BELLSOUTH

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December 17, 2004

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

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

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of Rebuttal Testimony of the following witnesses for BellSouth: Kathy K. Blake, P. L. (Scot) Ferguson, Eric Fogle, Carlos Morillo, and Eddie L. Owens.

Very truly yours,

Dorothy J. Chambers

Enclosures

cc: Parties of Record

563945

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof, this 17th day of December, 2004.

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AFFIDAVIT

STATE OF GEORGIA

COUNTY OF FULTON

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the State and County aforesaid, personally came and appeared Kathy K. Blake, who, being by me first duly sworn deposed and said that:

She is appearing as a witness before the Kentucky Public Service Commission in Case No. 2004-00044, In the Matter of: Joint Petition for Arbitration of NewSouth Communications Corp., Nuvox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC, and if present before the Commission and duly sworn, her direct testimony would be set forth in the annexed testimony consisting of 49 pages and 1 exhibits.

Kathy K. Blake

Kathy K. Blake

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 14TH DAY OF DECEMBER, 2004

Notary Public

MICHEALE F. BIXLER
Notary Public, Douglas County, Georgia
My Commission Expires November 3, 2005

BELLSOUTH TELECOMMUNICATIONS, INC.

REBUTTAL TESTIMONY OF KATHY K. BLAKE

BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

CASE NO. 2004-00044

DECEMBER 17, 2004

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH"), AND YOUR BUSINESS ADDRESS.

A. My name is Kathy K. Blake. I am employed by BellSouth as Director – Policy Implementation for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes. I filed Direct Testimony on November 19, 2004.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. My rebuttal testimony responds to portions of the direct testimony filed by the Joint Petitioners on November 19, 2004.

SUPPLEMENTAL ISSUES

Q. SHOULD THE KENTUCKY PUBLIC SERVICE COMMISSION ("COMMISSION") DEFER RESOLUTION OF THE SUPPLEMENTAL ISSUES IN THIS ARBITRATION PROCEEDING?

A. Yes. As I previously asserted in my Direct Testimony, the Commission should defer resolution of the Supplemental Issues to the generic proceeding BellSouth filed on October 29, 2004 ("Generic Proceeding").[1] In the event the Commission wishes to address the Supplemental Issues in this arbitration, BellSouth's position for each Supplemental Issue is set forth below.

Item 108, Issue S-1: How should the Final FCC Unbundling Rules be incorporated into the Agreement?

Q. WHAT IS THE JOINT PETITIONERS' POSITION AND HOW DO YOU RESPOND?

A. The Joint Petitioners' position on this issue is that the parties should engage in protracted negotiations and then dispute resolution at the Commission before the FCC issues its final unbundling rules ("Final FCC Unbundling Rules") and

[1] As an initial matter, BellSouth's position is that all Supplemental Issues addressing BellSouth's federal obligations resulting from *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), the *Interim Rules Order*, issued by the FCC in WC Docket No. 04-313, CC Docket No. 01-338 or the Final Unbundling Rules should be deferred to the generic change of law proceeding filed by BellSouth. In no event, however, should issues addressing any state-law obligations be included in such a generic proceeding.

such rules become effective.[2] Simply put, the Joint Petitioners' position does nothing more than promote delay, which is entirely inconsistent with the intent of the FCC as set forth in the *Interim Rules Order* (I fully explain and describe this intent in my Direct Testimony). Further, contrary to the Joint Petitioners' position, there is nothing in Section 251 of the Telecommunications Act of 1996 (the "Act") that specifically requires the Parties to engage in negotiations and then dispute resolution to address changes in the law as mandated by the FCC. And, in any event, BellSouth's position does not prohibit the parties from engaging in such negotiations and then amending the Agreement if the Parties ultimately agree to something other than what is mandated by the FCC.

More importantly, the Joint Petitioners' position presumes that the parties will disagree over what the FCC meant in issuing its new rules and that dispute resolution will be required. However, as made clear by the Joint Petitioners concurrence with BellSouth's definition of switching (see Item 112) as well as with other issues that the parties have resolved, there will be portions of the Final FCC Unbundling Rules with which even the Joint Petitioners cannot disagree. Thus, there is no need to frustrate the FCC's stated intent by delaying the total effect of the Final FCC Unbundling Rules. For those limited issues where there is a good faith disagreement over what the FCC ordered, BellSouth will agree to resolve such a dispute before the Commission. However, BellSouth submits that these disputes will be limited and that there should be no dispute over what elements BellSouth is no longer required to

[2] On December 15, 2004, the FCC announced its findings in the Final FCC Unbundling Rules; however, the rules have yet to be released.

unbundle.

It is interesting to note that the Joint Petitioners' position here appears to contradict their position regarding a similar, albeit resolved, issue concerning the effective date of future rate impacting amendments. In fact, for that issue, the Joint Petitioners objected to BellSouth's proposed language asserting that it provided BellSouth with the opportunity to delay the effectiveness of an amendment, and, according to the Joint Petitioners, injected a huge amount of uncertainty into a process that should be simple and straightforward.

For these reasons and those set forth in my Direct Testimony, the Commission should find that the Agreement will automatically incorporate the Final FCC Unbundling Rules immediately upon those rules becoming effective.

Item 109, Issue S-2: Should the Agreement automatically incorporate any intervening order of the FCC adopted in WC Docket 04-313 or CC Docket 01-338 that is issued prior to the issuance of the Final FCC Unbundling Rules to the extent any rates, terms or requirements set forth in such an order are in conflict with, in addition to, or otherwise different from the rates, terms and requirements set forth in the Agreement?

Q. WHAT IS THE JOINT PETITIONERS' POSITION AND HOW DO YOU RESPOND?

A. The Joint Petitioners' position is that the parties should engage in protracted

negotiations and then dispute resolution at the Commission before an intervening order becomes effective. For the reasons identified in responding to the CLECs' position as to Item 108, the Commission should reject their attempt to frustrate the FCC's intent by imposing unnecessary conditions as to when any intervening order of the FCC should be implemented and find that the Agreement should automatically incorporate the findings contained in an intervening order on the effective date of such order.

In addition, with their Issue Statement, the Joint Petitioners are improperly expanding the scope of this issue to include consideration of an intervening and potentially conflicting state commission order. As set forth in my Direct Testimony, the Commission should refuse to consider the issue because it exceeds the parties' agreement regarding the type of issues that could be raised after the 90-day abatement period. In addition, the issue is purely hypothetical in nature and not sanctioned by the *Interim Rules Order*, which specifically recognized the possibility that the FCC and only the FCC would issue an intervening order (which it has) during the Interim Period and that any such order would supersede the FCC's findings in the *Interim Rules Order*.

Further, while I am not an attorney, it is my understanding that state commissions are prohibited from issuing orders containing provisions that conflict with the *Interim Rules Order*. In fact, the *Interim Rules Order* identified the only type of state commission order that is permissible – one that increases rates for the frozen elements: "[The frozen] rates, terms, and conditions shall remain in place during the interim period, except to the extent

that they are or have been superseded by ... (3) (with respect to rates only) a state public utility commission order raising the rates for network elements." *See Interim Rules Order* at ¶ 29. Thus, unless the Commission increases rates for the frozen elements, the Commission is prohibited from issuing any intervening orders that conflict with the *Interim Rules Order*.

Further, BellSouth's position is consistent with the Act. The unbundling requirements of Section 251 are ***federally*** mandated and do not reference ***state*** law. The reason for this is obvious -- state law is not allowed to frustrate the national regulatory scheme as implemented by the FCC. Although a state commission has the authority to enforce state access and interconnection obligations, it may do so only to the extent "consistent with the requirements" of federal law and so as not to "substantially prevent implementation" of the requirements and purposes of federal law. *See* 47 U.S.C. §251(d)(3).

Finally, any state commission order requiring additional unbundling obligations under state law would be invalid without the state commission performing an impairment analysis. This analysis cannot be conducted in the context of a Section 252 arbitration proceeding that addresses BellSouth's federal obligations under the Act. Consequently, the Commission should reject the Joint Petitioners' attempt to convert this Section 252 arbitration into an impairment proceeding under state law and find simply that only an intervening FCC order should be automatically incorporated into the parties'

Agreement.[3]

Item 110, Issue S-3: If FCC 04-179 is vacated or otherwise modified by a court of competent jurisdiction, how should such order or decision be incorporated into the Agreement?

Q. WHAT IS THE JOINT PETITIONERS' POSITION AND HOW DO YOU RESPOND?

A. The Joint Petitioners' position is that the parties should engage in protracted negotiations and then dispute resolution at the Commission before any vacatur or invalidation of the *Interim Rules Order* becomes effective. For the reasons identified in Item 108, the Commission should reject their attempt to delay and prohibit the implementation of the current status of the law because, in such a scenario, BellSouth would have no obligation to continue to provide the vacated elements. It should also be noted that, in such a case, rather than disconnecting service, BellSouth's transition plan would apply, thereby providing the Joint Petitioners with the opportunity to receive comparable services at non-UNE pricing.

Simply put, in the event a court of competent jurisdiction vacates all or part of the *Interim Rules Order*, there will be no valid impairment findings with

[3] Pursuant to the *Interim Rules Order*, if the Commission issues an order increasing rates for frozen elements during the *Interim Period*, this order should be automatically incorporated into the Agreement as well.

respect to the vacated elements. Accordingly, the parties' Agreement should automatically incorporate the status of the law on the date the order or decision invalidating all or part of the *Interim Rules Order* becomes effective and the parties should invoke the transition process identified in Item No. 23 to convert vacated elements to comparable, non-UNE services.

Item 111, Issue S-4: At the end of the Interim Period, assuming that the Transition Period set forth in FCC 04-179 is neither vacated, modified, nor superceded, should the Agreement automatically incorporate the Transition Period set forth in the Interim Order?

Q. WHAT IS THE JOINT PETITIONERS' POSITION AND HOW DO YOU RESPOND?

A. The Transition Period, as defined in the *Interim Rules Order*, is the six-month period following the expiration of the Interim Period (*i.e.* March 12, 2005 or earlier in the event the FCC issues its Final Unbundling Rules prior). The Transition Period only applies if the Final FCC Unbundling Rules are not in effect at the end of the Interim Period or if the Final FCC Unbundling Rules do not find impairment with respect to one ore more of the frozen elements. During the Transition Period, vacated elements for which there has been no finding of impairment will be available to CLECs for their existing customer base but at higher prices. *See Interim Rules Order* at ¶¶ 1, 29. However, during the Transition Period, CLECs are prohibited from adding any new customers at the rates, terms, and conditions set forth in the Transition Period.

Id. at ¶ 29.

Moreover, refusing to find that the Transition Period is automatically incorporated into the parties' Agreement upon it becoming effective and instead requiring negotiation and the resulting dispute resolution frustrates the FCC's intent as it effectively prohibits the parties' from operating under the Transition Period. In fact, it is quite possible that the Transition Period will expire prior to the time any change of law negotiations/proceedings would be concluded, which is clearly not what the FCC intended.

Furthermore, it is unclear why the Joint Petitioners oppose the automatic incorporation of the Transition Plan in the absence of Final FCC Unbundling Rules. Indeed, without it, the Joint Petitioners will have no legal right to obtain new vacated elements after March 12, 2005.

Item 112, Issue S-5: (A) What rates, terms, and conditions relating to switching, enterprise market loops, and dedicated transport were "frozen" by FCC 04-179? (B) How should these rates, terms and conditions be incorporated onto the Agreement?

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The rates, terms, and conditions for the following subject elements were frozen by the FCC in the *Interim Rules Order*, as specifically set forth in the attached Exhibit KKB-1. This exhibit represents BellSouth's proposed language for

this issue and is in addition to the general definitions BellSouth presented in my Direct Testimony.

Q. WHAT IS THE JOINT PETITIONERS' GENERAL POSITION?

A. The Joint Petitioners' position is that the rates, terms, and conditions associated with switching, dedicated transport, and enterprise loops, as those elements are defined in the Joint Petitioners' Current Agreements, should continue to apply during the Interim Period. Importantly, these definitions as well as the Current Agreements themselves have yet to be modified to address the FCC's *Triennial Review Order*, also referred to as the *TRO*. Thus, the Joint Petitioners' position is that BellSouth should be obligated to continue to provide switching, dedicated transport, and enterprise loops pursuant to rates, terms, and conditions that do not reflect the FCC's modification of said definitions in the *TRO*.

Q. DO YOU AGREE THAT THE *INTERIM RULES ORDER* REQUIRED THE PARTIES TO DISREGARD PORTIONS OF THE *TRO* THAT WERE NOT VACATED?

A. No, but that is exactly what the Joint Petitioners are recommending. Specifically, the Joint Petitioners take the position that *USTA II*'s vacatur of only certain portions of the *TRO* means that those portions of the *TRO* that were not vacated are frozen by the *Interim Rules Order*. With such an argument, the Joint Petitioners are now attempting to avoid the implementation

of the non-vacated portions of the *TRO*. It is clear, however, that the non-vacated portions of the *TRO* were not impacted by *USTA II* and thus were not frozen by the *Interim Rules Order*. In addition to being inconsistent with the intent of the *Interim Rules Order*, such a position is also inconsistent with the practice of the Parties as they have reached agreement regarding how some non-vacated elements of the *TRO* will be implemented in the new Agreement.

A good example of this is the Parties' agreement on the language that relieves BellSouth from providing fiber to the home loops ("FTTH"). The *Interim Rules Order* clearly provides for the amendment of the frozen terms and conditions as a result of an intervening FCC Order. Under the Joint Petitioners' theory, while the *TRO* eliminated the obligation to unbundle FTTH, BellSouth would not be permitted to avail itself of that relief; however, based on the FCC's two intervening orders expanding on the FTTH relief (addressing FTTH to multiple dwelling units ("MDU") and fiber to the curb ("FTTC")) BellSouth would be relieved of those obligations. This result is completely nonsensical and is not supported in any manner by the *Interim Rules Order*. It should be noted that, had the Joint Petitioners amended their Current Agreements to make them *TRO*-compliant, this would not be an issue. Instead, because the Joint Petitioners' goal throughout this proceeding has been to delay those changes in the law that are not CLEC-beneficial, they are now attempting to promote antiquated definitions of enterprise loops and dedicated transport that fail to take into account rulings from the FCC that were not impacted by *USTA II*.

Q. WHAT IS THE JOINT PETITIONERS' POSITION REGARDING THE DEFINITION OF SWITCHING AND HOW DO YOU RESPOND?

A. The Joint Petitioners appears to agree with BellSouth's definition of mass market switching. Thus, it appears that this is no longer an issue.

Q. WHAT IS THE JOINT PETITIONERS' POSITION REGARDING THE DEFINITION OF DEDICATED TRANSPORT AND HOW DO YOU RESPOND?

A. The Joint Petitioners argue that the pre-*TRO* definition of dedicated transport that was in effect on June 15, 2004 in the Current Agreement should apply during the Interim Period. This definition of dedicated transport, however, was modified by the *TRO*. Specifically, in the *TRO*, the FCC excluded entrance facilities and Optical Carrier ("OCn") level transmission facilities from the definition of dedicated transport. Dedicated transport, as defined by the FCC in the *TRO*, was the only dedicated transport that the D.C. Circuit addressed and ultimately vacated in *USTA II*. Because the *Interim Rules Order* only froze those rates, terms, and conditions associated with the vacated elements, the frozen rates, terms, and conditions are only those that correspond to the DS1 and DS3 elements that were reviewed by the D.C. Circuit as a result of the *TRO* -- transmission facilities connecting ILEC switches and wire centers in a LATA, including dark fiber transport. Stated another way, the only rates, terms, and conditions that are frozen are those that were vacated, which by necessity were those that the FCC addressed through its *TRO* definition of

dedicated transport. To hold otherwise, would allow the Joint Petitioners to receive more through the *Interim Rules Order* than what the D.C. Circuit actually reviewed and what the FCC actually ordered. Simply put, it is beyond reason to suggest that the FCC intended to "freeze" rates, terms, and conditions that exceed the scope of what was vacated by *USTA II.* Moreover, to the extent that the Joint Petitioners argue that the definition of dedicated transport should be frozen and, therefore, that they should be entitled to frozen rates, terms and conditions for all levels of dedicated transport, the *Interim Rules Order* would prohibit the Joint Petitioners from ordering new DS0 level dedicated transport after the Interim Period and prohibit the Joint Petitioners from maintaining DS0 level dedicated transport after the Transition Period. Why the FCC would have eliminated an unbundling obligation through its *Interim Rules Order* that was unaffected by the *USTA II* decision is inconceivable and, yet, would be the result of the Joint Petitioners' self serving and nonsensical interpretation of the *Interim Rules Order.*

Q. WHAT IS THE JOINT PETITIONERS' POSITION REGARDING THE DEFINITION OF ENTERPRISE MARKET LOOPS AND HOW DO YOU RESPOND?

A. The Joint Petitioners appear to agree with BellSouth with regard to the definition of enterprise market loops. Notwithstanding the Parties' apparent agreement, the Joint Petitioners contend that the antiquated pre-*TRO* definition of enterprise market loops that was in effect on June 15, 2004 in the Current Agreement should apply during the Interim Period. Specifically, the *TRO*

defined enterprise market loops as those transmission facilities between a distribution frame (or its equivalent) in the ILEC's central office and the loop demarcation point at an end user customer premises at the DS1 and DS3 level, including dark fiber loops. *TRO* at ¶ 249. This definition of "enterprise market loops" was the only definition that the D.C. Circuit addressed and ultimately vacated in its review in *USTA II* of the FCC's rules in the *TRO* regarding BellSouth's obligation to provide enterprise market loops on an unbundled basis. Because the *Interim Rules Order* only froze those rates, terms, and conditions associated with the vacated elements, the frozen rates, terms, and conditions are only those that are associated with transmission facilities between a distribution frame (or its equivalent) in the ILEC's central office and the loop demarcation point at an end user customer premises at the DS1 and DS3 level, including dark fiber loops. Stated another way, the only rates, terms, and conditions that are frozen are those that meet the FCC's *TRO* definition of enterprise market loops.

To hold otherwise, would allow the Joint Petitioners to receive more through the *Interim Rules Order* than what the D.C. Circuit actually reviewed and would conflict with the non-vacated portions of the *TRO.* For instance, if the Commission adopts the Joint Petitioners' position, the Joint Petitioners would obtain fiber to the home and fiber to the curb loops during the Interim Period, even though the FCC removed any obligation of BellSouth to provide these loops in the *TRO* and its *TRO Reconsideration Order.* It is beyond reason to suggest that the FCC intended to "freeze" rates, terms, and conditions that exceed the scope of what was vacated or even addressed in *USTA II* (the fiber

to the curb ruling in the *TRO Reconsideration Order* was issued after *USTA II* and the *Interim Rules Order*).

Q. HOW DO YOU RESPOND TO THE JOINT PETITIONERS' ASSERTION ON PAGE 157 THAT THE INTERIM RULES ORDER AMENDMENT IS NOT APPLICABLE TO THEM?

A. The Joint Petitioners erroneously claim that they are immune from complying with their change of law obligations in their Current Agreements to implement the *Interim Rules Order* as a result of an alleged agreement between the Parties. Contrary to the Joint Petitioners' claim, there is no such agreement. Specifically, as part of the 90-day abatement agreement to address issues relating to *USTA II* in this arbitration proceeding, the parties also agreed to not proceed with a change of law proceeding to implement *USTA II* and its progeny. This limited decision does not and did not encompass any agreement to avoid the change of law process for the *Interim Rules Order* or the Final FCC Unbundling Rules.[4] Simply put, BellSouth never agreed to what the Joint Petitioners assert. Indeed, the FCC had not even issued the *Interim Rules Order* at the time the Parties reached the agreement regarding the 90-day abatement. Further, the Parties' agreement to continue operating under the Current Agreement until the new Agreement came into place was not to "freeze" the Joint Petitioners current UNE attachment, as intimated by the

[4] Although I am not a lawyer, I understand that "progeny" is a defined, legal term that means "a line of opinions succeeding a leading case <*Erie* and its progeny>" as defined by the 2000 edition of *Black's Law Dictionary*. The *Interim Rules Order* is not an opinion of a court or state commission reaffirming or restating the D.C. Circuit's findings in *USTA II* and thus does not comply with the above-definition.

Joint Petitioners. Rather, it was to address the Joint Petitioners' concern that BellSouth would "bump" the Joint Petitioners from their Current Agreement during the 90-day abatement. In any event, requiring the Joint Petitioners to incorporate the *Interim Rules Order* and the Final FCC Unbundling Rules into their Current Agreement would not violate such an agreement as they would still be operating under their Current Agreement until moving to the new Agreement. BellSouth will fully address this matter in its Post-Hearing Brief if this matter ultimately becomes an issue in this proceeding.

Item 113, Issue S-6: Did USTA II vacate the FCC's unbundling requirement, if any, relating to high-capacity loops and dark fiber?

Q. ON PAGE 162, THE JOINT PETITIONERS ARGUE THAT *USTA II* DID NOT VACATE THE FCC RULES WITH REGARD TO THE PROVISION OF UNBUNDLED ACCESS TO DS1, DS3, AND DARK FIBER LOOPS. HOW DO YOU RESPOND?

A. The Joint Petitioners devote numerous pages of their testimony arguing a position that is not supported by a clear reading of *USTA II*. The simple fact is that *USTA II* vacated the FCC's impairment finding that resulted in the requirement for BellSouth to unbundle and provide high capacity transmission facilities at TELRIC prices. Pursuant to the Act, there can be no obligation to unbundle any element unless the FCC has found impairment. In fact, the FCC recognized that *USTA II* eliminated impairment findings for these facilities and thus issued *Interim Rules Order* to address how these facilities will be

provisioned for a twelve-month transition period for existing CLEC customers. The refusal of the Joint Petitioners to recognize the straightforward and clear wording of the *Interim Rules Order* reveals that their strategy is to use the Commission to circumvent orders of the FCC. Furthermore, the Joint Petitioners are attempting to expand the scope this issue to address BellSouth's Section 271 obligation or state requirements. BellSouth fully addressed these arguments in my Direct Testimony. Fundamentally, however, a Section 252 arbitration proceeding is not the proper forum to address these arguments and the Commission should reject them.

Item 114, Issue S-7 <<CLEC ISSUE STATEMENT>>: (A) Is BellSouth obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport? (B) If so, under what rates, terms and conditions? :

Q. ON PAGE 176 THE JOINT PETITIONERS ADMIT "THAT THE COMMISSION IS NOW WITHOUT THE POWER TO MAKE [SIC] FINDING OF NON-IMPAIRMENT FOR PURPOSES OF SECTION 251" AND THEN, IMMEDIATELY IN THE NEXT SENTENCE, "REQUEST THAT THE COMMISSION REQUIRE UNBUNDLING OF DEDICATED TRANSPORT UNES PURSUANT TO SECTION 251." HOW DO YOU RESPOND?

A. Under their interpretation of Section 251, the Joint Petitioners conveniently fail to recognize that Section 251's unbundling obligation is only triggered upon an impairment finding. As a result of *USTA II*'s vacatur of the FCC's rules

relating to high-capacity transport, there is no longer a finding of impairment. With no finding of impairment, there is no current Section 251 unbundling obligation for high-capacity transport.

Likewise, and as I discussed in my Direct Testimony, BellSouth has no Section 271 obligation to unbundle the subject elements at Total Element Long Run Incremental Cost ("TELRIC") and the Commission is prohibited from ordering anything to the contrary. Again, this issue and the Joint Petitioners' positions in general are nothing more than the Joint Petitioners' attempt to circumvent the D.C. Circuit and the *Interim Rules Order* so that they can prolong an inapplicable pricing regime. Notwithstanding the Joint Petitioners' position and assertions, BellSouth recognizes its Section 271 obligation to offer its high-capacity transport to CLECs.

UNRESOLVED ISSUES

Item 2; Issue G-2: How should "End User" be defined? (Agreement GT&C Section 1.7)

Q. THE PETITIONERS STATE ON PAGE 19 OF THEIR TESTIMONY THAT BELLSOUTH'S PROPOSED LANGUAGE IS AMBIGUOUS AND SOMEHOW ATTEMPTS TO LIMIT WHO CAN OR CANNOT BE A CLEC'S CUSTOMER. PLEASE RESPOND.

A. First, there is nothing ambiguous about BellSouth's proposed definition. The

end user is the actual user of the service, i.e., the customer. BellSouth's language makes clear that an end user is not an intermediary user of the service. Webster's Dictionary defines "end" as "...the last part of a thing, i.e., the furthest in distance, latest in time, or last in sequence or series...". In this instance, the "end user" is not necessarily the CLEC's customer, as the Petitioners suggest, because that customer may or may not be the end of the sequence or series. In other words, no matter how many wholesalers, enhancers, etc., are in the chain, the "end user" is the ultimate user of the service. For example, a manufacturer of breakfast cereal may have a grocery store chain as its customer, but the end user is the little boy eating his Wheaties at his breakfast table. In contrast, the Joint Petitioners' language does create uncertainty. By defining an end user as any customer, even one who subsequently repackages the service to sell it to another, the Joint Petitioners contradict the commonly understood meaning of the word "end." Put differently, under their definition, "end user" means every user, not just the one at the end of the process.

Contrary to the Joint Petitioners' assertion at page 19, BellSouth is in no way attempting to limit who can or cannot be a CLEC's customer. CLECs can serve any customer they desire within the limits of the law and of their regulatory certification. The issue is not who CLECs serve, but rather what service qualifies for UNEs and UNE prices. Not every customer a CLEC serves is eligible to be served by Enhanced Extended Links ("EELs"). The provisions of the Act were not designed to allow CLECs to re-wholesale to another carrier. The Joint Petitioners would change the industry-accepted

definition of end user in order to improperly expand the categories of customers that can be served via UNEs.

Q. AT PAGES 19-20, THE JOINT PETITIONERS ALLEGE THAT BELLSOUTH USES DIFFERENT DEFINITIONS OF END USER WHERE IT SUITS BELLSOUTH. PLEASE RESPOND.

A. The instance the Joint Petitioners refer to regards service provided to an Internet Service Provider ("ISP"). This is a unique, isolated instance in which the Joint Petitioners are attempting to take a narrow exception where an ISP is referred as an end user customer and translate it into a rule that would enable them to serve an entity other than an end user with an EEL. The discussion particular to ISPs that the Joint Petitioners refer to (for example, KMC's Section 10.6.1 of Attachment 3) follows a more general discussion in Section 10.6 which addresses NPA/NXX Codes within a rate center assigned to end users outside of the Local Access Transport Area ("LATA") where that rate center is located. Although in hindsight, use of the term end user as applied to an ISP is clearly inappropriate, it is obvious its purpose in Section 10.6.1 is to highlight the fact that a CLEC cannot collect local reciprocal compensation payments for non-local traffic, whether it is from an end user or from an ISP.

It is important to remember that the FCC defines an EEL as a combination of local loop and transport and the FCC further defines a local loop as terminating at an end user customer's premises. The Joint Petitioners' position would result in an EEL no longer being an EEL, and a loop no longer being a loop, by

the FCC's definition. Under the Joint Petitioners' interpretation, they could provision an EEL to another carrier and say that the facility between BellSouth and the "customer's" central office is a loop, thus allowing them to, in actuality, designate a transport-to-transport combination as an EEL. In fact, a transport-to-transport combination is not an EEL, because an EEL is only transport connected to a local loop, and a local loop terminates at an end user customer's premises.

Q. AT PAGE 20, THE PETITIONERS REFER TO "OTHER APPARENT COMPLICATIONS RAISED BY BELLSOUTH'S PROPOSED DEFINITION." PLEASE RESPOND.

A. The Joint Petitioners raise this point in reference to the FCC's eligibility criteria established for EELs. This point is addressed more fully in my Direct Testimony under Issue 2-32.

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

Q. IS JOINT PETITIONERS' POSITION CONSISTENT WITH THEIR OWN TARIFFS?

A. No. The Joint Petitioners' position is a one-sided approach that benefits only the Joint Petitioners and is inconsistent with how they treat their own

customers. In fact, consistent with BellSouth's position on this issue, the Joint Petitioners' own retail tariffs limit their liability to the actual cost of the services or function not performed. This fact proves that (1) the Joint Petitioners are attempting to impose an obligation on BellSouth that they are not willing to take on with respect to their own customers and (2) the Joint Petitioners are attempting to use the limitation of liability provision as a means to generate revenue. Indeed, given the fact that their own tariffs limit their respective liability to the actual cost of the services or function not performed, receiving 7.5% of amounts collected from BellSouth potentially results in an undeserved financial windfall for the Joint Petitioners. The simple fact is that, contrary to their position, the Joint Petitioners employ standard limitation of liability language with their respective customers. This is the same language that BellSouth is requesting and that should be adopted by the Commission.

Q. ON PAGE 25, THE JOINT PETITIONERS CONTEND THAT BELLSOUTH'S PROPOSED LANGUAGE "IS NOT COMMERCIALLY REASONABLE IN THE TELECOMMUNICATIONS INDUSTRY." HAS THE FCC ADDRESSED THE SCOPE OF LIABILITY IN THE CONTEXT OF INTERCONNECTION AGREEMENTS?

A. Yes. In its decision in CC Docket No. 00-218, the FCC held:

> "Specifically, we find that, in determining the scope of Verizon's liability, it is appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers. Verizon has no duty to provide perfect service to its own customers; therefore, it is

> unreasonable to place that duty on Verizon to provide perfect service to WorldCom. In addition, we are not convinced that Verizon should indemnify WorldCom for all claims made by WorldCom's customers against WorldCom. Verizon has no contractual relationship with WorldCom's customers, and therefore lacks the ability to limit its liability in such instances, as it may with its own customers. As the carrier with a contractual relationship with its own customers, WorldCom is in the best position to limit its own liability against its customers in a manner that conforms with this provision."[5]

The above-findings by the FCC are consistent with BellSouth's position on this issue.

Item 5; Issue G-5: If the CLEC elects not to place in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the risks that result from this business decision? (Agreement GT&C Section 10.4.2)

Q. IS BELLSOUTH ATTEMPTING TO "DICTATE THE TERMS OF SERVICE BETWEEN PETITIONERS AND THEIR CUSTOMERS" AS ALLEGED ON PAGE 26 OF THE JOINT PETITIONERS' TESTIMONY?

A. Absolutely not. Except as otherwise controlled by a state or federal law or rule, the Joint Petitioners are free to establish whatever terms and conditions they please with their customers. BellSouth is simply stating that, if the Petitioners make a business decision not to limit their liability in their tariffs and contracts, that is their decision and the Petitioners should bear the business

[5] FCC Memorandum Opinion and Order, released July 17, 2002 in CC Docket No. 00-218, ¶709

risk resulting from the decision. Any liability that may occur as a result of that decision should be borne by the CLECs and not by BellSouth.

Q. YOU MENTIONED ABOVE, IN REGARDS TO ISSUE G-4, THAT THE JOINT PETITIONERS' TARIFFS INCLUDE LIMITATION OF LIABILITY PROVISIONS. IF THAT IS THE CASE, THEN WHY IS THIS AN ISSUE?

A. BellSouth is at a loss as to why Joint Petitioners continue to object to the proposed language because, consistent with industry standard, they all have standard limitation of liability provisions that severely limit their financial exposure. Given this fact, it is unclear why this is even an issue, unless of course, the Joint Petitioners intend to remove such provisions and rely upon BellSouth to fund their customers' claims against the Joint Petitioners.

Item 6; Issue G-6: How should indirect, incidental or consequential damages be defined for purposes of the Agreement? (Agreement GT&C Section 10.4.4)

Q. DO YOU HAVE ANY COMMENTS REGARDING THE JOINT PETITIONERS' ISSUE STATEMENT?

A. Yes. With their suggested issue language and stated position, the Joint Petitioners are attempting to provide their end users (either directly or vis-à-vis the Joint Petitioners) a right to receive indirect, incidental, or consequential damages against BellSouth. The Joint Petitioners' end users are not a party to

this Section 251 Interconnection Agreement and should not be given any rights against BellSouth, who is not their service provider. Further, pursuant to the Joint Petitioners' tariff filings, the Joint Petitioners, themselves, prohibit their end users from recovering indirect, incidentals or consequential damages against them. Thus, it appears that the Joint Petitioners are creating litigation opportunities for their end users against BellSouth for damages they are insulated from.

Q. THE PETITIONERS CONTEND THAT BELLSOUTH'S POSITION IS INTERNALLY INCONSISTENT BECAUSE THERE ARE OTHER LEGAL MATTERS, SUCH AS INDEMNIFICATION, THAT BELLSOUTH SEEKS TO DEFINE WITHIN THE CONTEXT OF THE AGREEMENT (PAGES 31-32). HOW DO YOU RESPOND?

A. The comparison that the Petitioners are attempting to make is not valid. Again, while I am not a lawyer, it is my understanding that although the term "indemnification" has a particular legal meaning, it is not so well defined that one can simply place language in a contract, for example, that "Party A agrees to indemnify Party B," and have both parties know precisely what is expected of them. Instead, it is necessary to set forth the specifics of who is indemnifying whom for what and under what circumstances. In contrast, the issue of what constitutes consequential damages is a purely legal issue that is defined in every state by a body of case law that has evolved over a long period of time. It is, therefore, possible for parties to simply say that consequential damages will be excluded, because the existing case law has

defined what constitutes this type of damages with such specificity that no further negotiation of what does or does not constitute these damages is needed or warranted.

If the Petitioners' position is that there should be liability for indirect, incidental or consequential damages, then they can certainly argue for this position (although BellSouth does not agree that this should be the case). It makes no sense, however, for the Petitioners to agree that there should be no liability for these types of damages, and then try to alter the legally operative terms so that, at least in some instances, the result would be exactly the opposite of what the parties have agreed upon.

Item 7; Issue G-7: What should the indemnification obligations of the parties be under this Agreement? (Agreement GT&C Section 10.5)

Q. ON PAGE 34, THE JOINT PETITIONERS CONTEND THAT BELLSOUTH'S PROPOSAL DEVIATES FROM "GENERALLY-ACCEPTED CONTRACT NORMS" AND "IS COMPLETELY ONE-SIDED." HOW DO YOU RESPOND?

A. As I discussed in my Direct Testimony, what must be offered and the standards that apply to those offerings is, in part, drawn from the language of the Act, and in part, the result of eight (8) years of decisions by the FCC and various state commissions. The services included in a Section 251 agreement are provided on the basis of TELRIC pricing and TELRIC pricing does not include

the cost of open-ended indemnification of the party receiving services. If one of the costs of providing UNEs and interconnection is damage payments that the Petitioners seek through their language, then those damages should also be recovered through the cost of UNEs and interconnection. However, this is not the case. Thus, the Petitioners' reliance upon commercial agreements is misplaced.

Q. PLEASE COMMENT ON THE JOINT PETITIONERS' CLAIM ON PAGE 34 THAT "BELLSOUTH'S PROPOSAL IS COMPLETELY ONE-SIDED."

A. The Joint Petitioners' claim that the Commission must reject BellSouth's language because it is one-sided rings hollow because of other provisions advanced by the Joint Petitioners that are one-sided in favor of them. For example, the Joint Petitioners' limitation of liability language favors only the Joint Petitioners because they primarily purchase service from BellSouth. In addition, the Joint Petitioners do not dislike one-sided limitation of liability language with their customers as they all have limitation of liability language in their tariffs that equal or exceed the language BellSouth proposes.

Item 8; Issue G-8: What language should be included in the Agreement regarding a Party's use of the other Party's name, service marks, logo and trademarks? (Agreement GT&C Section 11.1)

Q. ON PAGE 36, THE JOINT PETITIONERS CONTEND THAT BELLSOUTH'S PROPOSED LANGUAGE WILL "RESTRICT

PETITIONERS' RIGHTS TO ENGAGE IN COMPARATIVE ADVERTISING OR USE BELLSOUTH'S NAME, MARKS, LOGOS AND TRADEMARKS." IS THIS CORRECT?

A. Not if it is truthful advertising. As I discussed in my Direct Testimony, BellSouth does not object to its name being used in plain-type, non-logo format for the purposes of truthful, comparative advertising. Its experience, however, has been that some CLECs use BellSouth's name in their advertising in a way that does not meet this standard, that is, in a way that is not entirely truthful. The CLECs in these instances have, as one might suspect, asserted that their use of BellSouth's name is appropriate. The result is that there is a dispute that must be resolved, or in some cases, litigated. Given BellSouth's experience in this area, it only makes sense to utilize this experience to try to pro-actively avoid as many disputes as possible. Therefore, throughout negotiations, BellSouth has tried to reach an agreement with the Petitioners as to the parameters of acceptable comparative advertising. The Petitioners ultimately, have declined to accept these parameters, and want to revert back to the general language that trademark law applies, whatever it is. Again, BellSouth believes that, to avoid subsequent disputes (over interpretation of the law, or otherwise) it is important that the Agreement specifically spell out the circumstances under which the Petitioners may use BellSouth's name.

Item 9; Issue G-9: 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 its administrative remedies? (Agreement

GT&C Section 13.1)

Q. PETITIONERS ASSERT AT PAGES 39-40 OF THEIR TESTIMONY THAT BELLSOUTH'S POSITION DOES NOT ADEQUATELY ACCOMMODATE PETITIONER'S ABILITY AND DESIRE TO BRING MATTERS BEFORE A COURT OF LAW. IS THAT AN ACCURATE READING OF BELLSOUTH'S POSITION?

A. No, it is not. BellSouth recognizes that certain issues and disputes may not fall squarely under the expertise of either the FCC or this Commission. In those cases, CLECs should be permitted to seek relief in a court of law. However, BellSouth maintains that Petitioners should not forego resolution of issues at the appropriate regulatory body unless it is obvious, or has been determined, that neither the FCC nor this Commission has expertise or jurisdiction over the dispute. Additionally, often the terms and conditions that are included in an interconnection agreement result from an arbitration decision or the language is crafted from a rule or order written by the FCC or this Commission. Clearly, the regulatory bodies that dictate how the services are to be provisioned pursuant to an interconnection agreement are best suited to interpret and enforce those provisions. To prematurely bring a dispute to a court of law that might otherwise be addressed and resolved by a regulatory agency is to risk that the court will remand the case to the appropriate body.

Q. ON PAGE 39, THE JOINT PETITIONERS CLAIM THAT BELLSOUTH'S PROPOSAL COULD BE USED TO EFFECTIVELY FORCE CLECS TO

RE-LITIGATE THE SAME ISSUE IN NINE (9) DIFFERENT STATES. HOW DO YOU RESPOND?

A. I am somewhat confused by the Joint Petitioners contention as the Joint Petitioners have no problem arbitrating in nine (9) states. Further, the Joint Petitioners' position is entirely inconsistent with their statement in Direct Testimony that "the Commission and the FCC are obviously the expert agencies with respect to a number of (if not the majority of) the issues that might arise." (Joint Petitioners' Direct Testimony at pages 37-38.) Given this admission, the Joint Petitioners should have no objection to BellSouth's language. And, if the Joint Petitioners want to resolve interpretation and implementation of disputes in a single proceeding, the Joint Petitioners can file a proceeding at the FCC.

Q. ON PAGE 40, THE JOINT PETITIONERS ALSO CLAIM THAT BELLSOUTH'S PROPOSAL WOULD CAUSE "NEEDLESS BIFURCATION OF CLAIMS". HOW DO YOU RESPOND?

A. The Joint Petitioners' position results in the same outcome. If either party to the Agreement filed for dispute resolution with a court of law for resolution of issues relating to the implementation or interpretation of the Agreement, the most likely outcome would be for the court to defer the case to the state commission for resolution. Such action would require both parties to incur unnecessary cost and would cause substantial delay in resolving the dispute.

Item 12; Issue G-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? (Agreement GT&C Section 32.2)

Q. ON PAGE 41, THE JOINT PETITIONERS CLAIM THAT BELLSOUTH'S PROPOSED LANGUAGE IS INADEQUATE BECAUSE IT PURPORTS TO ADOPT PRINCIPLES THAT DIFFER FROM GEORGIA CONTRACT LAW AND FOR THAT MATTER, BLACK-LETTER CONTRACT LAW. HOW DO YOU RESPOND?

A. Although I am not an attorney, and as I discussed in my Direct Testimony, BellSouth's proposed language acknowledges an underlying obligation to provide services in accordance with applicable rules, regulations, etc. and that the parties have negotiated what those obligations are. However, in the unlikely event that an issue arises in the future wherein the parties dispute there is an obligation that has or has not been included in the agreement based on the law at the time the agreement was entered into, and the parties further dispute whether they had or had not negotiated their obligations with respect thereto, then the parties will attempt to resolve those issues by amending the agreement to define and incorporate include such obligation. In the event that the parties cannot agree on what the obligation is, or whether such obligation exists under the law, then the Commission should resolve that dispute. In the event that an obligation exists that was not previously included in the interconnection agreement, the parties should then amend the agreement *prospectively* to include such an obligation. To require retrospective compliance in such

circumstances would be inappropriate. BellSouth is not attempting to avoid its obligations under the law; it is simply trying to ensure that its obligations are sufficiently defined so that it can comply with them and so that it can expect compliance.

Q. ON PAGE 43, THE JOINT PETITIONERS OBJECT TO BELLSOUTH'S REVISED PROPOSED LANGUAGE CONTENDING THAT "BELLSOUTH IS ADDING AN ADMINISTRATIVE LAYER, A POTENTIAL PROCEEDING TO DETERMINE WHETHER A PARTY IS OR IS NOT BOUND BY APPLICABLE LAW." HOW DO YOU RESPOND?

A. Contrary to the Joint Petitioners' contention, it is the Joint Petitioners' proposed language that instigates the need for on-going litigation. In fact, NuVox and NewSouth have attempted to exploit a similar provision in their current interconnection agreements with BellSouth in an attempt to circumvent the provision in those agreements regarding how audits will be conducted to verify compliance with the EEL eligibility criteria. The Joint Petitioners' proposed "catch-all" language seeks to memorialize the "two bites at the apple" strategy they have taken in the NuVox and NewSouth EELs audit disputes. The first bite occurs during the contract negotiations (resulting in the agreed-upon EEL audit language in the Current Agreement, for example) and the second bite occurs if and when the agreed-upon language creates results that are unfavorable to the Joint Petitioners. The Joint Petitioners want to have a ready option at such times to canvass all laws, presumably from any source, to see if a better result for them might be obtained. This is a

fundamental difference in business approaches between the Joint Petitioners and BellSouth. BellSouth organizes itself around its obligations. The Joint Petitioners, at least in this effort, seek to keep obligations fluid for purposes that appear to be inconsistent with the Act.

Item 23; Issue 2-5: What rates, terms and conditions should govern the CLECs' transition of existing network elements that BellSouth is no longer obligated to provide as UNEs to other services? (Attachment 2, Section 1.5)

Q. WHAT IS THE JOINT PETITIONERS' POSITION ON THIS ISSUE AND HOW DO YOU RESPOND?

A. The main theme of the Joint Petitioners' position and testimony on this issue seems to be to delay or avoid any action that impedes their ability to continue to obtain vacated elements at the supra-discounted rates they currently enjoy. This position is most certainly rooted in their apparent belief that there is no advantage or incentive to converting the vacated elements and incurring the associated rate changes any sooner than is absolutely necessary. While that position may make sense to the Petitioners, it does little to further the implementation of the intent of the FCC's rules or to address this arbitration issue before the Commission.

Contrary to the Joint Petitioners' position, the CLECs should be responsible for ensuring that they are not violating the Agreement that they have negotiated, executed and agreed to abide by. Therefore, it should be the Joint

Petitioners' obligation to identify the arrangements that are no longer offered or are not in compliance with the terms of the Agreement and, therefore, must be transitioned. Additionally, it is reasonable to expect the Joint Petitioners to have sufficient records and the ability to research them in order to identify those arrangements that no longer comply with the terms of the Agreement since they have ordered the services in question.

Further, only the Joint Petitioners know whether if their plan is to disconnect the facility completely or convert the facility to a BellSouth resold service or access service or to a service offered under a commercial agreement with BellSouth. The Joint Petitioners have options with respect to the facilities they require to provide services to end users, and they also have options as to whether they choose to self-provision those facilities, buy the facilities from BellSouth or purchase facilities from a third party. Because BellSouth cannot select such options for the Joint Petitioners, the Joint Petitioners must not only identify the noncompliant facilities, but must also instruct BellSouth, via the appropriate ordering mechanism, as to whether they choose to disconnect the facility or to replace it with a comparable service.

Q. AT PAGE 46, THE PETITIONERS STATE THAT BELLSOUTH'S LANGUAGE WOULD "...PLACE THE BURDEN ON THE PARTY THAT DOES NOT NECESSARILY THINK THAT A SERVICE CHANGE IS DESIRABLE OR NECESSARY." PLEASE RESPOND.

A. Both the Joint Petitioners and BellSouth are equally bound by the Agreement.

Both parties have an obligation to honor the requirements and spirit of the Agreement. The Petitioners' tactic of "catch us if you can" is not appropriate. BellSouth should not be solely responsible for compliance with the Agreement. Because the non-compliant services are owned by the Joint Petitioners, the Joint Petitioners are in the best position to identify those services.

Item 26; Issue 2-8: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act? (Attachment 2, Section 1.7)

Q. ON PAGE 51, THE JOINT PETITIONERS ASSERT THAT BELLSOUTH SHOULD BE 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. HOW DO YOU RESPOND?

A. The Joint Petitioners' position is without merit. As I discussed in my Direct Testimony, BellSouth's position is consistent with the FCC's errata to the *Triennial Review Order*, in that there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the Act. Unbundling and commingling are Section 251 obligations. Services not required to be unbundled are not subject to Section 251. When BellSouth provides an item pursuant only to Section 271, BellSouth is not obligated by the requirements of Section 251 to either combine or commingle that item with any other element

or service. If BellSouth agrees to do so, it will be done pursuant to a commercial agreement.

Q. ON PAGE 52, THE JOINT PETITIONERS CLAIM THAT "NOTHING IN THE FCC'S RULES OR THE *TRO* SUPPORT [BELLSOUTH'S] INTREPRETATION." IS THIS TRUE?

A. No. BellSouth's interpretation of its commingling requirements is based solely on the obligations stated in the *TRO* by the FCC. Specifically, paragraph 579 states "competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services."

Contrary to their belief, the Joint Petitioners are not prevented from commingling wholesale services purchased from BellSouth's Special Access tariff with UNEs and UNE combinations provided pursuant to Section 251. However, there is no requirement for BellSouth to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the Act. To the extent the Joint Petitioners are asking to commingle UNEs with non-tariffed services provided only pursuant to BellSouth's Section 271 obligations, such commingling is not required by Sections 251 or 252 of the Act and, therefore, such commingling is

outside the scope of an Interconnection Agreement. Any such agreement to commingle such a 271 service should be addressed, if at all, by a separate agreement negotiated between the parties.

Item 27; Issue 2-9: When multiplexing equipment is attached to a commingled circuit, should the multiplexing equipment be billed under the jurisdictional authorization (Agreement or tariff) of the lower or higher bandwidth service? (Attachment 2, Section1.8.3)

Q. ON PAGE 53, THE JOINT PETITIONERS ASSERT THAT THE DEFINITION OF LOCAL LOOP INCLUDES MULTIPLEXING EQUIPMENT AND THEREFORE SHOULD BE PROVIDED AT UNE RATES WHEN A UNE LOOP IS PART OF THE CIRCUIT. DO YOU AGREE?

A. No. The Joint Petitioners base their position on their misinterpretation of the *TRO*, arguing that the FCC held that the definition of local loop includes multiplexing equipment (other than Digital Subscriber Line Access Multiplexers or "DSLAMS"). The type of multiplexing equipment referenced in the *TRO* is the type associated with Digital Loop Carrier ("DLC") rather than the type of multiplexing associated with transport facilities, which is at issue in this arbitration.

Q. WHAT IS DLC MULTIPLEXING?

A. DLC multiplexing is a form of "loop electronics" that is used to introduce digital transmission on very long customer loops, i.e., customers located long distances from the serving central office. Digital transmission eliminates the need for larger gauge cables or for signal amplifiers on existing copper wires, thereby reducing costs while improving the signal to ensure high quality voice service. And, unlike analog amplifiers used on some copper loops, digital transmission regenerates the voice signal while eliminating much or all accompanying electronic noise which the end user would otherwise encounter as static or low volume. As I discuss below, the multiplexing that is at issue in this proceeding is associated with transport facilities and not the local loop facilities and therefore, it is appropriate for the multiplexer used in the context of commingled circuit to be billed from the same jurisdictional authorization (Agreement or tariff) as the higher bandwidth service.

Q. AT PAGE 54, THE PETITIONERS COMPLAIN THAT "...IN A COMMINGLED CIRCUIT INCORPORATING A DS1 UNE LOOP AND DS3 SPECIAL ACCESS TRANSPORT (THE MOST COMMON KIND OF COMMINGLED CIRCUIT WE EXPECT TO SEE), THE MULTIPLEXING ELEMENT WOULD GET BILLED AT SPECIAL ACCESS RATES EVEN THOUGH IT IS BY DEFINITION PART OF THE LOOP UNE." PLEASE RESPOND.

A. BellSouth, in accordance with normal industry practices, installs the multiplexer when the higher bandwidth facility is installed. Multiplexing is by definition an option associated with transport and not the local loop. Indeed, if

combining lower level transmission circuits into higher level transmission circuits were not required (for example, individual DS-1 circuits were not combined into DS-3 circuits) then no multiplexing equipment would be required. When multiplexing is required, it is ordered with the higher-level transport and is a part of the higher-level transport circuit. Thus, a DS-1 to DS-3 multiplexer will be installed on the DS-3 facility. Likewise, the DS-0 to DS-1 multiplexer is installed with the DS-1 circuit. Further, it would not make sense to reverse this practice (as the Joint Petitioners suggest) because the lower bandwidth facilities are aggregated into the higher bandwidth facility which is the function performed by the multiplexer.

Item 50; Issue 2-32: Should the service eligibility criteria for high capacity EELs apply only to circuits provided to end users or to any CLEC customer? (Attachment 2, Section 5.2.5.2.1-7)

Q. ON PAGE 69, THE JOINT PETITIONERS CONTEND THAT BELLSOUTH IS ATTEMPTING TO LIMIT THE JOINT PETITIONERS' ACCESS TO EELS BEYOND THAT WHICH THEY ARE ENTITLED TO UNDER THE FCC'S RULES. HOW DO YOU RESPOND?

A. As an initial matter, the Joint Petitioners' position is without merit. As I discussed in my Direct Testimony, because BellSouth is not obligated to provide new high-capacity EELs after the Interim Period and must maintain existing high-capacity EELs during the Transition Period (as set forth in Items 111 and 112), this issue is only relevant during this twelve-month time period,

and the Commission should find as follows for this time period:[6] The term "customer" as used in the FCC's EEL eligibility criteria should be defined as the end user of an EEL. The high capacity EEL eligibility criteria apply only to End User circuits since a loop is a component of the EEL and the FCC's definition of a loop requires that it terminate to an "end-user" customer's premises.

Furthermore, to address the Joint Petitioners' concern that BellSouth's definition would prohibit an ISP customer from being considered an end user, BellSouth has agreed to include language specifically stating that the Joint Petitioners may use loops (as defined by the FCC), and therefore EELs to serve ISP customers. Additionally, BellSouth has proposed language to clarify that the EEL eligibility criteria apply to the use of EELs for both wholesale and retail purposes. With the concessions that BellSouth has made to the Joint Petitioners on this language, BellSouth is unsure why the Joint Petitioners are unwilling to resolve it.

Item 51; Issue 2-33: (B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed? (Attachment 2, Sections 5.2.6, 5.2.6.1, 5.2.6.2, 5.2.6.2.1 & 5.2.6.2.3)

[6] To the extent the Final FCC Unbundling Rules require BellSouth to continue to provide DS1 or DS3 loops or transport and to the extent the Final FCC Unbundling Rules do not change the EELs eligibility criteria, this issue would be relevant for the time period following the Final Unbundling Rules.

Q. WHAT IS BELLSOUTH'S POSITION WITH RESPECT TO THE AMOUNT OF TIME BETWEEN THE NOTICE TO THE CLEC OF BELLSOUTH'S INTENTION TO CONDUCT AN AUDIT AND THE START DATE OF THE AUDIT?

A. BellSouth's position is that the audit should commence 30 days from the date that BellSouth notifies the CLEC that it will conduct an audit. 30 days is ample time for the CLEC to identify the necessary personnel to assist with the audit and to make arrangements to receive the auditors. Naturally, there is room for negotiation as to the specific start date and time, and BellSouth will certainly consider extenuating circumstances that may not permit a CLEC to be ready within 30 days. But in no case should the CLEC be permitted to unduly and unilaterally delay the start of the audit.

Q. ON PAGE 70, THE JOINT PETITIONERS WANT TO REQUIRE BELLSOUTH TO PRE-IDENTIFY THE SPECIFIC CIRCUITS TO BE EXAMINED IN THE COURSE OF AN AUDIT AND RELAY THAT INFORMATION TO THEM PRIOR TO THE COMMENCEMENT OF THE AUDIT. PLEASE COMMENT.

A. As an initial matter, a requirement to identify specific circuits beforehand defeats the purpose of the compliance audit. The purpose of an EELs audit is to assess, via an independent, third-party auditor, the extent to which carriers are complying with the rules for determining the usage of EELs circuits. To require BellSouth to pre-identify the specific circuits to be examined would

provide an opportunity for a non-compliant CLEC to correct the mischaracterization of the EELs circuits in advance of the audit. While correcting mischaracterized circuits as a result of an audit is, and should be, a goal of both BellSouth and the CLEC, of more concern to BellSouth is the auditor's findings with respect to the processes and procedures used by the CLEC and the extent to which those processes may result in systematic errors in the accounting for EELs circuits. This attempt by Petitioners to limit the BellSouth audit solely to a list of pre-identified circuits would negate the effectiveness of the audit. During the conduct of an audit, findings may dictate that the audit follow a direction not originally intended in the initial audit scope. If the audit were restricted to specific circuits, such additional questions or examinations could not be followed and any errors corrected. A non-compliant CLEC could simply refuse to comply with any audit request that does not directly relate to the specific circuits identified, thus delaying the correction of erroneous EELs accounting.

Q. ON PAGE 73, THE PETITIONERS' CLAIM THAT THEIR PROPOSED LANGUAGE, "...COME(S) DIRECTLY FROM THE FCC'S *TRO*." ARE THE REQUIREMENTS IDENTIFIED BY THE JOINT PETITIONERS FOUND ANYWHERE IN THE TRO?

A. No. The Joint Petitioners are attempting to add two requirements (see pp. 72-73): 1) a third-party, mutually agreed-upon auditor and 2) the provisions regarding when a CLEC must reimburse BellSouth and when BellSouth must reimburse a CLEC should mirror those contained in the *TRO*. Neither of these

supposed requirements appear in the *TRO*.

Q. PLEASE ADDRESS EACH OF THE PETITIONERS' ADDITIONAL REQUIREMENTS.

A. First, I address the Petitioners' request for a "third party independent auditor mutually agreed-upon by the Parties." At Section 5.2.6.2, the Petitioners' proposed language advocates a third-party, mutually agreed upon auditor. This is a pointless step designed only as a delaying tactic. Because the *TRO* requires, and the parties agree, that the audit should be conducted according to the American Institute of Certified Public Accountants ("AICPA") standards, neither the specific auditor nor the independence of the auditor should be a factor. AICPA standards govern each of these areas. No other requirements are needed. If a CLEC is abusing the service eligibility requirements, these objections provide a simple path to delay the audit indefinitely. In no case is the selection of the auditor subject to "evaluation" by the Joint Petitioners. To subject the selection of the auditor to the approval of the CLEC is to invite gaming in the form of delay.

Second, the Petitioners also suggest that provisions regarding when a CLEC must reimburse BellSouth and when BellSouth must reimburse a CLEC should mirror those contained in the *TRO*. As paragraph 627 of the *TRO* states, "In particular, we conclude that incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." [Footnote deleted] [Emphasis added].

Paragraph 627 goes on to describe the situation in which the CLEC would be responsible for the cost of the audit. It is only in the case where the CLEC is found not to be complying with the eligibility criteria that BellSouth, and the *TRO*, would require the CLEC to reimburse BellSouth for the costs of the audit. Should the CLEC be found to be compliant in all material aspects, then BellSouth will reimburse the CLEC for its costs associated with the audit.

Indeed, the objective in any audit is to review a set of criteria in a reasonable amount of time, issue findings so that any inaccuracies in data or procedures may be corrected, and move on. The proposal by the Joint Petitioners with respect to the conduct of an audit would serve to limit the effectiveness of the audit through continuing disputes over the selection of the auditor, objecting to the specific data to be examined and disagreement over the date the audit is to begin.

Item 57; Issue 2-39: (A) Are the Parties legally obligated to perform CNAM queries and pass such information on all calls exchanged between them, including cases that would require the Party providing the information to query a third party database provider? (B) If so, which party should bear the cost? (Attachment 2, Section 7.4)

Q. THE PETITIONERS CLAIM, AT PAGE 75, THAT "...CLECS WILL BE PLACED AT AN UNFAIR COMPETITIVE ADVANTAGE BECAUSE ITS CUSTOMERS WILL NOT HAVE HIS/HER/ITS CALLER ID APPEAR WHEN A BELLSOUTH CUSTOMER SUBSCRIBES TO THAT SERVICE."

IS THE CLEC DISADVANTAGED AS CLAIMED?

A. No. CLECs are not disadvantaged as claimed. CLECs will be provided with the same Caller ID information that BellSouth provides to its retail customers. If BellSouth no longer queries a third party database for CNAM information, BellSouth's retail customers are impacted as well as CLECs retail customers. Therefore, BellSouth's practice does not disadvantage the CLECs.

Item 63; Issue 3-4: Under what terms should CLEC be obligated to reimburse BellSouth for amounts BellSouth pays to third party carriers to terminate CLEC originated traffic? (Attachment 3, Sections 10.10.6 – KMC; 10.8.6 – NSC & NVX; 10.13.5 – XSP)

Q. ON PAGES 78-79, THE JOINT PETITIONERS CONTEND THAT ANY REIMBURSEMENT TO BELLSOUTH FOR TERMINATION CHARGES THAT BELLSOUTH PAYS THIRD PARTY CARRIERS FOR CLEC-ORIGINATED TRAFFIC SHOULD BE LIMITED TO THOSE CHARGES BELLSOUTH IS CONTRACTUALLY-OBLIGATED TO PAY OR OBLIGATED TO PAY PURSUANT TO COMMISSION ORDER. HOW DO YOU RESPOND?

A. Regardless of whether or not BellSouth has a contractual obligation or an obligation to pay Independent Companies ("ICOs") for the delivery of the Joint Petitioners' transit traffic, BellSouth is unwilling to provide a transit function if the financial obligation to compensate rests with BellSouth and not the

originating carrier, which in this case would be the Joint Petitioners. Such an outcome is not required by the Act, and is clearly contrary to reasonable business practices. In the event that a terminating third party carrier imposes on BellSouth any charges or costs for the delivery of Transit Traffic originated by a CLEC, the CLEC should reimburse BellSouth for all charges paid by BellSouth. BellSouth's position is that the originating carriers (the Petitioners in this case) are responsible for the payment of intercarrier compensation to the terminating carriers, and the originator of the traffic rather than the transit provider must ensure that the terminating carrier is appropriately compensated. The Petitioners' suggestion that BellSouth should refuse to pay the ICOs in the instance where the originating carriers have not entered into agreements or compensation arrangements with the ICOs for terminating such traffic is disingenuous. The Petitioners make this suggestion without indicating that they will agree to enter into compensation arrangements with the ICOs, thus, the Petitioners' suggested course of action would leave the terminating carriers, i.e., the ICOs, with no way to recover the costs associated with terminating the Petitioners' traffic. Importantly, adopting the Joint Petitioners' position would require BellSouth to be unnecessarily engaged in compensation disputes between CLECs and ICOs in cases where BellSouth's retail customers neither originated nor received calls.

Q. IF THE JOINT PETITIONERS AGREE (PAGES 78-79) THAT THEY SHOULD REIMBURSE BELLSOUTH FOR TERMINATION CHARGES BELLSOUTH PAYS THIRD PARTY CARRIERS THAT TERMINATE JOINT PETITIONER-ORIGINATED TRAFFIC TRANSITED BY

BELLSOUTH, THEN WHY IS THERE STILL AN ISSUE?

A. In my opinion, this is still an issue because as long as the Joint Petitioners avoid establishing agreements directly with the carriers that terminate their traffic, they can continue to rely upon BellSouth to carry the traffic on their behalf. It is the obligation of the originating carrier (in this case the Joint Petitioners) to make arrangements with the terminating carrier with respect to delivery of and compensation for such transit traffic. However, where the originating carrier has failed to make arrangements with the terminating carrier to compensate the terminating carrier for such traffic, and the terminating carrier imposes costs and charges on BellSouth, BellSouth should be able to seek reimbursement from the originating carrier for those charges.

The Joint Petitioners' concern that BellSouth will "overpay" and the CLECs will "over-reimburse" is unfounded. Clearly, the best way a CLEC can mitigate such a concern is for the CLEC to negotiate compensation arrangements directly with the ICO. BellSouth reviews, disputes and pays third party invoices in a manner that is at parity with its own practices for reviewing, disputing and paying such invoices. If BellSouth believes the ICO has inappropriately billed BellSouth for calls, BellSouth will dispute such charges and seek reimbursement from the ICO.

Item 65; Issue 3-6: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic? (Attachment 3, Sections 10.10.1 – KMC; 10.8.1 – NSC)

Q. THE PETITIONERS CLAIM, AT PAGE 81, THAT THE TANDEM INTERMEDIARY CHARGE IS "PURELY 'ADDITIVE'." PETITIONERS ALSO CLAIM AT PAGE 82 THAT IF CURRENT TELRIC CHARGES FOR TANDEM SWITCHING AND COMMON TRANSPORT DO NOT COVER ALL COSTS, BELLSOUTH SHOULD CONDUCT A TELRIC STUDY OF THOSE ADDITIONAL COSTS AND PROPOSE A RATE IN THE NEXT GENERIC PRICING PROCEEDING. PLEASE RESPOND.

A. First, as stated in my direct testimony, the tandem intermediary charge is not "purely 'additive'." For example, BellSouth pays Telcordia for messages that are not recovered in tandem switching and common transport charges. BellSouth pays Telcordia for all messages, whether they are access records or end user billing records that are sent and received through Centralized Message Distribution System ("CMDS"). More importantly, CLECs can connect directly with other carriers in order to exchange traffic. They do not need BellSouth to pass such traffic for them. For whatever efficiencies they gain, the CLECs have elected to have BellSouth perform a transit traffic function for them. Because the transit traffic function is not a Section 251 obligation, it is not subject to Section 252 cost standards (TELRIC); therefore, submitting a TELRIC cost study for this function to a state commission is not appropriate. As stated previously, CLECs that elect to have BellSouth perform this function should negotiate the rates, terms and conditions of transit traffic in a separate agreement.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

[# 561462]