event the Commission chooses to address this issue now, BellSouth argued that the Joint Petitioners' position should be rejected because it conflicts with the *TRO* and BellSouth's nondiscriminatory obligations under the Act. Further, BellSouth observed that Matrix Item Nos. 36, 37, and 38 are all interrelated as they address BellSouth's line conditioning obligations in both a general and a specific fashion.

It is BellSouth's position that it is obligated to perform line conditioning on the same terms and conditions that BellSouth provides for its own customers. In particular, BellSouth contended that in Paragraph 643 of the *TRO*, the FCC stated that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." BellSouth explained that the FCC went on further, in Paragraph 643, to state that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops

for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations."

BellSouth maintained that the Joint Petitioners conceded that "parity" means "equal" and that the FCC's rationale for establishing an obligation to perform line conditioning was based upon BellSouth's nondiscrimination obligation. Notwithstanding these concessions, BellSouth contended that the Joint Petitioners' position is that BellSouth's line conditioning obligations are established by the related FCC Rule, as provided in Appendix B of the *TRO*, which does not provide for the same definition of line conditioning that appears in Paragraph 643 of the *TRO*. BellSouth argued that the only interpretation of both Paragraph 643 as well as the FCC Rule that gives effect to both provisions is BellSouth's interpretation. It is BellSouth's opinion that to decide otherwise, would be to "read away" and ignore the FCC's express findings in Paragraph 643, because BellSouth would then be required to perform line conditioning for the Joint Petitioners that exceed what BellSouth provides for its own customers.

Furthermore, BellSouth asserted that the fact that the Joint Petitioners' current agreements contain TELRIC rates for line conditioning in excess of what BellSouth provides for its customers is of no consequence. BellSouth maintained that this is because their current agreements are not *TRO*-compliant since the FCC clarified in the *TRO* that BellSouth's line conditioning obligations are limited to what BellSouth routinely provides for its own customers. Thus, BellSouth contended that the Joint Petitioners' argument that not all line conditioning is a routine network modification should be rejected. BellSouth pointed out that in the FCC's discussion of routine network modifications, the FCC expressly equated its routine network modification rules to its line conditioning rules in the *TRO*, in Paragraph 635, stating that "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules." Furthermore, BellSouth noted that the FCC echoed these sentiments in Paragraph 250 of the *TRO*, which states that "As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service."

In addition, BellSouth observed that in response to KMC witness Johnson's testimony, BellSouth witness Fogle explained that witness Johnson's Venn diagram illustration actually proves that line conditioning is a subset of routine network modification. Witness Fogle testified that

> Well, I'll say that when I heard the use of a VIM [Venn] diagram, from an electrical engineering standpoint, that's very exciting in a hearing. Because it involves mathematics, and it's actually a whole area of mathematics called set theory. If you take a sentence or words and you want to convert to a VIM [Venn] diagram, there are actually mathematical definitions of words that are then used to create these VIM [Venn] diagrams. . . . If you take the sentence, line conditioning is properly seen

> as a network – as a routine network modification. The word 'properly' according to dictionaries and others, has a mathematical definition, and the mathematical definition is [a] subset. In other words, line conditioning is a subset of routine network modifications . . . So that all line conditioning is a subset of a routine network modification, but there are routine network modifications that are not considered line conditioning.

Based upon its foregoing arguments, BellSouth recommended that the Commission should harmonize Paragraph 643 and the FCC Rule by adopting BellSouth's language and finding that BellSouth's obligation is to provide the Joint Petitioners with line conditioning on the same terms and conditions that it provides to its own customers.

In its Proposed Order, the Public Staff agreed with the Joint Petitioners' position that BellSouth is obligated to provide line conditioning, without limitation, in accordance with FCC Rule 51.319 (a)(1)(iii). The Public Staff stated that Paragraph 643 of the *TRO* clearly reflects the FCC's belief that line conditioning does not constitute creation of a superior network and illustrates the FCC's point that load coil and bridge tap removal (i.e. line conditioning) are network modifications that ILECs perform on a routine basis to provide advanced services to their customers. The Public Staff contended that because ILECs routinely condition lines, performing line conditioning for a CLP does not constitute the creation of a superior network. Further, the Public Staff explained that since ILECs provide line conditioning for their retail customers, they must also offer line conditioning as a loop network element. The Public Staff asserted that the importance of line conditioning to CLPs is emphasized by the FCC when it states in Paragraph 643 that "[c]ompetitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices."

The Public Staff stated that the FCC did not intend for Paragraph 643, in the *TRO*, to limit BellSouth's line conditioning obligations only to those situations in which BellSouth itself would perform these modifications for its own customers. Instead, the Public Staff contended that it is the function of removing load coils or bridge taps that constitutes a routine network modification, not the conditions under which these functions are performed. The Public Staff asserted that this is made clear in FCC Rule 51.319(a)(1)(iii)(A), which defines line conditioning "as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders." The Public Staff maintained that the FCC's definition does not limit line conditioning to the removal of devices only in situations where BellSouth would typically remove them.

Furthermore, the Public Staff observed that Paragraph 642 of the *TRO* supports the view that ILECs are obligated to perform the functions associated with line conditioning because of the characteristics of xDSL service. The Public Staff explained that certain devices added to the local loop to provide voice service disrupt the

capability of the loop in the provision of xDSL services. Thus, the Public Staff contended that because providing a local loop without conditioning the loop for xDSL services would fail to address the impairment CLPs face, the FCC requires ILECs to provide line conditioning to CLPs.

In addition, the Public Staff also observed that Footnote 1947 of the *TRO* states that the FCC refined the conditioning obligation to cover loops of any length in its *Line Sharing Order*[13]. Thus, the Public Staff asserted that even if an ILEC chooses not to condition loops of certain lengths, it is not absolved from its obligation to condition loops of any length upon request of a CLP.

Based upon the foregoing arguments of the parties, the Commission has reviewed the various sections of FCC orders referenced by the parties and, consequently, we begin our analysis by observing that in the FCC's *UNE Remand Order*, released November 5, 1999, at Paragraph 172, which concerns loop conditioning, the FCC stated the following:

> Conditioned Loops. We clarify that incumbent LECs are required to condition loops so as to allow requesting carriers to offer advanced services. The terms 'conditioned,' 'clean copper,' 'xDSL-capable' and 'basic' loops all describe copper loops from which bridge taps, low-pass filters, range extenders, and similar devices have been removed. Incumbent LECs add these devices to the basic copper loop to gain architectural flexibility and improve voice transmission capability. Such devices however, diminish the loop's capacity to deliver advanced services, and thus preclude the requesting carrier from gaining full use of the loop's capabilities. Loop conditioning requires the incumbent LEC to remove these devices, paring down the loop to its basic form. (Footnotes omitted.)

Thus, the Commission understands that in said Paragraph the FCC required the ILECs to condition loops by removing bridge taps, low-pass filters, range extenders, and similar devices from copper loops to allow requesting carriers to offer advanced services. The Commission also notes that the FCC in its Appendix C to the *UNE Remand Order* adopted its revised Rule 51.319 (Specific unbundling requirements) which included a Local Loop Section (a)(3) with subsections A-D regarding line conditioning. In addition, we note that that portion of the Rule is reflected, herein, under a previous footnote included within the discussion of this issue and, thus, it will not be repeated here. However, we are compelled to note, in part, that the Rule provides that "[t]he incumbent LEC shall condition lines required to be unbundled under this section wherever a competitor requests, whether or not the incumbent LEC offers advanced services to the end user customer on that loop. . . . Line conditioning is defined as the removal from the loop of any devices that may diminish the capability of the loop to deliver high-speed switched wireline telecommunications capability, including xDSL service".

[13] CC Docket No. 98-147 and CC Docket No. 96-98, released on December 9, 1999.

On August 21, 2003, the FCC released its *TRO* and, therein, the FCC in its Appendix B to the *TRO* adopted its further revised Rule 51.319 which included a Local Loop – Copper Loops Section (a)(1)(iii) with its subsections A-E regarding line conditioning. As stated previously, Section (a)(1)(iii) states, in part, that "The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop." And Section (a)(1)(iii)(a) states, in part, that "[l]ine conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders." Also, in the FCC's *TRO*-revised Rule 51.319, separate and apart from the line conditioning rule section, the FCC included another Local Loop Section (a)(8)(i-ii) regarding routine network modifications. The routine network modifications rule section states, in part, that "[a]n incumbent LEC shall make all routine network modifications to unbundled loop facilities used by requesting telecommunications carriers where the requested loop facility has already been constructed. . . . A routine network modification is an activity that the incumbent LEC regularly undertakes for its own customers. Routine network modifications include, but are not limited to, rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a DS1 loop to activate such loop for its own customer."

On February 4, 2005, the FCC released its *TRRO*. In the *TRRO*, the FCC further revised Rule 51.319, however, the sections of the Rule concerning the line conditioning rules and the routine network modification rules were not changed by the FCC.

As discussed herein, BellSouth's argument is that its line conditioning obligations were changed by the *TRO*, as a result of the FCC's adoption of its routine network modification rules; therefore, BellSouth maintained that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers; and BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. BellSouth has cited certain language in the *TRO* from Paragraphs 250, 635, and 643 in support of its position.

Based upon our review of the *TRO* as it relates to the matters at issue here, the Commission does not believe that BellSouth's line conditioning obligations were

changed by the *TRO*. As discussed previously, BellSouth has cited certain excerpts of text from *TRO*-Paragraphs 250, 635, and 643, to support its position that the only interpretation of both Paragraph 643, as well as the FCC Rule that gives effect to both line conditioning and routine network modification provisions, is BellSouth's interpretation. We disagree with BellSouth's interpretation of the FCC's actions.

The *TRO* provided a discussion in Part VI.A.4.a.(v)(a), consisting of three Paragraphs (248-250), concerning "Legacy Networks" – "Stand-Alone Copper Loops". Paragraph 250 is worded as follows, including footnotes:

> **250.** The practical effect of this unbundling requirement is to ensure that requesting carriers have access to the copper transmission facilities they need in order to provide narrowband or broadband services (or both) to customers served by copper local loops. We understand that this unbundling obligation may require an incumbent LEC to provide the functionality available in certain equipment, as well as to remove the functionality from other equipment (*i.e.,* to condition the loop), in order to provide a complete transmission path between its main distribution frame (or equivalent) and the demarcation point at the customer's premises.[747] As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service.[748]
>
> [Footnotes for Paragraph 250:]
>
> [747] As discussed in Part VI.A. *infra,* we readopt incumbent LECs' line conditioning obligations. The Commission noted in its *Line Sharing Order* that devices such as load coils and bridged taps interfere with the provision of xDSL service and, absent a certain showing by the incumbent LEC to the relevant state commission, must be removed at the request of the competitive LEC. *See Line Sharing Order*, 14 FCC Rcd at 20952-54, paras. 83-86. We determine that, upon the competitive LEC's request, incumbent LECs must similarly condition unbundled stand-alone loops to make them xDSL-compatible.
>
> [748] We also require such conditioning for the HFPL consistent with the grandfather provision and transition period described below. *See Line Sharing Order*, 14 FCC Rcd at 20952-54, paras, 83-87.

The Commission does not believe that the FCC's statement from Paragraph 250, which states that "we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service" requires that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers and that BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. Instead, the Commission believes that this language means that the function of line conditioning, i.e., the removal of devices such as bridge taps, load coils, low pass filters, and range extenders, constitutes a form of routine network modification, not the

conditions under which this function is performed. The Commission also notes that in Footnote 747, the FCC stated "we readopt incumbent LECs' line conditioning obligations."

Further on in the *TRO*, the FCC provided a discussion in Part VII.D.2.a., consisting of 10 Paragraphs (632-641), concerning "Routine Network Modifications to Existing Facilities". Paragraph 635 is worded as follows, including footnotes:

> **635.** The record reveals that attaching routine electronics, such as multiplexers, apparatus cases, and doublers, to high-capacity loops is already standard practice in most areas of the country.[1923] Moreover, performing such functions is easily accomplished. The record shows that requiring incumbent LECs to make the routine adjustments to unbundled loops discussed above that modify a loop's capacity to deliver services in the same manner as incumbent LECs provision such facilities for themselves is technically feasible[1924] and presents no significant operational issues.[1925] In fact, the routine modifications that we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules.[1926] Specifically, based on the record, high-capacity loop modifications and line conditioning require comparable personnel; can be provisioned within similar intervals; and do not require a geographic extension of the network.[1927]

[Footnotes for Paragraph 635:]

[1923] The record reflects that different incumbent LECs perform varying degrees of network modifications when provisioning unbundled high-capacity loops. See, e.g., Letter from Patrick J. Donovan, Counsel for Cbeyond, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (Cbeyond Dec. 16, 2002 No Facilities Ex Parte Letter), Declaration of Richard Batelaan at paras. 8-9 (filed Dec. 16, 2002) (discussing the different "no facilities" policies of Qwest, SBC, and Verizon).

[1924] See Allegiance Sept. 30, 2002 Ex Parte Letter at 5, Attach. 4 (citing Verizon Maryland, Inc.'s response to a data request stating "[g]enerally speaking, Verizon MD does not reject DS1 requests for end users due to no facilities.").

[1925] See Allegiance Sept. 30, 2002 Ex Parte Letter at 2.

[1926] See infra Part VII.D.2.b. Specifically, in the UNE Remand Order, the Commission held that incumbent LECs must remove certain devices, such as bridge taps, low-pass filters, and range extenders, from basic copper loops in order to enable the requesting carrier to offer advanced services. UNE Remand Order, 15 FCC Rcd at 3775, para. 172. Although Verizon rejects unbundled DS1 loop orders where there is no apparatus or doubler case on the loop claiming that installation of these cases is "complex" – requiring a truck roll to either dig up existing cable or a "bucket" to reach aerial cables in order to splice open the cable sheath – it must perform similar activities to accommodate line conditioning requests. See Letter from W. Scott Randolph, Director – Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 4-5 (filed Oct. 18, 2002) (Verizon Oct. 18, 2002 No Facilities Ex Parte Letter); see also El Paso Galindo Decl. at para. 14 ("When an ILEC outside plant technician conditions a

copper loop for xDSL by removing bridged tap and Load Coils in the loop, the work is generally performed by the same staff that performs rearrangement for DS1 services.").

[1927] See Cbeyond Nov. 23, 2002 Ex Parte Letter at 3. Furthermore, these routine modifications are generally provided by incumbent LECs within relatively short intervals. Mpower Reply at 29 (stating that Verizon's customers "[i]n almost every instance . . . can order service and have it installed within one week.").

The Commission does not believe that the FCC's statement in Paragraph 635, that "the routine modifications that we require today are substantially similar activities to those that the incumbent LECs currently undertake under our line conditioning rules", supports BellSouth's position that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers and that BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. To the contrary, the Commission believes that the FCC is simply stating that its required routine modifications are substantially similar activities to those undertaken by the ILECs, as required by the FCC's line conditioning rules. Furthermore, the Commission notes that in Footnote 1926, which is an integral part of the subject statement, the FCC referenced Part VII.D.2.b. of the *TRO* concerning line conditioning and explained that "[s]pecifically, in the UNE Remand Order, the Commission held that incumbent LECs must remove certain devices, such as bridge taps, low-pass filters, and range extenders, from basic copper loops in order to enable the requesting carrier to offer advanced services. UNE Remand Order, 15 FCC Rcd at 3775, para. 172. Although Verizon rejects unbundled DS1 loop orders where there is no apparatus or doubler case on the loop claiming that installation of these cases is 'complex' – requiring a truck roll to either dig up existing cable or a 'bucket' to reach aerial cables in order to splice open the cable sheath – it must perform similar activities to accommodate line conditioning requests."

Next, the *TRO* provided a discussion in Part VII.D.2.b., consisting of three Paragraphs (642-644), concerning "Line Conditioning". Paragraph 642 is worded as follows, including footnotes:

> **642.** As noted above, we conclude that incumbent LECs must provide access, on an unbundled basis, to xDSL-capable stand-alone copper loops because competitive LECs are impaired without such loops.[1946] Such access may require incumbent LECs to condition the local loop for the provision of xDSL-capable services.[1947] Accordingly, we readopt the Commission's previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order*.[1948] Line conditioning is necessary because of the characteristics of xDSL service – that is, certain devices added to the local loop in order to facilitate the provision of voice service disrupt the capability of the loop in the provision of xDSL services. In particular, bridge taps, load coils, and other equipment disrupt xDSL transmissions.[1949] Because providing a local loop without conditioning the loop for xDSL services would fail to address the impairment competitive LECs face, we require incumbent LECs to provide line conditioning to requesting carriers.

[Footnotes for Paragraph 642:]

[1946] *See supra* Part VI.A.4.a.(v)(a).

[1947] In the *UNE Remand Order,* the Commission made clear that incumbent LECs must condition loops to allow requesting carriers to offer advanced services, and identified the removal of bridge taps, load coils, and similar devices as part of this obligation. *UNE Remand Order*, 15 FCC Rcd at 3775, para. 172. The Commission specifically rejected the contention that the Eighth Circuit's holding on "superior quality" overturned the rules requiring incumbents to provide conditioned loops even where the incumbent itself is not providing advanced services to those customers. *Id.* at 3775, para. 173 ("We find that loop conditioning, rather than providing a 'superior quality' loop, in fact enables a requesting carrier to use the basic loop."). The Commission subsequently refined the conditioning obligation to cover loops of any length, to recognize the potential degradation of analog voice service, and to enable incumbent LECs to charge for conditioning loops. *Line Sharing Order*, 14 FCC Rcd 20912, 20951-53, paras. 81-87.

[1948] We note that the *USTA* court did not expressly opine on the Commission's line and loop conditioning rules.

[1949] *See* Telcordia Technologies, Inc. NOTES ON DSL at 2-10 to 2-16 (describing limitations of xDSL service); Padmanand Warrier and Balaji Kumar, xDSL ARCHITECTURE 95-97 (2000) (describing the effect of bridge taps, load coils, various gauges of copper cable, and analog/digital conversions on xDSL transmissions); *see also Line Sharing Order*, 14 FCC Rcd at 20951-52, para. 83.

The Commission notes that the text of Paragraph 642 explicitly indicates that the FCC readopted its previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order.* In addition, in said Paragraph and Footnotes, the FCC (1) required incumbent LECs to provide access, on an unbundled basis, to xDSL-capable stand-alone copper loops because competitive LECs are impaired without such loops; (2) recognized that access to xDSL-capable stand-alone copper loops may require incumbent LECs to condition the local loop for the provision of xDSL-capable services; (3) explained that line conditioning is necessary because of the characteristics of xDSL service, i.e., certain devices added to the local loop to provide voice service disrupt the capability of the loop in the provision of xDSL services; (4) concluded that providing a local loop without conditioning the loop for xDSL services would fail to address the impairment CLPs face; (5) required incumbent LECs to provide line conditioning to requesting carriers; (6) identified the removal of bridge taps, load coils, and similar devices as part of the line conditioning obligation; and (7) observed that the *Line Sharing Order* refined the conditioning obligation to cover loops of any length, to recognize the potential degradation of analog voice service, and to enable incumbent LECs to charge for conditioning loops. Based upon the foregoing, the Commission does not believe that BellSouth's line conditioning obligations have now been constrained by the FCC's inclusion in Rule 51.319 of its routine network modifications' Section (a)(8).

Further, *TRO* Paragraph 643 is worded as follows, including footnotes:

**643.** Line conditioning does not constitute the creation of a superior network, as some incumbent LECs argue.[1950] Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers. As noted above, incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves. Similarly, in order to provide xDSL services to their own customers, incumbent LECs condition the customer's local loop.[1951] Thus, line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations. We therefore agree with the commenters that argue that requiring the conditioning of xDSL-capable loops is not mandating superior access,[1952] and reject Verizon's renewed challenge that the Commission lacks authority to require line conditioning.[1953] Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices. We therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element.[1954]

[Footnotes for Paragraph 643:]

[1950] *See* Verizon Jan. 17, 2003 Guyer *Ex Parte* Letter at 3-4 (arguing that line conditioning constitutes the creation of a superior network).

[1951] We note that all BOCs offer xDSL service throughout their service areas. *See, e.g.,* Verizon, *Verizon Online DSL for Your Home Including Personal or Office Use and Price Packages for DSL,* http://www22.verizon.com/ForHomeDSL/channels/dsl/forhomedsl.asp > (describing Verizon's xDSL offerings for residential customers).

[1952] *See, e.g.,* NuVox *et al.* Reply at 43; WorldCom Reply at 42-43.

[1953] Verizon Comments at 63 (arguing that "loop conditioning plainly is an unlawful requirement to provide a superior quality network."). More specifically, we do not accept Verizon's contention that line conditioning is a "significant construction activity" that provides a "*superior* quality network facility." Jan. 17, 2003 Verizon Guyer *Ex Parte* Letter at 4.

[1954] As the Commission noted in the *UNE Remand Order*, the Eighth Circuit expressly affirmed the Commission's determination that section 251(c)(3) requires incumbent LECs to provide modifications to their facilities in order to accommodate access to network elements. *UNE Remand Order*, 15 FCC Rcd at 3775, para. 173 (citing *Iowa Utils. Bd. v. FCC,* 120 F.3d at 813, n.33). With respect to making routine network modifications, the Eighth Circuit stated: "Although we strike down the Commission's rules requiring incumbent LECs to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission's statement that 'the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.'" *Iowa Utils. Bd. v. FCC,* 120 F.3d at 813, n.33 (citing *Local Competition Order,* 11 FCC Rcd at 15602-03, para. 198).

The Commission does not believe that the FCC's statement in Paragraph 643, that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers" supports BellSouth's position that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers and that BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. The Commission believes that this language merely means that the function of line conditioning is to be properly seen as a routine network modification, i.e, the function of line conditioning, constitutes a form of routine network modification, not the conditions under which this function is performed. The Commission observes that in Footnote 1951, the FCC stated that "[w]e note that all BOCs offer xDSL service throughout their service areas." Furthermore, the FCC found that "Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices. We therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element." Consistent with that finding, the Commission notes that in the FCC's specific unbundling requirements, Rule 51.319(a)(1), the FCC provided, in part, that "A copper loop is a stand-alone local loop comprised entirely of copper wire or cable. Copper loops include two-wire and four-wire analog voice-grade copper loops, digital copper loops (e.g., DS0s and integrated services digital network lines), as well as two-wire and four-wire loops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the copper loops are in service or held as spares." (Emphasis added.)

The Commission rejects BellSouth's position that its line conditioning obligations are now constrained by the FCC's *TRO*-implemented rule on routine network modifications. The FCC did not modify the line conditioning definition in its *TRO* rules to allow for any routine network modification limitation as BellSouth is now seeking to impose on the definition for line conditioning. Moreover, the FCC concluded that line conditioning is intrinsically linked to the local loop; the FCC included line conditioning within the definition of an unbundled copper loop network element; and the FCC found that providing a local loop without conditioning the loop for xDSL services would fail to address the impairment CLPs face and, thus, the FCC required ILECs to provide line conditioning to the requesting carriers. The Commission believes that the ILECs' line conditioning obligations remained virtually the same as they did before the *TRO*, with the exception that the line conditioning obligations were expanded to include copper subloops. We understand that the CLPs need to have access to line conditioning at TELRIC rates, so that they will be able to deploy advanced services on copper loops (including subloops), free of devices that diminish the capabilities of the loop, and we also understand that the ILEC's line conditioning obligations apply to loops of any length. Based upon the foregoing, the Commission believes it is entirely appropriate to agree with the Joint Petitioners' and the Public Staff's positions such that line conditioning would be defined in the Agreement as set forth in FCC Rule 51.319(a)(1)(iii)(A); and BellSouth would be obligated to provide line conditioning in accordance with FCC Rule 51.319 (a)(1)(iii).

## CONCLUSIONS

The Commission concludes that line conditioning should be defined in the Agreement as set forth in FCC Rule 51.319(a)(1)(iii)(A); and BellSouth should be required to perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii). Accordingly, the Commission adopts the Joint Petitioners' proposed language for inclusion in the Agreement, in Attachment 2, Section 2.12.1.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

**ISSUE NO. 11 - MATRIX ITEM NO. 37:**

**Joint Petitioners' Issue Statement:** Should the Agreement contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less?

**BellSouth's Issue Statement:** Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less?

## POSITIONS OF PARTIES

**JOINT PETITIONERS:** The Joint Petitioners argued that the Agreement should not contain specific provisions limiting the availability of line conditioning - in this case, load coil removal - to copper loops of 18,000 feet or less.

**BELLSOUTH:** BellSouth maintained that it has no obligation to remove load coils on copper loops in excess of 18,000 feet at TELRIC rates for the Joint Petitioners because BellSouth does not remove load coils on long loops for its own customers.

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

## DISCUSSION

According to the Joint Petitioners' Petition for Arbitration and the Joint Petitioners' Exhibit A, this issue relates to the matter of the appropriate contract language to be included in Section 2.12.2 of Attachment 2 (Network Elements and Other Services) to the Agreement.

The Joint Petitioners asserted that the Agreement should not contain any specific contract language limiting the availability of line conditioning for load coil removal to only copper loops of 18,000 feet or less in length.

Whereas, BellSouth argued that the Agreement should contain specific language indicating that BellSouth has no obligation to remove load coils on copper loops in excess of 18,000 feet. However, BellSouth represented that it will remove such load coils upon request of a CLP, but only pursuant to special construction pricing, which