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November 1, 2005

VIA HAND DELIVERY

Hon. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

Re: Joint Petition for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended; Docket No. PSC 2004-00044

Dear Ms. O'Donnell:

Enclosed for filing in the above-styled case is the original and ten copies of the Response to BellSouth's Motion for Rehearing and Request for Oral Argument.

Thank you, and if you have any questions, please call me.

Very truly yours,

DINSMORE & SHOHL LLP

Holly C. Wallace

Holly C. Wallace

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Enclosure
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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN 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	)	**Case No. 2004-00044**

JOINT PETITIONERS' RESPONSE TO BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT

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NuVox Communications, Inc. ("NuVox") and Xspedius Communications, Inc., with its operating subsidiaries ("Xspedius"), collectively the "Joint Petitioners," hereby file this Response to BellSouth Telecommunications, Inc.'s Motion for Rehearing and Request for Oral Argument filed in this docket on October 18, 2005 ("Motion"). In its Motion, BellSouth Telecommunications, Inc. ("BellSouth") requests that the Kentucky Public Service Commission ("Commission") rehear certain findings within its Order released in this docket on September 26, 2005. More specifically, BellSouth moves the Commission to adopt BellSouth's proposed language by rehearing the Commission's decisions on Issues 26, 36, 37, 38, 65, 51(A), 86, 100, 101, and 103. BellSouth's Motion provides flawed and unpersuasive reasoning which should do nothing to cause the Commission to alter, or modify in any way, its initial decisions on these specific issues. Accordingly, the Commission should deny BellSouth's Motion and affirm the

Order's findings with regard to these issues and adopt Joint Petitioners' contract language proposed in relation thereto.

BELLSOUTH'S REQUEST FOR ORAL ARGUMENT

In its Motion, BellSouth requests that the Commission schedule oral arguments to assist the Commission in deciding the issues presented ***in the Motion***. Motion at 2. Joint Petitioners do not object to the Commission scheduling oral arguments; however, Joint Petitioners do object to the limiting nature of BellSouth's request. Joint Petitioners believe that if the Commission is to hear oral arguments, it should do so on ***all*** issues subject to rehearing motions filed by the parties, and not just those issues described ***in BellSouth's Motion***. Accordingly, Joint Petitioners object to BellSouth's request, in part, and hereby move and request that the Commission schedule oral arguments for the purpose of hearing the parties' respective arguments on all open issues in this arbitration proceeding for which reconsideration or clarification is sought.[1]

RESPONSE TO BELLSOUTH'S MOTION FOR REHEARING
ISSUE 26

Issue Statement: *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?*

BellSouth, in its Motion for rehearing of the Commission's ruling on this issue, sets forth several stale and unconvincing arguments that the Joint Petitioners will address below. *See* BST Motion at 4-13. Moreover, BellSouth attempts to intimidate the Commission by declaring this is

[1] Joint Petitioners respectfully request that oral arguments be subject to a per issue time limitation with additional time allowed for questions by the Commission and its staff. Subject to the Commission's availability, as well as the availability of its staff and BellSouth, Joint Petitioners suggest that oral arguments, to the extent the Commission is inclined to grant them, be set for one of the following days: November 8, November 11, November 30, December 1 or December 2.

the only commission in "BellSouth's region" that has "determined that BellSouth has an obligation to commingle 251 services with services offered only pursuant to Section 271." BST Motion at 4. The Commission should not be intimidated as, first and foremost, its conclusion is correct and in accordance with the FCC's rules and orders. It is no shame that this Commission correctly refused to bless BellSouth's invented and self-serving exception to the FCC's commingling rules. Moreover, there are still six more state commissions that have not rendered decisions on this issue and the Joint Petitioners have objected to the North Carolina Utilities Commission's ("NCUC's") Recommended Arbitration Order ("*NCUC Order*")[2] on this issue, and intend to pursue an appeal of the Florida Public Service Commission ("FPSC") decision on this issue as well ("*FPSC Order*").[3] Accordingly, for these reasons and as detailed below, the Commission should affirm its Order for this issue in its entirety.

BellSouth makes the argument that the Commission "erred in refusing to recognize that BellSouth has no obligation to commingle 251 services with 271 services." BST Motion at 4. Contrary to BellSouth's arguments, the Commission was correct in rejecting BellSouth's argument and concluding "[t]he TRO and subsequent FCC orders have not relieved BellSouth of its obligation to commingle UNEs or combinations of UNEs that it is required to make available pursuant to Section 271." Order at 10. The Joint Petitioners' brief supports this conclusion, as it clarifies that FCC Rules 51.309(e) and (f) require ILECs, including BellSouth, to connect

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2 *See In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.*, North Carolina Utilities Commission, Docket No. P-772, Sub 8 et al., *Recommended Arbitration Order* at 23-24 (July 26, 2005) ("*NCUC Order*"). The Joint Petitioners filed Objections to certain of the NCUC's recommended decisions on September 1, 2005.

3 *See also In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with Bellsouth Telecommunications, Inc.*, Florida Public Service Commission, Docket No. 040130-TP at 19 (Oct. 11, 2005) ("*FPSC Order*").

Section 251 UNEs with any element or service "obtained at wholesale." JP Br. at 33-34. That rule has no limitation and does not exclude any type of element or wholesale offering. *Id.* Notably, the FCC has never said that Section 271 services are not wholesale services for purposes of its commingling rule.

BellSouth's assertion that the FCC's Errata to the *TRO*[4] "deleted the only reference in the *TRO* that would have required ILECs to combine 251 and 271 services" is also incorrect. BST Motion at 5. As Joint Petitioners explained in their Brief, the FCC made a key revision to Footnote 1990 to clarify that commingling indeed does apply to Section 271 elements. JP Br. at 36-37. Specifically, Footnote 1990 formerly closed with the sentence "[w]e decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items." *TRO* n.1990. Paragraph 31 of the Errata states: "In footnote 1990, **we delete the last sentence**." That deletion indicates that while the FCC did not find Section 271 elements subject to the **combination** rule, it certainly found them subject to the **commingling** rule. Thus, BellSouth's interpretation of the FCC's Errata is misplaced and should be disregarded by the Commission, as it provides no basis for unlawfully limiting the commingling language for this Agreement. *See* JP Br. at 37.

BellSouth relies on the *NCUC Order* an the *FPSC Order* to support its claim that it is under no obligation to commingle Section 271 elements with Section 251 elements. BST Motion at 5-6. Both these state commission orders impermissibly create an implied exception

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4 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *corrected by Errata*, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004).

not contained in the FCC's rule or in the *TRO,* and such exception cannot be squared with the second part of the FCC's Errata, which deleted the FCC's footnote 1990 sentence that had said "[w]e decline to apply our commingling rule...to service that must be offered pursuant to these checklist items." These commissions made no attempt to read the rule and *TRO* as a whole and instead overstepped their Section 252 authority by effectively re-inserting into the FCC's commingling rule and *TRO* an exception that the FCC had erroneously included and then corrected with its Errata. Accordingly, both the NCUC and the FPSC reached erroneous and unsustainable conclusions on this issue.[5] Conversely, this Commission made the correct conclusion that accords with the FCC's commingling rule and *TRO* and should therefore be affirmed.

BellSouth also makes the lengthy but spurious argument that the Commission's Order "erroneously asserts jurisdiction over BellSouth's 271 services...." BST Motion at 8. Despite BellSouth's arguments to the contrary, the Commission does have jurisdiction over services provided pursuant to the Section 271 checklist as recognized by the FCC. *See* Docket 2004-00427, Generic Proceeding, Issue 14. Nevertheless, even if the Commission ultimately decides that it does not have jurisdiction over Section 271 elements in the Generic Proceeding (which the Joint Petitioners think would be contrary to the Act and FCC rules and orders) the Commission still has authority, pursuant to Section 252, to require BellSouth to commingle 251 and 271 elements, as such commingling is a Section 251 requirement firmly established in an FCC rule implementing that section of the Act. The Commission correctly recognized this jurisdiction

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[5] The Joint Petitioners have filed an objection to the *NCUC Order* on this decision, *see* Joint Petitioners' Objections to the Recommended Arbitration Award at 17-22 (filed Sept. 1, 2005). The Joint Petitioners also intend to appeal the *FPSC Order* on this issue.

when it stated "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." Order at 5. This Commission should not be swayed by BellSouth's erroneous contentions regarding its jurisdiction. Commingling is a Section 251 obligations and a Section 251 rule. The Commission has both the jurisdiction and the duty to decide the issue just as it has done.[6]

BellSouth continues its arguments, by claiming that the Commission's order recreates "UNE-P" with 271 services in contravention to federal law. This is not the case. There simply is no federal law barring the connection of Section 271 switching elements to Section 251 UNE loops. "UNE-P" includes local switching elements and the local loop, all priced at TELRIC pursuant to Section 251. On the other hand, a commingled arrangement replacing UNE-P would not include all elements priced at TELRIC. Thus, the two scenarios result in different pricing and therefore commingling does not result in the Section 251 UNE combination commonly referred to as UNE-P. There is no legal or rational policy basis under which the Commission could or should endorse BellSouth's ploy to make Section 271 switching unavailable for use with Section 251 UNEs.

BellSouth makes the additional argument that " [t]he Joint Petitioners are free to commingle 251 services with tariffed access services under BellSouth's proposed language." BST Motion at 12. Tariffed services are not the same as Section 271 elements that must be priced in accordance with Sections 201 and 202 of the Act. To find otherwise would render the

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[6] *See* 47 U.S.C. § 252(c)(1) ("ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251.").

Section 271 "checklist" meaningless, as there would have been no need for Congress to have adopted it in the first place.[7]

Though the *TRO* may "refer[] to tariffed access services" in the context of commingling, such references are provided as examples only and cannot be deemed to establish an unwritten limitation which contravenes the plain language of Rule 51.309, which contains no such "tariffing" limitation. BellSouth Motion at 23, *citing TRO* ¶¶ 579-81, 583. Paragraph 579 of the *TRO* states that ILECs must commingle Section 251 UNEs with "services (***e.g.***, switched and special access services offered pursuant to tariff)."[8] Tariffed services are provided as an example, not as an exhaustive list, of items to be commingled with Section 251 UNEs. Similarly, Paragraph 581 of the *TRO* states that ILECs must commingle UNEs with services "***including*** interstate access services." Here too, the FCC provides an example but includes no words of limitation suggesting that interstate access services are the only services an ILEC must commingle with Section 251 UNEs. In sum, nothing in the *TRO* states that elements "obtained at wholesale" are exclusively tariffed switched and special access services. For these reasons, and the Commission's sound rationale in its Order, the Commission should affirm its holding that under BellSouth's proposal "commingling would be eliminated." Order at 10.

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7 Note the issue of Section 271 service offerings and pricing is currently being addressed in the Generic Docket before the Commission, *see Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law,* Case No, 2004-00427, Issue 14.

8 Joint Petitioners respectfully note that "*e.g.*" is the abbreviation for *exempli gratia*, which means, "for example; for instance". *See Black's Law Dictionary* (7th ed. 1999).

For all the forgoing reasons as well as those expressed in Joint Petitioners' briefs,[9] the Commission should deny BellSouth's request that the Commission reconsider or clarify its initial decision on this issue.

RESPONSE TO BELLSOUTH'S MOTION FOR REHEARING ISSUES 36-38

Issue Statement for Issue 36: *(A) How should Line Conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to line conditioning?*

Issue Statement for Issue 37: *Should the Agreement contain specific provisions limiting the availability of Line Conditioning to copper loops of 18,000 feet or less?*

Issue Statement for Issue 38: *Under what rates, terms and conditions should BellSouth be required to perform Line Conditioning to remove bridged taps?*

BellSouth's Motion provides no basis for the Commission to modify its decisions on these issues. Moreover, BellSouth's attempt to distort the rationale of the Commission's correct ruling that BellSouth must "provide line conditioning when requested by the Joint Petitioners as specified in 47 C.F.R. § 51.319(a)" is hardly compelling. Order at 13; BST Motion at 13-15. In reaching its holding, the Commission correctly found that line conditioning "does not create a superior network." Order at 11. This is the right result and has been the position the Joint Petitioners have maintained throughout this proceeding. *See* JP Br. at 39-40; JP Reply Br. at 29. The Commission should disregard BellSouth's overarching and erroneous claim that its ruling does not accord with federal law. Once again, the Commission's order squares well with the federal law interpreted and implemented by the FCC and not with unwritten exceptions to FCC rules invented by BellSouth.

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[9] Joint Petitioners incorporate herein by reference all arguments presented previously on this issue in their post-hearing briefs as grounds for denying BellSouth's Motion.

BellSouth remains incorrect in arguing that its line conditioning obligations are somehow modified and limited by the FCC's separate rules on routine network modifications. BST Motion at 13-14. Neither the line conditioning rule, 47 C.F.R. § 51.319(a)(1)(iii), nor the routine network modification rule, *id.* § 51.319(a)(8), contain any such modification or limitation. Nevertheless, BellSouth argues that its obligations to provide line conditioning at TELRIC rates are limited to those functions that fit the definition of routine network modification. Yet, even BellSouth has admitted that the FCC rules and orders relevant to BellSouth's obligations do not support this position. In fact, Mr. Fogle conceded at the Florida hearing both that "I'm not aware of any particular place where [the *TRO*] says 'limiting its line conditioning rules,'" FL Tr. at 690:6-7, and that "I don't believe in this [line conditioning] section that they talk about routine network modifications." *Id.* at 691:24-25.

The FCC defines routine network modifications as "an activity the incumbent LEC regularly undertakes for its own customers." 47 C.F.R. § 51.319(a)(8). The routine network modification rule is quite distinct from the line conditioning rule, and neither rule cross-references the other.[10] Moreover, nothing in the *TRO* indicates that the FCC's readopted line conditioning rules would be from that point forward limited by its separate and newly adopted routine network modification rules. *See* JP Direct Test. at 56:9-18; JP Reply Test. at 44:10-18; *see also* GA Tr. Vol. 1 at 24:25-25:15; FL Tr. Vol. 4 at 586:12-587:13. Indeed, the FCC reworked some portions of the line conditioning rules (actually expanding, not contracting, the

[10] Indeed, in Georgia, while looking at the final line conditioning rule (*i.e.*, that rule that followed the *TRO*), BellSouth witness Fogle conceded that "the words routine network modification do not appear in this [line conditioning] definition." GA Tr. Vol. 2 at 795:16-17.

obligation) and none of this reworking reflects the exception or limitation BellSouth claims. *See* JP Direct Test. at 57:14-58:6; JP Rebuttal Test. 45:9-46:13; *see also* GA Tr. Vol. 1 at 479:11-20.

Despite the Commission's holding to the contrary, BellSouth argues that by requiring line conditioning in accordance with FCC Rule 51.319, the Commission is requiring BellSouth to create a superior network, "as it requires BellSouth to perform line conditioning at TELRIC for the Joint Petitioners even when such line conditioning exceeds what BellSouth provides itself." BST Motion at 14. This tired legal argument has been rejected repeatedly. The FCC, in the *TRO*, states that "requiring the conditioning of xDSL-capable loops **is not mandating superior access**." *TRO* ¶ 643. (emphasis added). The FCC did not qualify these statements or make compliance with its independent line conditioning rule contingent upon a BellSouth decision to make such line conditioning available (routinely) on a retail basis. Thus, without having to go further, the Commission should dismiss BellSouth's superior network argument which already has been rejected by the FCC in the *TRO*.[11]

In its Motion, BellSouth for the first time relies on an invented and hallow distinction between the type of line conditioning it does on long copper loops used to provide T1s and that which it does when the copper loops are used to provision other services. BST Motion at 16. This gambit is unavailing, as it merely underscores BellSouth lack of candor and credibility when it claims it does not routinely perform certain loop conditioning and provides no basis for limiting BellSouth's obligation to condition copper loops. The FCC's line conditioning obligations simply do not recognize this distinction as they do not hinge on the services

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[11] Notably, the *USTA II* decision provided BellSouth the opportunity to challenge the FCC's finding that line conditioning does not create a superior network, but the FCC's determination was not at issue in the case before the court. BellSouth may not lodge an indirect challenge to the FCC's decision through this proceeding. BellSouth's reliance on that decision is thoroughly misplaced. *See* BST Motion at 13-14.

BellSouth provides over copper loops or on the customers BellSouth is willing to provide such services to.

Nevertheless, BellSouth claims that it should have no line conditioning obligation on long loops because, even though it ***does*** routinely perform load coil removal on long loops for its own "T1 for copper loop" customers, it claims it ***does not*** remove load coils on copper loops greater than 18,000 feet long for its other copper loop customers.[12] This claimed distinction is both meaningless and irrelevant. The copper loop facility is what is subject to the FCC's line conditioning rule. 47 C.F.R. § 51.319(a)(1)(iii). The fact that a copper loop is used to provide a T1 service does not change the fundamental fact that it is still a copper loop. Thus, when BellSouth repeats the erroneous claim that it "does not remove load coils on copper loops beyond 18,000 feet for its own customers", BST Motion at 16, it demonstrates nothing other than BellSouth's willingness to continue to ignore the fact that the service provided over a copper loop does not change the fact that the loop is still a copper loop. BellSouth's use of the terms "T1s for copper loops", "T1 loops" and "T1s" does not mask or change the fact that the facility conditioned is simply a long copper loop.

Moreover, the FCC's line conditioning obligations do not turn on the classification of customers used by BellSouth or on the particular customers to which BellSouth elects to provide line conditioning. The obligation applies, "whether or not the incumbent LEC offers advanced services to the end-user customer" served by the copper loop. 47 C.F.R. § 51.319(a)(1)(iii).

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[12] A copper loop is a facility and not a service. In any event, it is unclear whether BellSouth's allegations pertain to all other copper loops or merely some of them. Neither the Commission nor Joint Petitioners have any idea whether there are other instances Mr. Fogle omitted or whether BellSouth deems other invented qualifications relevant.

Thus, the type of services purchased by BellSouth customers served by long copper loops has no bearing on BellSouth's line conditioning obligations.

Also incorporated in BellSouth's argument is an erroneous re-articulation of the Act's nondiscrimination standard which ignores the fact that the **copper loop** is the network element to which the nondiscrimination obligation attaches and that obligation commands that CLECs be afforded the same access to the copper loop that **BellSouth** has – not the same gated access that BellSouth elects to provide to its retail customers (who are not similarly entitled to purchase such loops at TELRIC pricing).[13] Thus, the Act's nondiscrimination standard commands that CLECs will have cost-based access to copper loops. The CLECs have a right to the same access to a loop that BellSouth has, which the FCC has defined to include line conditioning,[14] irrespective of whether BellSouth elects to perform such conditioning "routinely" or claims that it does not or perhaps "no longer" performs[15] such conditioning routinely and does so only when it can charge "special construction" or similarly unpredictable and non-TELRIC compliant pricing.

BellSouth's claim that the Commission may not require it to provide line conditioning to remove bridged taps between 0 and 2500 feet at TELRIC fails for similar reasons. If the Commission were to grant BellSouth's request and reverse its decision, then it would anoint BellSouth as regulator (in addition to being the regulated) and it would thereby bestow upon

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13 BellSouth notes that the FPSC endorsed its skewed devolution of the Act's competitive access provisions into a perverse "retail parity" standard. BellSouth Motion at 17. The Florida parity standard is not the federal parity standard. Under the standard embraced by the FPSC, Joint Petitioners, at least in certain contexts, apparently have no rights greater than Florida retail customers. The *FPSC Order* renders in many respects the Act and the FCC's line conditioning rules a nullity. Accordingly, the Joint Petitioners intend to appeal the *FPSC Order* to federal court.

14 *See TRO* ¶ 643 (where the FCC stated: "[w]e therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element.").

15 GA Tr. Vol. 2 at 813:16-17 (where BellSouth witness Fogle stated in the Georgia hearing that "**we no longer routinely** remove load coils." (emphasis added)).

BellSouth the ability to wipe out its line conditioning obligations in their entirety. Simply put, what BellSouth wants is in direct defiance of federal law.

Finally, BellSouth's position is belied by the FCC's purpose in creating the line conditioning rules. As noted in the *TRO*, "line conditioning speeds the deployment of advanced services by ensuring that competitive LECs are able to obtain, as a practical matter, a local loop UNE with the features, functions, and capabilities necessary to provide broadband service." TRO ¶644. By setting limitations on when line conditioning will be provided at TELRIC rates, BellSouth is attempting to hobble Joint Petitioners' ability to innovate and compete and is effectively attempting to ensure that Joint Petitioners provide no better services to consumers no more quickly than BellSouth decides to provide to them. This anti-competitive construct is contrary to the FCC's rules and orders and is antithetical to the Sections 251, 252 and 706 of the Act.

For all the forgoing reasons as well as those expressed in Joint Petitioners' briefs,[16] and by the Commission's in its Order, BellSouth's arguments offer no basis for the Commission to change its initial decisions on these three issues, and therefore the Commission should affirm its recommendation on Items 36, 37 and 38.[17]

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16 Joint Petitioners incorporate herein by reference all arguments presented previously on this issue in their post-hearing briefs as grounds for denying BellSouth's Motion.

17 As noted in their Petition for Rehearing, Joint Petitioners request that the Commission clarify its decision so that it sets forth Joint Petitioners' proposed language as the language the Commission adopts for incorporation into the Agreement for Issues 36, 37 and 38. The Order, as it now stands, finds in favor of Joint Petitioners, but it does not specifically conclude that Joint Petitioners' proposed language is to be adopted in the Agreement. Accordingly, the Commission should adopt the Joint Petitioners' language in its entirety. Such clarification would consistent with the Commission's findings on Issues 36, 37 and 38, where the Commission adopts Joint Petitioners' position that line conditioning must be provided at the Commission's already set TELRIC rates. Order at 12-13.

RESPONSE TO BELLSOUTH'S MOTION FOR REHEARING ISSUE 51(B)[18]

***Issue Statement**: Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?*

Before the Joint Petitioners can address the merits of BellSouth's arguments with respect to this issue, the Joint Petitioners must correct BellSouth's misinterpretation of the Commission's Order. Specifically, BellSouth states that the Commission's decision in the NuVox/BellSouth EEL audit dispute in Case 2004-00295 "resolves the second issue – there is no requirement that the parties mutually agree to the election of the auditor." BST Motion at 29. This is wrong. The Commission, in its Order, states that "[t]he unresolved matters related to Issue 51 deal with appropriate notice requirement for BellSouth to conduct an audit of Enhanced Extended Links ("EELs"), ***who should conduct such audit, and how it should be conducted.***" Order at 14 (emphasis added). This covers the scope of unresolved arbitration issues regarding EEL audits and does not exclude the issue of whether the Parties must mutually agree to the independent auditor.[19]

Moreover, the Commission, itself, acknowledges that its previous orders "are pending in litigation." *Id.* Accordingly, the Commission declined to decide at this time additional issues

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[18] Joint Petitioners note that BellSouth has mistakenly employed "Issue 51(a)" in its Motion's argumentative caption found at page 29. Given the nature of BellSouth's argument in support of rehearing and clarifying the Commission's decision on Issue 51, Motion at 29-33, it appears that BellSouth intended this caption to read: "Issue 51(B)."

[19] The issue of whether disputes over the independence of an arbitrator must be held until after an audit is conducted is not at issue in this case. The parties negotiated no exception to the standard dispute resolution provision which allows an aggrieved party to chose when it will seek enforcement of a right. Further, since the FCC requires that EEL audits be conducted by independent auditors, a state commission may not through Section 252 arbitration impose an obligation that potentially subjects a CLEC to an audit by a non-independent entity and promises only the opportunity to sort through the damage after it is done.

regarding EEL audits.[20] The Commission did so even though the issues involved in the pending litigation involve the interpretation of obligations under an existing interconnection agreement and not the arbitration of provisions to be incorporated into a new interconnection agreement and subject to a later FCC ruling. Although the issues in the two cases are distinct, the subject matter is related and analysis involved in resolving the issues certainly could overlap. Thus, Joint Petitioners did not take issue with the Commission's decision to decline to address the pending arbitration issues at this time. Instead, Joint Petitioners have requested that the Commission clarify its decision to find that no audit language will be included in the Agreement (or that such audit provisions will be inoperative) until such time as the Commission decides the issue in this arbitration docket. JP's Request for Rehearing at 19. Until the Commission actually decides the issues set for arbitration, this is the only appropriate result. Thus, Joint Petitioners submit that the Commission should disregard BellSouth's attempt to "boot-strap" and spin decisions from the complaint case involving different contract provisions and an entirely different context into this arbitration.

In an odd attempt to sway the Commission's thinking on issues it declined to resolve, BellSouth rolls out tired arguments based on inaccurate and misleading claims. Such advocacy should not be rewarded. First, BellSouth argues that adopting the Joint Petitioners' language will result in the Joint Petitioners "having means to delay BellSouth's audit." BST Motion at 30. Ensuring that BellSouth does not overstep its limited EEL audit right (*i.e.*, enforcing one's rights) does not result in unreasonable delay. As this Commission's decision in Case No. 2004-00295 makes plain, BellSouth sought an audit far more expansive than that to which it was

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[20] BellSouth acknowledges that "it is unclear whether the Commission's decision also resolves the scope of audit issue addressed in Issue 51(a)." *See* BST Motion at 29.

entitled.[21] And, as the Georgia Public Service Commission ("GPSC") found, BellSouth has sought to audit with an auditor unable to satisfy the independent auditor requirements.[22] Indeed, of three state commission decisions on the NuVox/BellSouth EEL audit dispute, the only one currently not enjoined by a federal court is the one from the GPSC, which BellSouth appealed (NuVox has nevertheless has allowed the audit to proceed).

BellSouth also incorrectly and unfairly claims that if there is a possibility that the Joint Petitioners will be found in violation of the law "there is no amount of identification or documentation that will appease a Joint Petitioner to allow the audit to proceed and reveal the Joint Petitioners' malfeasance." BST Motion at 30-31. This baseless argument is easily refuted by the fact that NuVox did not appeal the GPSC's decision allowing a limited audit of 44 converted EEL circuits for which BellSouth has demonstrated (as opposed to merely alleging) cause.

BellSouth also mischaracterizes the testimony of NuVox witness Mr. Russell. BellSouth claims, Mr. Russell "refused to agree that a fining of 60 percent, 70 percent, or even 80 percent noncompliance would result in NuVox not objecting to the expansion of the initial audit." BellSouth Motion at 31, *citing* FL. Tr. Vol. 2 at 236. In Florida, Mr. Russell steadfastly refused to agree that there is an arbitrary line that, regardless of the circumstances, would lead to an expanded audit. For example, Mr. Russell explained "[a] finding of 70 percent noncompliance

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21 Commission Order, Case No. 2004-00295 at 5 (limiting BellSouth's audit to just 15 of more than 150 converted circuits).

22 *In re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order, Docket No. 12778-U (June 30, 2004) ("*GPSC EEL Audit Order*"). BellSouth has appealed the Georgia decision, *see BellSouth Telecommunications, Inc. v. NuVox Communications, Inc.*, Case No. 1:04-CV-2790, filed in the United States District Court for the Northern District of Georgia, Sept. 23, 2004.

by an independent auditor with an audit that was conducted in a professional fashion and according to the accounting or account professional standards, that would be something we needed to talk about. If the audit, in fact, was conducted in violation of those standards, in violation of AICPA by an nonindependent auditor, no you could not conduct an additional audit."[23] Mr. Russell also explained that "If an audit were conducted by an independent auditor, according to AICPA rules in a professional manner, there would be a percentage of noncompliance that would justify an additional audit. But I can't, as I am sitting here today, give you a particular percentage based on a hypothetical." FL Tr. Vol. 2 236:19-24. Thus, BellSouth attempt to misrepresent through selective quoting does nothing to prove that Joint Petitioners are not ready to afford BellSouth the "limited right to audit" EEL circuits provided in the *TRO*. *TRO* ¶¶622, 626. Instead, it merely demonstrates the type of underhanded tactics BellSouth has regularly employed to seek an unlawful expansion of the limited right the FCC established.

Joint Petitioners simply seek to incorporate this "for cause" auditing standard into the Agreement in a manner that gives the standard meaning and that should avoid the type of protracted litigation that has surrounded the EEL audit issue here in Kentucky and elsewhere in BellSouth's service territory.[24] BellSouth is unable to provide a rational explanation of how it intends to give meaning to the FCC's "for cause" standard – instead it maintains that it will have

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23 FL Tr. Vol. 2 at 236:3-10. When asked about an 80 percent finding, Mr. Russell responded "[i]t is the same hypothetical. You are just increasing the percentages, My answer will remain the same. *Id.* at 236:12-13.

24 Notably, the EEL audit litigation in Georgia, Kentucky and elsewhere likely would not have been necessary if BellSouth had not attempted to end-run its contractual obligations regarding EEL audits. In Georgia, it took BellSouth more than two years to finally demonstrate compliance with the interconnection agreement at issue. That is the fault of nobody other than BellSouth. No other ILEC has sought to abuse its limited EEL audit rights in the manner BellSouth has.

cause to audit every circuit every year. KY Tr. at 201:8-13; *see also* GA Tr. Vol. 3 at 1093:16-25 (Blake); FL Tr. Vol. 7 at 997:8-10 (Blake). With regard to the mutual consent proposal borrowed from BellSouth's own preferred PIU/PLU audit provisions,[25] BellSouth provides no rational response as to why such provisions would not work in this context. FL Tr. Vol. 1 at 167:3-5 (Blake); *see also* GA Tr. Vol. 2 at 1101:11-16 (Blake); FL Tr. Vol. 7 at 999:14-18 (Blake). Notably, BellSouth ignores the fact that NuVox has not opposed the selection of the new auditor BellSouth retained to conduct an EEL audit in Kentucky.

BellSouth relies on the FPSC and the NCUC orders to support its request for reconsideration of a decision the Commission has yet to make. BST Motion at 3. Neither of these decisions is sound on this issue. The FPSC concluded that BellSouth need not identify circuits or provide any support for its allegation of cause. *FPSC Order* at 45. How this will prevent delays in auditing is beyond comprehension. The FPSC is not empowered to eviscerate the "for cause" auditing standard established by the FCC and the Joint Petitioners are unwilling to cede their right to enforce that federal standard. Surprise audits for undocumented cause are simply not consistent with federal guidance on this issue. Accordingly, the Joint Petitioners intend to pursue an appeal of this issue. The NCUC similarly found that BellSouth need not provide all supporting documentation upon which BellSouth establishes the cause and the Joint Petitioners have filed an objection to that holding.

Based on the foregoing and for the reasons set forth in the Joint Petitioners' briefs,[26] the Commission should rule that BellSouth must identify the circuits for which it has cause and

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[25] See Attachment 3 (Interconnection) Section 10.5.7 (NuVox), and Section 10.8.5 (Xspedius).

[26] Joint Petitioners incorporate herein by reference all arguments presented previously on this issue in their post-hearing briefs as grounds for denying BellSouth's Motion.

provide documentation supporting its allegations of cause. Moreover, the Commission should require mutual agreement on the auditor retained by BellSouth to conduct EEL audits. As discussed above, the Commission declined to address this issue due to pending litigation between NuVox and BellSouth now in federal court. Accordingly, as stated by the Joint Petitioners' in their Petition for Rehearing, JP's Request for Rehearing at 19, the Commission should clarify that no audit language will be included in the Agreement or the incomplete audit provisions will be inoperative until such time as the Commission decides the issue in this arbitration docket.

RESPONSE TO BELLSOUTH'S MOTION FOR REHEARING
ISSUE 65

***Issue Statement**: Should BellSouth be allowed to charge the CLEC a Transit Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?*

BellSouth, in its Motion for rehearing relating to the transit intermediary charge ("TIC"), argues that it is under no obligation, expressed or implied, to provide the transit function under federal law (although it agrees it will). Moreover, BellSouth submits that it should not be required to offer the transiting function at TELRIC rates but rather, should be able to charge a rate out of its access tariffs. As discussed in detail below, BellSouth's arguments are unconvincing and flawed as a matter of law. Accordingly, the Commission should deny BellSouth's request for reconsideration of its Order on this item in its entirety.

A. BellSouth is required to provide the transit function pursuant to federal law at TELRIC-compliant rates

BellSouth claims that it is not required to provide the transit function as a matter of law citing several FCC orders. BST Motion at 19-21. None of BellSouth's arguments or reliance on FCC and state commission decisions are persuasive because as recognized by Commission "[t]he

Commission has not been precluded by the FCC from requiring BellSouth to transit traffic under circumstances requested by the Joint Petitioners." Order at 15.

BellSouth begins its argument by reciting language of the *TRO*, which states "[t]o date, the [FCC's] rules have not required incumbent LECs to provide transiting." *Id.*, *citing TRO* ¶ 534, n. 1640. That the *TRO* makes this statement is true. Nevertheless, it provides no basis to change the Commission's Order on this issue. That the FCC has not elected to address the extent to which incumbent LECs are obligated to provide transiting service does not preempt this Commission from correctly concluding that such an obligation does indeed exist under Section 251. As noted in the *TRO*, the FCC plans to address transiting in its pending *Intercarrier Compensation* rulemaking proceeding. *TRO* ¶ 534, n. 1640. If transiting is determined by the FCC to be outside the scope of BellSouth's Section 251 and TELRIC pricing obligations, BellSouth can invoke the change of law provisions in the Agreement and it can petition the Commission to establish an appropriate rate (as opposed to the completely unsupported and unjustified rate it proposes in this docket).

BellSouth also relies on the *Virginia Arbitration Order*.[27] BellSouth recites language from that order which states, in pertinent part, that "the [FCC] has not had occasion to determine whether incumbent LECs have a duty to provide transit service" and "[the Wireline Competition Bureau] decline[s], 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." BST Motion at 20, *citing Virginia Arbitration Order* ¶ 117. Contrary to BellSouth's claim, the statements made in the

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[27] *In the Matter of Petition of WorldCom , Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission*, CC Docket No. 00-218, 17 FCC Rcd 27039 (rel. July 17, 2002) ("*Virginia Arbitration Order*").

Virginia Arbitration Order do not establish that transiting is not a 251 obligation. All these statements do is show that the FCC's Wireline Competition Bureau chose not to make a determination on delegated authority.

BellSouth's reliance on the FCC's grant of BellSouth's Kentucky 271 application and the statements made therein is similarly misplaced. BST Motion at 14. In this decision, which came two months after the Wireline Competition Bureau's *Virginia Arbitration Order,* the FCC states that "the [FCC] has not had occasion to determine whether incumbent LECs have a duty to provide transit service under section 251(c)(2), and [the FCC] do[es] not find clear [FCC] precedent or rules declaring such a duty." *Id.* In other words, the FCC states that it has not had occasion to make a determination, but then says nothing on the record to indicate that its decision on the 271 application will serve as that occasion. In fact, BellSouth's reliance on the grant of its 271 application runs contrary to the FCC's precedent regarding 271 applications that "new interpretive disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that [the FCC's] rules have not yet addressed and that do not involve *per se* violations of the Act or [the FCC's] rules, are not appropriately dealt with in the context of a section 271 proceeding."[28] In short, there is no FCC order that finds that BellSouth does not have a Section 251 obligation to provide transit service at TELRIC rates.

BellSouth also argues that it is under no "implied" obligation to provide a transiting function pursuant to Sections 251(a)(1) or 251(c)(2). BST Motion at 21-26; citing 47 U.S.C. §§

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[28] *In the Matter of Joint Application By BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, Interlata Service in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595 ¶ 227 (2002), *citing Verizon Pennsylvania Order*, 16 FCC Rcd at 17470, para. 92; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9075, para. 114; *SWBT Texas Order*, 15 FCC Rcd at 18366, para. 24; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6246, para. 19.

251(a)(5), 251(c)(2). The NCUC is among those state commissions that already have found otherwise. Both of these statutory provisions address obligations to interconnect telecommunications networks. Specifically, Section 251(a)(1) requires all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Moreover, Section 251(c)(2) imposes a further obligation on ILECs to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." These statutes set forth interconnection obligations on telecommunications carriers and do not exempt BellSouth from providing transit service as ordered by the Commission.

In addition to the statutes discussed above, BellSouth also provides a long and confusing explanation of a complaint proceeding before the FCC involving Total Telecommunications, Atlas Telephone and AT&T.[29] This case, which BellSouth acknowledges presents "another context", BST Motion at 22, has no impact on the Commission's decision. The FCC did not resolve any issues regarding an ILEC's obligations to provide transit service at TELRIC rates in *Total*. Indeed, the discussion relied upon by BellSouth is inapposite to the issue before the Commission as "transport" is not "transit" and "transport and termination" is not "interconnection".[30] As the FCC's Wireline Competition Bureau and the FCC itself recognized

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29 BST Motion at 23; *citing In the Matter of Total Telecommunications Services Inc. and Atlas Telephone Company Inc. v. AT&T Corporation*, Memorandum Opinion and Order, File No. E-97-003, 16 FCC Rcd. 5726 (2001) ("*Total Order*").

30 *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*, First Report and Order, CC Docket 96-98, CC Docket No. 95-185, 11 FCC Rcd 15499, 15590, ¶176 (1996).

in orders that post-date *Total*, the FCC has not decided the issue previously – not in *Total* and not in any other order. *See TRO* ¶ 534, n. 1640.

In further support of its unfounded contention that the Commission's decision is incorrect as a matter of law, BellSouth turns to the Georgia Commission's recent adoption of a non-TELRIC $0.0025/minute ***composite*** transiting rate ***on an interim basis***.[31] While the Joint Petitioners obviously disagree with the GPSC's decision to the extent it endorses a non-TELRIC rate, Joint Petitioners note that the rate adopted by the GPSC in Docket 16772-U, is not comparable to the rate at issue in this arbitration and in the Parties' companion arbitration before the GPSC (Docket No. 18409-U). The $0.0025 composite rate adopted on an interim basis by the GPSC was not the rate proposed by BellSouth during the negotiations that led to the filing of this arbitration issue. This new composite TIC rate was neither litigated nor discussed prior to arbitration,[32] and pursuant to the rationale of *Coserve*, it should not be arbitrated within this case.[33] Thus, BellSouth's reference to the GPSC's decision is of little relevance (and no binding effect) here,[34] for the issue to be decided here is whether BellSouth's additive TIC of $0.0015 can lawfully be imposed on Joint Petitioners in addition to the Commission-approved TELRIC

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31 The $0.0015 per minute of use rate proposed by BellSouth in this proceeding would apply in addition to the already agreed-upon TELRIC rates for the functionalities used in providing transiting service. It is not the same as, nor is it comparable to, the $0.0025 composite rate that was at issue in the Georgia Commission's transit case.

32 Ms. Blake admitted at the Georgia hearing that this rate had never been proffered for negotiation. *See* GA Tr. at 1104:10-16.

33 *See Coserve Limited Liability Corp. v. Southwestern Bell Tel.*, 350 F.3d 482, 487 (5th Cir. 2003) ("*Coserve*").

34 For this new Agreement, the Parties agree that, where applicable, the Agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC and appropriate state commission, but that in all other respects the Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles. *See* General Terms & Conditions, Section 22.1.

rates the parties already have voluntarily agreed will continue to apply to transit service.[35] Accordingly, BellSouth's "no obligation" argument is unpersuasive and should in no way persuade the Commission to change its decision on this issue.

B. BellSouth must charge only the TELRIC rates already agreed upon, until the Commission approves a TELRIC-compliant TIC

The Commission correctly ruled that "[t]he rates previously charges [by BellSouth] should be contained in the new interconnection agreements until and unless BellSouth can justify the TIC additive." Order at 15. As Joint Petitioners have explained in their post –hearing briefs, BellSouth provided no justification for its TIC.[36] Moreover, the Commission's order will not result in BellSouth providing the transit service for free. *See* BST Motion at 27. Instead the already agreed-upon and already Commission approved TELRIC rates will apply. The Commission acknowledges, and agrees, with the Joint Petitioners that the TIC is a purely additive charge. *Id.*, *see also*, JP Br. at 57-58. BellSouth argues that the Commission does not have jurisdiction to make its finding. BST Motion at 26. As its basis for this argument, BellSouth claims that it "only has an obligation to negotiate and arbitrate those issues listed in Section 251(b) and (c) of the 1996 Act." *Id.* at 27. BellSouth also claims that "the Commission only has authority under the 1996 Act to arbitrate non-Section 251 issues if the issue was a

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35 In support of its argument, BellSouth also refers to the FPSC finding on this same issue in the concurrent arbitration proceeding between the Parties in that state. The quote offered by BellSouth reveals that the *FPSC Order* turned on its finding that "transit service is not a § 251 UNE". BellSouth Motion at 21. No Party claimed it was – nor has the FCC ever declared that the Act's TELRIC pricing obligations are limited to UNEs. As indicated previously, the *FPSC Order* – a decision where it rejected Joint Petitioners' position on all but one issue will be appealed.

36 JP Br. at 58, 62.(BellSouth witness Ms. Blake could not provide any cost justification for the TIC rate and the Joint Petitioners explained that they did not need BellSouth to send any call records on their behalf to third parties).

condition required to implement the agreement." *Id.* To support these claims, BellSouth relies on *Coserve* and *MCI*.[37]

BellSouth's reliance on *Coserve* and *MCI* is misplaced. Neither the *Coserve* nor *MCI* holdings suggest that the Commission was without jurisdiction to decide the issue.[38] BellSouth voluntarily negotiated provisions regarding transit service and voluntarily agreed to continue to apply the same Commission-approved TELRIC rates it always has applied for providing this form of interconnection. The arbitration issue evolved over BellSouth's proposal of an additive TIC and the parties' failure to negotiate what that charge would be (or not be). Thus, even if transit service were not a 251 obligation (which it is), the Commission has jurisdiction under both the *Coserve* and *MCI* lines of reasoning to decide this issue. Per *Coserve*, the issue was voluntarily negotiated.[39] Per *MCI*, resolution of the issue was necessary to implement the Agreement (there was no dispute that BellSouth would continue to provide transit service at TELRIC rates – the dispute was over whether BellSouth would be entitled to impose a monopoly rent in the form of a TIC over and above the agreed upon TELRIC charges).[40] Thus, under the reasoning of both *Coserve* and *MCI*, this Commission does indeed have jurisdiction to decide

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37 *MCI Telecom. Corp. v. BellSouth Telecom. Inc.*, 298 F.3d 1269 (11th Cir. 2002) ("*MCI*").

38 Joint Petitioners note that neither *Coserve* nor *MCI* stands for the proposition that the Commission is without authority to arbitrate 251 issues.

39 *See Coserve* at 487 (where the court stated "[w]e hold, therefore, that where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). The jurisdiction of the PUC as arbitrator is not limited by the terms of §251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations. It may arbitrate only issues that were the subject of the voluntary negotiations.").

40 *MCI* at 1274.

this issue.[41] Accordingly, BellSouth's *Coserve* and *MCI* arguments provide no compelling reason why the Commission should change its initial recommendation.[42]

BellSouth provides no compelling reason why the Commission should change its initial ruling on this issue. For all the forgoing reasons as well as those expressed in Joint Petitioners' briefs,[43] the Commission should deny BellSouth's request that the Commission reconsider or clarify its initial decision on this issue.

RESPONSE TO BELLSOUTH'S MOTION FOR REHEARING ISSUE 86(B)[44]

***Issue Statement**: How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?*

In its Motion, BellSouth promises that it will seek expedited Commission resolution of any CSR-related dispute and will not engage in suspension or termination activity during the pendency of such dispute; however, BellSouth requests that the Commission clarify that filing a complaint is unnecessary and inappropriate in situations where a party fails to respond to

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41 Notably, per Section 252, the Commission does not have jurisdiction to impose the TIC proposed by BellSouth, as it fails to comport with the TELRIC pricing standard. Even in the absence of a Section 251 obligation (which again is not the case), the Commission could not in any context approve BellSouth's proposed TIC, as BellSouth provided the Commission with no rational basis whatsoever to do so. Not even BellSouth's professional witness could explain how the charge was developed or how it was reasonable or necessary. *See* Tr. v. 6 at 337:7-345:14.

42 BellSouth claims that the Commission, in Case Nos. 2002-00143 and 2003-0023 held that the transit provider "should 'receive compensation' for providing the service. BST Motion at 26. In reviewing the orders , however, it does not appear that the Commission set forth what rate and according its conclusion that the rate currently included in the Parties Agreements should apply until BellSouth can justify an additive TIC is justified.

43 Joint Petitioners incorporate herein by reference all arguments presented previously on this issue in their post-hearing briefs as grounds for denying BellSouth's Motion.

44 BellSouth's Motion requests rehearing on "Issue 86." Joint Petitioners note that Issue 86 was an issue with two subparts. The first subpart, 86(A), was resolved long ago, and only the second subpart, 86(B), remains an open issue in this arbitration proceeding.

allegations regarding the unauthorized access to CSR information.[45] BST Motion at 34. The Commission should reject BellSouth's request in its entirety, as BellSouth's support for its request is flawed and the promise made in its Motion is not reflected in BellSouth's proposed language. Accordingly, the Commission should affirm its initial decision and adopt Joint Petitioners' proposed language.

With regard to the promise BellSouth includes its Motion (*i.e.*, no suspension or termination during a dispute), the simple fact that BellSouth has steadfastly refused to memorialize that promise in its proposed contract language should compel the Commission to reject BellSouth's reconsideration request and affirm that Joint Petitioners' proposed language – which memorializes the assurances made by BellSouth's witness on the stand in Florida and elsewhere (yet has been rejected by BellSouth in Kentucky). *See* JP Reply Brief at 41-41. For unknown and increasingly suspect reasons, BellSouth intentionally leaves its proposal unacceptably vague and leaves Joint Petitioners and their customers dangerously exposed to potential coercion and manipulation. The day may come when BellSouth relies solely on the Agreement's language (which could be interpreted to permit suspension and termination, even if a dispute were pending before the Commission) and not on BellSouth's suspicious attempt to

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[45] BellSouth also references the Florida PSC's especially poorly reasoned and legally flawed decision on this issue and argues that this Commission should follow that decision. However, the Commission should not entertain BellSouth's request, as BellSouth makes the argument but provides no compelling reason why the Commission should reconsider its initial decision. Even though the Florida PSC ruled in BellSouth's favor, this fact, in and of itself, does not support BellSouth's suggestion that the Commission should follow the Florida decision here. The Commission is quite capable of deciding this issue, and determining what is in the best interest of Kentucky consumers and local competition, without having to turn to the Florida PSC. Additionally, Joint Petitioners note that the Florida PSC decision is not yet final, and Joint Petitioners intend to appeal the decision given, among other things, the arbitrary and capricious nature of so many of its findings.

persuade the Commission to adopt BellSouth's proposed language based on commitments it refuses to memorialize in contract language.

Moreover, Joint Petitioners are fully committed to complying with all regulations regarding access to customer service records. Nevertheless, Joint Petitioners' proposal for Issue 86 ensures that their service is protected while disputes over unproven BellSouth allegations of CSR abuse are resolved by a neutral decision maker such as the Commission. Joint Petitioners have agreed to provide a letter of authority ("LOA") upon request and have never given BellSouth cause for concern in the past. Yet, because disputes may still arise, Joint Petitioners wish to remain protected from service suspension or termination unless the dispute is resolved or it is proven they are in violation of the law. (Even then, Joint Petitioners would, with the dispute resolved, prefer an opportunity to cure or correct the violation that does not impact their customers so adversely.) If adopted, BellSouth's language does not afford Joint Petitioners that protection, but rather effectively entitles BellSouth to suspend or terminate ***all*** Joint Petitioner services at its whim. Joint Petitioners should not be requir4ed to do business with the uncertainly and unpredictability inherent in BellSouth's language. Moreover, nothing in BellSouth's language assures Joint Petitioners that production of an LOA will save them from suspension and termination.

The Commission also should deny BellSouth's request for clarification. The Commission's requirement of a complaint filing prior to BellSouth's being able to resort to the "ultimate remedy" FL Tr. Vol. 6 at 784:5-13 is eminently reasonable. Even in cases where a CLEC has for some unexplained reason not responded to BellSouth allegations of unauthorized access to CSR information, it is better to involve the Commission and to provide an opportunity to respond with an answer than it is to risk customer-impacting suspensions and terminations

solely on the basis of alleged, but still unproven, allegations of misconduct.[46] It is the Commission's prerogative to determine how best to protect competition and consumers in Kentucky. If BellSouth would like to petition the Commission for the establishment of new or modified complaint and adjudication procedures, it should petition the Commission separately to do so .

The foregoing considered, the Commission should reject BellSouth's request for clarification in its entirety and affirm the Commission's initial decision by adopting Joint Petitioners' proposed language.

RESPONSE TO BELLSOUTH'S MOTION FOR REHEARING
ISSUE 100

***Issue Statement**: Should CLEC be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?*

In its Motion, BellSouth states that the Commission should reconsider its 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. BST Motion at 35. Additionally, BellSouth states that the Commission should clarify that BellSouth's contractual commitment to advise Joint Petitioners of additional amounts that must be paid to avoid suspension or termination of service removes Joint Petitioners' concerns. *Id.* BellSouth offers nothing new in its Motion that should compel the Commission to stray from its

[46] If no answer is provided the Commission could then consider entering a default judgment and may then wish to consider what measures if any are needed to protect consumers prior to allowing BellSouth to proceed with suspension or termination.

initial decision.[47] Accordingly, the Commission should affirm its decision and adopt Joint Petitioners' language.

In not only its Motion, but also its prior pleadings, BellSouth speaks of its commitment to advise Joint Petitioners of the amounts due. BST Motion at 36. This commitment, as noted in the Motion, amounts to BellSouth providing Joint Petitioners with aging reports along with the suspension notice. These aging reports, however, do not resolve the underlying issues here in any respect, as Joint Petitioners have noted time and time again. See JP Brief at 48; JP Reply Brief at 47-48. The record shows that BellSouth sends aging reports only at the affirmative request of the CLEC and then stamps on the reports: "**Not an Official BellSouth Document.**"[48] This surely calls into question Joint Petitioners' ability to rely upon the reports. This also clearly indicates that BellSouth does not intend to be bound by them. In other words, BellSouth's commitment removes none of Joint Petitioners concerns, a fact quite contrary to BellSouth's clarification request.

Finally, the Commission should reject BellSouth's clarification request. BellSouth bills, tracks payments and posts disputes by account. Requiring BellSouth to similarly provide past due notices by account is imposing no great burden. Indeed, it is necessary to ensure that proper notice and adequate time is provided with respect to each account. That BellSouth seems more interested in securing suspension or termination than it is in ensuring a reasonable process for

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47 As BellSouth does throughout its Motion, it again notes that the Florida PSC ruled in BellSouth's favor on this issue, and BellSouth suggests that the Commission turn to the Florida decision for guidance in reconsidering this issue here. Joint Petitioners again note that the Florida PSC's decision is neither binding nor well reasoned. This Commission is quite capable of making its own determinations as to what is best for Kentucky consumers and local competition in Kentucky. Also, when the FPSC decision is finalized, Joint Petitioners intend to appeal many of the decisions made therein to federal court.

48 *See* JP Brief at 81, *citing* KY Tr. at 210:22-25; 212:11-13 (noting that BellSouth witness Blake testified that an aging report will accompany all termination notices but that the report still will not state the exact amount due, and that the Joint Petitioners must call to request it); *see also* JP Reply Brief at 47.

identifying and rectifying past due amounts is profoundly disappointing, especially in light of the Joint Petitioners' long and established history of paying millions each month (regionally) for the bottle neck facilities and services the 1996 Act says they have the right to purchase. The Commission should affirmatively reject BellSouth's attempt to forgo proper notice on each account and to collapse the notice periods on subsequent accounts.

For all the forgoing reasons as well as those expressed in Joint Petitioners' briefs,[49] the Commission should deny BellSouth's request that the Commission reconsider or clarify its initial decision on this issue.

RESPONSE TO BELLSOUTH'S MOTION FOR REHEARING
ISSUE 101

***Issue Statement**: How many months of billing should be used to determine the maximum amount of the deposit?*

In its Motion, BellSouth raises a single off-point argument that provide no basis for reconsidering the Commission's initial decision on this issue. Moreover, its request for clarification is nothing more than a less than candid attempt to have the Commission render meaningless its adoption of the maximum deposit provision advocated by Joint Petitioners on this issue. Accordingly, the Commission should deny in its entirety BellSouth's request that the Commission reconsider its initial decision on this issue.

In an attempt to defend its discriminatory refusal to agree to the same maximum deposit provision it agreed to with ITC^DeltaCom, BellSouth claims that the Joint Petitioners are trying

[49] Joint Petitioners incorporate herein by reference all arguments presented previously on this issue in their post-hearing briefs as grounds for denying BellSouth's Motion.

to "pick and choose" deposit language from the ITC^DeltaCom agreement.[50] BST Motion at 37. This argument is a red herring. Contrary to BellSouth's claim, Joint Petitioners are not at all trying to "pick and choose" in contravention of the FCC's new rule for implementing Section 252(i). *See* 47 C.F.R. § 51.809.

Indeed, Joint Petitioners invoke neither the old "pick-and-choose" rule nor the new "all-or-nothing" rule in this arbitration. Instead, Joint Petitioners have weathered the time and expense of well over two years of negotiations, and Joint Petitioners have endured the additional cost and expense of nearly two years of protracted arbitration proceedings. And, although a CLEC's ability to "pick and choose" is no longer permitted, there is nothing in the FCC's new rules that says a CLEC cannot "pick and arbitrate" a provision from another interconnection agreement that BellSouth unreasonably and discriminatorily refuses to agree to again. Indeed, the new rule suggests that this is precisely what must be done.

This Commission's decision to adopt as reasonable the language Joint Petitioners proposed and noted had already been agreed to by BellSouth with DeltaCom is neither factually

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[50] Although BellSouth's "pick and chose" argument is at the core of its Motion on this issue, BellSouth lofts several other incidental arguments and statements as support for its request for reconsideration. BellSouth, as it does with other issues throughout the Motion, references decisions rendered in BellSouth's favor on this issue in the arbitration proceedings before the FPSC and the NCUC. BST Motion at 38. Again, Joint Petitioners note that the Commission is quite capable of making its own decision here and need not turn to the FPSC or NCUC on this issue for answers as to what is best for the consumers and competition in Kentucky. Also, Joint Petitioners have filed objections to the *NCUC Order* on this issue on September 1. 2005 (as well as filed subsequent comments and reply comments to the exceptions). At this time, the NCUC has not rendered a final order in light of the post-recommendation pleadings. As for the Florida decision, Joint Petitioners intend to appeal many of the decisions made therein to federal court when the decision is finalized. Additionally, BellSouth states that its language is consistent with industry standards. *Id.* at 39. Joint Petitioners find irony in BellSouth's "industry standard" statement given that in the record of this proceeding there are three distinct (and wholly dissimilar) examples of deposit provisions: (1) the ITC^DeltaCom Agreement deposit provision setting forth a 1 month deposit for services billed in advance and 2 month's billing for services billed in arrears; (2) the language proposed by BellSouth here; and (3) the ALLTEL agreement (*see* Hearing Ex. BST 1), which sets forth a three month deposit. Accordingly, BellSouth's claim that its language is consistent with "industry standard" is non-compelling in light of the record.

nor legally flawed. It is entirely just and reasonable and is in any event necessary to prevent BellSouth from engaging in further unlawful discrimination.

As indicated above, BellSouth's request for clarification amounts to a less than candid attempt to get the Commission to unwittingly undo its decision in favor of Joint Petitioners on this issue. In its Order, the Commission found that "BellSouth has a right to request an additional deposit from a Joint Petitioner who fails to meet its payment obligations." Order at 19. Such failure is commonly called "default". Joint Petitioners did not seek clarification on this determination because they read the Commission order to mean what it says and that such failure would be given its standard meaning (*i.e.*, default).

Conversely, BellSouth attempts to equate "fails to meet its payment obligations" with the failure to establish a "good payment history", which is a term that the parties have defined and a factor included among the criteria for establishing a deposit.[51] The inability to meet the definition of good payment history is not the same thing as failing to meet its payment obligations.

From its erroneous replacement of the Commission's "fails to meet its payment obligations" with "fails to establish a good payment history", BellSouth then notes that because "good payment history" is one of multiple criteria that if not met could trigger a right for BellSouth to request a deposit, the Commission should find that failure to meet **any** of the deposit criteria should trigger the right for BellSouth to request additional deposit in excess of the cap found by the Commission to be reasonable. BellSouth fails to disclose that, BellSouth may only secure a deposit from the Joint Petitions if they do not meet all of the criteria. *See*

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[51] *See* Section 1.8.5.1 of Attachment 7 (Billing). ("A ***good payment history*** shall mean that less than 10% of the non-disputed receivable balance is received over thirty (30) calendar days past the Due Date.").

Section 1.8.5 of Attachment 7 (Billing). Otherwise BellSouth has no right whatsoever to a deposit. And so, under the guise of a clarification request, BellSouth has asked this Commission to nullify its well reasoned decision to adopt a deposit maximum of one month's billing for services billed in advance and two months' billings for services billed in arrears, and instead find that BellSouth is entitled to a deposit of up to two-months billing any time it is entitled to request a deposit. Under BellSouth's proposed clarification, the cap adopted by the Commission in the Order would apply only when BellSouth has **no right** to request a deposit. Obviously, there is no basis for the clarification BellSouth seeks. Moreover, for all the reasons stated herein and in Joint Petitioners' briefs, there is no basis for the Commission to reconsider its decision on this issue.

For all the forgoing reasons as well as those expressed in Joint Petitioners' briefs,[52] the Commission should deny BellSouth's request that the Commission reconsider or clarify its initial decision on this issue.

RESPONSE TO BELLSOUTH'S MOTION FOR REHEARING
ISSUE 103

***Issue Statement**: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?*

In its Motion, BellSouth makes several trivial arguments that provide no basis for the Commission reconsidering its initial decision on this issue. Accordingly, the Commission should deny BellSouth's request for reconsideration here.

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[52] Joint Petitioners incorporate herein by reference all arguments presented previously on this issue in their post-hearing briefs as grounds for denying BellSouth's motion.

To begin, BellSouth argues, quite confusingly, that the Commission erred in its decision when stating that "[t]he Commission finds that BellSouth should not be permitted to terminate CLEC services when the CLEC has met all of its financial obligations to BellSouth with the exception of the demand for deposit" and that "[i]t is inappropriate for BellSouth to terminate service when a Joint Petitioner has paid all bills except the request for deposit." *See* BST Motion at 39, *citing* Order at 20. To support this argument, BellSouth claims that termination for non-payment of services rendered is not part of Issue 103 and is not in dispute. *Id.* Additionally, BellSouth claims that "neither party's proposed language for Issue 103 makes any reference to non-payment for services rendered." *Id.* These statements provide no sound basis for the Commission to reconsider its initial decision. It is fully within the Commission's prerogative to determine that termination is not an appropriate way to address non-payment of a requested deposit amount. Indeed, the parties have for years been able to negotiate appropriate deposit amounts without BellSouth having an analogous suspension and termination provision applicable to deposit requests, *see* Russell Depo. at 220-222, 226-228; Falvey Depo. at 314, and without the need to resort to the standard dispute resolution process. These negotiations typically take months – attaching a 30-day pull-the-plug option, as BellSouth proposes, will do nothing but generate unnecessary disputes which will wastefully consume the resources of the parties and this Commission.

There is no compelling reason for the Commission to change what has worked reasonably well in the past and to replace it with something that threatens to impact the service of Kentucky consumers far removed from any debate over whether a request for a particular deposit is justified given the varying criteria that must be considered.

BellSouth also argues that the Commission's ruling is "inconsistent with the Commission's own rules and Bellsouth's end user tariffs – both of which permit termination for non-payment of a deposit." BST Motion at 39-40, *citing* BellSouth Tariff § A2.2.10; 807 KAR 5:006, Section 7. This argument, however, is flawed and should not compel the Commission to reconsider its initial decision. As an initial matter, Joint Petitioners are not retail end users. The rules relied upon by BellSouth are constructed with regard to the termination of service to end users who fail to pay deposits.[53] In that respect, termination of service will only affect a single Kentucky retail customer. Contrarily, Joint Petitioners are not end users here – they are wholesale purchasers – and termination of services to Joint Petitioners could result in scores of Kentucky consumers losing service unexpectedly. And as for the decision being inconsistent with BellSouth's end user tariffs, BellSouth provides no reason – legal or otherwise – as to why the Commission's decision must be consistent with BellSouth's tariff. And that is because there is no such reason.

For all the forgoing reasons as well as those expressed in Joint Petitioners' briefs,[54] the Commission should deny BellSouth's request that the Commission reconsider or clarify its initial decision affirm its decision on this issue and adopt Joint Petitioners' proposed language.

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53 Notwithstanding, 807 KAR 5:006, Section 2 provides that: "[t]he adoption of administrative regulations by the [Commission] shall not preclude the [Commission] from altering or amending the same in whole or in part, or from requiring any other or additional service, equipment, facility, or standards, either upon request, or upon its own motion, or upon the application of the utility." Therefore, even if Section 7 were to apply to wholesale purchasers, BellSouth's argument fails nonetheless, as the Commission is not precluded from making the decision it made here.

54 Joint Petitioners incorporate herein by reference all arguments presented previously on this issue in their post-hearing briefs as grounds for denying BellSouth's Motion.

CONCLUSION

For all the foregoing reasons, Joint Petitioners respectfully request that the Commission deny BellSouth's Motion, in its entirety, with regard to the reconsideration of the Commission's initial decision on the issues described therein. Additionally, Joint Petitioners respectfully request that the Commission affirm its initial decision on those issues and adopt within the Agreement Joint Petitioners' language on said issues.

Respectfully submitted, this 1st day of November, 2005.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of November, 2005, a true and correct copy of the foregoing has been forwarded via first class U.S. Mail, to the following:

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