BELLSOUTH

BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Room 407
Louisville, KY 40203

Dorothy.Chambers@BellSouth.com

Dorothy J. Chambers
General Counsel/Kentucky

502 582 8219
Fax 502 582 1573

October 18, 2005

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

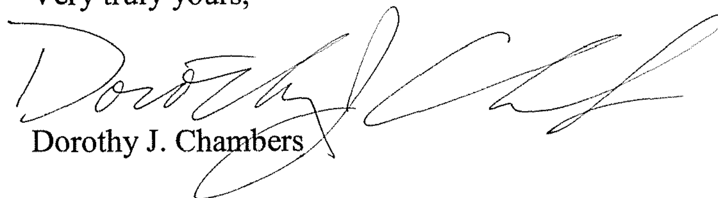
RECEIVED
OCT 18 2005
PUBLIC SERVICE COMMISSION

Re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of An Interconnection Agreement With BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, As Amended PSC 2004-00044

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) paper copies of BellSouth Telecommunications, Inc.'s Motion for Rehearing and Request for Oral Argument. Since the Exhibits total close to 200 pages, only one paper copy of the Exhibits is attached. The other ten copies of the Exhibits are provided to the Commission on CD. A paper copy of the Motion and a CD containing the Exhibits will be served on parties of record.

Very truly yours,



Dorothy J. Chambers

Enclosures

cc: Parties of Record

606417

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC	)	CASE NO. 2004-00044

MOTION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT

Dorothy J. Chambers
Cheryl R. Winn
601 W. Chestnut Street, Room 407
P. O. Box 32410
Louisville, KY 40232
(502) 582-8219

James Meza III
Robert Culpepper
Suite 4300, BellSouth Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

October 18, 2005

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ISSUE 26	4
ISSUE 36	13
ISSUES 37 AND 38	15
ISSUE 65	19
ISSUE 51a	29
ISSUE 86	33
ISSUE 100	35
ISSUE 101	37
ISSUE 103	39
CONCLUSION	40

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, pursuant to KRS § 278.400, respectfully requests that the Kentucky Public Service Commission ("Commission") reconsider or clarify its September 26, 2005 *Order* for Issues 26, 36-38, 51(a), 65, 86, 100, 101, and 103 in the above-captioned arbitration proceeding between BellSouth and NewSouth Communications Corp ("NewSouth"), NuVox Communications, Inc. ("NuVox"), and Xspedius Communications, LLC ("Xspedius") (collectively referred to as "Joint Petitioners").[1] As will be established below, rehearing is necessary to correct errors of law and fact or to provide clarification as to what the Commission ordered.

INTRODUCTION

In the *Order*, the Commission resolves disputes between BellSouth and the Joint Petitioners in a Section 252 arbitration proceeding initiated and conducted pursuant to federal law – the Telecommunications Act of 1996 (the "Act"). As such, the Commission's role in this arbitration proceeding is to ensure that its decisions comply with and do not contravene federal law. BellSouth submits this request for rehearing to address decisions of the Commission that unintentionally violate this standard.

BellSouth recognizes the considerable time and energy this Commission already has devoted to the issues in this case. Reconsideration, nevertheless, is necessary because some of the Commission's determinations are in conflict with federal law. Further, this Commission now may avail itself of decisions and the analyses therein, that were not available to this Commission

[1] Originally KMC Telecom V, Inc. and KMC Telecom III, LLC were parties to this arbitration proceeding. However, on May 31, 2005, the KMC entities filed a withdrawal with prejudice of their petition for arbitration. Thus, the KMC entities are no longer a party to this proceeding.

at the time it reached its September 26, 2005 decision.[2] The key points which BellSouth respectfully urges for this Commission's consideration on rehearing are the following:

- Under Federal law the Commission may not order BellSouth to commingle 251 services with 271 services.
- Imposing such a commingling requirement effectively and improperly recreates the now defunct UNE-P.
- Preferential requirements for line conditioning that exceed what BellSouth provides for its own customers violates federal law.
- Clarification is necessary as to any transit requirements to identify the basis for such a requirement and to confirm that Bellsouth is not impermissibly required to furnish the service for free.

The issues raised in this motion are not unique to the Joint Petitioners. Rather, as most of the issues raised in this Motion also are being addressed in the Commission's Generic Docket, these issues will impact BellSouth's rights and obligations and those of essentially all carriers in the Commonwealth on important and fundamental matters. Accordingly, BellSouth respectfully urges the Commission to reconsider its ruling on the issues identified in this Motion, to consider the recent and thorough analyses of other tribunals on these same issues, and then correct the errors of law and fact and to rule in accordance with federal law.

REQUEST FOR ORAL ARGUMENT

Due to the significance of the matters and their effect on the business relationship between the parties and potentially between BellSouth and all CLECs in Kentucky, BellSouth respectfully requests that the Commission schedule oral argument to assist it in deciding the issues presented in this Motion. The issues in dispute are complicated, have wide-ranging implications on the telecommunications industry, and will impact the public policy of this

[2] In particular, the Florida Public Service Commission's thorough and well-reasoned opinion, issued October 11, 2005, approximately two weeks after this Commission's decision, now may be of assistance to this Commission upon rehearing. This Commission frequently considers the well-reasoned decisions of other sister commissions.

Commonwealth.[3] BellSouth believes the Commission will benefit from a detailed discussion of the issues and the need for reconsideration or clarification.

STANDARD FOR REHEARING

KRS § 278.400 allows any party to apply for rehearing with respect to "any of the matters" determined by the Commission. The primary purpose of rehearing is for the Commission to consider its Order in light of alleged errors and omissions. *See Adjustment of the Rates of Kentucky-American Water Company*, Case No. 2000-120 (Feb. 26, 2001). The Commission, in construing KRS § 278.400, has determined that "the administrative agency retains full authority to reconsider or modify its order during the time it retains control over any question under submission to it." *Kentucky Power Company*, Case No. 7489 (Jun. 27, 1980). Further, the Commission has determined that it can reconsider an Order based upon evidence adduced at the initial hearing or new evidence presented at rehearing. *See Adjustment of the Rates of Kentucky-American Water Company*, Case No. 2000-120 (Feb. 26, 2001).[4] BellSouth requests that the Commission invoke its authority under KRS § 278.400 and grant rehearing so that it can correct the errors of law and fact identified herein.

---

[3] In such circumstances oral argument is useful. *See In re: Application of East Kentucky Power Cooperative, Inc.*, Case No. 2005-00089 at 1 (Sept. 27, 2005) (granting East Kentucky Power's request for oral argument on its application for rehearing).

[4] Regarding the submission of new evidence, the Commission has refused to consider such evidence in certain instances in the past where the evidence "clearly existed at the time of the initial hearing and the petitioner for rehearing elected not to present at the hearing." *Id.* In this instance, BellSouth presents as new evidence the October 11, 2005 decision of the Florida Public Service Commission, Docket No. 040130-TP (Exhibit 1), the Florida Commission Transcript of the August 30, 2005 Agenda Conference in that docket, released September 16, 2005 (Exhibit 2), and the Panel decision of the North Carolina Utilities Commissions dated July 26, 2005, in Docket Nos. P-772, Sub 8; P-913, Sub 5; P-989, Sub 3; P-824, Sub 6; P-1202, Sub 4 (Exhibit 3) on the same issues that are the subject of BellSouth's Motion for Rehearing. Both of these state commissions rendered their decisions after the hearing in this matter, and the Florida Commission's decision was issued after this Commission issued its decision.

ARGUMENT

A. Issue 26: The Commission Committed Errors of Law and Fact in Finding that BellSouth Must Commingle 251 Services with 271 Services.

For the first time in BellSouth's region and contrary to the recent decisions of the Florida Commission and the North Carolina Commission Panel, this Commission determined that BellSouth has an obligation to commingle 251 services with services offered only pursuant to Section 271. The Commission's decision to permit "commingling" of these elements runs afoul of two fundamental principles: 1) the maintenance and advancement of the Federal Communication Commission's ("FCC") binding judgment that combining Section 271 and Section 251 services cannot be required, and 2) preserving and honoring the jurisdictional limitations of state commissions established under federal law. The Commission's ruling violates these fundamental principles in a number of ways, as set forth below, and therefore, must be reversed.

First, and fundamentally, this Commission erred in refusing to recognize that BellSouth has no obligation to commingle 251 services with 271 services. The FCC has so said, and this Commission cannot overturn that FCC decision. The FCC defined "commingling" in the *Triennial Review Order*, FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("*TRO*") as the ***combining*** of a 251 element with a wholesale service obtained from an ILEC by any method other than unbundling under Section 251(c)(3) of the Act.[5] *TRO* at ¶ 579. BellSouth has no 271 obligation to combine 271 elements or to combine elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act. *See TRO* at ¶ 655, n. 1990 ("We decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required

[5] This is not the first time the FCC equated commingling with combining. In the FCC's *Supplemental Order on Clarification*, FCC 00-183, CC Docket No. 96-98 (rel. June 2, 2000) ("*SOC*") issued prior to the *TRO*, the FCC defined commingling as "*i.e.* ***combining*** loops or loop-transport combinations with tariffed special access services . . . ." *SOC* at ¶ 28 (emphasis added).

to be unbundled under Section 251."); *United States Telecom Ass'n v. FCC*, 359 F.3d at 589 (D.C. Cir. 2004) ("*USTA II*"). Further, with the *Errata*, the FCC deleted the only reference in the *TRO* that would have required ILECs to combine 251 and 271 services. *See TRO Errata* at ¶ 27. Thus, it is clear that the ILEC's commingling obligations exclude 271 services because BellSouth has no obligation to commingle or combine 271 services with 251 services.[6]

The North Carolina Utilities Commission Panel used this same reasoning to adopt BellSouth's position in the North Carolina Joint Petitioner arbitration, finding: "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." *See* NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order* at 24.

The Florida Commission also reached this same conclusion in its Joint Petitioner arbitration:

> In paragraph 584 of the *TRO*, the FCC said "as a final matter we require the incumbent LECs to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to Section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act." The FCC's errata to the TRO struck the portion of paragraph 584 referring to ". . . any network elements unbundled pursuant to Section 271 . . . ." The removal of this language illustrates that the FCC did not intend commingling to apply to

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

> Section 271 elements that are no longer also required to be unbundled under section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to section 271.

FPSC Order No. PSC-05-0975-FOF-TP at 19 (October 11, 2005). This Commission should follow the well-reasoned analysis of the Florida and North Carolina Commissions on this significant issue and recognize that BellSouth has no obligation to commingle Section 251 services with those provided only pursuant to Section 271.[7]

Second, even if the FCC established commingling prohibition were not clear, this Commission has no jurisdiction to determine or enforce the rates, terms, and conditions under which BellSouth must provide network elements or services pursuant to Section 271. On the contrary, Congress gave the FCC the exclusive right to enforce compliance with Section 271. 47 U.S.C. § 271(d)(6)(A). As the FCC explained, the Act grants "sole authority to the [FCC] to administer . . . section 271." *InterLATA Boundary Order*,[8] 14 FCC Rcd at 14400-01, ¶¶ 17-18; *see also* *Triennial Review Order*, FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) at ¶¶ 664, 665 ("*TRO*"). ("Whether a particular checklist element's rate satisfies the just and reasonable standard of section 201 and 202 is a fact-specific inquiry that the (Federal Communications) Commission will undertake. . . ."; ". . . section 271(d)(6) grants the (Federal Communications) Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271. In particular, this section provides the Commission with enforcement authority where a BOC 'has ceased to meet any of the conditions required for such approval.'"). The only role that Congress gave state commissions in Section 271 is a

[7]BellSouth acknowledges that other states outside of BellSouth's region have reached a different conclusion, while at least one has ruled consistent with the Florida and North Carolina commissions. Nevertheless, the Florida Commission's Order is the most recent and most persuasive decision on this issue.

[8] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) ("*InterLATA Boundary Order*").

consultative role during the Section 271-approval process. 47 U.S.C. § 271(d)(2)(B); *see also Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004) (state commission cannot "parley its limited role" in consulting with the FCC on a BOC's application for long-distance relief to impose substantive requirements under the guise of Section 271 after that application has been granted).

Indeed, state commissions' authority to arbitrate and approve interconnection agreements entered into "pursuant to section 251" is specifically limited by the Act to implementing Section 251 obligations, not Section 271 obligations. *See* 47 U.S.C. § 252(c), (d); *see also Coserv Ltd. Liab. Co. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 487-88 (5th Cir. 2003) (ILEC has no duty to negotiate items not covered by Section 251); *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (same). Accordingly, Congress did not authorize a state commission to enforce Section 271 obligations, to establish any 271 obligations, to establish rates for any Section 271 obligation, or to otherwise regulate Section 271 obligations. *See UNE Remand Order* at ¶ 470; *TRO* at ¶¶ 656, 664; *United States Telecom Ass'n v. FCC*, 359 F.3d at 237-38 (D.C. Cir. 2004) ("*USTA II*").

The United States District Court for the Eastern District of Kentucky confirmed this bedrock jurisdictional prohibition, finding that "[t]he enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first." *BellSouth Telecommunications, Inc. v. Cinergy Communications Co. ET AL.*, Civil Action No. 3:05-CV-16-JMH at 12 (Apr. 22, 2005). Likewise, the United States District Court for the Southern District of Mississippi held that, "even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC . . . ." *BellSouth Telecommunications, Inc. v. Mississippi Public Ser. Comm'n*, 368 F.

Supp. 2d 557 (S.D. Miss. 2005). This court concluded by stating that "[t]hus, it is *the prerogative of the FCC*, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service." *Id* at 566 (emphasis added).

This Commission's Order erroneously asserts jurisdiction over BellSouth's 271 services in the statement, "the network facilities used by BellSouth to provide access which it is obligated to provide pursuant to Section 271 are within this Commonwealth and are used to provide intrastate service." *Id.* That analysis is incorrect. The sole basis for any obligation to provide these facilities is Section 271, and, as the Eastern District of Kentucky and other federal courts have made clear, it is only the FCC, not this Commission, that may enforce Section 271. Consequently, the *Order,* as presently written, unlawfully attempts to enforce BellSouth's 271 obligations by dictating the terms and conditions under which BellSouth has to make 271 services available to CLECs.

In addition to the federal court authorities previously cited, in a recent arbitration decision, the Kansas Corporation Commission ("Kansas Commission") made expressly clear the FCC's exclusive or preemptive jurisdiction over 271:

> The FTA's 271 provisions explicitly provide that a BOC, desirous of entering the interLATA marketplace, may apply to the FCC for authorization to do so (§ 271(d)(1)); the FCC determines the BOC's qualification for interLATA authority (§ 271 (d)(3)); and, it is the FCC that possesses the sole authority to determine if the BOC continues to abide by the 271 requirements (§ 271(d)(6)). The only state participation in the 271 qualification inquiry is consultation with the FCC to verify BOC compliance with 271 requirements. ***The clear implication here is that there is no place for independent state action***. The Commission concludes for the foregoing reasons, and those expressed by the Arbitrator, that ***the FCC has preemptive jurisdiction over 271 matters.***

In the Matter of Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P., Docket No. 05-BTKT-365-ARB, *et al.* at ¶¶ 13-14 (Jul. 18, 2005) (emphasis added).[9]

Based on the finding that state commissions were preempted by the FCC for 271 matters, the Kansas Commission further held that (1) "SWBT's was not under the obligation to include 271 commingling provisions in successor agreements"; (2) "271 commingling terms and conditions had no home in the successor agreements"; and (3) if "SWBT refused to provide such commingling, it would have no enforcement authority against SWBT because that authority . . . resides with the FCC." *Id.* at ¶¶ 17-18. This Commission should reach the same conclusion here.

Further, because the sole source of the duty to provide these facilities is Section 271, the fact that some portion of BellSouth's 271 services may be intrastate is immaterial and does not translate into granting state commissions jurisdiction over 271 services. The Kentucky Commission acknowledged that fact in reversing its prior decision requiring BellSouth to provide DSL service to CLEC voice customers in Kentucky. In that proceeding, the Commission recognized that the FCC had the exclusive authority to regulate DSL even though it previously asserted jurisdiction over the service because it was provided in conjunction with voice communications. *In re: Petition to Establish Docket to Consider Amendments to*

[9] The holding of the Kansas Commission is consistent with the vast majority of state commissions that have addressed this issue. *See e.g.*, Pennsylvania Public Utility Commission (Docket No. P-00042092) at 42 (June 10, 2005) ("We believe that the enforcement responsibilities of Section 271 compliance lies with the FCC."); Rhode Island Public Utilities Commission (Docket No. 3662) at 9 (Jul. 28, 2005) ("At this time, it is apparent to the Commission that at the bistro serving up the BOC's wholesale obligations, the kitchen door numbered 271 is for "federal employees only."); Idaho Public Utilities Commission (Docket No. CVD-T-05-1) at 4 (Jul. 18, 2005) ("We conclude that the Commission does not have authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement."); South Dakota Commission (Docket No. TC05-056) at 12 (Jul. 26, 2005) ("With respect to the section 271 issue, the Commission finds that it does not have the authority to enforce section 271 requirements within this section 252 arbitration. . . In addition, the language of section 271 places enforcement authority of that section with the FCC."). BellSouth acknowledges, that some state commissions, albeit the minority and outside of BellSouth's region, have reached a different conclusion.

Interconnection Agreements Resulting from Change of Law, Kentucky Broadband Act, Case No. 2004-00501 (Apr. 29, 2005). The fundamental principle of the FCC's exclusive jurisdiction over Section 271 is indistinguishable in this case. This Commission cannot utilize an "intraLATA jurisdictional hook" to establish jurisdiction where none exists.

Third, by requiring BellSouth to combine or commingle 251 elements with services BellSouth provides only pursuant to Section 271, this Commission has contravened federal law and decisions of the FCC by effectively recreating UNE-P with 271 services. The FCC made clear in the *TRRO*, that there is "no section 251 unbundling requirement for mass market local circuit switching nationwide." *Triennial Review Remand Order*, FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) at ¶ 199 ("*TRRO*"). The North Carolina Commission already has determined that it "does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P." *In re: Complaints Against BellSouth Telecommunications, Inc., Regarding Implementation of the* TRRO, Docket No. P-55, Sub 1550 at 13. Likewise, the New York Public Service Commission as well as the Mississippi Federal District Court have indicated that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to 271-based UNE-P arrangements.'" *BellSouth v. Mississippi Public Serv. Comm'n*, Civil Action No. 3:05CV173LN at 16-17 (stating that the court would agree with the New York Commission's findings) (quoting *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y. P.S.C. (Mar. 16, 2005)). Accordingly, the regulatory landscape is now clear – UNE-P is abolished and state commissions cannot recreate it with 271.

The Florida Commission, in its very recent and sound analysis, similarly used the elimination of UNE-P in the *TRRO* as a basis to adopt BellSouth's position on commingling in

the Florida Joint Petitioner arbitration proceeding. "Further, we find that connecting a section 271 switching element to a section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential recreation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition." FPSC Order No. PSC-05-0975-FOF-TP at 19 (October 11, 2005). In reaching this conclusion, the Florida Commission stated the following, which is particularly instructive:

> COMMISSIONER EDGAR . . But the way I have tried to approach this, again, after reading and rereading and rereading, I do think that an errata is to make a correction, I'll make that statement and throw out for possible discussion. In the discussion in the item, staff states that Paragraph 584 after the errata could be construed to mean that commingling of network elements unbundled pursuant to Section 271 is no longer required. And staff further states that the errata change to Paragraph 584 made the issue unclear and no longer straightforward. I'm not sure it was clear and straightforward before, but I do agree that it is not completely clear and straightforward as we sit today.
>
> So with that, again, ***I think we need to do is look at in the larger context, and that the language at issue should be interpreted within the larger context of FCC decisions and direction, and in keeping with this Commission's recognition of that direction.***
>
> ***Recreating UNE-Ps or UNE-P type service provisions, I believe, is in contradiction to the goals of the FCC and the direction that they have laid out in the TRO and as followed through with the errata that came after than. I also don't believe that the CLECs are significantly disadvantaged by removing 271 services from those services that must be commingled with UNEs or with UNE combinations. 271 services will continue to be available from BellSouth through special access tariffs or commercial agreements.***
>
> And that is kind of the thought process that I have gone through. I can move forward with a motion along those lines, or I'm open to more discussions or questions, Commissioner Bradley, whatever is your pleasure.

> COMMISSIONER BRADLEY: Well, this is a philosophical issue that I also have given a lot of thought to, and I have always stated in order to have real competition that all competitors must be facilities-based. ***And I think the message that we have received, or what I'm hearing as it relates to the direction of seeing – as it relates to the direction that the FCC is moving in is that is also their thinking. And I know it's painful, but the only way that we can have true competition is to have facilities-based companies competing.*** So, therefore, I agree with what you have said.
>
> COMMISSIONER EDGAR: I do have a concern, as I stated, that regardless of pricing, that ***one could argue that commingling 251, those elements, and 271 switching could be representative of UNE-P. And I agree with your statement that that is not the direction that the FCC has given us and that this Commission has been following through on,*** as well. . . .

Florida Commission Transcript (emphasis added), Exhibit 2. The Florida Commission's analysis that the allowance of commingling results in recreating what the FCC has conclusively abolished, UNE-P, is insightful, correct, and should be followed by this Commission.

Fourth, this Commission should reverse its decision on commingling because its analysis is incorrect. In particular, the Commission stated that, "[i]f BellSouth prevails, commingling would be eliminated." This statement is incorrect. *See Order* at 10. BellSouth recognizes its commingling obligations established in the *TRO,* and the Joint Petitioners are free to commingle 251 services with tariffed access services under BellSouth's proposed language. Consequently, the Commission rejected BellSouth's language because of an error of fact.

For all of these reasons and those set forth in BellSouth's post-hearing briefs,[10] this Commission should reconsider its decision for Issue 26. This Commission cannot and should not improperly resurrect UNE-P under the guise of commingling. In accordance with federal law, the federal court decisions cited herein, and the vast majority of state commissions that have

[10] For the purposes of appeal, BellSouth incorporates by reference all of the arguments asserted by BellSouth in its post-hearing briefs as grounds for rehearing.

addressed this issue, this Commission should rule that BellSouth has no obligation to commingle 251 services with services made available pursuant to Section 271 only.

B. Issues 36-38: The Commission Committed Errors of Law and Fact in Finding that BellSouth Must Provide Line Conditioning to the Joint Petitioners at TELRIC that Exceeds What BellSouth Provides for Its Own Customers.

(Issue 36)

The Commission's *Order* concluded that "line conditioning is a routine network modification, not the creation of a superior network." *Order* at 11. This decision is correct and BellSouth has no dispute with it. However, the Order then stated that "[a]s such, BellSouth must provide line conditioning when requested by the Joint Petitioners as specified in 47 C.F.R. 51.319(a)." *Id.* This conclusion, however, as a matter of law is incorrect.

Specifically, upon finding that "line conditioning is a routine network modification", federal law mandates that the Commission also find that BellSouth has no obligation to perform line conditioning that exceeds what BellSouth provides to <u>its own</u> customers. This is because the FCC in the *TRO* defined routine network modifications as "those activities that incumbent LECs regularly undertake for their own customers." *TRO* at ¶ 632.[11]

The D.C. Circuit in *USTA II* confirmed this obligation:

> The ILECs claim that these passages manifest a resurrection of the unlawful superior quality rules. We disagree. **The FCC has established a clear and reasonable limiting principle**: the distinction between a "routine network modification" and a "superior quality" alteration **turns on whether the modification is of the sort that the ILEC routinely performs, on demand, for**

[11] The FCC further found that (1) "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." *TRO* at ¶ 643. Further describing this obligation, the FCC stated that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services ***at parity*** with how incumbent LECs provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations." *Id.* (emphasis added).

> **its own customers**. While there may be disputes about the application, the principle itself seems sensible and consistent with the Act as interpreted by the Eighth Circuit. Indeed, the FCC makes a plausible argument that requiring ILECs to provide CLECs with whatever modifications the ILECs would routinely perform for their own customers is not only allowed by the Act, but is affirmatively demanded by § 251(c)(3)'s requirement that access be "nondiscriminatory."

USTA II, 359 F.3d at 578 (emphasis added). Accordingly, as articulated by the D.C. Circuit, a routine network modification is a modification that the ILEC routinely performs for its customers on demand; in contrast, a modification that the ILEC does not routinely perform for its own customers is prohibited as a "superior quality" alteration.

There is no dispute that BellSouth does not regularly remove load coils beyond 18,000 feet or remove bridged taps between 0 and 2,500 feet for its own customers. (FL Tr. at 676, 682). Consequently, BellSouth has no obligation under the law to perform these same activities for the Joint Petitioners at TELRIC. The Commission's decision violates the federal parity standard because it requires BellSouth to perform line conditioning ***without regard*** to the line conditioning that BellSouth provides to its own customers. Such an obligation cannot be reconciled with the Commission's finding that line conditioning constitutes a routine network modification and conflicts with BellSouth's nondiscrimination obligations under the Act.

Further, contrary to federal law, the *Order* affirmatively obligates BellSouth to create a superior network for the Joint Petitioners as it requires BellSouth to perform line conditioning at TELRIC for the Joint Petitioners even when such line conditioning exceeds what BellSouth provides itself. It is well settled that ILECs have no obligation "to provide interconnection and UNEs superior in quality to those that the ILEC provided to itself." *USTA II*, 359 at 577. For this additional reason, the Commission should reconsider its decision and find that BellSouth's

line conditioning obligations are limited to parity or to the type of line conditioning that BellSouth regularly performs for its own customers.

The Florida Public Service Commission ("Florida Commission"), in its very recent decision, reached this same conclusion. That is, BellSouth's obligation to perform line conditioning is parity. Specifically, in the Florida Joint Petitioner arbitration, the Florida Commission rejected the Joint Petitioners' interpretation and proposed language and held that "to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders." *See* FPSC Order No. PSC-05-0975-FOF-TP at 29 (October 11, 2005).[12]

Simply put, BellSouth's obligation to perform line conditioning for the Joint Petitioners is limited as a matter of law to its nondiscrimination under the Act. This nondiscrimination obligation requires BellSouth to provide to the Joint Petitioners the same type of line conditioning that it provides to itself, nothing more. The *Order* should be revised to recognize this standard instead of re-imposing the unlawful "superior in quality" standard which has been struck down by the federal courts.

(Issues 37 and 38)

As a practical matter, the very arguments applicable to Issue 36 also apply to the Commission's *Order* for Issues 37 and 38. In these Issues, the Commission required BellSouth to provide certain types of line conditioning at TELRIC – load coil removals beyond 18,000 feet and bridged tap removal between 0 and 2500 feet – even though BellSouth does not perform the same type of line conditioning for its own customers. For the reasons stated above, the Commission's decision for Issues 37 and 38 are incorrect as a matter of law and should be reversed.

[12] A Panel of the North Carolina Utilities Commission did not adopt BellSouth's position on this issue. *See* NCUC *Recommended Arbitration Order,* Docket P-772, Sub 8 et al, issued July 26, 2005. However, BellSouth has filed objections to the decision which is not yet final.

In addition, independent grounds also exist for the reversal of the *Order* regarding these issues. For instance, as to Issue 37, the Order is flawed because it misconstrues BellSouth's nondiscrimination obligations in requiring BellSouth to perform the same type of line conditioning it provides for T1s for copper loops, even though they are two, distinct services. Specifically, the Order states, "[b]ased on the provision of load coil removal of such long loops for the provision of T1 circuits and based on BellSouth's assertion that it seeks to provide its services at parity, the Commission finds that when requested by the Joint Petitioners, BellSouth should remove the load coils on loops in excess of 18,000 feet at the existing TELRIC rates." *Order* at 12. Thus, the Order while adopting the parity standard it previously had rejected for Issue 36, reached a factually erroneous conclusion in the application of the standard.

It is undisputed that the type of service in dispute with Issue 37 is line conditioning for copper loops. (KY Tr. at 248). It is also undisputed that BellSouth does not remove load coils on copper loops beyond 18,000 feet for its own customers. (KY Tr. at 248-49). BellSouth does remove load coils beyond 18,000 feet for T1 loops, however, because BellSouth performs these same activities for its own T1 customers. (KY Tr. at 248). Accordingly, BellSouth's position for cooper loops and T1s is entirely consistent: BellSouth agrees it is obligated to, and will provide, to the Joint Petitioners the same type of line conditioning it provides to its own customers for copper loops and T1s pursuant to its nondiscrimination and parity obligations. Mr. Fogle explained this fact in response to Staff counsel's questions:

> If you do happen to want to have a T1 on loops longer than 18,000 feet, we will remove the load coils. We do those for our own T1s as well as for the Joint Petitioners. So BellSouth's position is completely consistent in that the same line conditioning function that we routinely perform for that service for ourselves we will do for the Joint Petitioners, and we do so at TELRIC.

(KY Tr. at 248).

Contrary to the Order, however, federal law does not require BellSouth to perform the ***exact same type*** of line conditioning for cooper loops that it provides for T1s. This is especially true here, because there are "considerable technical differences" between the two services. (KY Tr. at 249). Rather, BellSouth nondiscrimination obligation requires BellSouth to (1) perform the same type of line conditioning for T1s at TELRIC for the Joint Petitioners that it routinely provides for its own T1s customers; and (2) perform the same type of line conditioning at TELRIC for the Joint Petitioners for cooper loops that it provides for its own copper loop customers. BellSouth complies with this standard.

And, because the *Order's* requirement that BellSouth perform line conditioning on copper loops at TELRIC, exceeds what BellSouth routinely performs for its own copper loop the Order customers conflicts with federal law and thus should be reversed.[13] As succinctly and correctly stated by the Florida Commission addressing this exact issue:

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

FPSC Order No. PSC-05-0975-FOF-TP at 36. This Commission should reach the same conclusion here.

In addition, this Commission's finding as to Issue 38 is incorrect as a matter of law. It imposes TELRIC obligations upon BellSouth for a service it is not required to provide under

[13] The Panel of the North Carolina Utilities Commission did not adopt BellSouth's position on this issue. *See Recommended Arbitration Order,* Docket P-772, Sub 8 (July 26, 2005). However, BellSouth has filed objections to the decision which is not yet final.

Section 251 of the Act. In particular, the Order states that BellSouth has an obligation to remove bridged taps between 0 and 2500 feet at TELRIC even though BellSouth does not perform this same activity for its own customers. *Order at 13.*

As a matter of law, BellSouth is only obligated to charge TELRIC for services BellSouth is required to provide under Section 251(c) of the Act. *See* 47 U.S.C. § 252(d)(2); *USTA II*, 359 at 589 ("we find nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances were it has found impairment.") BellSouth has no obligation, and a state commission cannot require, BellSouth to charge TELRIC for voluntary services provided outside of Section 251(c). Here, as stated above, BellSouth has no obligation to remove bridged taps for the Joint Petitioners between 0 and 2500 feet at TELRIC because BellSouth does not routinely remove such bridged taps for its own customers. Therefore, the Commission erred as a matter of law in finding that TELRIC applies to this voluntary service, regardless of whether it believes BellSouth will be "adequately compensated" with TELRIC.[14]

For all of these reasons and those set forth in BellSouth's post-hearing briefs,[15] this Commission should reconsider the *Order* and find for Issues 36-38 that BellSouth has no obligation beyond parity, that is BellSouth is not required to provide the Joint Petitioners line conditioning at TELRIC that exceeds the line conditioning BellSouth provides to its own customers.

---

[14] Regarding Issue 38, the Florida Commission, in its very recent decision, correctly ruled that ". . . BellSouth shall be required to remove bridged taps to ensure xDSL capability at parity with what it does for itself. Cumulative bridged taps greater than 6,000 feet shall be removed at no charge. Cumulative bridged taps between 2,500 feet and 6,000 feet shall be removed at no more than TELRIC rates. Bridged taps less than 2,500 feet may be removed based upon the rates, terms and conditions negotiated by the parties. If negotiations are not successful, BellSouth's Special Construction Process shall apply." FPSC Order No. PSC-05-0975-FOF-TP at 41. In contrast, the Panel of the North Carolina Utilities Commission did not adopt BellSouth's position on this issue. *See Recommended Arbitration Order,* Docket P-772, Sub 8 (July 26, 2005). However, BellSouth has filed objections to the decision which is not yet final.

[15] For the purposes of appeal, BellSouth incorporates by reference all of the arguments asserted by BellSouth in its post-hearing briefs as grounds for rehearing.

C. Issue 65: The Commission Erred in Requiring BellSouth to Perform the Transit Traffic Function and Also in Preventing BellSouth From Charging the TIC Rate Until It Can Justify the Charge.

As this Commission will remember, the issue in dispute is whether BellSouth is required to provide its transit service at TELRIC rates. BellSouth already has agreed to provide the transit function, just not at TELRIC. In the *Order*, the Commission ruled that it "has not been precluded by the FCC from requiring BellSouth to transit traffic" and that it "will continue to require BellSouth to transit such traffic." *Order* at 16. The *Order* does not state, however, whether BellSouth is obligated to provide the transit function pursuant to federal or state law and thus BellSouth seeks clarification from the Commission in this regard. Specifically, BellSouth seeks reconsideration and clarification as to the source of the obligation that supports the Commission's decision that it can require BellSouth to perform the transit function. Further, BellSouth also requests that the Commission reconsider its decision that BellSouth cannot charge the .0015 Transit Intermediary Charge ("TIC") rate until that rate can be justified as BellSouth already has justified the costs associated with the service. Reconsideration is necessary because the decision could improperly result in BellSouth performing the transit function for free.

1. Source of the Obligation to Provide Transit Function.

i. BellSouth Has No Express Obligation to Perform the Transit Function Under Federal Law or at TELRIC.

In reviewing this request, the Commission should keep in mind that BellSouth currently has no federal law obligation to provide the transit function. The FCC made this clear in the *TRO* as it stated: "[t]o date, the Commission's rules have not required incumbent LECs to provide transiting." *TRO* at ¶ 534, n. 1640. Similarly, the FCC's Wireline Competition Bureau in the *Virginia Arbitration Order* declined to find that ILECs have an obligation to provide a transit function.

> We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under section 251(A)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.

Virginia Arbitration Order at ¶ 117. The Wireline Competition Bureau subsequently reaffirmed these principles in denying AT&T's request for reconsideration, wherein it stated that (1) it "did not find that Verizon had a legal obligation to provide transit service at TELRIC"; (2) it "did not agree with AT&T's assertion that the Virginia Commission would have been required to agree with AT&T that Verizon must provide transit service under the Act, nor do we agree that the Bureau was required to so conclude." *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State* Corporation, CC Docket No. 00-251, 19 F.C.C.R. 8467 (May 14, 2004).

Even prior to the above decisions, the FCC refused to find that BellSouth had an obligation to provide its transit service. Specifically, in granting BellSouth's 271 application, the FCC stated: "To the extent that NuVox's arguments apply to BellSouth's pricing of transit trunks, we note that the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under section 251(c)(2), and we do not find clear Commission precedent or rules declaring such a duty. We therefore do not find a violation of checklist item 1 in connection with BellSouth's provision of transit trunks." *In the Matter of Joint Application By Bellsouth Corporation, Bellsouth Telecommunications, Inc., and Bellsouth*

Long Distance, Inc. for Provision of In-Region, Interlata Services in Alabama, Kentucky, Mississippi, North Carolina, And South Carolina, WC Docket No. 02 – 150, 17 FCC Rcd., 17595 (Sept. 18, 2002).

Decisions that are contrary to the *Order* are not limited to the FCC. For instance, the Georgia Public Service Commission ("Georgia Commission") recently determined that BellSouth does not have to provide the transit function at TELRIC and has ordered that CLPs pay a non-TELRIC transit intermediary charge ("TIC") of $.0025 as an interim rate. *See BellSouth's Petition for a Declaratory Ruling Regarding Transit Traffic*, Docket No. 16772-U, *Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies*, G.P.S.C. (Mar. 24, 2005). Similarly, the Florida Commission addressed this issue in the Florida Joint Petitioner arbitration and very recently held that "a TELRIC rate is inappropriate because transit service has not been determined to be a § 251 UNE." *See* FPSC Order No. PSC-05-0957-FOF-TP at 52.[16]

ii. BellSouth Has No Implied Obligation Under Federal Law to Provide the Transit Function

In addition to there being no express federal authority requiring BellSouth to provide the transit function, there is also no implicit duty under Section 251(a)(1). This provision imposes a duty on every telecommunications carrier (including without limitation ICOs, ILECs and CLECs) to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . . ." This section clearly does not require every telecommunications carrier in the country to provide a transiting function to any other carrier that asks for it.

[16] The Panel of the North Carolina Utilities Commission did not adopt BellSouth's position on this issue. *See Recommended Arbitration Order*, Docket P-772, Sub 8 (July 26, 2005). However, BellSouth has filed objections to the decision which is not yet final.

Instead, Section 251(a)(1) deals with the requirement that telecommunications carriers interconnect their networks, which has nothing at all to do with any carriers' purported obligation to transport calls between two or more other carriers. In fact, although the decision was reached in another context, the FCC has already determined that the duty to interconnect imposed by Section 251(a)(1) does not include any obligation to transport traffic. Specifically, the FCC considered this issue in its decision in a case involving AT&T and two other carriers in Oklahoma. *In the Matter of Total Telecommunications Services Inc. and Atlas Telephone Company, Inc. v. AT&T Corporation*, File No. E-97-003, *Memorandum Opinion and Order*, 16 FCC Rcd 5726 (2001), *affm in part, remanded in part*, AT&T Corporation v. FCC, 317 F.3d 227 (D.C. Circuit 2003). One of the issues in that proceeding was whether AT&T could refuse to buy access services from Total Telecommunications Services, Inc. ("Total"). In its decision, the FCC described the situation as follows:

> During the period at issue here, when an AT&T subscriber placed a long distance call to Audiobridge in Big Cabin, Oklahoma, the call was initially handled by the subscriber's local telephone company. In this context, the local telephone company is known as the "originating access provider." The local telephone company transported the call to AT&T, which transported the call across AT&T's long distance network to an AT&T point of presence ("POP") located in an area of Oklahoma near Big Cabin served by Southwestern Bell Telephone Company ("Southwestern Bell"). From the AT&T POP, the call was transmitted through Southwestern Bell's facilities to a "meet point" with Atlas. Atlas carried the call over its facilities, switched the call through its access tandem switching equipment, and ultimately transported the call to a meet point with Total (the "terminating access provider"). Atlas charged AT&T a relatively modest fee for this tandem switching service pursuant to the NECA tariff. As the "terminating access provider," Total routed the call to its sole end user customer, Audiobridge. Total then separately billed AT&T for terminating access services.

Id. at ¶6. Evidently, Total's terminating access charges were significantly higher than Atlas' access charges. AT&T claimed that the arrangement was a sham and blocked the traffic that was sent to Total's customer.

Atlas and Total filed a number of complaints, ultimately ending up at the FCC. Among other things, Atlas and Total argued that Section 251(a)(1) "requires AT&T to purchase Total's terminating access services and refrain from blocking calls to Audiobridge." *Id.* at ¶ 22. More particularly, Atlas and Total argued that "a carrier's duty to 'interconnect' under section 251(a) encompasses a duty to transport and terminate all traffic bound for any other carrier with which it is physically linked." *Id.* In other words, Total and Atlas argued that section 251(a)(1) required AT&T to deliver all traffic "bound for any other carrier with which it is physically linked" (i.e., provide a transit function).

The FCC concluded that this was not what the law required. Instead, the FCC concluded that the term "interconnection," as it is used in Section 251 (a)(1), "cannot reasonably be interpreted to encompass a general requirement to transport and terminate traffic." *Id.* at ¶ 26. Clearly, although the FCC has not been faced with the precise issue presented in the case pending before this Commission, the FCC has concluded that Section 251(a)(1) does not require a carrier to "transport and terminate" calls to any carrier with which the transiting carrier is interconnected. This portion of the FCC's order has been affirmed by the United States Court of Appeals for the District of Columbia. Consequently, Section 251(a)(1) does not require BellSouth to provide a transiting function to the Joint Petitioners or any other carrier.

Further, the obligation to allow for indirect interconnection in Section 251(a)(1) does not equate into a finding that ILECs must provide the transit function. Because Section 251(a) is applicable to all telecommunications carriers, it is impossible to glean from that section an

obligation that is applicable to only one type of telecommunications carrier. Even though a carrier cannot be forced to provide a transit function, it may elect to do so (as BellSouth has done) at prices and on terms and conditions that are set out in its tariffs or in contracts that it negotiates with other carriers that use its transit service. That is where Section 251(a)(1) comes into play.

Section 251(a)(1) requires that when Carrier 1 chooses to interconnect with Carrier 3 "indirectly" by using a transiting service that Carrier 2 is willing to provide, Carrier 3 cannot refuse the interconnection merely because it is not a "direct" connection between itself and Carrier 1. That is, if NuVox interconnected with BellSouth, and BellSouth interconnected with AT&T, NuVox could interconnect indirectly with AT&T via BellSouth's network (assuming BellSouth agreed), and AT&T could not refuse the traffic. Such an interpretation clearly harmonizes all of the diverse sections of the Act, without doing damage to any of them, which cannot be said of any argument that the Act requires ILECs and all other carriers to provide a transit function.

Moreover, Section 251(c)(2)(a) does not require carriers to provide the transit function. This statute requires ILECs to interconnect with "the facilities and equipment of any requesting telecommunications carrier" for the "transmission and routing of telephone exchange service and exchange access . . . ." The FCC has stated, clearly and without equivocation that Section 251(c) (2) only relates to interconnection and does not implicate transport. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, CC Docket No.95-185, *First Report and Order*, 11 FCC Rcd 15499 (1996).

Equally important, interpreting Section 251(c)(2) to require transit is illogical because, while the Act provides a specific method that allows the ILEC to recover its costs for every other service or facility it provides to CLECs, it does not provide a specific method for the ILEC providing the transit service to recover its costs. That is, the Act clearly provides for the recovery by an ILEC of its costs for the "transport and termination of telecommunications." §251(b)(5). The Act also clearly provides for the recovery of the ILEC's cost of interconnecting its network with that of another telecommunications carrier. §251(c)(2)(D). The Act likewise specifically provides for the ILEC to recover its costs for providing Unbundled Network Elements ("UNEs") and for the provision of services for resale by other telecommunications carriers. 251(c)(3)&(4). However, there is no provision for the recovery of the cost of calls that "transit," but do not terminate on, the ILEC's network. Indeed, the FCC recognized this situation specifically in its *Local Competition Order*, saying:

> In addition, in setting the pricing standard for section 251(c)(2) interconnection, section 252(d)(1) states it applies when state commissions make determinations "of the just and reasonable rate for interconnection of *facilities and equipment* for purposes of subsection (c)(2) of section 251." Because section 251(d)(1) states that it only applies to the interconnection of "facilities and equipment," if we were to interpret section 251(c)(2) to refer to transport and termination of traffic as well as the physical linking of equipment and facilities, it would still be necessary to find a pricing standard for the transport and termination of traffic apart from section 252(d)(1).[17]

The logical reason for the absence of such a provision is that transiting was not contemplated by the Act. Instead, the Act contemplates that ILECs will interconnect with other telecommunications carriers, will accept local traffic at the interconnection point, and will then transport and terminate that traffic on the ILEC's network to the ILEC's subscribers. The Act makes provision for cost recovery for each of these steps.

---

[17]47 U.S.C. § 251(d)(1) (emphasis added).

If Congress had intended to also require the ILEC to provide a transit service, it would also have provided a cost recovery method. It did not. The only conclusion that can be reached from the absence of a cost recovery method for transiting is that Section 251(c)(2) cannot be fairly read to require transiting.

Accordingly, the overwhelming federal precedent in conjunction with state commission decisions on this issue establishes that this Commission should reconsider and reverse the *Order* to the extent it concluded that BellSouth has an obligation to provide the transit function under federal law or at a TELRIC rate. Simply put, as a matter of law, there is no federal authority to support any finding that BellSouth has a 251 obligation to provide its transit service or that it must provide the service at TELRIC.

iii. If BellSouth Has a State Law Obligation to Provide the Transit Function, It Should Be Provided Pursuant to Tariff.

In the *Order*, the Commission states that it has "previously required third party transiting by the incumbent based on efficient network use." *Order* at 15. BellSouth is unaware of any such decision involving BellSouth, and in conducting research, BellSouth found only two Orders (Case No. 2002-00143 and Case No. 2003-00023) where this issue was discussed. Neither of these Orders, however, address the rate that can be charged for this service, although they both recognized that the transit provider should "receive compensation" for providing the service. *See id.*

Importantly, if this Commission determines that the obligation lies under state law, the Commission has no jurisdiction to force BellSouth to provide this function in a Section 252 agreement. BellSouth only has an obligation to negotiate and arbitrate those issues listed in Section 251(b) and (c) of the 1996 Act. *See Conserve Limited Liab. Corp. v. Southwestern Bell Tel.*, 350 F.3d 482, 487 (5th Cir. 2003). In addition, this Commission only has the authority

under the 1996 Act to arbitrate non-Section 251 issues if the issue was a condition required to implement the agreement. *MCI Telecom., Corp. v. BellSouth Telecom., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002). As established by the cases cited above, there is no federal support for the proposition that BellSouth must provide this transit function at TELRIC under Section 251, and BellSouth submits that state commissions have no jurisdiction to make such a finding.

Therefore, to the extent this Commission determines that the source of the obligation is based in state law, the Commission should refuse to make any ruling on this issue in the arbitration and order BellSouth to file a transit tariff in Kentucky to govern the provision of this service. Likewise, this Commission should require all carriers in Kentucky to file tariffs governing the provision of this service.

2. BellSouth Should Be Allowed To Charge a Rate for Providing the Transit Service.

In addition and alternative to the above request, at a minimum, this Commission should allow BellSouth to charge the Joint Petitioners a non-TELRIC rate for the transit service even if BellSouth was previously not charging for this service. As recognized by this Commission in Case No. 2002-00143 and Case No. 2003-00023, the transit provider should receive compensation for providing the transit service. However, the *Order* erroneously permits BellSouth to charge for the service only to the extent and at the rate BellSouth previously charged for this service. *Order* at 15. Thus, if BellSouth previously did not charge the TIC because it was not in the CLECs agreement, then BellSouth would be unable to charge anything for this service. As a matter of principal, BellSouth should not be ordered to provide any service for free.

Further, this Commission should allow BellSouth to charge the $.0015 rate offered in this proceeding, because BellSouth established that it experiences costs in providing the service.

Specifically, as part of the transit function, BellSouth experiences costs in (1) "sending records to the CLECs identifying the originating carrier"; (2) "ensuring that BellSouth is not being billed for a third party's transit traffic"; and (3) handling "disputes arising from the failure on the part of the CLECs to enter into traffic exchange arrangements with terminating carriers". (Blake Direct Testimony at 42; Tr. at 206). The Florida Commission's very recent decision correctly recognized these costs in allowing BellSouth to charge the .0015 TIC:

> The fact that the TIC is an additive is also noted, and we understand there are costs associated with providing a transiting function, such as providing billing records to the terminating carrier and the cost of reconciling improper billing by the terminating carrier when BellSouth is the intermediary or transiting carrier. . . Therefore, we find BellSouth's costs for providing the billing records that it indicated were not being recovered through tandem switching and common transport charged and the fact that some transiting calls may require reconciliation when third party carriers improperly bill BellSouth must be recognized.

FPSC Order No. PSC-05-0975-FOF-TP at 52-53.

Therefore, BellSouth respectfully submits that this Commission's Order is in error in holding that the TIC rate was not justified; BellSouth requests that the Commission reconsider its decision and allow BellSouth to charge the TIC rate of .0015. If the Commission still has concerns about the rate, the Commission could elect to follow the Georgia Commission and order the .0015 rate until such time as a permanent rate is established. In no event however, should the TIC be priced at TELRIC (for the reasons described above) or should BellSouth be required to provide the service for free for any length of time.

D. Issue 51(a): The Commission Should Clarify that BellSouth's EEL Audit Rights Are Not Limited to the Circuits Identified in the Notice and Documents Provided in Support of the Audit.

Issue 51 relates to the Joint Petitioners' attempt to impose unnecessary and illegal conditions on BellSouth's Enhanced Extended Links ("EELs") audit rights in contravention of the *TRO* by (1) seeking to limit BellSouth's audit rights to those circuits identified in the notice of the audit and for which the Joint Petitioners believe sufficient documentation is produced to support the audit; and (2) seeking to dictate the selection of the auditor by requiring mutual agreement before proceeding. There is nothing in the *TRO* that supports these conditions, which are only designed to impede or delay BellSouth's right to catch and correct the Joint Petitioners' unauthorized use of EELs.

In the *Order*, the Commission stated that it had already resolved this issue in the context of a separate dispute between BellSouth and NuVox regarding BellSouth's request to perform an audit under the current interconnection agreement. *Order* at 14. In that decision, which NuVox has appealed, the Commission rejected the Joint Petitioners' arguments and allowed (1) BellSouth to audit 15 circuits; and (2) BellSouth to select the auditor. *See* Case No. 2004-00295 (Apr. 15, 2005). The Commission's decision in Case No. 2004-00295 resolves the second issue – there is no requirement that the parties mutually agree to the selection of the auditor. However, it is unclear whether the Commission's decision also resolves the scope of audit issue addressed in Issue 51(a).

Specifically, while the Commission limited BellSouth's audit rights to those circuits it identified for which it has "shown concern" in Case No. 2004-00295, there are several other discrete issues in the arbitration that were not addressed in that decision. In particular, the Commission's decision is silent as to (1) whether BellSouth has to identify circuits in the notice

for which it has cause; (2) whether BellSouth must provide documentation to the Joint Petitioners to support the audit with the notice; (3) whether the audit is limited to those circuits identified in the notice or for which sufficient documentation (according to the Joint Petitioners) is produced; (4) whether the Joint Petitioners can delay an audit by simply refusing to agree that the notice or documentation is sufficient such that the audit should proceed; and (5) if their position is adopted, whether the Joint Petitioners can refuse to allow a subsequent audit of additional circuits to proceed if an initial audit is conducted and establishes violations of the law.

Accordingly, BellSouth requests that the Commission clarify the *Order* and affirmatively answer the above-questions relating to Issue 51(b) in the negative. And, to the extent the Commission determines that it has resolved the above-identified questions adverse to BellSouth in Case No. 2004-00295, BellSouth requests that the Commission reconsider its decision and remove these unnecessary and illegal limitations to BellSouth's undisputed audit rights.

Reconsideration or clarification is needed because adoption of the Joint Petitioners' position will only result with the Joint Petitioners having a means to delay BellSouth's audit rights. Indeed, based on NuVox's behavior and arguments in its appeal of Case No. 2004-00295, NuVox will fight "to the death" to prevent ***any*** audit from proceeding, even though it has repeatedly stated that it has ordered EELs in compliance with the law. (FL Tr. at 234; GA Tr. at 429).[18] NuVox's behavior confirms BellSouth's position: If an audit is going to establish that a Joint Petitioner is in violation of the law, there is no amount of identification or documentation

[18] To illustrate how the Joint Petitioners' proposal will lead to delay, one only has to look at Joint Petitioners' testimony. Joint Petitioners concede that (1) they alone would determine if the documents produced along with the notice were sufficient for the audit to proceed; and (2) if they disagreed that the documentation was sufficient, the parties would have to go to dispute resolution prior to the audit commencing. (FL Tr. at 232). Thus, all a Joint Petitioner would have to do to frustrate and delay an audit would be to challenge the identification and documentation provided by BellSouth.

that will appease a Joint Petitioner to allow the audit to proceed and reveal the Joint Petitioner's malfeasance.

Further, as conceded by the Joint Petitioners, there is nothing in the *TRO* expressly requiring these additional conditions. (FL Tr. at 233-34). In fact, the *TRO* is completely silent on the contents of any notice requirement and does not limit BellSouth's audit right to those circuits identified in any notice. Accordingly, the Joint Petitioners can find no support in the *TRO* for its position.

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

In the Florida Commission's very recent decision, that Commission recognized the deficiencies and potential for abuse in the Joint Petitioners' language and rejected it, finding:

> We agree with BellSouth that requiring BellSouth to identify specific circuits and to provide documentation to support is belief of noncompliance, could unnecessarily delay the audit. If the CLEC did not believe that BellSouth provided adequate documentation or that the documentation did not support an audit, the CLEC could object to the audit, possibly requiring our

> involvement to settle the dispute. After BellSouth performed the audit and found those specific circuits out of compliance, the CLEC could object to auditing the rest of the circuits even though Joint Petitioner witness Russell testified, at hearing and in his deposition in Hearing Exhibit 2, that such an additional audit could be warranted. BellSouth witness Blake points out in response to one of staff's interrogatory in hearing Exhibit 2, 'if a CLEC is in violation of the law, there [is] not amount of documentation that would be sufficient for the CLEC such that it would not object to the audit proceeding." We find this argument compelling.

FPSC Order No. PSC-05-0975-FOF-TP at 44-45.

Likewise, the Panel for the North Carolina Commission refused to adopt the Joint Petitioners' unfounded and unnecessary limitations to BellSouth's audit rights:

> As the TRO grants ILECs limited authority to audit compliance with the qualifying service criteria on no more than an annual basis, the Commission is satisfied by virtue of this authority, need not supply requesting carriers with additional documentation to support their audit rights, *except that, as distinct from documentation, BellSouth should state its concern that the requesting carrier has not met the qualification criteria and should forth a concise statement of the reasons therefore.* In any even, BellSouth has agreed to provide notice to a CLP stating the cause for the audit. The Commission finds this proposal to be reasonable.

See Docket No. P-772, Sub, *Recommended Arbitration Order* at 50. These decisions are insightful and should be followed by this Commission.

For these reasons and those set forth in BellSouth's post-hearing briefs,[19] the Commission should clarify (or reconsider) its *Order* and expressly find that (1) BellSouth does not have to identify specific circuits in the notice of the audit; (2) BellSouth does not have to provide sufficient documentation supporting its cause with the notice; and (3) BellSouth's audit rights are not limited to those circuits identified in any notice, if any, or for which supporting

[19] For the purposes of appeal, BellSouth incorporates by reference all of the arguments asserted by BellSouth in its post-hearing briefs as grounds for rehearing.

documentation is produced, if any. Alternatively, if the Commission construes its ruling in Docket No. 2004-00295 adverse to BellSouth for Issue 51(b) and refuses to reconsider it, at a minimum, the Commission should clarify that the Joint Petitioners cannot (1) prevent an audit from proceeding by claiming that the notice or documentation produced is deficient; and (2) refuse to allow a subsequent audit from proceeding if the initial audit establishes that the Joint Petitioner obtained EELs in violation of the law.

E. Issue 86: The Commission Committed Errors of Fact in Finding that the Parties Have Differing Views Regarding How to Address Customer Service Records ("CSRs") Related Disputes and Should Clarify that Remedies Associated with Undisputed Allegations Regarding Unauthorized Access to CSRs do not Require Commission Involvement.

The Order contains errors of fact in the finding that "[t]he parties have differing views over how to address disputes that may arise about access to customer service record information." *Order* at 15. To be clear, the parties have no disagreement regarding how to address disputes regarding unauthorized access to customer service record ("CSR") information. Specifically, ***both parties agree*** that disputes regarding unauthorized access to CSR information should be handled in accordance with the Agreement's dispute resolution provisions. (Attachment 6, § 2.5.5.3 [both versions]). Indeed, this fundamental error of fact (or mistaken view that BellSouth's proposal allows for termination of service while a CSR-related dispute is pending) appears to have led to the finding that "BellSouth should not be permitted to undertake this step [suspension of access to ordering systems or termination of service] without affording the Joint Petitioners an opportunity for Commission involvement." *Id.* at 16.

The Florida Commission, in its recent and sound analysis, recognized that the parties' positions on Issue 86 were identical regarding disputes over unauthorized access to CSR information, and thus adopted BellSouth's position, which provides for suspensions/termination

rights only when a party ***fails to dispute*** such allegations. Specifically, the Florida Commission correctly concluded:

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

FPSC Order No. PSC-05-0975-FOF-TP at 56. The Florida Commission's analysis and ruling on Issue 86 should be followed by this Commission.[20]

The factual error in the Order regarding the substance of BellSouth's position is compounded by the finding that BellSouth must file a complaint "prior to disconnecting joint CLECs from the customer service record information when BellSouth alleges unauthorized access." *Order* at 16. Again, BellSouth will seek expedited Commission resolution of any CSR-related dispute and will not engage in any suspension or termination activity during the pendency of such a dispute. That said, with a complete understanding of BellSouth's position, this Commission should clarify (or reconsider) that the filing of a complaint is unnecessary and inappropriate in situations where a party fails to respond to allegations regarding the unauthorized access to CSR information. Indeed, imposing a complaint filing requirement in such a situation does not protect citizens of Kentucky (as unauthorized access to customer information is allowed to continue unchecked), nor does it incent the parties to abide by their

[20] The Panel of the North Carolina Utilities Commission did not adopt BellSouth's position on this issue. *See Recommended Arbitration Order,* Docket P-772, Sub 8 (July 26, 2005). However, BellSouth has filed objections to it and the decision is not yet final.

unqualified and undisputed contractual and legal obligations to obtain customer permission before accessing customer records.

For all of these reasons and those set forth in BellSouth's post-hearing briefs,[21] the Commission should reconsider its decision for Issue 86, and adopt BellSouth's proposed language for Issue 86.

F. Issue 100: The Commission Should Find that BellSouth's Current Collections Practice and Proposed Contract Language for Issue 100 Satisfies the Commission's Ruling on this Issue and Should be Adopted.

Regarding Issue 100, the Order held that "BellSouth should calculate the exact amount due and the date by which the amount must be received in order to avoid suspension of service. If additional past due amounts are accrued, then BellSouth should send a written notice to the CLECs specifying such additional amounts." *Order* at 18. The Commission should reconsider this decision and find that BellSouth's proposed language and collections process provides a CLEC with the means to determine the amounts that must be paid to avoid suspension or termination of service.

As an initial matter, BellSouth' proposed language for Issue 100 states that, upon request, BellSouth will advise of the additional amounts that must be paid to avoid suspension or termination of service. (BellSouth Exhibit A, Attachment 7, § 1.7.2). The *Order* however, makes no mention of BellSouth's language. Accordingly, the Commission should make the straightforward clarification that a BellSouth contractual commitment to advise Joint Petitioners of additional amounts that must be paid to avoid suspension or termination of service removes any reasonable and rational concern the Joint Petitioners may have regarding amounts that must be paid to avoid suspension or termination of service.

---

[21] For the purposes of appeal, BellSouth incorporates by reference all of the arguments asserted by BellSouth in its post-hearing briefs as grounds for rehearing.

Further, BellSouth provides an aging report along with a suspension notice. The aging report shows, by billing account number, current charges, past due charges, disputes charges, total past due amount less current charges and disputed charges, plus the ability to determine amounts that will become past during the notice period. (BellSouth Response to FL Staff Interrogatory 117). Indeed, after reviewing BellSouth's aging reports and accompanying documents during the Florida hearing, Joint Petitioners admitted that there is no guesswork involved in BellSouth's collections process. (FL Tr. at 268-269).

Based on Joint Petitioners' concession and the same evidence presented to this Commission, the Florida Commission found that there is no guesswork involved in BellSouth's collections process and adopted BellSouth's language.[22] This Commission should do likewise, and clarify that BellSouth's proposed language for Issue 100 should be adopted. At a minimum, the Commission should clarify that its ruling is not intended to dismantle BellSouth's collections process and require BellSouth to send an individual past due notice for each individual bill that a Joint Petitioner fails to timely pay. In the case of NuVox, such a ruling could require BellSouth to send over 1,100 past due notices a month.

For all of these reasons and those set forth in BellSouth's post-hearing briefs,[23] the Commission should reconsider its decision for Issue 100, and adopt BellSouth's proposed language for Issue 100.

[22] FPSC Order No. PSC-05-0975-FOF-TP at 65-66. The Panel of the North Carolina Utilities Commission did not adopt BellSouth's position on this issue. *See Recommended Arbitration Order,* Docket P-772, Sub 8 (July 26, 2005). However, BellSouth has filed objections to the decision which is not yet final.

[23] For the purposes of appeal, BellSouth incorporates by reference all of the arguments asserted by BellSouth in its post-hearing briefs as grounds for rehearing.

G. Issue 101: The Commission Committed Errors of Fact and Law in Finding that the Joint Petitioners Are Entitled to Maximum Security Deposit Amount Less Than Two Months' Billing.

The Commission concluded that Joint Petitioners' maximum security deposit amount should not exceed one month's billing for services billed in advance and two months' billing for service bill in arrears. *Order* at 19. In so ruling, the Commission noted that BellSouth had agreed to this maximum deposit amount with other carriers [ITC^DeltaCom], *id.* at 18, and found that "BellSouth has a right to request an additional deposit from a Joint Petitioner who fails to meet its payment obligations." *Id.* at 19. The Commission's conclusion cannot be reconciled with the facts in the record, and thus is incorrect. First, it is true that BellSouth agreed to a lesser maximum with ITC^DeltaCom. It is equally true, however, that the deposit criterion contained in the BellSouth/ITC^DeltaCom interconnection agreement (attached to Ms. Blake's testimony as Exhibit KKB-9) is much more stringent than the deposit criterion contained in the interconnection agreement subject of this arbitration. (Attachment 7, § 1.8.5). Not surprisingly, BellSouth offered the Joint Petitioners the same deposit language in its entirety that it agreed to with ITC^DeltaCom but the Joint Petitioners rejected it. (GA Tr. at 544-545; FL Tr. at 1065-1069). Allowing Joint Petitioners to "pick and choose" the ITC^DeltaCom maximum security deposit provision, while permitting them to throw out the associated ITC^DeltaCom deposit criterion as well as rejecting the ITC^DeltaCom agreement in its entirety, is inappropriate and impermissible as it resurrects a "pick and choose" regime that the FCC abandoned in July 2004.[24] Accordingly, the Commission should not sanction any unwarranted "picking and choosing" by forcing BellSouth to include the ITC^DeltaCom maximum deposit provision in the

[24] In construing 47 U.S.C. §252(i), the FCC issued a new adoption rule that replaced the "pick and choose" rule with an "all or nothing" rule. *Second Report and Order*, CC Docket No. 01-338, FCC 04-164 (rel. July 13, 2004).

Joint Petitioners' interconnection agreement without also requiring all associated language from that agreement.

Apparently recognizing that a lowered maximum deposit amount increases BellSouth's financial exposure if a Joint Petitioner fails to pay its bills, the Commission ruled that "BellSouth has a right to request an additional deposit from Joint Petitioner that fails to meet its payment obligations." *Order* at 19. However, the parties have agreed upon specific and objective deposit criteria that govern when BellSouth can demand a deposit (or an additional deposit). (Attachment 7, § 1.8.5). A good payment history is but one of several, agreed-upon factors that make up the deposit criteria. Accordingly, the Commission should clarify (or reconsider) that, if a Joint Petitioner fails to satisfy such criteria (which includes a good payment history), then BellSouth should be allowed to seek a deposit that does not exceed two months' billing.

This Commission's decision on Issue 101 is contrary to the recent decisions of the Florida Commission and the North Carolina Utilities Commission Panel on this same issue. In both instances (Florida and North Carolina) BellSouth's proposed language was adopted.[25] Further, the Commission's decision is inconsistent with industry standards including the two months deposit provisions contained in the Kentucky end user tariffs of BellSouth and the Joint Petitioners. *See* Exhibits KKB-2, KKB-3. Simply put, creating a lower maximum deposit amount for Joint Petitioners unnecessarily increases BellSouth's financial exposure. It is undisputed that it takes BellSouth approximately 74 days to disconnect for non-payment under the provisions of the interconnection agreement. (FL. Tr. at 907-908; BellSouth Response to FL Staff Interrogatory No. 118).

[25]FPSC Order No. PSC-05-0975-FOF-TP at 68; NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order* at 87.

For all of these reasons and those set forth in BellSouth's post-hearing briefs,[26] the Commission should reconsider its decision for Issue 101, and adopt BellSouth's proposed language for Issue 101. BellSouth's language is consistent with industry standards (including the end user tariffs of BellSouth and the Joint Petitioners) and protects BellSouth from non-payment because it takes BellSouth over two months after service is rendered to disconnect for non-payment.

H. Issue 103: The Commission Committed Errors of Fact in Finding that Payment of all Current Charges Relieves a Joint Petitioner from its Obligation to Respond to a Deposit Demand and Should Clarify that Consistent with this Commission's Rules, a Deposit Demand that is Ignored is Sufficient Grounds for Termination of Service.

In its *Order,* the Commission concluded that "[i]t is inappropriate for BellSouth to terminate service when a Joint Petitioner has paid all bills except the request for a deposit." *Id.* at 20. As an initial matter, Issue 103 is limited to termination of service due to a Joint Petitioners' failure to pay an undisputed deposit. Termination for non-payment of services rendered is not part of Issue 103 and is not in dispute. Further, neither party's proposed language for Issue 103 makes any reference to non-payment for services rendered. Moreover, the Commission's ruling gives no indication as what contract language should be included in the Agreement. Accordingly, the Commission erred as a matter of fact in its ruling and should clarify that BellSouth may terminate for non-payment of a deposit. Such a ruling is consistent with the recent rulings of the Florida Commission and the North Carolina Utilities Commission Panel on this issue. FPSC Order No. PSC-05-0975-FOF-TP at 73; NCUC Docket No. P-772, Sub 8, *Recommended Arbitration Order* at 90.

Importantly, such a ruling also is consistent with this Commission's own rules and

---

[26] For the purposes of appeal, BellSouth incorporates by reference all of the arguments asserted by BellSouth in its post-hearing briefs as grounds for rehearing.

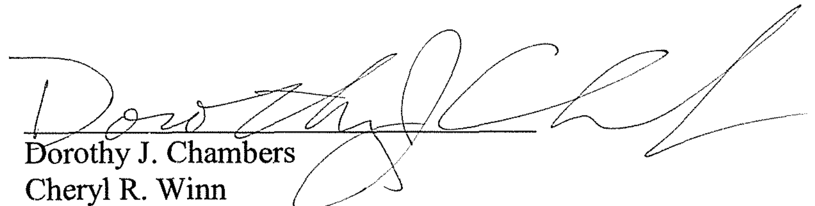
BellSouth's end user tariffs – both of which permit termination for non-payment of a deposit. *See* BellSouth Tariff § A2.2.10; 807 KAR 5:006, Section 7.

For all of these reasons and those set forth in BellSouth's post-hearing briefs,[27] the Commission should reconsider its decision for Issue 103, and adopt BellSouth's proposed language for Issue 103.

CONCLUSION

Because of the importance of the issues, the need to reconcile the Commission's Order with controlling federal law and to consider recent and thoughtful analyses of sister state commissions, BellSouth respectfully requests this Commission grant rehearing and Order oral argument as to the issues identified herein.

Respectfully submitted,



Dorothy J. Chambers
Cheryl R. Winn
601 W. Chestnut Street, Room 407
P. O. Box 32410
Louisville, KY 40232
(502) 582-8219

James Meza III
Robert Culpepper
Suite 4300, BellSouth Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

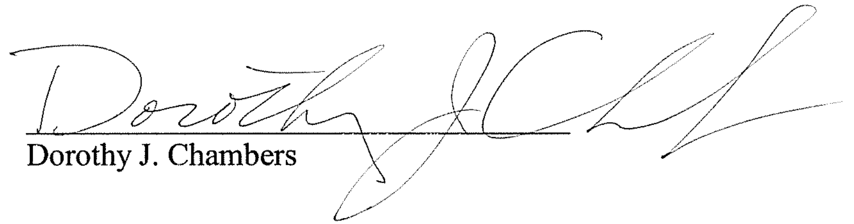
606278

[27] For the purposes of appeal, BellSouth incorporates by reference all of the arguments asserted by BellSouth in its post-hearing briefs as grounds for rehearing.

KPSC 2004-00044

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the individuals on the attached service list by mailing a copy thereof, this 18th of October 2005.



Dorothy J. Chambers

SERVICE LIST – PSC 2004-00044

Jake E. Jennings
NewSouth
Two North Main Street
Greenville, SC 29601

Mary Campbell
NuVox Communications, Inc.
301 North Main Street, Suite 5000
Greenville, SC 29601

Riley Murphy, Esq.
NuVox Communications, Inc.
301 North Main Street, Suite 5000
Greenville, SC 29601

Marva Brown Johnson
KMC Telecom
1755 North Brown Road
Lawrenceville, GA 30043

James C. Falvey
Xspedius
Suite 200
7125 Columbia Gateway Drive
Columbia, MD 21046

John J. Heitmann
Enrico C. Soriano
Heather T. Hendrickson
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036

John E. Selent
Dinsmore & Shohl LLP
1400 PNC Plaza
500 W. Jefferson Street
Louisville, KY 40202