Dinsmore&Shohl LLP
ATTORNEYS

John E. Selent
502-540-2315
john.selent@dinslaw.com

RECEIVED
JUL 15 2005
PUBLIC SERVICE COMMISSION

July 15, 2005

Via Hand Delivery

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

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, before the Public Service Commission of the Commonwealth of Kentucky, Case No. 2004-00044***

Dear Ms. O'Donnell:

Enclosed herewith is the original and eleven copies of the Joint Petitioners Post-Hearing Brief for filing in the above-styled matter.

If you have any questions with respect to this matter, please call me.

Very truly yours,

DINSMORE & SHOHL LLP

John E. Selent

1400 PNC Plaza, 500 West Jefferson Street Louisville, KY 40202
502.540.2300 502.585.2207 fax www.dinslaw.com

JES/bmt
Enclosures

cc: Amy E. Dougherty, Esq.
All Parties of Record

RECEIVED
JUL 15 2005
PUBLIC SERVICE COMMISSION

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. 2004-0044**

JOINT PETITIONERS' POST-HEARING BRIEF

John E. Selent
Dinsmore & Schohl LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
502-540-2300
502-585-2207 fax

John J. Heitmann
Stephanie A. Joyce
Garret R. Hargrave
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036

July 15, 2005

TABLE OF CONTENTS

INTRODUCTION 1

STANDARD OF REVIEW AND STATEMENT OF JURISDICTION 4

EVIDENCE RELIED UPON 4

DISCUSSION 6

ITEM NO. 4 6

ITEM NO. 5 15

ITEM NO. 6 18

ITEM NO. 7 21

ITEM NO. 9 23

ITEM NO. 12 27

ITEM NO. 26 33

ITEM NO. 36 38

ITEM NO. 37 44

ITEM NO. 38 47

ITEM NO. 51B 49

ITEM NO. 51C 54

ITEM NO. 65 57

ITEM NO. 86 63

ITEM NO. 88 68

ITEM NO. 97 73

ITEM NO. 100 77

ITEM NO. 101 82

ITEM NO. 102 85

ITEM NO. 103 88

INTRODUCTION

Joint Petitioners' aim in this arbitration, as well as in negotiations, is to obtain an Interconnection Agreement ("Agreement") that comports with prevailing law, preserves the rights already guaranteed to them by the Federal Communications Commission ("FCC") and the Kentucky Public Service Commission ("Commission"), and protects Petitioners from BellSouth's ability to injure them and their customers through negligent or coercive conduct. Throughout this case, Joint Petitioners have stressed a few themes that link its positions on several issues and illustrate the fallacy of BellSouth's intransigence during the negotiation of this Agreement:[1]

The Agreement Must Preserve Joint Petitioners' Rights Under Applicable Federal and State Law [Items 9, 12, 26, 36, 37, 38, 51, 65 and 88]

Nine of the issues remaining in this arbitration represent Joint Petitioners' request to avail themselves of, or preserve, legal rights and network facilities already provided to them by applicable law. **Item 9** seeks to preserve Petitioners' right to seek dispute resolution before a court of competent jurisdiction. **Item 12** seeks to preserve Petitioners' right to rely on relevant applicable law unless expressly agreed otherwise. **Item 26** seeks to preserve Petitioners' right to commingle and to obtain commingled circuits in accordance with FCC Rules. **Item 36** seeks to preserve Petitioners' right to obtain line conditioning in accordance with FCC Rules. **Item 37** seeks to preserve Petitioners' right to request removal of load coils from loops at Commission-approved TELRIC-compliant rates. **Item 38** seeks to preserve Petitioners' right to request removal of bridged taps from loops at Commission-approved TELRIC-compliant rates. **Items 51B and 51C** seek to preserve Petitioners' right to insist that the FCC's "for cause" auditing standard be

[1] On May 17, 2005, the Commission granted a joint motion to move Items 23, 108, 111, 113 and 114 to Case No. 2004-00427, *Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law.* In addition, BellSouth and Joint Petitioners settled Items 2 and 104 on June 28, 2005, and thus those items do not appear in this brief.

given proper meaning and to ensure that audits will at all times be performed by a truly independent auditor. **Item 65** seeks to preserve Petitioners' right to continued access to BellSouth's transiting service at Commission-approved TELRIC-compliant rates and without imposition of a Transit/Tandem Intermediary Charge ("TIC") that is not Commission-approved and TELRIC-compliant, and does not recover any identified or legitimate BellSouth costs. Finally, **Item 88** ensures the right to obtain Service Date Advancements (a/k/a "expedites") on UNEs at Commission-approved TELRIC-compliant rates.

Joint Petitioners Should Be Protected from BellSouth's Coercive Leveraging of its Near Monopoly Status [Items 86, 100, 101, 102, and 103]

Five items in this arbitration involve the ability of BellSouth, by virtue of its control over the local network and dominant market share, to shut down or impede Petitioners' service for a number of purported "causes." **Item 86** – one of three "pull the plug" items – seeks to prevent BellSouth from suspending or terminating Petitioners' service based on mere allegations of improper CSR access. **Item 100** seeks to prevent BellSouth from suspending or terminating Petitioners' service based on their failure to calculate precisely the amounts outstanding on all of their accounts or failure to accurately predict timing of dispute posting and payment receipt. **Item 101** seeks to set a one month maximum deposit amount for services billed and advance (two months for services billed in arrears) in light of the Petitioners' well established business relationships with BellSouth and BellSouth's recent agreement to accept the same with another CLEC. **Item 102** seeks a deposit "offset" based on all past due amounts owed by BellSouth and provides for the restoration of such offset based on BellSouth's meeting the same "good payment history" standard that applies to Petitioners. Finally, **Item 103** seeks to prevent BellSouth from suspending or terminating Petitioners' service if they do not remit a requested deposit within 30 days.

This Agreement Should Reflect and Incorporate the Practical Business Experience of the Parties Since the 1996 Act [Items 4, 5, 6, 7, and 97]

The remaining five items in this case stem from the fact that the parties have the benefit of nine years' experience under the 1996 Act – operationally and financially – from which to draw. Petitioners therefore have crafted language that reflects this experience, especially with regard to issues of general contracting, to make the Agreement more commercially reasonable and less one-sided in BellSouth's favor. Though this Agreement may be mandated in part by Sections 251 and 252 of the 1996 Act, BellSouth has no basis to eschew general fairness in favor of onerous, heavy-handing, and one-sided terms that are not commercially reasonable. Thus, **Item 4** seeks to ensure that the parties are entitled to a modest measure of relief for damages caused by negligence. **Item 5** seeks to ensure that Petitioners need not mirror BellSouth's limitation-of-liability language in their tariffs and custom contracts (as BellSouth has no obligation to and does not do so in its own contracts) or incur indemnity obligations. **Item 6** clarifies that damages that are direct and reasonably foreseeable should not be considered indirect, consequential or incidental. **Item 7** seeks to ensure that the parties indemnify each other for damages caused by their own negligence or violation of the law. **Item 97** seeks a payment due date of 30 days from receipt of a bill, which provides a reasonable and non-variable interval in which to review, dispute and pay bills in a manner necessary to establish a good payment history.

Petitioners will address all items in sequential order for the sake of convenience, but ask the Commission, Staff, and the Panel to bear these themes in mind as a means of understanding Joint Petitioners' need to resort to arbitration in the forging of this Agreement.

STANDARD OF REVIEW AND STATEMENT OF JURISDICTION

The 1996 Act empowers the Commission to arbitrate interconnection agreements on the petition of any party. 47 U.S.C. § 252(b)(1). The Commission has jurisdiction over every issue raised in the petition. *Id.* § 252(b)(4)(A). These issues may not always relate directly to a section 251 obligation, but rather may include any term or condition that the parties had attempted to negotiate. *Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 487 (5th Cir. 2003). In addition, the Commission has jurisdiction over disputes regarding terms and conditions necessary for implementing or performing the agreement, including liability-related terms and enforcement mechanisms. 47 U.S.C. § 252(b)(4)(C) (state commission may "impos[e] appropriate conditions as required to implement subsection [251] (c)"); *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) ("Clearly, enforcement and compensation provisions, including the liquidated damages provision desired by MCI, fall within the realm of 'conditions ... required to implement' the agreement.").

In resolving the disputed items set for arbitration, the Commission must ensure that the outcome meets "the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). The Commission also has jurisdiction to review any rates proposed within the arbitration. *Id.* § 252(c)(2).

EVIDENCE RELIED UPON

According to the Joint Stipulation filed in this proceeding and approved by Chairman Goss at hearing, the Parties have each designated the record from one previous hearing before another State Commission in this arbitration to be entered as evidence in this proceeding. Joint Petitioners selected and filed the record from the hearing before the Georgia Public Service Commission, and BellSouth selected and filed the record from the Florida Public Service

Commission. In addition, the one-day hearing before this Commission resulted in a transcript and a limited number of exhibits. This brief will incorporate all three of these records.

For ease of reference, Joint Petitioners provide the following key to the citations to the various sets of evidence relied upon in this brief:

Transcript of Proceedings, Kentucky Public Service Commission (May 17, 2005)	KY Tr.
Joint Petitioner Exhibits, Kentucky Public Service Commission (May 17, 2005)	KY JP Exhibit
BellSouth Exhibits Kentucky Public Service Commission (May 17, 2005)	KY BST Exhibit
Transcript of Proceedings, Georgia Public Service Commission (Feb 8-10, 2005)	GA Tr.
Joint Petitioner Exhibits, Georgia Public Service Commission (Feb 8-10, 2005)	GA JP Exhibit
BellSouth Exhibits, Georgia Public Service Commission (Feb 8-10, 2005)	GA BST Exhibit
Transcript of Proceedings, Florida Public Service Commission (Apr. 26-28, 2005)	FL Tr.
Joint Petitioner Exhibits Florida Public Service Commission (Apr. 26-28, 2005)	FL JP Exhibit
BellSouth Exhibits Florida Public Service Commission (Apr. 26-28, 2005)	FL BST Exhibit

In addition, this brief will include references to the transcripts of depositions taken by the parties. Joint Petitioners were deposed December 14-17, 2005, and BellSouth's witnesses were

deposed June 28-29, 2005, and December 8-10, 2005.

Please note that all cites to pre-filed written testimony by any party refer only to testimony filed with this Commission.

DISCUSSION

Item No. 4, Issue No. G-4 *[Section 10.4.1]: What should be the limitation on each Party's liability in circumstances other than gross negligence or willful misconduct?*

POSITION STATEMENT: Liability for negligence should be limited to an amount equal to 7.5% of the aggregate fees, charges or other amounts billed for any and all services provided or to be provided pursuant to the Agreement as of the day the claim arose.

A Party Is Entitled to Some Relief for Harm Caused by the Other Party's Negligence.

The dispute in this item is whether the Agreement should provide any remedy for harm caused by the negligence of either party. Petitioners have proposed language that would provide a maximum of 7.5% recovery to an injured party, calculated from the total revenue received and/or billed as of the date the negligence took place ("the day the claim arose"). Exhibit A at 1.[2] This provision is commercially reasonable in this context, and reflects settled principles of contracts law.

A simple example illustrates how Joint Petitioners' language would operate. Surmise that on Day 61 of the Agreement, a DS3 transport trunk was negligently disconnected by BellSouth, leaving 50 Petitioner customers without service for 24 hours. As of Day 61, that Petitioner had paid $1 million to BellSouth, with another invoice for $500,000 pending. BellSouth would be liable for a maximum of 7.5% of $1.5 million, or $112,500, for that outage. The negligent party would thus pay the damages proved before a competent tribunal up to that maximum amount.

---

[2] As the Commission is aware, negotiations have continued since the hearing, which was held May 17, 2005. Joint Petitioners therefore attach the most recent version of Exhibit A that incorporates the very latest proposals made by both BellSouth and Petitioners.

Today, Petitioners are not even granted this minimal level of relief in their interconnection agreements when they suffer harm through BellSouth's negligence. Any harm that BellSouth negligently causes becomes Joint Petitioners' burden, including any liability they incur and any revenue they lose as a result of service degradation or disruption. This inequity does not exist in other commercial contexts — including Joint Petitioners' contracts with customers and vendors — and moreover does not reflect the settled law of contracts. And the fact that BellSouth has always been able to impose such harsh liability terms does not make them any less improper. To resolve this problem, Joint Petitioners have proposed a limited right to damages for negligence, capped at 7.5%, that reflects general principles of contracting as well as an incremental move toward commercially reasonable liability terms seen in other contracts between service providers.

Section 373 of the Second Restatement on Remedies states that an "injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance." Rest. II Remedies § 373(1). Thus, money paid by a party to a vendor for services rendered is subject to restitution if the party were injured by the vendor's conduct or performance. BellSouth's "bill credits" proposal comports with the precept that one is not entitled to payment for services not properly rendered. However, this principle does not stand for the notion that liability for additional harms caused by the negligent provision of services should be eliminated (which is the essence of BellSouth's proposal).

BellSouth asserts that its proposed language, which provides no relief for harm caused by negligence, is "industry standard." Blake Direct. Test. at 8:12. This assertion is incorrect. First, Ms. Blake has not denied in other forums – for example, Georgia – that BellSouth itself gives more favorable liability terms in custom contracts. She in fact acknowledged that such favorable terms may be offered where "other provisions in there ... kind of justify accepting that additional risk."

GA Tr. at 1000:11-14. *See also id.* at 1001:4-7 (Ms. Blake unable to state whether "every contract BellSouth has with every customer ... is exactly like this [BellSouth proposal]."). Secondly, Joint Petitioners presently have contracts with telecommunications service providers that provide damages for harm caused by simple negligence. These contracts also contain deviations from the standard claimed by BellSouth. Even Xspedius's template contract, for example, provides a limitation of liability for "mistakes, omissions, interruptions, delays, errors or defects in the service" that is capped at "$100,000 or five (5) months' worth of paid monthly recurring charges." **Attachment 1** (XSP 000004-5) [filed under seal]. Thus, just as BellSouth is no longer "the [only] phone company", the BellSouth standard (which evidently remain standard for BellSouth only in certain contexts) is no longer the industry standard.[3]

Indeed, the NuVox-AllTel interconnection agreement diverges from BellSouth's purported "industry standard." **Attachment 2** (excerpt from agreement). This agreement provides liability up to $250,000 for harm caused by negligence; it does not limit recovery to bill credits. *See* KY Tr. at 76:5-8 (Russell) (describing $250,000 cap). Thus, BellSouth's proposed liability language is not only contrary to the standard in the telecommunications industry, it is not the standard even in the more specialized realm of interconnection agreements.

To the extent that Joint Petitioners' tariffs provide only bill credits for harm caused by their own negligence, those tariffs are often not incorporated into actual user agreements. *See generally* GA Tr. at 383:13 – 384:10 (Russell). As Mr. Russell explained in Georgia, "it is a customary practice with the company to make modifications" to standard liability terms "where a potential customer may be receiving alternative proposals from different carriers." GA Tr. at 384:3-6. And

[3] BellSouth has never denied that it enters into custom contracts that deviate from its claimed standard. GA Tr. at 999:11-12 (Blake) ("I'm not familiar with any of the details in a specific contract or arrangement."); FL Tr. at 947:18-22 (Blake) ("I don't know the details of every contract service arrangement.").

in Florida Mr. Russell explained that NuVox will "provide additional amounts in the event of service outages" in order to make customers whole. FL Tr. at 184:18. *See also* GA Tr. at 386:23-25 ("It is our policy and procedure at the company to make changes to customer service agreements."). Bill credits are not often the only recovery that NuVox customers receive. Thus, it is not the case, as BellSouth seeks to imply, that Petitioners are requesting more beneficial liability language than what they themselves provide to their own customers (even if the comparison of wholesale to retail service offerings is appropriate, which it is not). And in the many instances in which Petitioners have given customers more than mere bill credits to cover their injury, BellSouth's elimination-of-liability clause would not, as Ms. Blake admitted in Georgia, make Petitioners whole when BellSouth's negligence caused the problem. GA Tr. at 998:12-16.

It is moreover not appropriate to compare the terms of Petitioners' contracts with the terms that they seek to incorporate into this Agreement. Joint Petitioners are competitive providers of retail telecommunications services – they are not retail customers. *See* GA Tr. at 383:10-11 (Russell) ("What we're arbitrating today is a carrier agreement."). BellSouth, by contrast, is the incumbent that acts as a wholesale supplier to Joint Petitioners, and yet competes with them in the retail market. Thus, the terms imposed on Joint Petitioners have a pass-through effect on their customers, which impacts both their customers and the Kentucky telecommunications market generally. The same is not true of the Joint Petitioners tariffs or the actual contracts Petitioners sign with their customers.[4]

---

[4] Very few Joint Petitioner customers purchase services out of tariffs. Mr. Russell of NuVox, for example, noted at hearing in Georgia that "99 percent of our customers purchase out of customer service agreements but do not purchase services out of our tariff." GA Tr. at 381:19-22.

The Proposed 7.5% Liability Cap for Negligence Is Appropriate in this Context.

Service contracts generally include liability terms that provide relief for harm caused through negligence. Mr. Russell explained at hearing the fact that Petitioners' proposal is in keeping with "contracts with other vendors and service providers." Tr. at 376:10-11. Petitioners' prefiled testimony discussed these contracts, which often include liability for negligence up to "15% to 30% of the total revenues actually collected or otherwise provided for over the entire term of the relevant contract." Joint Petitioner Direct Testimony at 24:15-16 (Nov. 19, 2004) ("JP Direct Test.").

What Joint Petitioners propose is a hybrid, or compromise, between the liability provisions of these contracts and the present-day terms under which BellSouth has for too long enjoyed a complete elimination of liability for negligence. *See* JP Direct Test. at 51:1-5. This 7.5% cap is a reasonable and proportional balance between the risk of incurring harm versus the revenues that will be generated under this Agreement. *See id.* at 24:13-16.

BellSouth continues to misapprehend (or misrepresent) how this 7.5% cap will operate. It is not the case, as counsel attempted to show at hearing, that BellSouth is automatically liable for 7.5% of all billed revenue. *See* KY Tr. at 63:10-14 (Meza). Thus, the fact that NuVox may pay millions of dollars to BellSouth under the Agreement, based on current invoices, *see id.* at 63:7-9, does not mean that BellSouth's liability in the last year of this Agreement would certainly be millions of dollars. KY Tr. at 63:15-16. Rather, BellSouth only would be liable for the amount of damages that a Petitioner actually incurred due to BellSouth's negligence – up to a 7.5% cap. "It's a cap. It's not a guaranteed maximum." KY Tr. at 25:15-16. Or as Mr. Russell explained to the Florida Commission, "it is not as if over the course of this contract we are going to get an $8.1 million rebate from BellSouth." FL Tr. at 274:9-11. Stated differently, as Mr. Russell explained

in Georgia, if a Petitioner paid out $60 to a customer injured through BellSouth's negligence, "then BellSouth's liability, if you will, to NuVox would be $60. It would not be 7.5 percent of $3 million." GA Tr. at 404:10-11.

In addition, BellSouth (or a Petitioner) pays out only if it is negligent. As Ms. Johnson of KMC succinctly put it to the Georgia Commission, "if each party acts responsibly, this provision never kicks in." GA Tr. at 577:12-13. *See also* GA Tr. at 389:18-19 (Russell) ("It's only requiring that BellSouth be liable for its own negligence."). Moreover, even Ms. Blake agreed in Georgia that BellSouth is "not going to have any risk" unless it is negligent. GA Tr. at 1004:24 – 1005:1. BellSouth Counsel's attempt to startle the panel with liability figures in the millions is therefore concededly hyperbolic and, in any event cannot be separated from the fact that no BellSouth liability is triggered without BellSouth negligence.

BellSouth's proposal is not a limitation-of-liability clause, but rather an "elimination of liability" clause. JP Direct Test. at 23:13. ***It places the entire risk of BellSouth's own negligence on Petitioners.*** This result is inappropriate in what should be "an arm's-length contract between commercially sophisticated parties." *Id.* at 22:19. Joint Petitioners thus seek "some measure, albeit a modest one relative to universally-regarded commercial practices, of accountability and contractual responsibility." *Id.* at 23:19-21. BellSouth should not be shielded from all liability for its own negligence simply because this is an Interconnection Agreement, or because it has always been shielded in this way.

BellSouth has also objected to Petitioners' 7.5% liability cap on the ground that the revenues it will obtain under this Agreement are TELRIC-based and do not cover that exposure. Blake Direct Test. at 10:10-12. BellSouth's witness had no basis upon which she could support that objection (she does not know what goes into TELRIC rates) and conceded at hearing in

Georgia, however, that "I know there's shared and common costs that would account for" the costs of insurance. GA Tr. at 1002:15-16 (Blake). Mr. Russell's testimony to this Commission made this same acknowledgement. Joint Petitioner Rebuttal Testimony at 18:4-5 (Dec. 17, 2004) ("BellSouth no doubt already carries insurance which is factored into its TELRIC pricing."). In any event, the TELRIC pricing rules do not allow for BellSouth to recover the costs of damages it imposes on Petitioners through its own negligent acts. TELRIC allows for recovery of the forward looking costs of providing an element; it does not allow for recovery of the costs of failing to provide that element properly due to negligence. *See* 47 C.F.R. § 51.505 (describing appropriate elements of network costs).

BellSouth's latest retort to Petitioners' proposal is that interconnection agreements are not "true commercial contracts." GA Tr. at 390:20-21 (Meza). BellSouth apparently believes that this declaration absolves it of any obligation to provide redress for its own negligence. To the contrary, the fact that this agreement in an interconnection agreement – impacting the telecommunications services that Joint Petitioners are providing to Kentucky consumers – makes it all the more necessary that BellSouth provide such redress. It is for this very reason that BellSouth is, as counsel observed in Georgia, subject to regulation. *See*, *e.g.*, GA Tr. at 392:18-20 (noting that SEEMS penalties apply to BellSouth).[5]

---

[5] SEEMS penalties do not resolve, or even address, Petitioners' need to receive some modicum of remedy when they are injured by BellSouth's negligence. SEEMS penalties often are payable to the resident State Commission, and are triggered only when BellSouth's average or aggregate performance in a specific regard meets some predetermined threshold. SEEMS payments are not triggered by individual negligent acts and the predetermined penalty figure is in no way tied to the damages incurred as a result of negligent performance. It is highly probable that a negligent act by BellSouth would not trigger SEEMS, though it may cause costly damage to a Petitioner. Seeking redress for those specific and proven damages caused by BellSouth's negligent acts is fundamentally different than imposition of penalties under the SEEMs plan (which may be viewed by BellSouth simply as a cost of doing business). Moreover, SEEMS is part of a voluntary package of regulatory measures that allowed BellSouth into the very lucrative long distance and bundled services markets. Mr. Russell explained in Georgia why SEEMS is irrelevant to Issue 4 at the Georgia hearing. GA Tr. at 393:2-19.

Yet the degree of regulation imposed on BellSouth — particularly with respect to pricing — has diminished substantially since passage of the 1996 Act. Previous regulatory theory had advised that utilities were owed a certain degree of freedom from liability in exchange for regulatory constraints. *See* Rendi L. Menn-Stadt, *Limitation of Liability for Interruption of Service for Regulated Telephone Companies: An Outmoded Protection?*, 1993 U. Ill. L. Rev. 629, 640 (1993) (appended hereto as **Attachment 3**). Thus, a regulated telephone company "is charged with the duty of providing service upon application, but in exchange for such responsibility, [it] will not be required to provide completely uninterrupted or perfect quality service." *Id.* That theory no longer obtains, however, in an environment where BellSouth has obtained interLATA relief and considerable pricing flexibility. *See id.* at 644-45. Indeed, BellSouth's relationship with the Petitioners involves significant billings offered pursuant to very relaxed regulation by the FCC. In this environment, a rebalancing is warranted. *See id.*

This rebalancing is especially warranted in the case of this Agreement, which will involve provision of elements and services that are no longer at TELRIC prices (*e.g.* certain interconnection trunks and facilities, as well as section 271 network elements). And under the FCC's recent *Triennial Review Remand Order*, many more of the elements that Petitioners use could be removed from the UNE list. Having achieved a much less regulated pricing regime for local network elements, BellSouth should be subject to liability terms that are commercially reasonable and that better reflect the new regulatory environment.

"The Day the Claim Arose" Provides a Date Certain for Calculating a Party's Liability.

Joint Petitioners' proposed language marks liability from "the day the claim arose." This phrase refers to the day on which the negligent act occurred. This concept ensures that the parties can identify a date certain from which to calculate damages.

BellSouth argues that Joint Petitioners' language "serves only to encourage CLECs to game the claims and litigation process[.]" Blake Direct Test. at 7:19-20. Ms. Blake largely recanted this opinion at hearing in Georgia, acknowledging that BellSouth's interpretation of Petitioners' proposed language was incorrect. GA Tr. at 1004:13-23. She also agreed there that "if a circuit went down on account of BellSouth's negligence, we could easily figure out and agree on the date the claim arose." GA Tr. at 1005:14-17.

Moreover, BellSouth is incorrect as a matter of law. The Uniform Commercial Code states that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." U.C.C. § 2-725(2). Thus, it is recognized that "damages are generally measured as of the date of the breach," though greater damages may be awarded. Samuel Williston, A Treatise on the Law of Contracts, Section 64.4 (4th ed. 2002). Petitioners' language mirrors that rule, and leaves no room for delaying a claim to obtain unfair advantage.

It will be evident, under this Agreement, when a claim arises. This Agreement involves the operation of a closely monitored communications network. In fact, BellSouth is required by law to be actually aware of any network outages and to remedy them quickly. *E.g.*, 47 C.F.R. § 63.100 (federal outage reporting requirements); 807 Ky. Admin. Regs. 5:061 Sec. 25(2) (requiring utilities to create and retain outage reports for Commission inspection). Thus, BellSouth will know when a breach of service has occurred, even if Joint Petitioners do not. BellSouth's objection that Petitioners will or could "game the system" under their proposed language is therefore meritless.

For all these reasons, the Commission should adopt Petitioners' language for Item 4.

Item No. 5, Issue No. G-5 *[Section 10.4.2]: To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future), should it be obligated to indemnify the other Party for liabilities not limited?*

POSITION STATEMENT: Joint Petitioners should be able to offer commercially reasonable limitation-of-liability terms to their customers without being penalized by BellSouth by being forced to indemnify it. Joint Petitioners require this flexibility in negotiations in order to compete fairly with BellSouth in response to demands for custom contracts.

<u>Petitioners Should Not Be Required to Mirror BellSouth's Limitation-of-Liability Terms In Order to Avoid Incurring an Additional Obligation to Indemnify BellSouth</u>.

This item arises from BellSouth's unreasonable and heavy-handed insistence that Joint Petitioners include limitation-of-liability language in their contracts and tariffs that is exactly as stringent as BellSouth's *tariffed* limitation of liability provisions. If Joint Petitioners do not include liability language in all of their service arrangements (which predominantly are custom contracts known as CSAs) that virtually mirrors BellSouth's tariff language, for the entire duration of this Agreement, then BellSouth would make Joint Petitioners pay any damages awarded for negligence *attributable to BellSouth*. In short, BellSouth seeks to have Joint Petitioners pay any and all claims attributable to *BellSouth's* negligence, simply because, if BellSouth retained a complete monopoly, it would limit its liability completely in its tariffs – and everybody would be served out of those tariffs. But BellSouth does not retain a complete monopoly and it is unable to assert that it subjects all of its own customers to the same rigid limitation of liability provisions contained in its tariffs. GA Tr. at 999:11-12 (Blake) ("I'm not familiar with any of the details in a specific contract or arrangement."); *see id.* at 1000:8-23. Indeed, it is all but certain that BellSouth, too, negotiates limitation-of-liability provisions when competing with CLECs for a custom contract customer; Petitioners are unable to state with certainty what the terms of those contracts may be, because, as Mr. Russell stated, "when BellSouth has contract service

arrangements, they frequently file those as trade secrets or under seal." KY Tr. at 65:1-3. Thus, by its proposed language, BellSouth simply seeks to create an uneven playing field and make it more difficult for Joint Petitioners to compete.

Joint Petitioners presently have commercially reasonable limitation-of-liability terms in their tariffs, template contracts and CSAs. GA Tr. at 406:10-16 (Russell); FL Tr. at 203:14-16 (Russell). None of the Petitioners intend to remove their limitation-of-liability language from their tariffs or template contracts altogether. GA Tr. at 406:17-19; FL Tr. at 203:19 – 204:2. However, Joint Petitioners must continue to respond to the demands of a competitive marketplace wherein customers insist on negotiating CSAs with less stringent limitation of liability provisions. As Petitioners have explained from the beginning, they will ensure that their terms and conditions of service will "adhere to these existing standards of due care, commercial reasonableness, and mitigation." JP Direct Test. at 28:10-11.

Indeed, even without any proposed contract language for this issue, Joint Petitioners believe that it is incumbent upon them to incorporate "commercially reasonable" limitation of liability terms in all tariffs and contracts. Moreover, Joint Petitioners have made clear to BellSouth that it remains protected by "existing provisions of the Agreement and applicable commercial law stipulating that a Party is precluded from recovering damages to the extent it has failed to act with due care and commercial reasonableness." JP Direct Test. at 28:7-9.

Yet, limitation-of-liability language is among the terms that Petitioners presently must negotiate in order to win customers. GA Tr. at 407:7-15 (Russell); FL Tr. at 206:4-11 (Russell). Presently Joint Petitioners provide a great proportion of their service via individual agreements, and not tariffs. GA Tr. at 381:20-23 (Russell) ("99 percent of our customers purchase out of customer service agreements"); FL Tr. at 203:22-24. Joint Petitioners are "in the competitive

environment," as the 1996 Act expressly permits, and "[w]e're talking about a competitive situation where BellSouth is attempting to dictate the terms that NuVox can afford to its customers[.]" GA Tr. at 408:5-7. Joint Petitioners thus request the ability continue to negotiate commercially reasonable limitation-of-liability terms with potential and existing customers without facing financial and anti-competitive retribution from BellSouth in the form of an indemnity obligation.

Liability terms are frequently negotiated such that they are different from the template limitation of liability terms in Joint Petitioners' tariffs. *Compare* **Attachment 1** (XSP 00004-5) *with* **Attachment 4** (excerpts of tariffs) (XSP 000023, 39, 48, 56, 64, 72, 81). BellSouth's proposed language would punish Joint Petitioners for providing consumers with commercially reasonable terms reflective of a competitive marketplace. It would require Petitioners to cover BellSouth for BellSouth's own negligent, reckless, or unlawful conduct for failing to "mirror," as Mr. Russell put it (KY Tr. at 19:14), BellSouth's own stringent limitation-of-liability language that it imposes on many Kentucky consumers. *See also* JP Direct Test. at 29:1-7 (such a requirement is "unreasonable, anti-competitive and anti-consumer"). Petitioners are committed to including **commercially reasonable** limitation-of-liability terms in their tariffs and contracts,[6] and the Commission should not force them to do more. Petitioners should not be punished for competing with BellSouth.

But this appears to be exactly BellSouth's intent. Ms. Blake stated in her witness summary that "the purpose of this provision is to put BellSouth in the same position it would be in if the Joint Petitioners' end user was a BellSouth end user." KY Tr. at 157:10-12. In other words, if

[6] BellSouth's persistent suspicion that Petitioners will give customers terms such as "I'm going to give you $5,000, customer, if I fail to provide you service on a particular date," is simply, as Mr. Russell put it, "a **ridiculous hypothetical**." GA Tr. at 403:14-15. "[W]e've never done that, we have no plans to do so." *Id.* at 403:11-12.

BellSouth loses a customer because Petitioners provide them greater protection from injury, BellSouth wants someone to pay. It wants to penalize Petitioners. This despite the fact that Ms. Blake admitted to Vice Chairman Baker of the Georgia Commission that she is not aware of any "litigation that arose from a CLEC's customer against BellSouth." GA Tr. at 1015:13-18.

BellSouth's unjustified purpose and position is bad for consumers, bad for competitors, and bad for the Kentucky telecommunications market. The Commission should therefore adopt Joint Petitioners' proposed language for Issue 5.

Item No. 6, Issue No. G-6 *[Section 10.4.4]: Should limitation on liability for indirect, incidental or consequential damages be construed to preclude liability for claims or suits for damages incurred by CLEC's (or BellSouth's) End Users to the extent such damages result directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance obligations set forth in the Agreement?*

POSITION STATEMENT: The Agreement should be clear that damages to end users that result directly, proximately, and in a reasonably foreseeable manner from a party's performance do not constitute "indirect, incidental, or consequential" damages. Petitioners should not be barred from recovering such damages subject to the Agreement's limitation of liability for negligence.

Damages That Are Reasonably Foreseeable and Direct Are Not "Indirect, Incidental, and Consequential" and Thus Should Not Be Precluded by the Agreement.

Item 6 is in large measure a definitional issue: how should indirect, incidental, and consequential damages be defined for purposes of the Agreement? These are damages for which neither Party will be liable to the other. Because of this harshly preclusive effect, Petitioners seek to define them in a manner that does not unfairly deprive any party of damages which are indeed reasonably foreseeable. Moreover, Petitioners seek to avoid any misperception or to lend any credence to arguments that BellSouth may make now or in the future that the parties somehow herein agreed in some manner to curtail the legal rights of Petitioners' Kentucky customers.

Accordingly, Petitioners insist on this clarification, which reflects the extent and limit of their voluntary agreement with BellSouth to waive certain damages claims: "[d]amages to customers that result directly, proximately, and in a reasonably foreseeable manner from BellSouth's (or a CLEC's) performance of obligations set forth in the Agreement ... should be considered direct and compensable under the Agreement for simple negligence or non-performance purposes[.]" JP Direct Test. at 30:2-8.

Joint Petitioners' language for Section 10.4.4 states that indirect, incidental and consequential damages do not include damages that "result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder." Reasonably foreseeable damages are those for which contracting parties are responsible when they act negligently, recklessly, or in a manner that violates the law. Thus, if damages are 'reasonably foreseeable,' they cannot be deemed 'indirect' or 'incidental' or 'consequential.' These damages are "an appropriate risk to be borne by any service provider in a contract that clearly envisions that the effect of performance or nonperformance of such services will be passed through to ascertainable third parties[.]" JP Direct Test. at 29:20 – 30:2.

In any event, Kentucky law provides that sellers are subject to incidental and consequential damages resulting from their breach of contract. Ky. Rev. Stat. § 355.2-715. Incidental damages include "commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach." *Id.* § 355.2-715(1). 'Cover' is the operation of obtaining replacement goods and services. *Id.* § 355.2-712. Consequential damages include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could reasonably be prevented by cover or otherwise." *Id.* § 355.2-715(2). So, to the extent that the reasonably

foreseeable damages contemplated by Petitioners' proposed language may be characterized as indirect, incidental or consequential, Petitioners, consistent with Kentucky law, do not voluntarily agree to absolve BellSouth of these damages. Thus, for example, if through BellSouth's conduct the services NuVox provides to a hospital were to go down, NuVox should not be "left holding the bag" for the injury incurred by that hospital. KY Tr. at 30:7-14 (Russell).

BellSouth knows that Joint Petitioners rely on BellSouth's bottleneck facilities, such as loops and transport, in order to serve customers. 47 U.S.C. § 251(c). As such, BellSouth's acts and omissions foreseeably and directly impact Petitioners' ability to do business and serve customers. Were BellSouth's facilities to go down, Petitioners must attempt to obtain alternate services as cover, if at all possible. They may also be required to give credits and additional redress to their customers for any outage. If the outage was caused by BellSouth's negligence, recklessness, or willful misconduct, BellSouth should compensate Petitioners for the losses they incur therefrom. Such losses are reasonably foreseeable and flow directly from BellSouth's – not Petitioners' – conduct. Unless BellSouth compensates Petitioners for those losses, it will improperly inflate Petitioners' costs and impede their ability to deploy facilities and serve customers.

BellSouth's principal objection to Petitioners' language is that its corporate witness assigned to the issue found the proposed language to be "quite confusing." GA Tr. at 1022:8 (Blake). *See also* FL Tr. at 953:6 (Blake). In fact, its corporate witness admits not to understand what indirect, incidental, or consequential damages are (despite the fact that she was offered as the most knowledgeable BellSouth witness for depositions on this issue). GA Tr. at 1020:8-21 (Blake). Yet she somehow maintains that the language "kind of doesn't really do anything," *id.* at 1021:10, but only in her "layman's reading." *Id.* at 1021:23. Indeed, Ms. Blake stated four times

to the Georgia panel during the colloquy on Item 6 that she is not an attorney. GA Tr. at 1020:11, 1021:23, 1022:7-8, 1023:3. BellSouth's position on Item 6 is thus no position at all, as they have no grounds to reject Petitioners' language other than because it is "lengthy." GA Tr. at 1022:7; Transcript of Blake Deposition at 305:23-25 (Dec. 8, 2004).

Joint Petitioners must not be left without relief when BellSouth's conduct results in direct, reasonably foreseeable damages. These are damages that Kentucky law provides. Moreover, they are necessary to preserving competition in this state. Accordingly, Joint Petitioners' language for Section 10.4.4 of the General Terms and Conditions should be adopted for the Agreement.

***Item No. 7, Issue No. G-7** [Section 10.5]: What should the indemnification obligations of the parties be under this Agreement?*

POSITION STATEMENT: The Party receiving services should be indemnified, defended and held harmless by the Party providing services against any claims, loss or damage to the extent reasonably arising from or in connection with the providing Party's negligence (subject to limitation of liability for negligence), gross negligence or willful misconduct.

<u>It Is Reasonable and Appropriate in this Agreement for the Provisioning Party to Bear the Risk of Its Own Services</u>.

Joint Petitioners' proposed language for Section 10.5 provides that the party providing service must indemnify the other party for damages caused in providing that service. This language comports with industry practice as reflected in Joint Petitioners' own tariffs and contracts, and rests on the same commonsense notion, expressed above with respect to Item 4, that parties must be responsible for damages that they cause by their own acts and omissions. As Petitioners have stated, "[a] Party that fails to abide by its legal obligations should incur the damages arising from such conduct. A Party that is negligent should bear the cost of its own mistakes." JP Rebuttal Test. at 28:22 – 29:2.

BellSouth and Joint Petitioners agree that the party **receiving** service should indemnify the party **providing** service for damages caused by the **receiving party's own unlawful conduct**. Exhibit A at 4. *See also* GA Tr. at 1030:23-25(Blake); JP Rebuttal Test. at 28:15-18. And in fact, Joint Petitioners presently impose such indemnification obligations in their tariffs and contracts, demonstrating that, contrary to BellSouth's insistence, forcing a receiving party to indemnify the service provider **for the service provider's negligence** is **not** "the standard in the industry." KY Tr. at 158:17-18 (Blake Summary). For example, Xspedius's tariffs state that the company does not indemnify customers for damages caused by "the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees" or the customer's infringement of patents, copyrights or trade secrets. **Attachment 3**. And Xspedius's template customer contract requires the customer to indemnify Xspedius for any loss that "arises out of, or is directly or indirectly related to, ... any act or omission of Customer."

Where the Parties diverge is with respect to instances where the **providing** party is negligent. In that instance, BellSouth insists that the receiving party (most often, a Petitioner) should indemnify the providing party (most often BellSouth) for the providing party's negligence. That is backwards, contrary to law and common sense. It is also not "industry practice." For example, a sample NewSouth contract produced to BellSouth states that "NewSouth hereby assumes liability for, and shall indemnify, defend, protect, save and hold harmless Customer ... from and against any and all third party liabilities, claims, judgments, damages and losses." **Attachment 5** (NVX 00051-52) [filed under seal]. In addition, neither the Xspedius tariff nor its template contract requires customers to indemnify the company for damages caused by the company's service. *See* Attachment 3. These examples demonstrate what seems axiomatic: a party that provides services cannot expect indemnification from its customers when it was the

providing party's conduct that caused the harm. As Petitioners' testimony explains, "in virtually all other commercial-services contexts, the service provider, not the receiving party, bears the more extensive burden on indemnities." JP Direct Test. at 33:16-17.

BellSouth's refusal to accept Joint Petitioners' language amounts to their foisting upon these CLECs the obligation to act as BellSouth's insurance carrier. It means that when BellSouth or its service causes harm, Joint Petitioners must pay. This cannot be the right result in any commercial context, even a regulated one.

In addition, forcing Joint Petitioners to indemnify BellSouth for damages that BellSouth causes runs exactly contrary to the longstanding legal principles discussed above with respect to Item 4. A party that contracts to provide goods or services is responsible for the damages it causes. Thus, just as an injured party is entitled to relief from the causing party, a party is entitled to indemnification from the causing party. It would be absurd and anomalous to hold the causing party liable in the first scenario, but not the second.[7]

For these reasons, Joint Petitioners' proposed language for Issue 5 should be adopted.

Item No. 9, Issue No. G-9 *[Section 13.1]: Should a court of law be included in the venues available for initial dispute resolution?*

POSITION STATEMENT: No legitimate dispute resolution venue should be foreclosed to the Parties and either Party should be able to petition the Commission, the FCC, or a court of competent jurisdiction for resolution of a dispute. The Commission should decline BellSouth's invitation to unlawfully strip state and federal courts of jurisdiction.

[7] In order to further ensure that these provisions work in parallel fashion, Joint Petitioners have proposed that the 7.5% cap on liability for negligence also apply to indemnification for damages caused by negligence. Exhibit A at 4; GA Tr. at 37:19-22 (Russell Summary).

Joint Petitioners Should Not Be Forced to Give Up Their Legal Right to Go to Court.

The right to resolve disputes in a court of law belongs to everyone. Joint Petitioners are unwilling to give up that right, and they should not be forced to do so. Moreover, this Commission should decline BellSouth's invitation to strip federal and state courts of jurisdiction in any respect, as it is unlikely that the Commission may lawfully do so.

Joint Petitioners' existing agreements afford them the right to go to court, as BellSouth concedes. GA Tr. at 1036:20 (Blake) ("I believe it's in at least one of them."); FL Tr. at 965:14-16 (Blake) ("I have seen it in at least one of them I recall."). BellSouth's proposed language for Section 13.2 curtails that right, permitting the parties to go to court only "for such matters which lie outside the jurisdiction or expertise of the Commission or FCC." Exhibit A at 5. Thus, prior to filing any action, the parties must agree on the forum. *Id.* If the parties cannot reach agreement on the forum, BellSouth would force the parties to come to the Commission to resolve a dispute. According to Ms. Blake's testimony to the Georgia panel, "if it is not agreed that the Commission lacks the jurisdiction or expertise, then it would go to the Commission or the FCC." GA Tr. at 1057:13-15. "It" would be the substantive dispute, and not the question of proper forum. *Id.* at 1057:16-17 ("You wouldn't go the Commission to dispute whether they have jurisdiction or not."). This proposal places BellSouth in a position of great power, for BellSouth can deprive Joint Petitioners of their day in court.

Ms. Blake has in fact twice admitted that BellSouth seeks to limit Petitioners' rights to go to court in the event that a case belongs, in BellSouth's estimation, at a Commission. In Georgia she explained the deciding criterion as "if we don't agree with you that you claim the Commission doesn't have expertise or jurisdiction and we claim they do and our language prevails, then the matter would come before the FCC or the Commission." GA Tr. at 1058:2-5. Ms. Blake outlined

a similar criterion in Florida. FL Tr. at 971:14-16 (BellSouth would not consent to court jurisdiction "to the extent that the jurisdiction or expertise of the dispute is in the possession of the Commission or the FCC").

Yet this criterion appears to be boundless, and may embroil every dispute between the parties, regardless of its genesis, to the forum-selection quagmire that Ms. Blake has envisioned. When asked at deposition when it would be discernible as to what type of complaint is not within the FCC's or a State Commission's jurisdiction, Ms. Blake answered "I can't think of any specific examples." Deposition of Kathy Blake at 348:7-10 (Dec. 8, 2004). She could only generalize that "there could be some facets that aren't relative to interpretation or implementation" that fall outside agency jurisdiction. *Id.* at 348:11-13. Indeed, the only type of claim of which Ms. Blake was certain was a trademark dispute – which the parties already have expressly agreed will go to court. *Id.* at 347:10-16. For all other claims, however, a dispute over choice of forum via "simple filings" may occur under BellSouth's language.

In effect, BellSouth's language will deprive Petitioners of their right to seek adjudication by a court of competent jurisdiction. Thus, BellSouth's proposal gives itself the power to deny Joint Petitioners their day in court: all BellSouth needs to do is disagree and persist in that position. This result, obtained unilaterally by an interested party, would not be fair or equitable.

Moreover, this result is unlawful. The jurisdiction of courts in this state is set by the Kentucky Constitution, which provides that "[t]he judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court." KY Const. Art. Sec. 109. It further provides that "[n]o person or collection of persons, being of one of those departments, shall exercise any power

properly belonging to either of the others, except in the instances hereinafter permitted." KY Const. Sec. 28. Federal court jurisdiction is similarly secured by Article III of the United States Constitution. U.S. Const. Art. III § 1. The Commission therefore does not have the authority to change or limit the jurisdiction of courts, which is precisely what BellSouth's proposed language would require it to do.

Adjudication in a court of law may also, in certain circumstances, be more efficient. By requiring disputes to be brought to a state commission (such as the Kentucky Commission) or the FCC, BellSouth imposes the burden of "litigating before up to 9 different state commissions or to waiting for the FCC to decide whether it will or won't accept an enforcement role[.]" JP Direct Testimony at 37:7-9. Because of the delay and cost inherent in dispute resolution that involves up to 9 different regulatory bodies or an often reluctant and sometimes unwilling FCC, BellSouth "often is able to force carriers into heavily discounted, non-litigated settlements." *Id.* at 38:16. Mr. Falvey of Xspedius described his own actual experience with litigating unpaid reciprocal compensation — $25 million worth — against BellSouth. Though "[w]e won in AAA arbitration ... we kept winning ... 100 cents on the dollar plus charges past due," his company incurred significant costs in having to pursue that claim "in Georgia ... in Kentucky, [and in] a AAA arbitration that spanned three states, Alabama, South Carolina, and Louisiana." Transcript of Deposition of James Falvey at 94:3-6, at 93:20-23 (Dec. 15, 2004). These costs can "bleed[] the new entrant dry." *Id.* at 94:23-24. Notably, BellSouth has refused proposals to include alternative dispute resolution in the Agreement.

BellSouth's professed worry regarding Petitioners' language is that it may entitle a party "[t]o prematurely bring a dispute to a court of law" and "risk that the court will remand the case to the appropriate body." Blake Rebuttal Test. at 29:20-22. Primary jurisdiction referrals are no

indication that a matter has been brought "prematurely" to a court, and they are not akin to a "remand." Moreover, BellSouth's hollow concern does not entitle it to curtail Joint Petitioners' rights. It is not for BellSouth to rule *a priori* that Joint Petitioners' claims cannot be heard in court. That is a matter to be determined by a court of law, were any claim to be filed. And the fact that BellSouth is not familiar with any Joint Petitioner seeking redress in court, as permitted by the current interconnection agreements, demonstrates that Petitioners are not overly litigious and do not raise frivolous claims. GA Tr. at 1036:23-25 (Blake) ("I'm not familiar of any claims that may have been or disputes that may have been taken to a court[.]"); FL Tr. at 838:4-5 (Blake) (Petitioners have not "exercised that right within their contract up to this point"). Moreover, it certainly does not constitute waiver of the right to go to court.

For these reasons, Joint Petitioners' proposed language for Issue 9 should be adopted.

Item No. 12, Issue No. G-12 *[Section 32.2]: 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?*

POSITION STATEMENT: Consistent with Georgia contract law, nothing in the Agreement should be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, as defined in the Agreement, except in such cases where the Parties have negotiated an express exemption or agreed to abide by other standards.

The Agreed-Upon Governing Law of the Agreement Is Clear that All Laws of General Application in Existence at the Time of Contracting Are Incorporated Unless Expressly Excluded or Displaced by Conflicting Requirements Negotiated by the Parties.

Under Georgia contract law, which the Parties have already agreed will govern the Agreement (GT&C, Section 22.1), all laws of general applicability that exist at the time of contracting will apply to the contract unless expressly repudiated via an explicit exception or displaced by conflicting requirements voluntarily agreed to by the parties. Joint Petitioners'

proposed language for Section 32.2 of the General Terms and Conditions simply incorporates this tenet of already agreed-upon governing law into the Agreement.

As the parties have agreed to Georgia law as the governing body of contract law, it is important to recognize that the Supreme Court of Georgia has held that "[l]aws that exist at the time and place of the making of a contract, enter into and form a part of it ... and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter." *Magnetic Resonance Plus, Inc. v. Imaging Systems, Int'l*, 273 Ga. 525, 543 S.E.2d 32, 34-35 (2001). This holding comports with doctrine from the United States Supreme Court, which has held that "[l]aws which subsist at the time and place of the making of a contract ... **enter into and form a part of it** ...; this principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Farmers' & Merchants Bank of Monroe, N.C. v. Federal Res. Bank of Richmond*, 262 U.S. 649, 660 (1923) (emphasis added). And as the Court later held, "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if fully they have been incorporated in its terms[.]" *Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991) (holding post-merger rail company was exempt by statute from pre-existing collective bargaining agreement with labor union).

Parties are "**presumed to have contracted with reference to such laws.**" *Magnetic Resonance Plus*, 543 S.E.2d at 35. Due to this presumption, contracts are not deemed to exclude any tenet of applicable law unless done so expressly. A "contract may not be construed to contravene a rule of law." *Van Dyck v. Van Dyck*, 263 Ga. 161, 429 S.E.2d 914, 916 (1993). Parties have the right to waive or repudiate elements of applicable law, "however, these **must be expressly stated** in the contract." *Jenkins v. Morgan*, 100 Ga. App. 561, 112 S.E.2d 23, 24 (1959)

(emphasis added). Stated differently, parties are "presumed to contract under existing laws, and **no intent will be implied** to the contrary unless so provided by the terms of their agreement." *Jenkins*, 100 Ga. App. at 562 (emphasis added).

Not only is this principle a tenet of law, but it also makes practical sense. Parties to a contract — particularly this Agreement, which regards highly complex duties like interconnection and unbundling — could not be expected to expressly include all elements of generally applicable law into one contract. That contract would be tens of thousands of pages long. The FCC's *First Report and Order* alone is more than 700 pages long. The basic concept that silence implies incorporation and an affirmation of willingness to abide by the law is thus a means of ensuring that contracts are of manageable size.

BellSouth's oft-heard but hollow retort — "[i]f that's the case, why do we even need an interconnection agreement?" — is frivolous. *See* GA Tr. at 1061:11 (Blake) ("why do we need an agreement?"). As an initial matter, sections 251 and 252 of the 1996 Act require interconnection agreements to be approved by state commissions. There must be something in writing for the parties to file and for the Commission to approve. As a practical matter, additional language is often needed to implement legal requirements and processes may need to be agreed upon to ensure proper conduct and operations by the parties.

Moreover, the Statute of Frauds requires that this agreement be in writing. U.C.C. § 2-201(1) (sale of goods); Rest. II Contracts § 130 (contract not to be performed within one year). Even laying the statute of frauds aside, however, this Agreement already contains concessions and express waivers of generally applicable law. For example, NuVox and Xspedius have, with BellSouth, voluntarily agreed in Attachment 3 to interconnection point and compensation terms that deviate from the requirements set forth in applicable law. *See, e.g.*, Att. 3, Sec.3.3.2, 3.3.3,

10.1 (NuVox); *id.* Sec. 3.3.1, 3.3.2, 10.1 (Xspedius). These concessions in fact prove Joint Petitioners' point: parties can voluntarily negotiate away rights to which they are entitled if there is a clear bargain memorialized in the plain terms of the contract. Absent plain language setting forth an agreement to abide by standards other than those set forth in applicable law, no party should be deemed to have given up their rights. To find otherwise would be unlawful, grossly unfair and contrary to the public interest.

BellSouth's proposed language for Item 12 is both contrary to prevailing law and unfair. BellSouth proposes that if Petitioners contend that an element of existing telecommunications law applies to the Agreement, they must request a ruling of the Commission to that effect. If the Commission agreed that the element of law in fact applies, it would apply ***on a prospective basis only***.

It is impossible to square BellSouth's proposal with the parties' already agreed-upon language for section 32.1 of the General Terms and Conditions, wherein the parties define "Applicable Law" as "**all applicable** federal, state, and local statutes, laws, rules, regulations, codes, effective orders, injunctions, judgments and binding decisions, awards and decrees that **relate to its obligations under this Agreement**." That settled definition does not cull "substantive Telecommunications law" out, either expressly or impliedly, but rather means any type of generally applicable law governing any aspect of this Agreement. Thus, BellSouth's new language proposal already violates settled terms.

Even as now limited by its new language, BellSouth's proposal turns the longstanding legal doctrine of contracts, summarized above, on its head. *See Farmers' & Merchants Bank of Monroe*, 262 U.S. at 660; *Magnetic Resonance Plus*, 543 S.E.2d at 34-35. It means that federal or state telecommunications law that existed at the time of contracting would for all practical

purposes be ignored by the Parties if it was not replicated in the Agreement. In that event, the non-reproduced applicable law would have no bearing on the Agreement, not only until it was invoked, but until after *a dispute as to its applicability is resolved.* So a rule or aspect of an order of the FCC or this Commission would go unenforced and unfollowed for possibly years under BellSouth's proposal, despite the fact that the parties never negotiated an exception to or a deviation from such legal requirements.

BellSouth's position on this item even injures its own interests. For example, Attachment 6 of this Agreement, which relates to ordering, includes provisions (Sections 2.5.5.2 and 2.5.5.3) to govern redress for unauthorized access to Customer Service Records ("CSRs"). BellSouth seeks stringent language on that topic, in order "to protect CPNI." Deposition of Scot Ferguson at 185:16 (Dec. 7, 2004). Yet the term "CPNI" is neither defined nor mentioned in Attachment 6, nor is there a reference to the statute that regards CPNI, 47 U.S.C. § 222, or the FCC's CPNI rules. Thus, according to BellSouth's position on this Item 12, nothing in that important body of law has any place in the performance of the Agreement, and the parties are not bound by it. That cannot be the right result.

In addition, BellSouth is incorrect in arguing that it would be "in the intolerable position of not knowing exactly what its contractual obligations are[.]" Blake Direct Test. at 21:17-18. This argument is either pure hyperbole or a shocking admission of ignorance. BellSouth is required to know what its interconnection obligations are, and Ms. Blake could think of no rules or orders that BellSouth would not follow. KY Tr. at 194:5-25. Further, Joint Petitioners note that their proposal for Section 32.2 does not require that **all decisions** and orders of the FCC and this Commission apply to this Agreement. Rather, it requires that decisions of **general applicability**, as well as statutes, shall apply. Thus, for example, an existing order from an arbitration or

adjudication between BellSouth and another CLEC **would not apply** to this Agreement **unless expressly incorporated**. Nor would a decision by the FCC Enforcement Bureau that involves other parties. Nor would the result in a case brought before this Commission regarding the interpretation of another CLECs' interconnection agreement. Only statutes and rules and orders resulting from general rulemakings of the FCC and this Commission that existed at the time of contracting apply. BellSouth, which seeks to comply with the law (GA Tr. at 1060:23-24) — is presumed under Georgia law to know what these legal requirements are. *See Walston & Associates, Inc. v. City of Atlanta*, 224 Ga.App. 482, 483, 480 S.E.2d 917, 918 (Ga.Ct.App. 1997) (parties to contract with the city "are presumed to know the law, OCGA § 1-3-6, which includes not only statutes like OCGA § 45-6-5 but also the provisions of municipal ordinances."). *See also Magnetic Resonance Plus*, 543 S.E.2d at 35 (parties are "presumed to have contracted with reference to such laws"). Thus, BellSouth can expect to comply with all Applicable Law, except to the extent that it has negotiated language with Joint Petitioners that expresses a clear intent to exclude particular requirements as between the parties or to displace particular requirements with conflicting ones that were freely negotiated.

BellSouth's new concern – not expressed anywhere in their written testimony (Blake Direct Test. at 18:15 – 22:15; Blake Rebuttal Test. at 31:1 – 33:4) – is about federal preemption and it is similarly misplaced. The question whether federal law preempts the law of any state is one that gets answered in response to a request for declaration of preemption. It is not, as BellSouth suggests, a defense BellSouth may at some point raise for failure to comply with its contractual and other legal obligations. It is nonsensical for BellSouth to assert that the possibility of preemption (1) renders it unable to know what Applicable Law is, or (2) could in any way render it liable in an unnecessary or unfair way. If BellSouth intends, as it states, to comply with the law,

then a heretofore-unknown instance of federal preemption should not enable it to limit that compliance as its proposed language seeks to do.

For all these reasons, the Agreement should state that applicable law that exists at the time of contracting will govern the Agreement unless expressly waived or repudiated.[8] Joint Petitioners' proposed language for Section 32.2 of the General Terms should therefore be adopted.

***Item No. 26, Issue No. 2-8** [Section 1.7]: 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?*

POSITION STATEMENT: BellSouth is required to permit commingling and to perform the functions necessary to commingle a section 251 UNE or UNE combination with any wholesale service, including those BellSouth is obligated to make available pursuant to section 271 (*e.g.*, section 271 transport commingled with section 251 loops).

Commingling of Section 251 Elements With Any Wholesale Facility and Service, Including Section 271 Elements, Is Required Under the *TRO* and FCC Rules.

The FCC requires all ILECs to connect UNEs, combinations of UNEs, and all other wholesale elements at a CLEC's request. 47 C.F.R. §§ 309(e), (f); *TRO* ¶¶ 579-84. BellSouth's proposed language for Section 1.7 unlawfully limits this right based on a flawed, and incomplete, reading of the *TRO*. In fact, its interpretation has proven to be unsupportable. The Commission should therefore adopt Joint Petitioners' language.

FCC Rule 51.309(e) states that "an ***incumbent LEC shall permit*** a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier ***has obtained at wholesale*** from an incumbent LEC." 47 C.F.R. §

[8] Changes of law that occur between the time of negotiations and finalization of the agreement should be addressed via the modification of agreement provisions of the Agreement, wherein the parties agreed to renegotiate and amend the Agreement in the event of a change of law.

51.309(e) (emphasis added). Rule 51.309(f) further provides that "[u]pon request, an ***incumbent shall perform*** the functions necessary to commingle [a UNE or UNE Combination] with one or more facilities or services ... ***obtained at wholesale*** from an [ILEC]." *Id.* § 51.309(f) (emphasis added). Joint Petitioners' proposed language for Section 1.7 adopts Rule 51.309(e) and (f) expressly, thus making even more clear their intent that the Agreement will provide them the rights already granted by the FCC.

The text of the *TRO* is exactly in keeping with the language of Rules 51.309(e) and (f). It states that "we require that incumbent LECs permit commingling of UNEs and UNE combinations ***with other wholesale facilities and services***." *TRO* ¶ 584. Special access, resale and section 271 are **examples** of "wholesale facilities and services." *Id.* Nowhere in the *TRO* does the FCC exclude a certain subset of wholesale services, such as wholesale services offered only pursuant to section 271.

Yet, BellSouth would like to preclude commingling, and refuse to perform commingling, of a section 251 UNE with a section 271 element. Its proposed language states that it "will not commingle or combine UNEs or Combinations with any service, Network Element or other offering that it is obligated to make available only pursuant to section 271 of the Act." Exhibit A at 10. BellSouth's sole argument in favor of this language is that the FCC changed the substance of Rules 51.309(e) and (f) by issuing an "Errata." KY Tr. at 160:12 (Blake Summary). This argument, through which BellSouth seeks to omit section 271 elements from commingling and thus render them useless, is incorrect as a matter of fact and meritless as a matter of law. In fact, Ms. Blake repudiated this position at the Georgia hearing.

The *TRO* states in Paragraph 584 that ILECs are required to "permit commingling of UNEs and UNE combinations ***with other wholesale facilities and services***, ***including*** any network

elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act."[9] The Errata upon which BellSouth relies, *see* GA Tr. at 446:8-18 (Meza examination of Johnson), removed the stray reference to Section 271 in paragraph 584 which is focused on resale (section 271 checklist items are not the equivalent of resale). *See* JP Direct Test. at 40:15 (the Errata was "an attempt to clean-up stray language"). BellSouth interprets this Errata to mean that Section 271 elements are now ineligible for commingling. Blake Direct Test. at 27:17-21. In sum, BellSouth is asserting that the *implied* meaning of the FCC's Errata and subsequent revision of Paragraph 584 is that section 271 elements are not wholesale items. At hearing in Georgia, however, Ms. Blake flatly stated that ***"I don't believe the errata impacted the rule at all."*** GA Tr. at 1079:16-17.

In addition to this fatal concession, Ms. Blake gave several other responses at the Georgia hearing that completely undercut BellSouth's position on Item 26. First, she admitted that commingling is "an obligation to commingle UNEs and UNE combinations with wholesale services." GA Tr. at 1074:13-14. Then Ms. Blake admitted that loops and transport under Section 271 are wholesale. *Id.* at 1070:25 – 1071:8. She then acknowledged that BellSouth sells switching as a wholesale element, *id.* at 1072:16-19, and that switching offered under Section 271 "would be made available to the CLEC market, which is a wholesale type customer." GA Tr. at 1073:16-17. Finally, she acknowledged that Rule 51.309 does not state that section 271 elements are exempt from commingling. Tr. at 1076:23-25. BellSouth nonetheless refuses to commingle, or permit commingling of, 271 elements with 251 UNEs. *Id.* at 1073:21-24 (Blake). Yet if an element is covered by the 271 checklist, and 271 elements are wholesale, and wholesale elements may be commingled, then this refusal is plainly illegal.

---

[9] The *TRO* also states that ILECs must "perform the necessary functions to effectuate such commingling upon request," which reflects the substance of Rule 51.309(f). *TRO* ¶ 579.

BellSouth recently has invented a new argument to avoid this result. The purported bright-line test for what may be commingled now appears to be whether the requested item is tariffed. This position does not appear in BellSouth's written testimony and there is no basis for it in the FCC's rules or in the text of the *TRO*. *See* Blake Direct Test. at 26:10 – 29:1; Blake Rebuttal Test. at 35:7 – 37:3. Ms. Blake stated at both the Georgia and the Florida hearings that for purposes of commingling, "our understanding of the wholesale services intended by the *TRO* pertain to tariff services." GA Tr. at 1074:14-16. *See also* FL Tr. at 982:23-25 ("[T]he FCC has defined wholesale services to be tariffed access services.") As such, BellSouth believes it has fully complied with its commingling obligation by offering "our 251 UNEs and UNE combinations for commingling with our special access services[10] or resale services." *Id.* at 1074:16-18. So BellSouth is willing to commingle 271 elements (loops and transport) with 251 UNEs if they come from a high-priced special access service offering. Switching, on the other hand, is not tariffed but rather is available only "under contract." *Id.* at 1071:17. *See also* FL Tr. at 984:14-15 ("through a commercial agreement"). Thus, providing switching in a contract makes it somehow not a 271 element and not wholesale, even though Ms. Blake already stated the opposite on both counts. Moreover, the reason that switching is not offered in a tariff, is simply that "it's not the way we offer switching." GA Tr. at 1074:25. The inanity of Ms. Blake's testimony only demonstrates that BellSouth's position on Item 26 is unsupportable.

Significantly, there is another part of the Errata that is fatal to BellSouth's self-serving attempt to exclude Section 271 elements from the commingling rule. The Errata removed one sentence from Footnote 1990 of the *TRO*. Footnote 1990 previously said (with emphasis added):

---

[10] In Georgia, Ms. Blake curiously referred to a "251 special access offering" as eligible for commingling, GA Tr. at 1078:6, yet Section 251 UNEs are absolutely distinct from special access elements as a regulatory matter. Again, the position that BellSouth has taken with respect to commingling has forced Ms. Blake to take untenable, sometimes nonsensical positions in its defense.

> We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). **We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items.**

Paragraph 31 of the Errata states: "In footnote 1990, **we delete the last sentence**." In purposefully removing that sentence, the FCC preempted any misunderstanding that may have been created through use of the text of the *TRO* to suggest that section 271 elements are not eligible for commingling.

The factual inaccuracy of BellSouth's position aside, it must also be noted that, as a matter of law, the FCC could not have substantively amended Rules 51.309(e)and (f) via Errata, even if that had been its intention. As Ms. Johnson aptly put it in Georgia, "erratas do not change orders ... that's what motions for reconsideration and appeals are for." GA Tr. at 446:16-18. All substantive agency rules must be promulgated in accordance with the procedures set forth in the Administrative Procedures Act. *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (reversing payphone compensation rules for failure to provide proper notice of proposed rule); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 249 (2d Cir. 1977) (informal rulemaking permissible under APA but must be properly opened to comment and decided on the record). Thus, the manner in which BellSouth is attempting to implement the *TRO* contravenes settled administrative law, and it is doubtful that the FCC would, or could, endorse it.[11]

---

[11] Petitioners' reliance on the errata to Footnote 1990 is not the same as BellSouth's reliance on the errata to Paragraph 584. The change to Footnote 1990 is exactly in keeping with the expansive, label-neutral wording of Rule 51.309 ("facilities and services ... obtained at wholesale"). The change to Paragraph 584, as BellSouth interprets it, fundamentally limits the substantive reach of Rule 51.309 to non-Section 271 elements, and as such attempts to alter a rule substantively without proper APA procedure.

At bottom, the FCC's commingling rules were not changed by the Errata. Neither the rules nor the text of the *TRO* contain the exception BellSouth claims. Joint Petitioners' language properly implements Rule 51.309(e) and (f) by ensuring that they can commingle, or the request the commingling of, UNEs and UNE Combinations with section 271 elements, and thus should be adopted for Section 1.7 of Attachment 2 of this Agreement.

Item No. 36, Issue No. 2-18 *[Section 2.12.1]: (A) How should Line Conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to Line Conditioning?*

POSITION STATEMENT: (A) Line Conditioning should be defined in the Agreement as set forth in FCC Rule 47 CFR 51.319 (a)(1)(iii)(A). (B) BellSouth should perform line conditioning in accordance with FCC Rule 47 C.F.R. 51.319(a)(1)(iii). BellSouth's line conditioning obligations were not curtailed by the FCC's subsequent adoption of separate routine network modification rules.

<u>Line Conditioning Should be Defined by Reference to FCC Rule 51.319(a)(1)(iii)(A), and BellSouth Should Perform Line Conditioning in Accordance With the Rule.</u>

1. <u>BellSouth Must Condition Copper Loops at TELRIC Rates.</u>

Line conditioning is a section 251(c)(3) obligation. In its *UNE Remand Order*, the FCC clarified its unbundling rules to require that ILECs condition copper loops to provide advanced services.[12] FCC Rule 51.319(a)(3) was promulgated with the *UNE Remand Order* to effect the clarification stated in the text of that Order. *See* GA JP Exhibit 10. As required by the rule, BellSouth signed interconnection agreements containing rates, terms and conditions for conditioning **all** copper loops. These agreements provided for conditioning copper loops of any length and removing bridged tap, without length restrictions, at TELRIC rates already set by this Commission. As Mr. Falvey of Xspedius stated at hearing, "[i]f the Joint Petitioners win" Item 36,

---

[12] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 ¶ 172 (rel. Nov. 4, 1999) ("*UNE Remand Order*").

"it would be status quo." KY Tr. at 120:10. *See also* GA JP Exhibit 12 (BellSouth/NewSouth Agreement excerpt); GA Tr. at 821:23 – 825:12 (Fogle); FL Tr. at 702:24 – 703:2 (load coil removal is at TELRIC rates in existing agreements), at 703:3-6 (bridged tap removal is at TELRIC rates in existing agreements). BellSouth has sought to limit the line conditioning obligations imposed by the *UNE Remand Order* only after the *TRO* was issued. In so doing, BellSouth seeks to deny Joint Petitioners access to line conditioning at the TELRIC rates set by the Commission.

2. Line Conditioning Obligations Were Not Circumscribed by the *TRO*.

ILEC line conditioning obligations were not circumscribed by the *TRO*. Rather, the FCC readopted its line conditioning rules in the *TRO*. Indeed, the FCC took this opportunity to *expand* its statement of the ILEC obligation and to completely rewrite subsections (D) and (E) of the rule. *See* JP Exhibit 10. However, the FCC chose not to materially change the Rule's definition of line conditioning at subsection (A). BellSouth witness Fogle twice conceded this fact at hearing. GA Tr. at 796:17-21; FL Tr. at 691:13-16.

Nothing in the text of the *TRO* itself suggests that ILEC conditioning obligations were limited by that Order. Instead, the FCC reaffirmed that ILECs must condition copper loops: "Competitors cannot access the loop's inherent 'features, functions and capabilities' unless it has been stripped of accretive devices. ***We therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element.***" *TRO* ¶ 643 (emphasis added). Had the FCC intended to limit ILEC conditioning obligations as BellSouth suggests, surely the FCC would have worded this section of the *TRO* differently. However, there are no words of limitation in this paragraph. Indeed, the FCC reiterated in the *TRO* the absence of loop length limitations on ILEC conditioning obligations. *Id.* n.1947. And, in this very paragraph, the FCC "reject[ed] Verizon's renewed challenge that the Commission lacks authority to require

line conditioning." *Id.* The FCC repeatedly has found that line conditioning does not constitute the creation of a superior network; it instead constitutes an affirmative obligation to modify the existing network. *TRO* ¶ 643 ("Line conditioning does not constitute the creation of a superior network, as some incumbent LECs argue."); *UNE Remand Order*, 15 FCC Rcd. at 3775 ¶ 173 ("We find that loop conditioning, rather than providing a 'superior quality' loop, in fact enables a requesting carrier to use the basic loop."); *Local Competition First Report and Order*, 11 FCC Rcd. at 15692 ¶ 382 ("some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3)").

BellSouth argues that the FCC "clarified" its line conditioning rules in the *TRO* so as to limit ILEC obligations. However, neither the line conditioning rules nor the text of the *TRO* contain any such limitation. This situation is in sharp contrast to the FCC's revision of its dedicated transport rules. To be sure, the FCC knows how to change its rules when it wishes to do so. For example, in the *TRO*, the FCC limited its definition of dedicated transport to exclude certain dedicated transport facilities known as entrance facilities. *Id.* ¶ 365. The FCC then changed the definition contained in the rule. In short, the FCC expressly stated in the text of the *TRO* its intent to limit the rule and then changed the rule itself to reflect the FCC's intent. Nothing of the kind occurred with respect to the line conditioning rule. The FCC expressed no intent to circumscribe the requirements of the rule, and no such change to the rule was made. BellSouth would have the Commission divine an intent on the part of the FCC for which there is no basis. Indeed, all the evidence is to the contrary.

3. <u>Line Conditioning Is Not Limited by the Routine Network Modification Rules</u>.

BellSouth argues that its line conditioning obligations are somehow modified and limited by the FCC's separate rules on routine network modifications (one of which has nothing to do with

copper loops). However, 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.

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, the codified rules 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). This rule is quite distinct from the line conditioning rule, and neither rule cross-references the other. 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. at 795:16-17.

BellSouth seizes on a single sentence from the *TRO*'s discussion of line conditioning as the basis for its position. At paragraph 643 of the *TRO*, the FCC outlines the rationale for its rejection of claims that line conditioning constitutes creation of a superior network for CLECs. The FCC explains that line conditioning in some ways resembles routine network modifications: "Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL service to their customers." *Id.* ¶ 643. Yet the *TRO* text and line conditioning rules do not limit ILECs' obligations to perform conditioning to those instances where the requested removal of accretive devices also happens to qualify as a routine network modification under the FCC's separate routine network modification rules. Indeed, the text of the

TRO's discussion of line conditioning does not even reference those rules. Likewise, the *TRO* text and rules on routine network modification **impose no such limitations on line conditioning**. Nor do they even reference the subject.

What the FCC describes in the quoted sentence from paragraph 643 is the intersection of two separate obligations. BellSouth witness Fogle routinely testifies that BellSouth regularly conditions loops for retail customers served by loops less than 18,000 feet in length. GA Tr. at 808:19-21; 814:5-8; FL Tr. at 700:2-2. Because this is an activity BellSouth regularly undertakes for its own customers, it fits the definition of routine network modification. However, this activity also squarely fits the definition of line conditioning – it entails removal from a copper loop of a load coil that could diminish the capability of the loop to high-speed switched telecommunications service. *See* 47 C.F.R. § 51.319(a)(1)(iii)(A). The relationship between the two rules was illustrated with Petitioners' Exhibit 11 which is a Venn diagram showing two intersecting circles. Each circle represents the activities defined by the respective rule. The intersection of the circles represents those activities common to both rules.

BellSouth's strained interpretation of "is properly seen as" cannot be reconciled with the conclusion that conditioning is "intrinsically linked to the local loop" and part and parcel of the definition of the loop network element. *TRO* ¶ 643. Indeed, Mr. Fogle agreed with Joint Petitioner counsel in Georgia that the FCC "never said that line conditioning is never anything but a routine network modification." GA Tr. at 805:15-20. Yet, BellSouth's proposal rewrites line conditioning in exactly that unlawful manner.

Moreover, as Commissioner Burgess himself recognized, BellSouth's interpretation of the rules would give it the sole discretion to determine when line conditioning would be performed. That is, no line conditioning would be done if BellSouth did not "routinely" do such conditioning

for itself. For example, BellSouth claims that "[a]t 18,000 feet, though, we no longer routinely remove load coils and so our obligation ends on loops that are 18,000 feet." GA Tr. at 813:16-17.[13] But taken to its logical conclusion, BellSouth's position enables it to ***eliminate all line conditioning completely***, based on what it decides is prudent for its own retail customers. Mr. Fogle made this clear in response to questioning in Georgia. GA Tr. at 808:11-809:13 ("hypothetically that would remove our [BellSouth's] obligation to perform line conditioning at TELRIC for the Joint Petitioners"). If BellSouth determines that something is not "routine," it will not do what is required by Rule 51.319(a)(1)(iii) (Line Conditioning). As Commissioner Burgess of the Georgia Commission stated to Mr. Fogle, "if you didn't want to do it for your own customers, literally you could wipe away your requirement and obligation." GA Tr. at 816:13-14. Such a situation is not a hypothetical, and, as Commissioner Burgess recognized, if BellSouth prevails, its position will allow BellSouth to circumvent its line conditioning obligations mandated by the FCC's rules.

This result would have severe consequences for competition and consumer choice in Kentucky. According to Mr. Fogle, 14% of BellSouth's copper loops in Kentucky are longer than 18,000 feet. KY Tr. at 247:15-17. BellSouth claims that it will not "routinely" condition them, and thus no CLEC could get them conditioned at reasonable and predictable TELRIC rates. The FCC certainly did not delegate to BellSouth (or any other entity) the authority to redefine the loop network element. As noted by Commissioner Burgess of Georgia, "[i]f it's an obligation, it's an

---

[13] Mr. Fogle's language is telling: "**we no longer routinely remove** load coils." This suggests that BellSouth conditioned lines over 18,000 feet prior to the issuance of the *TRO*, and now is asserting the "routine network modification" fallacy as a means of halting TELRIC-priced line conditioning going forward. Thus, if BellSouth does not condition long loops now (which is not the case – BellSouth conditions long loops, it just seeks to avoid doing some of this conditioning at TELRIC), it matters not that they conditioned such loops in the past. This position is patently discriminatory and displays an unfortunate lack of candor regarding the removal of accretive devices and impediments from "long" loops.

obligation." GA Tr. at 812:25-813:1. And, when Commissioner Burgess asked that Mr. Fogle to point to authority that says "[BellSouth's] got the ability to change the standard," he was unable to meet that request. GA Tr. at 812:18-818:2.

Nor did the FCC delegate rule enforcement to the "shared loop collaborative" that Mr. Fogle often references. Fogle Direct Testimony at 8:21 – 9:18 (Nov. 19, 2004). The fact that several CLECs agreed voluntarily to accept less than the law affords them via a proposal similar to BellSouth's proposal here in no way requires Joint Petitioners to accept the same. This arbitration must be decided in accordance with sections 251 and 252 and the FCC's implementing rules. 47 U.S.C. § 252(c)(1). "Groupthink" and voluntary negotiations by others does not trump this obligation.

This Agreement should define line conditioning by reference to the FCC rule. This convention is regularly used by BellSouth in its interconnection agreements. *See, e.g.*, Exhibit KKB-1 to Blake Direct Test. at 3 (several terms are "as defined in the FCC's rules"). Joint Petitioners want only what the rule requires, and they are entitled to all that the rule permits.

***Item No. 37, Issue No. 2-19** [Section 2.12.2]: Should the Agreement contain specific provisions limiting the availability of Line Conditioning to copper loops of 18,000 feet or less?*

POSITION STATEMENT: There should not be any specific provisions limiting the availability of Line Conditioning (in this case, load coil removal) to copper loops of 18,000 feet or less in length. The Commission's already-approved TELRIC rates for load coil removal on loops greater than 18,000 feet should apply.

The Agreement Should Not Contain Specific Provisions Limiting The Availability Of TELRIC-Rated Line Conditioning To Copper Loops Of 18,000 Feet Or Less.

BellSouth should not be permitted to impose artificial restrictions on its obligation to provide line conditioning at Commission-approved TELRIC-compliant rates. As demonstrated

above, the proper outcome is to require BellSouth to remove bridged taps and load coils from copper loops at the request of a CLEC at the TELRIC-compliant rates already set by this Commission. As Commissioner Burgess of Georgia aptly put it, "**you don't change the pricing standard**" based on a parochial interpretation of the rules. GA Tr. at 814:17-18 (emphasis added).

As required by the FCC's line conditioning rules, BellSouth must remove load coils at TELRIC rates on loops of any length. *See TRO* n.1947 ("In the *UNE Remand Order*, the Commission made clear that incumbent LECs must condition loops to allow requesting carriers to offer advanced services, and identified the removal of bridge taps, load coils, and similar devices as part of this obligation. ... The Commission subsequently refined the conditioning obligation to cover loops of any length[.]"). BellSouth has refused to remove load coils on copper loops greater than 18,000 feet at TELRIC rates because it implausibly claims that this activity is not *for BellSouth* a routine network modification as defined by the FCC.[14] BellSouth's refusal to condition these loops at TELRIC rates is based on its flawed interpretation of the line conditioning rules.

As demonstrated above with respect to Item 36, BellSouth's line conditioning obligations are not constrained by the routine network modification rule. Nor are they limited to the conditioning of loops for xDSL services. Rule 51.319(a)(1)(iii))(A) states that the services for which conditioning is required are "high-speed switched wireline telecommunications capability, ***including*** digital subscriber line service." The Commission therefore should order that this Agreement should in no way preclude or impede, through prohibitively high and unpredictable "special construction" prices, the availability of line conditioning to copper loops 18,000 feet or less.

---

[14] In making this suggestion, BellSouth implausibly suggests that DS1 UNE loops and various loop products that it willingly offers under its access tariffs are limited to 18,000 feet – they are not.

In addition, even if BellSouth's "routine network modification" position were plausible, BellSouth should be required to remove load coils on all loops at TELRIC rates. Mr. Fogle testified that BellSouth routinely removes load coils on loops greater than 18,000 feet in order to provide T1 circuits. KY Tr. at 248:14-16. As such, T1 conditioning would qualify as a "routine network modification" under BellSouth's criteria. Mr. Fogle also testified that T1 circuits are provisioned over a copper loop. KY Tr. at 251:9-11. Thus, **according to BellSouth's own logic**, xDSL-capable copper loops of 18,000 feet or more must be conditioned. Otherwise BellSouth would be violating the "obligation to perform line conditioning at parity" that it purports to uphold. KY Tr. at 244:12-13.

A note about the concept of "business impacting" issues is warranted here. BellSouth's argument throughout this arbitration has been that "a lot of the issues that we're fighting about are simply not business impacting." GA Tr. at 15:24-25 (Meza Opening Statement). *See also* FL Tr. at 19:8-9 (Meza Opening Statement) ("[T]hese issues or some of these issues are truly not business impacting."). The implication being that litigating this case is a waste of time. Yet in this Issue 37, BellSouth is refusing to adopt language that reflects federal law even though BellSouth does not expect ever to have to fulfill it. In fact, Mr. Fogle explained at the Georgia and Florida hearings that BellSouth has received only **2 requests** for load coil removal on loops longer than 18,000 feet. GA Tr. at 813:21-23; FL Tr. at 708:2-3. Thus, BellSouth has no reason to think that Joint Petitioners will inundate it with line conditioning requests.

Notably, the Commission **has already set TELRIC rates** for line conditioning on loops of all lengths. At hearing, Mr. Fogle admitted this fact. GA Tr. at 822:23-823:6; FL Tr. at 702:24 – 703:6. Yet, Mr. Fogle indicated that BellSouth now wishes to stop, via this Agreement, offering those Commission-approved rates to Joint Petitioners. GA Tr. at 823:20-824:20; FL Tr. at 703:6-

10. The new "rates" would be set on an unpredictable, individual-case-basis FCC tariff Special Construction[15] rates for load coil removal on long loops. GA Tr. at 810:5-8, 826:9, 832:2-6; FL Tr. at 708:7-8. Plainly, BellSouth is attempting to circumvent the rates set by order of this Commission. Joint Petitioners are not willing to waive the application of these rates, and have proposed the rejection of BellSouth's proposed language for Section 2.12.2 that would exclude their application. The Commission should accordingly adopt Joint Petitioners' language to ensure the continuing applicability of its TELRIC rates for load coil removal on loops, including those that are greater than 18,000 feet in length.

***Item No. 38, Issue No. 2-20** [Sections 2.12.3, 2.12.4]: Under what rates, terms and conditions should BellSouth be required to perform Line Conditioning to remove bridged taps?*

POSITION STATEMENT: In accordance with FCC line conditioning rules requiring removal of all accreted devices, bridged tap of less than 2,500 feet should be removed at TELRIC rates, which the Commission has already set, rather than usurious "Special Construction" rates.

BellSouth Should Be Required to Remove Bridged Tap of Any Length at TELRIC Rates.

Like Item 37, this issue is resolved in Joint Petitioners' favor with the proper resolution of Item 36. BellSouth has refused to remove bridged tap less than 2500 feet in length from copper loops at TELRIC rates. As with Item 37, BellSouth is relying on its incorrect interpretation and implausible application of the routine network modification rule for its refusal.

First, BellSouth argues that since it is willing to erroneously claim that it does not remove bridged tap less than 2500 feet in length from copper loops serving its retail customers, this activity is not a routine network modification. Because BellSouth incorrectly equates line

[15] Load coil removal is not "Special Construction." *Compare TRO* ¶¶ 645-648 (Special Construction of Transmission Facilities), *with id.* ¶¶ 642-644 (Line Conditioning).

conditioning with routine network modification, it maintains that this type of bridged tap removal does not constitute line conditioning and need not be done at TELRIC rates. However, as demonstrated above, the FCC does not equate line conditioning and routine network modifications. **They are separate and distinct rules.** ILEC line conditioning obligations are not modified or limited by the routine network modification rules. There was no length limitation in the FCC line conditioning rules before the *TRO*, and there is none now. BellSouth remains obligated to remove bridged tap from loops of any length pursuant to section 251(c)(3) of the Act and 47 C.F.R. § 51.319(a)(1)(iii)(A). There is no exception for "short" bridged taps.

Second, BellSouth proposes to limit bridged tap removal to that which "serves no network design purpose." Fogle Direct Test. at 9:15. There is no legal basis for this purported standard either. Moreover, such a "standard" would have the same effect as described above in item 36. This standard would give BellSouth the sole discretion to determine when bridged tap would be removed.

Finally, BellSouth recites the tired argument that requiring it to remove bridged tap of this length would create a "superior network" for Joint Petitioners. Fogle Direct Test. at 9:22. The FCC has expressly stated that "[l]ine condition does not constitute the creation of a superior network as some incumbent LECs argue." *TRO* ¶ 643. As such, Joint Petitioners' proposed implementation of Rule 51.319 as to line conditioning does not violate any precept of parity, but rather comports exactly with the FCC's own interpretation of ILEC non-discriminatory access responsibilities under section 251(c)(3).

Again, as with load coils, the Commission has already set TELRIC rates for bridged tap removal on loops of all lengths. Petitioners' Exhibit 12 includes the Commission's TELRIC rates for removing bridged taps for all loops; Mr. Fogle again recognized that these rates were set by

this Commission under the TELRIC methodology. GA Tr. at 822:23 – 823:6; FL Tr. at 703:3-6. Again, BellSouth wants to cease complying with those rates. GA Tr. at 823:20 – 824:20; FL Tr. at 703:6-11, 708:7-8. BellSouth should not be permitted, above Joint Petitioners' objection, to impose other rates — particularly unpredictable "Special Construction" rates — in contravention of the FCC rules and the Commission's TELRIC pricing decisions.

This conclusion must hold true regardless of any voluntary agreement that other CLECs may have made to accept less. Thus, the fact that BellSouth got certain CLECs to agree in the Shared Loop Collaborative to accept grossly inflated and unpredictable pricing for line conditioning, Fogle Direct Test. at 10:4-9, does not diminish Joint Petitioners' right to enforce and adopt FCC Rule 51.319(a) in this Agreement. This Commission is neither required nor authorized to impose the Shared Loop Collaborative result in this arbitration, but rather must adhere to the mandates of section 251(c) and the FCC's associated line conditioning and TELRIC pricing rules. 47 U.S.C. § 252(c)(1).

The Commission should accordingly adopt Joint Petitioners' language for this issue.

Item No. 51B, Issue No. 2-33 *[Sections 5.2.6, 5.2.6.1, 5.2.6.2, 5.2.6.2.1, 5.2.6.2.3]: (B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?*

POSITION STATEMENT: FCC rules provide for only limited EEL audit rights. To properly implement the FCC's "for cause" auditing standard, BellSouth must identify the circuits for which it has cause and provide documentation supporting its allegations of cause. To avoid unnecessary disputes, this information should be provided with the audit notice.

<u>EEL Audit Notices Should Demonstrate Cause and Include Supporting Documentation</u>.

BellSouth does not have carte blanche to conduct unlimited EEL audits at its own discretion. The FCC has held that ILECs may only conduct EEL audits "based upon cause." *TRO* ¶ 622; *see also Implementation of the Local Competition Provisions of the Telecommunications*

Act of 1996, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd. 9587, 9603 ¶ 29 n.86 (audits should "only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria"); *TRO* ¶ 621 (noting that the Commission concluded that "audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern"). The *TRO* grants ILECs only a "limited right to audit" EEL circuits. *TRO* ¶ 626. 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.[16]

Only after Joint Petitioners filed for arbitration did BellSouth nominally agree to incorporate the "for cause" standard for EEL audits into the Agreement.[17] Its proposed language for Section 5.2.6 now states that it will "send a Notice of Audit ... identifying the cause upon which BellSouth rests its allegations." Exhibit A at 12. Yet the manner in which BellSouth is prepared to show cause (if at all) is designed to render meaningless the "for cause" auditing standard established by the FCC. To wit, BellSouth refuses to agree that it will identify the circuits for which it has cause to suspect a compliance issue and it refuses to provide any supporting documentation to demonstrate that it has such cause. At best, BellSouth "could **allude to** in the letter that there's cause[.]" KY Tr. at 198:2-3 (Blake) (emphasis added).

---

[16] 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.

[17] Similarly, Joint Petitioners were forced to file for arbitration over the FCC's EEL eligibility criteria. Only after the issue was raised as an arbitration issue, did BellSouth recant on its attempt to force Joint Petitioners to accept a pro-BellSouth and unlawful rewrite of the rules.

Joint Petitioners already have agreed that they will use EELs in a manner that complies with FCC regulations. Mr. Russell, the Petitioners' designated witness for this Item, affirmed that promise at both the Georgia and Florida hearings. GA Tr. at 462:22-4 ("we've certified … we are in compliance"); FL Tr. at 235:8 ("we've certified compliance"). Having obtained that promise, BellSouth should not be permitted to demand a right to demand an audit for no cause or even for a cause it prefers to keep secret (likely because it is no cause at all).

Tellingly, BellSouth has admitted that it wants the right to audit 100% of Petitioners' EELs in Kentucky every single year and has essentially asserted that it will have cause to audit every circuit every year. KY Tr. at 201:8-13. *See also* GA Tr. at 1093:16-25 (Blake); FL Tr. at 997:8-10 (Blake). Indeed, Ms. Blake has twice agreed, under BellSouth's logic, if BellSouth had cause with respect to a **single** circuit, that would, in its opinion, justify an audit of **all** EEL circuits in the state. GA Tr. at 1094:1-10; FL Tr. at 997:14-18.

Such broad audits would render the FCC's "limited right to audit" and "for cause" auditing standards meaningless. BellSouth must have more grounds for an audit than "something may not be right" on one of these circuits or "we just want to check." The FCC adopted a higher standard. As Mr. Russell stated at hearing in Georgia, it appears that "somebody at the FCC expects either that BellSouth could be up to no good and wanting to look at our records or that it is intrusive[.]" GA Tr. at 463:10-12. Hence the Joint Petitioners have maintained that

> If a Petitioner is going to have to endure the time and expense necessary to comply with a BellSouth audit request, at the very least, BellSouth can provide adequate notice to CLECs setting forth the scope of and cause upon which the audit request is based along with supporting documentation.

JP Direct Test. at 72:14-17. The FCC's "for cause" auditing standard is the means by which this bargain is struck and enforced. The fishing expeditions contemplated by Ms. Blake are anathema to the FCC's order on this issue.

It bears emphasis that Joint Petitioners do not seek to curtail BellSouth's right to pursue legitimate concerns about EEL eligibility criteria compliance. At the Georgia hearing, Mr. Russell stated that he "never disagreed" that BellSouth has a right to audit a CLEC's EELs if it has a legitimate cause to believe there is non-compliance. GA Tr. at 462:14-18. He also has agreed that "absent this audit right, there is no way for BellSouth to challenge a CLEC's certification" of compliance." FL Tr. at 230:10-12. Thus, Joint Petitioners are prepared to comply with an audit for "those circuits identified by BellSouth for which it produced supporting documentation." GA Tr. at 453:21-22. *See also* FL Tr. at 231:9-10 (agreeing to audits of "circuits for which BellSouth demonstrated a concern"). Mr. Russell also agreed that an audit of limited scope may later be expanded, if the results of the initial audit establish cause to expand the scope. GA Tr. at 456:9-13; FL Tr. at 238:8-14. Any expansion of the scope should be agreed to by the parties or ordered by the Commission, if no agreement can be reached. It must, however, be remembered that audits are "very intrusive," Tr. at 40:9 (Russell), and create "lost business opportunities" when scarce resources are diverted from serving customers to assisting auditors. GA Tr. at 462:3-4. Moreover, unnecessary audits are simply an entrée to mischief that BellSouth has demonstrated a fierce and decidedly perverse desire to engage in. *See* GA Tr. at 458:12 (Russell) (cause standard "prevents unnecessary mischief on the part of BellSouth").

BellSouth's chief reason for refusing to identify the circuits for which it has cause is its belief that Joint Petitioners would convert an identified EEL back to special access prior to the audit, and thereby avoid liability. GA Tr. at 459:20-25 (Meza); FL Tr. at 996:16-17 (Blake) (Petitioner could

"switch those circuits back to special access real quick"). This belief is groundless, and the conclusion is more than a bit silly. Audits are about reviewing certifications of compliance. Even if a circuit were switched, all of the certification records remain and can still be audited. The CLEC's quick conversion would be easily detected and it would not cure a past violation.

For these reasons, the FCC's for-cause standard for audits should be incorporated into the Agreement with notice and disclosure requirements that ensure that the standard is not rendered meaningless but instead serves as intended – which is to allow only targeted audits of limited scope conducted based upon good and demonstrable cause. Joint Petitioners' language, which requires BellSouth to articulate its cause and provide supporting documentation, reasonably implements these requirements. Given the burden that audits impose, and the FCC's desire to limit their scope appropriately, this proposed documentation requirement is a necessary and minimal obligation for BellSouth to perform. Moreover, this Commission certainly has jurisdiction to order and adopt reasonable provisions for implementing the auditing requirements set forth in the *TRO*. *TRO* ¶ 625 (deferring to state commissions to address implementation). *See also* 47 U.S.C. § 252(b)(4)(C); GA Tr. at 458:12-16 ("this Commission … can order" a more expansive audit) (Russell). BellSouth's assertion that the *TRO* does not specifically require it to identify the circuits for which it has cause or to demonstrate that the cause is real and legitimate, is hollow and will serve only fuel its resource draining, cost-raising litigation campaign against facilities-based CLECs such as NuVox. Clarity is needed to avoid providing BellSouth with a fresh 42-month-long opportunity to engage in vexatious litigation that drains the resources of both its competitors and this Commission.

Accordingly, Joint Petitioners' language for Issue 51B holds true to both the FCC's and this Commission's orders on the topic and should be adopted.

***Item No. 51C, Issue No. 2-33** [Sections 5.2.6, 5.2.6.1, 5.2.6.2, 5.2.6.2.1, 5.2.6.2.3]: (C) Who should conduct the audit and how should the audit be performed?*

POSITION STATEMENT: The FCC requires that EEL audits be performed by AICPA-compliant third party independent auditors. The best way to implement this requirement, to avoid disputes, and to uncover potential conflicts is to require mutual agreement on the auditor retained by BellSouth. Such agreement may not be unreasonably withheld by Petitioner.

Ensuring the Independence of an Auditor In Any Specific Case Requires Mutual Consent.

The FCC has held that audits must be conducted by an independent auditor. *TRO* ¶ 626. Joint Petitioners' proposed language for Section 5.2.6.2 of Attachment 2 properly implements this requirement in a manner designed to avoid the protracted litigation that has ensued over this issue by ensuring that the independent auditor selected must be "mutually agreed-upon by the Parties." Exhibit A at 12. This is the only process by which conflicts can be fully and properly vetted. Moreover, it does not deny BellSouth the right to select an auditor that it must pay for.[18] Instead, it simply serves as a protective measure designed to ensure that the independence requirement is met at the outset of the audit.[19]

BellSouth's position on this issue is to assure Petitioners that any auditor it chooses will comply with American Institute for Certified Public Accountants ("AICPA") standards. Blake Direct Test. at 32:9-11. BellSouth argues that "AICPA standards govern each of these areas. No other requirements are needed." *Id.* at 33:24-25. Thus, per BellSouth, any auditor that BellSouth chooses will be, *ipso facto*, independent. The fact that it is not willing to permit Petitioners the opportunity to test that assertion is troubling. Indeed, BellSouth attempts to circumvent any due diligence regarding conflicts or the relationships that particular auditors develop with the Parties.

---

[18] For example, an initial list of potential AICPA-compliant auditors can be presented and then conflicts on both sides can be disclosed and the list can be narrowed from there. BellSouth could select from the remaining auditors on the list.

[19] We are unable to suggest a way to ensure that independence is maintained throughout the course of an audit other than to suggest that BellSouth be instructed to leave the auditor alone and to refrain from meddling.

What is most curious is that BellSouth elsewhere (wisely) insists on mutual consent for independent auditors in other contexts. Indeed the Parties have agreed to a provision in Attachment 3 of the new interconnection agreement that Percent Local Usage/Percent Interstate Usage ("PLU/PIU") audits must be conducted by a mutually agreed-upon third party auditor. FL Tr. at 167:3-5 (Blake). *See also* GA Tr. at 1101:11-16 (Blake); FL Tr. at 999:14-18 (Blake); Agreement, Att. 3, Sec. 10.5.7 (NuVox), and 10.8.5 (Xspedius). It is difficult to understand why mutual agreement is not appropriate for EEL audits when it is appropriate for PLU/PIU audits. Moreover, this Commission certainly has jurisdiction to order and adopt reasonable provisions for implementing the auditing requirements set forth in the *TRO*. *TRO* ¶ 625 (deferring to state Commission's to address implementation). *See also* 47 U.S.C. § 252(b)(4)(C).

Joint Petitioners' concern that auditors must be independent is not simply academic. NuVox, for example, has significant experience with EEL audits. The Georgia Commission, for example, essentially rejected the very first "independent auditor" BellSouth proposed. **Attachment 6** (*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 at 1, 12-14 (Ga. P.S.C. May 18, 2004) ("*NuVox Audit Order*"). The auditor conducting the audit authorized by the Commission in Docket No. 12778-U recently acknowledged that its independence had been compromised. On its own volition, the auditor suspended work on the audit until it could proceed in compliance with AICPA standards.

Again, as Mr. Russell had earlier stated, audits not only create "interruptions to the business," GA Tr. at 461:13, but they create the highly intrusive situation in which one's biggest

competitor is reviewing sensitive business records. KY Tr. at 40:9-20.[20] Thus, NuVox, as well as Xspedius, understandably wish to ensure that each auditor, in every instance, is at all times truly independent. BellSouth's refusal to allow their input on this matter is therefore inappropriate.

Invoking AICPA standards as the shibboleth for independence is not enough. As Mr. Russell explained to the Florida Commission, ruling out conflicts of interest require individual analysis. The Georgia EEL audit, which Mr. Meza raised at the hearing before Chairman Goss (KY Tr. at 70:9 – 71:14), is a perfect example. NuVox had recommended KPMG as the auditor, believing it was truly independent. FL Tr. at 241:4-6 (Russell). Yet the individual auditors tasked with the job proved to be unable to adhere to AICPA standards for independence. *Id.* at 241:22-23. That conclusion could not have been reached *a priori*, but rather resulted from specific analysis of the facts involved. That NuVox initially had thought KPMG was appropriate for the job is therefore irrelevant. *See* KY Tr. at 70:24 – 71:14. Conflicts cannot be predicted or assessed in a vacuum.

This is not a "delaying tactic" as Ms. Blake disingenuously suggests. Blake Direct Test. at 34:10. Mutual agreement on auditors in the context of PIU/PLU audits has resulted in no known delays – and no known disputes, for that matter. GA Tr. at 1101:11-16 (Blake). Ms. Blake's attempt to distinguish PIU/PLU audits from EEL audits in this respect – that they are "a whole different animal" (KY Tr. at 167:5-8) – was unexplained and unsupported. Her similar attempt at the Georgia hearing – asserting that "a jurisdictional factor is different than complying with the

[20] "They are one of our – they are our biggest competitor. They are also one of the company's biggest vendors[.] ... So we're competing with them and purchasing services from them[.] ... So it is a competitive issue to a large degree." *See also* GA Tr. at 463:3-4 ("Would you be concerned if I came to office [*sic*] and went through all your business records?").

law" – was also unavailing. GA Tr. at 1101:24 – 1102:1.[21] An independent auditor is required and it cannot be presumed or declared by one party without the input of the other.[22]

Accordingly, Joint Petitioners' language for Issue 51(c) should be adopted.

Item No. 65, Issue No. 3-6 *[Section 10.8.1, 10.10. 1]: Should BellSouth be allowed to charge the CLEC a Tandem/Transit Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?*

POSITION STATEMENT: BellSouth may not impose upon Joint Petitioners a new non-cost-based, unjustified, and discriminatory Transit Intermediary Charge ("TIC") for transit traffic in addition to the TELRIC tandem switching and common transport charges the Parties already have agreed will apply to transit traffic. The TIC is a "tax" that is unlawful, unjustified and discriminatory.

Joint Petitioners Should Not Be Required to Pay the Additive "TIC" In Addition to the TELRIC Rates the Parties Already Have Voluntarily Agreed Will Continue to Apply to BellSouth's Provisioning of Transit Service.

As an initial matter, this issue is about whether BellSouth may impose a TIC over and above the TELRIC rates the parties already have agreed will apply to transit traffic. **The parties already have agreed that:** (1) BellSouth will continue to provide transit service just has it always has done, (2) TELRIC rates for tandem switching and common transport (to the extent used) will apply just as they always have, (3) that the originating party will pay for the service – same as it ever was.

[21] In fact, Ms. Blake later admitted in Georgia that "I don't have any knowledge of PIU audits," GA Tr. at 1102:24, rendering her attempt to distinguish them from EEL audits specious. In sum, BellSouth's concern that choosing a mutually acceptable EEL auditor will create delay is baseless.

[22] BellSouth recently has claimed that it was surprised to find out that the auditor conducting the audit in Docket No. 12778-U also serves as NuVox's financial auditor. *See* KY Tr. at 70:16-19. Why this fact was apparently not disclosed by the auditor to BellSouth when it was retained is unknown to NuVox. However, the language proposed by Joint Petitioners requiring mutual consent will require a process wherein known conflicts are disclosed, discussed and resolved without unnecessarily consuming the resources of the Commission.

Petitioners must also begin by noting that BellSouth's TIC proposal is entirely vague. It began as a request for $.0015 per minute for transit traffic, GA Tr. at 1105:15-17 (Blake), in addition to the tandem switching and common transport rates already established in this Agreement, *id.* at 1104:10-16, that would purportedly cover the cost of forwarding records to terminating CLECs that identify Petitioners as the originators of transited traffic. GA Tr. at 1108:2-4 (Blake). The week before the Georgia hearing it became a request for a $.0025 composite TIC rate that included tandem switching, common transport, and the new records charge. *Id.* at 1104:21 – 1105:7 (Blake). Yet at the hearing before this Commission, which occurred a few weeks later, BellSouth made no rate proposal for the TIC. *See generally* KY Tr. at 161:10-19 (Blake Summary), 169:13 – 170:6, 204:19 – 207:18. In fact, Joint Petitioners understand that BellSouth has withdrawn the composite rate proposal and has reverted back to its original proposed language now reflected in the revised Exhibit A attached hereto.[23] Petitioners are thus forced to discuss both the $.0015 additive TIC and the $.0025 composite TIC in this brief, neither of which is appropriate or should be adopted for this Agreement.

1. <u>The $.0025 Composite TIC Adopted by the Georgia Commission Is Not Justiciable in This Arbitration</u>.

The TIC at issue in this arbitration is not comparable to the composite rate ordered as an interim rate by the Georgia Commission in Docket No. 16772-U. The $0.0025 per minute rate adopted on an interim basis by that Commission – which is not at all based on TELRIC – is not at issue in this docket. Instead, the BellSouth proposed additive TIC of $0.0015 per minute is at issue here. BellSouth is not at liberty to change an arbitration issue and in essence create a brand new issue the week before the hearing. *See generally* GA Tr. at 1102:25 – 1105:24 (Blake). And

[23] If this understanding is incorrect and the withdrawal applies only to states other than Georgia, it would be evident that BellSouth continues to have difficulty communicating what are settlement proposals and what are language proposals for Exhibit A, the difference between the two, and where they apply.

Petitioners must also raise that BellSouth appears poised to challenge the Georgia TIC in some fashion: BellSouth's post-hearing brief to that Commission, filed July 8, 2005, asks that the $.0025 composite TIC be imposed on Petitioners, but footnotes that "BellSouth reserves all rights relating to the Commission's authority to establish a non-TELRIC rate for the transit function." **Attachment 7** (BellSouth GA Brief at 51 n.34). Should BellSouth in fact challenge the Georgia decision, its request that Petitioners be forced to adopt the composite TIC would prove disingenuous in the extreme.

It also must be noted that BellSouth has – prior to the Commission's adoption of the composite TIC rate – repeatedly asserted that State Commissions have no jurisdiction to include the TIC in this Agreement, Blake Direct Test. at 42:5-6, and wanted to pull the TIC out and place it in a separate agreement (a proposal which the Joint Petitioners soundly reject). Blake Depo. Tr. at 497:17-18 (Dec. 8, 2004). Yet, in Georgia BellSouth apparently has succumbed to Commission jurisdiction to establish a rate for transit service, and it now seeks to impose that interim rate on Joint Petitioners in mid-arbitration in every other state. BellSouth's pre-existing commitment to provide the transit function to Joint Petitioners at the same TELRIC rates that have always applied cannot be undone unilaterally.

The TIC at issue in this docket is not a composite rate and it is not the interim rate that was at issue in Georgia Docket No. 16772-U. As Ms. Blake acknowledged at the Georgia hearing, this composite TIC was never negotiated by the parties. GA Tr. at 1104:10-16. As such, the composite TIC should not be adjudicated in this proceeding. *Coserv*, 350 F.3d at 487 (a State Commission "may arbitrate only issues that were the subject of the voluntary negotiations"); *MCI*, 298 F.3d at 1274. To do so would unlawfully upend existing voluntarily negotiated language, namely that Petitioners will pay a tandem switching rate that is TELRIC-compliant and approved

by this Commission.

The prevailing dispute in this arbitration over the TIC is thus substantially different than the issue for which the Georgia Commission set the interim composite rate. That new rate was never negotiated and agreed to (TELRIC rates were voluntarily negotiated and agreed to), was not raised as an arbitration issue, and cannot not be forced into this Agreement.

2. The Alternative $.0015 Additive Rate Is Unjustified and Unnecessary.

In any event, BellSouth's proposed TIC of $0.0015 is neither cost-based nor just and reasonable. The parties have agreed that BellSouth will provide transit service to Joint Petitioners at the TELRIC-compliant rates for tandem switching and common transport. GA Tr. at 1104:10-16; FL Tr. at 1002:13-18 (Blake). This is settled and not subject to arbitration. What the parties did not agree on is whether BellSouth could also impose a non-cost based additive TIC of $0.0015 per minute in addition to the agreed-upon TELRIC rates. GA Tr. at 1105:15-17 (Blake); *see generally* FL Tr. at 1003:5 – 1010:15 (questioning of Ms. Blake). Joint Petitioners found the charge to be unlawful, unnecessary and unsupported, and thus refused to accept the TIC. JP Direct Test. at 81:1 – 82:3. As other state commissions have found, compensation for the transiting of traffic should be TELRIC-compliant.[24]

[24] On July 11, the Missouri Public Service Commission adopted language for the Missouri 271 Agreement ("M2A") stating that compensation for transiting "is based on TELRIC pricing." Southwestern Bell Tel., L.P. d/b/a SBC Missouri's Petition for Compulsory Arbitration, Case No. TO-2005-0336, Arbitration Order at 52-53 (July 11, 2005) (**Attachment 8**). In addition, the Public Utilities Commission of Texas has long required SBC, an ILEC and RBOC like BellSouth, to provide its transit services at TELRIC rates. *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Arbitration Award – Track 1 Issues, PUCT Docket No. 28821, at 23. "Consistent with prior Commission decisions in the Mega-Arbitrations, Docket No. 21982 and the predecessor T2A agreement, the Commission finds that SBC Texas shall provide transit services at TELRIC rates. The Commission notes that there has been no change in law or FCC policy to warrant a departure from prior Commission decisions on transit service." *Id.* The Texas PUC went on to say that "[g]iven SBC Texas's ubiquitous network in Texas and the absence of competitive transit providers in Texas, the Commission concludes that requiring SBC Texas to provide transit services at cost-based rates will promote interconnection of all telecommunications networks. In the absence of alternative transit providers in Texas, the Commission finds that SBC Texas's proposal to negotiate transit services separately outside the scope of an FTA § 251/252 may result in cost-prohibitive rates for transit service." Excerpt of this order attached hereto as **Attachment 9**. BellSouth's Kentucky network is similarly

The reasons why BellSouth's TIC should be rejected in this docket are many. First, it is not a cost-based rate of any kind (TELRIC is the applicable cost-based pricing methodology). Indeed, BellSouth provides no cost support for the proposed rate. Therefore it would be impossible on the record established in this docket for this Commission to deem the rate just and reasonable.

There are other independently valid reasons to reject the TIC. As an initial matter, it must be noted that **none** of Joint Petitioners' existing agreements include a TIC charge — this fee is entirely new. JP Direct Test. at 81:18-19; GA Tr. at 1106:12-16 (Blake); FL Tr. at 1003:5-13 (Blake). Yet BellSouth has been transiting traffic for the Joint Petitioners since each of them (or a predecessor company) began interconnecting with BellSouth in the mid-to-late 1990s. That the TIC has never been imposed on Petitioners only further demonstrates that it is unnecessary and unjustified. Until now, BellSouth has been satisfied that the agreed-upon TELRIC charges adequately cover BellSouth's costs. In this docket, it has provided no proof of its costs or that its costs are not covered. Ms. Blake's assertion that the absence of the TIC in Petitioners' existing agreements means that "the CLECs possibly have been getting something for nothing over the years" is therefore unfair, inflammatory, and patently incorrect. KY Tr. at 169:17-18.

Moreover, it is not in dispute that BellSouth will transit traffic between Joint Petitioners and other carriers. This obligation is already in the Agreement. Agreement Att. 3, Section 10.11.1 (XSP), Section 10.8.1 (NVX). For this reason, BellSouth's continued resort to the argument that Joint Petitioners can avoid the TIC and "*connect directly with other carriers in order to exchange traffic*," Blake Rebuttal Test. at 48:13-14 (emphasis in original), is irrelevant and, as a practical and economic matter, wrong. KY Tr. at 133:8- 134:3 (Mertz). Consistent with section 251 of the

---

ubiquitous to that of SBC in Texas. The record in this proceeding also contains no evidence that alternative competitive transit providers are operating in Kentucky.

Act, BellSouth has already agreed to transit traffic. If anything, BellSouth's repeated reference to (typically uneconomic) direct interconnection only further demonstrates that it is using the TIC as a means to extract monopoly rents, or perhaps to punish CLECs, for electing to efficiently passing traffic over BellSouth's legacy tandem facilities. Indeed, the North Carolina Commission has held that an ILEC is obligated to transit traffic "as a matter of law." **Attachment 10** (*Verizon Petition for Declaratory Ruling*, Docket P-19, Sub 454, Order Denying Petition at 5-6).

Joint Petitioners have long disputed the TIC as being an unsubstantiated and unnecessary additive charge. JP Direct Test. at 80:14 – 81:18. As Mr. Falvey stated at the Georgia hearing, "there's this additional charge that BellSouth wants [us] to pay above that and we've said to them what exactly are we paying for, we've never gotten a straight answer." GA Tr. at 469:18-21. BellSouth's written testimony asserts that the TIC charge covers the costs of "sending records **to the CLECs** identifying the originating carrier." Blake Direct Test. at 42:16-17. In other words, BellSouth would send records to NuVox informing NuVox of the traffic NuVox had originated. Having realized that assertion makes no sense,[25] Ms. Blake changed this testimony for the more recent hearings. BellSouth's new position is that it must send records to the terminating carrier identifying the **originating** carrier, in order that **terminating** carrier knows who sent it. KY Tr. at 207:14-18; GA Tr. at 1108:2-4 (Blake). It is the carrier that originates a transit call that would pay BellSouth's TIC. KY Tr. at 207:11-14; GA Tr. at 1107:7-10. So, BellSouth seeks to charge Joint Petitioners for records BellSouth sends to third parties. This is senseless. Joint Petitioners should not pay for records that another party requests. Moreover, Joint Petitioners' own switches provide SS7 signaling which enables terminating carriers to identify the originating carrier. As such, Joint Petitioners do not need BellSouth to send these records, either to Petitioners or to third parties.

[25] At hearing in North Carolina, Ms. Blake acknowledged that "I think you know who you are." **Attachment 11** (NC Tr. v. 6 at 343:11).

The Commission therefore should hold that Joint Petitioners must pay only the agreed-upon tandem switching and common transport rate in connection with transited traffic, as BellSouth has failed in this arbitration to provide any justification for an additive TIC rate.

***Item No. 86, Issue No. 6-3** [Sections 2.5.6.2, 2.5.6.3] (A) This issue has been resolved. (B) How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?*

POSITION STATEMENT: Disputes over CSR access should be handled pursuant to the Dispute Resolution provisions set forth in the General Terms of the Agreement. BellSouth's ambiguous language that reserves some right to suspend access to ordering systems and to terminate all services, is coercive and threatens to harm competitors and consumers.

Disputes Over Unauthorized Access to CSR Information Should be Subject to the Dispute Resolution Provisions of the Agreement.

Disputes over unauthorized access to CSR information should be handled in the same manner as other disputes arising under the Agreement. The party alleging non-compliance should notify the other party of the issue. If the parties are unable to resolve the dispute themselves, they should resort to the dispute resolution provision in the General Terms and Conditions of the Agreement. BellSouth's proposed "self-help" remedies are inappropriate, dangerous and coercive. JP Direct Test. at 85:16 – 86:1.

BellSouth proposes a menu of debilitating and extremely disruptive sanctions for any allegation by BellSouth of unauthorized access to CSR information. Under its proposal, BellSouth could refuse to accept new orders and it could also suspend any pending orders, and access to ordering and provisioning systems, Ferguson Direct Testimony at 13:8-12 (Nov. 19, 2004), thus closing off Petitioners' ability to serve the needs of existing customers, as well as potential new ones. Ultimately, BellSouth "may discontinue the provisioning of existing services", *id.* at 13:11-12, no matter how unrelated to the unproven allegations of unauthorized access to CSRs. *See also*

Exhibit A at 14-15. BellSouth's proposal affords it the discretion to select any of these remedies regardless of whether allegations pertained to an isolated problem or one that was systemic. GA Tr. at 690:6, 14 (Ferguson) (stating "[y]ou've got to have some firm language" that will apply on "just an individual case basis").

Critically, under BellSouth's recent proposal, it has the sole discretion to impose these draconian sanctions, which threaten catastrophic impacts on both CLECs and the Kentucky businesses (predominantly small businesses) they serve. At hearing in Georgia, Mr. Ferguson acknowledged that suspension or termination "definitely" has an impact on Joint Petitioners' business. GA Tr. at 687:3-7. BellSouth has offered no rationale for seeking the right to impose such an extreme and one-sided remedy.[26] Nor has BellSouth alleged or shown that any Joint Petitioner has ever misused CSR information in the past. If such remedies are ever appropriate, it should be up to the Commission to decide to impose them – not BellSouth.

Contrary to Mr. Ferguson's testimony before Chairman Goss, BellSouth's proposed language **does not preclude** BellSouth from terminating services if a Petitioner files a dispute with the Commission. *See* KY Tr. at 224:16-19. Rather, BellSouth's language simply states that, where an accused party disputes allegations of CSR misuse, "the alleging Party shall proceed" according to the Dispute Resolution language in the General Terms and Conditions. Exhibit A at 15. In fact, BellSouth **refuses** to accept Petitioners' suggested language that "the alleging Party shall not invoke any remedy specified in this paragraph" pending a dispute. Exhibit A at 14. It therefore does not appear to be true that "by the offer that [BellSouth] made in our revised

---

[26] Mr. Ferguson did, however, make one very telling remark in Georgia. He stated that a customer could "choose to go away from the account set up that they had with the CLEC" in order to avoid service disruption. GA Tr. at 687:20-22. This remark suggests that BellSouth's intent in Item 86 is not to safeguard CPNI but rather to use anticompetitive and dangerous methods to drive customers away from CLECs and back to BellSouth.

language, we would take it to the Commission and ask them to expedite a resolution" in lieu of service termination. KY Tr. at 224:16-18 (Ferguson).

Petitioners must also make clear that this issue is not simply about producing LOAs, as BellSouth may suggest. BellSouth's language does not state that producing an LOA (Letter of Authorization) ensures service continuity. Rather, BellSouth's language states that suspension and termination will occur if the alleged unlawful CSR access "is not corrected or ceased." Exhibit A at 15. BellSouth decides if the use has ceased or been corrected. GA Tr. at 690:4-22 (Ferguson). Yet, as Mr. Falvey made clear at hearing, "[w]e have legitimate disputes over whether that CSR is proper." KY Tr. at 103:20-21.

The gravity and overbreadth of BellSouth's language became clear at the Georgia hearing, when BellSouth witness Scot Ferguson could not answer the arbitration panel's questions as to when and why service termination would be imposed. GA Tr. at 688:16-22 ("Well, how severe does the violation have to be?") (Vice Chm. Baker); *id.* at 689:15 – 690:3. Rather, he could only state that "[y]ou've got to have some firm language" and whether a Petitioner will get off is "just an individual case basis." *Id.* at 690:6, 22. Vice Chairman Baker immediately saw the danger here, asking "[w]ell, who makes the final call? … I mean, effectively you're going to put companies out of business if you ever did that." GA Tr. at 703:16-22.

As a result of this questioning by the Georgia Commission, BellSouth revised its proposed language for Item 86(b), as the potential for abuse and grave harm to Joint Petitioners and their customers had become starkly evident. *See* Exhibit A at 15. While this language appears to accept the precept that disputes should be decided by a neutral decision-maker, such as the Commission, it inexplicably retains the menu of debilitating pull-the-plug remedies and impossibly short response windows (*e.g.*, BellSouth "may discontinue the provisioning of existing services if such

use is not corrected or ceased by the tenth (10th) calendar day"). At the next hearing, which was before the Florida Public Service Commission, Mr. Ferguson was unable to explain why it was that BellSouth felt compelled to leave in its proposal "pull-the-plug" language that could be used by BellSouth to turn Joint Petitioners' networks dark and cause massive service outages (likely without notice) to their entire base of Florida customers within just 10 days. FL Tr. at 784:5-13 (acknowledging that Petitioners' counsel was "absolutely right" that BellSouth's language retains a right to terminate all services). Mr. Ferguson's assurances that BellSouth will use its power to impose the "ultimate remedy" judiciously provides no comfort, as neither he nor his friendly spin on what BellSouth would do are within the four corners of the contract.

Moreover, Mr. Ferguson was unable in Florida to explain away the apparent conflict between BellSouth's proposed language and the Dispute Resolution provisions in the General Terms of the Agreement. FL Tr. at 778:21 - 779:5. Again, Mr. Ferguson's assurances that the general provisions governing dispute resolution which require continuing performance during a dispute would trump the more specific provisions that would seemingly allow BellSouth to terminate services provides no comfort. FL Tr. at 779:3-5. Indeed, Mr. Ferguson's assurances are at odds with how Georgia contract law would apply to the interpretation of the agreement (if there is a conflict between general and specific provisions, the specific provisions trump). *E.g.*, *Tower Projects, LLC v. Marquis Tower, Inc.*, 598 S.E.2d 883, 885 (Ga. Ct. App. 2004) ("When a provision specifically addresses the issue in question, it prevails over any **conflicting** general language."). Thus, nothing would stop BellSouth's lawyers from telling us all a few months or years down the road that Mr. Ferguson was wrong (and that he was unqualified to give assurances that hinged upon legal questions of contract interpretation).

Finally, Petitioners must address BellSouth's persistent worry that "this is an adoptable agreement," KY Tr. at 223:11 (Ferguson), and thus while Joint Petitioners have never caused a problem regarding CSR access, *id.* at 227:10-12 (Ferguson), BellSouth must retain draconian language on this matter to ensure that "other CLECs would appropriately follow the [CSR] provisions." *Id.* at 223:13. First, as Commission Attorney Dougherty astutely observed, it would be more appropriate for BellSouth, in this circumstance, to seek a declaratory ruling on an emergency basis" to deal with CSR abuse, rather than arrogate the power to terminate Petitioners' service in this Agreement. KY Tr. at 223:18-20. Secondly, Mr. Ferguson acknowledged that this Commission can "adequately deal with rogue CLECs" that opt into this Agreement and violate CSR restrictions. KY Tr. at 227:17-19. The CLEC right to adopt Interconnection Agreements is not a justification for the pull-the-plug language that BellSouth wants.

When the business of the Joint Petitioners and their Kentucky customers are on the line, this Commission simply cannot delegate such "enforcement" power to BellSouth. The harms caused by misuse of that power would be massive, widespread – and from the standpoint of Joint Petitioners, irreparable. If ever such remedies are appropriate the Commission can decide. For these reasons, the Commission should adopt Joint Petitioners' proposed language for Issue 86(b),[27] as it affords no less protection to CPNI and much more protection against potentially fatal abuse by BellSouth.

---

[27] Joint Petitioners responded to BellSouth's new language proposal by "redlining" that proposal to ensure that the representations and assurances made by Mr. Ferguson during cross examination at the Florida hearing (that the Commission and not BellSouth would resolve disputes and determine whether imposition of any of the remedies lists is appropriate) were incorporated into the four corners of the agreement. Joint Petitioners offered this redlined language to BellSouth more than a month ago and have even adopted it as their own new language proposal for this issue. Exhibit A at 14-15. Alarmingly, BellSouth has refused to accept Joint Petitioners' revised language for Georgia. Regrettably, this refusal casts considerable doubt on the credibility and reliability of Mr. Ferguson's testimony.

Item No. 88, Issue No. 6-5 *[Section 2.6.5]: What rate should apply for Service Date Advancement (a/k/a service expedites)?*

POSITION STATEMENT: Rates for Service Date Advancement (a/k/a service expedites) of UNEs, interconnection or collocation must be set consistent with federal TELRIC pricing rules. Service expedites are required as part of the section 251(c)(3) obligation to provide non-discriminatory access to UNEs.

<u>Service Date Advancements Are a Key Component of UNE Provisioning and Thus Must Be Priced at Commission-Approved TELRIC-Compliant Rates</u>.

All UNEs and UNE Combinations must be priced at TELRIC. 47 U.S.C. § 252(d)(1); 47 C.F.R. § 51.501 *et seq.*. Service Date Advancements (a/k/a expedites) are part and parcel of UNE provisioning and thus must also be priced at TELRIC. This result is required as both a matter of non-discriminatory access to UNEs, 47 U.S.C. § 251(c)(3), and Congress's mandate for cost-based UNE pricing. *Id.* §§ 251(c)(3), 252(d)(1). BellSouth has lodged an objection to this issue on the ground that it "should not be in the Agreement." Morillo (Blake) Rebuttal Testimony at 2:21-24 (Dec. 17, 2004). *See also* GA Tr. at 1112:7-9 (Blake); FL Tr. at 1019:11-16 (Blake). The necessary conclusion to be drawn from this statement is that BellSouth believes that this Commission has no authority to deal with the rates for expedites. Yet, section 252 expressly requires this Commission to review all rates, terms and conditions of interconnection agreements and ensure that they comply with non-discriminatory access requirements of section 251 and the pricing requirements of section 252(d). 47 U.S.C. § 252(e)(2). BellSouth has already agreed to perform Service Date Advancements for Petitioners under the Agreement. Exhibit A at 15 (indicating that the dispute is limited to the rate); GA Tr. at 561:12-13 (Meza) ("Mr. Falvey, BellSouth is willing to do service expedites, correct?"). As such, it has conceded that this Commission has jurisdiction to consider Service Date Advancements, which perforce includes the rates to be charged. *MCI Telecomms.*, 298 F.3d at 1274. In addition, the prices of UNEs are

committed to the jurisdiction of this Commission, 47 U.S.C. § 252(d), which again includes Service Date Advancement rates. Finally, the parties did attempt to negotiate an actual expedite rate. FL Tr. at 1020:22 – 1021:1 (Blake) (acknowledging that the parties "did, in fact, try to negotiate a rate for expedites"); GA Tr. at 1120:25 – 1121:6 (Blake) ("I don't recall any specific amount that was offered[.]"). Item 88 is therefore a proper arbitration issue and is well within this Commission's jurisdiction to resolve. *Coserv*, 350 F.3d at 487.

The dispute in this item is that BellSouth seeks to impose an exorbitant Service Date Advancement charge of $200 for each facility, per each day that the provisioning is expedited. Thus, for example, a request to expedite by 2 days an order to a small business requiring 8 lines would cost Petitioners (and, if passed through, would cost the small business owner) $3200. BellSouth purports that this rate recovers "its cost," but has never attempted to identify these "costs," even when asked to do so by Vice Chairman Baker of the Georgia Commission. GA Tr. at 1114:12-17 (Blake); *see also* FL Tr. at 1021:6-10, 1022:1-2 (Blake); Deposition of Carlos Morillo at 74:21-25 ("I don't know of any specific [cost study]. I'm not aware of one.").[28] Because BellSouth is unable to identify in this case what costs are recovered by its proposed Service Date Advancement fee, it is impossible that it was created in accordance with TELRIC principles.

All UNEs must be priced in accordance with TELRIC. 47 U.S.C. § 252(d)(2). This mandate applies to all UNEs; FCC Rule 51.501 — the first of the TELRIC rules — states, "[t]he rules in this subpart apply to the pricing of network elements, interconnection, and methods of obtaining access to unbundled elements, including collocation and virtual collocation." 47 C.F.R. § 51.501. *See also First Report and Order*, 14 FCC Rcd. at 15812-14 ¶¶ 618-24.

---

[28] Both Ms. Blake and Mr. Morillo were offered by BellSouth in response to a deposition notice issued pursuant to North Carolina Rule of Civil Procedure 30(b)(6) as the persons most knowledgeable about this issue.

A Service Date Advancement is part of the UNE being expedited and part of provisioning UNE known as OSS. Moreover, it is patently a method of obtaining access to loop and transport UNEs, and thus falls within this rule. As Petitioners have stated, "Unbundled Network Elements must be provisioned at TELRIC-compliant rates. BellSouth does not dispute this fact. An expedite order for a UNE should not be treated any differently." JP Rebuttal Test. at 77:12-14.

BellSouth's proposed Service Date Advancement fee is an additional charge over and above the recurring and non-recurring charge of a UNE. Yet there is no evidence of additional installation work involved for BellSouth to perform a Service Date Advancement. In other words, installing a loop is installing a loop, regardless of the day on which the installation takes place. Thus, this charge appears to be purely "additive," **Attachment 12** (BellSouth Response to Interrogatory 6-5-2), and has no justification other than BellSouth's desire to extract additional charges from and raise the costs of Joint Petitioners.

Nor would a Service Date Advancement impose any opportunity cost — even if opportunity costs were a permissible element of pricing[29] — to BellSouth, because the Agreement already states that BellSouth can decline to do an advancement where circumstances require. Exhibit A at 15; Morillo Depo. Tr. at 54:11-15, at 59:4-9. At hearing, Ms. Blake explained that "we may not always be able to honor the expedite request." GA Tr. at 1119:21-22. *See also* FL Tr. at 1027:2-5. It is, however, an obligation to provide expedites on a nondiscriminatory basis. 47 U.S.C. § 251(c)(3) (requiring "nondiscriminatory access").

In defense of the usurious $200 charge that BellSouth has requested, it has argued that it must price expedites prohibitively high, in order to "not make that [expedite] become the normal due date and totally supplant our installation intervals." GA Tr. at 1114:8-10 (Blake). Ms. Blake

[29] The FCC held in the *First Report and Order* that opportunity cost is not a valid cost component under Section 252. 14 FCC Rcd. at 15859-60 ¶ 709.

has also testified that BellSouth created the $200 charge "to somewhat have a disincentive for everybody expediting an order[.]" FL Tr. at 1029:16-17. Similarly, at his deposition, BellSouth witness Carlos Morillo stated that "if there was no charge or a very insignificant charge to expedite the service request, most people would potentially request expedited services." Morillo Depo. Tr. at 56:21-24. In other words, the $200 expedite charge is ***expressly intended as a penalty for CLECs***. That is unacceptable under the 1996 Act. Moreover, BellSouth can make no representation that the $200 per circuit per day rate is the rate BellSouth uniformly charges – even to CLECs, and BellSouth cannot quantify the number of expedite requests it receives, GA Tr. at 1119:12-21 (Blake), rendering their fear of being overrun by expedites simply hypothetical.

In addition, this charge violates the nondiscriminatory access mandate of Section 251. It is certain that BellSouth's wholesale/network division does not incur **costs** of $200 per circuit per day for Service Date Advancements. And, although Service Date Advancements are routinely provided to BellSouth's retail division for the benefit of BellSouth's retail customers, Ms. Blake, BellSouth's designated witness for this Item 88, was not able to answer questions as to whether the retail division of BellSouth must pay the wholesale/network division a $200 per circuit per day charge (or any charge) for expediting orders for BellSouth's retail customers. GA Tr. at 1116:7-23 (Blake). Ms. Blake could only state that expedite charges are in BellSouth's retail tariff. *Id.* at 1117:8-12. At the Kentucky hearing, Ms. Blake opined that BellSouth may waive an expedite fee if "we missed the due date." KY Tr. at 170:14. She could not respond to Ms. Dougherty's observation that a missed due date would mean there had been no expedite in the first place, and thus no waiver would be necessary. KY Tr. at 171:1-23. She also did not claim that the would be the only time that BellSouth would waive an expedite charge. *Id.* Thus, although BellSouth performs expedites for its retail customers, where it is able, GA Tr. at 1110:22-23, the record does

not show that the network services arm of BellSouth incurs costs for performing this service or that such costs are passed through to and imposed upon the retail services arm of BellSouth.

Even if such costs were passed from BellSouth's network services arm to its retail services arm, it is a virtual certainty that such costs would be well below the $200 per circuit per day retail rate which BellSouth seeks to foist on the Joint Petitioners. And in fact there definitely "could be certain circumstances" where the expedite charge is waived. GA Tr. at 1118:12-13 (Blake). Petitioners currently don't receive such waivers. GA Tr. at 1024:19– 1025:4. When asked whether waiving the expedite fee enables BellSouth "to provide an expedited service more quickly than your competitor," Ms. Blake simply said "I can't see that as being a common situation." KY Tr. at 172:2-5. Yet that kind of discrimination must *never* happen, even under BellSouth's notion of "parity." *E.g.*, KY Tr. at 244:13 (Fogle). And the fact that Ms. Blake remains unable to testify to actual costs incurred or to the extent such waivers are granted strongly suggests that Service Date Advancements is an area where unlawful discrimination is likely occurring.

The Act's non-discriminatory access requirements require that Joint Petitioners have access to UNEs at cost-based rates closely tethered to the ILECs' costs – not its retail rates. 47 U.S.C. 251(c)(3); 47 C.F.R. 51.307(a). The principle embodied in this requirement is that the Joint Petitioners are supposed to have access akin to BellSouth's wholesale/network services arm, so that they compete with BellSouth's retail arm. Thus, what matters for purposes of non-discriminatory access is not how BellSouth treats customers, but how its retail division is treated. Again, Joint Petitioners are not BellSouth retail customers, which Ms. Blake recognizes. GA Tr. at 1111:15-18 (retail customers do not lease loops); FL Tr. at 676:17-25. Indeed, they compete with BellSouth's retail services unit for those retail customers. There being no evidence that

BellSouth's retail entity pays a Service Date Advancement fee, BellSouth is prohibited from charging one to Joint Petitioners.

It is possible that BellSouth may later identify costs associated with a Service Date Advancement — perhaps it incurs back-office costs related to OSS management and service order queuing. To date, such additional OSS UNE related costs have not been identified. If BellSouth is able to identify such costs, the Commission should review those costs and establish in a future TELRIC docket a Service Date Advancement rate that complies with TELRIC. Again, as stated above with respect to the TIC, Joint Petitioners would by change of law amendment adopt any new Commission-approved rate elements into the Agreement going forward. The $200 per circuit/per day charge presently proposed, however, is usurious, unsupported and unacceptable. Accordingly, Joint Petitioners should not pay any fee for advancements until a suitable TELRIC-compliant charge is established.

Item No. 97, Issue No. *7-3 [Section 1.4]: When should payment of charges for service be due?*

POSITION STATEMENT: Payment of charges for services rendered should be due thirty calendar days from receipt or website posting of a complete and fully readable bill or within thirty calendar days from receipt or website posting of a corrected or retransmitted bill, in those cases where correction or retransmission is necessary.

Payment for Charges Should be Due 30 Calendar Days from Receipt or Website Posting.

Payment of charges for services rendered under the Agreement should be due 30 calendar days from receipt or website posting of a complete and fully readable bill. JP Direct Test. at 104:3-4. Joint Petitioners receive an enormous number of bills from BellSouth monthly which are voluminous and complex. JP Direct Test at 104:21 (NuVox receives more than 1100 monthly); JP Exhibit 2 (copy of voluminous bill from BellSouth to NuVox). These bills are often incomplete and sometimes incomprehensible. *Id.* at 104:17-18. There is generally a long gap between the bill

issue date and the date the BellSouth bill is actually posted or received by Joint Petitioners. *Id.* at 105:5-15. BellSouth takes from **3 to 30 days** to deliver its electronic bills. *Id.* at 105:8-9. The **average delivery time is 7 days** for NuVox's BellSouth bills. *Id.* at 105:9-10. Xspedius conducted a study of its BellSouth billing and found that on average the bill was received more than 6 days after the bill issue date posted on the BellSouth bill. JP Direct Test. at 105:19-22. Because of the volume and complexity of the BellSouth bills, it takes more than three weeks to review and process them for payment. JP Direct Test. at 105:12-13. BellSouth's testimony corroborates these results, as BellSouth explains that its proposed process starts by designating a bill date on day one and then it takes various steps before sending out electronic and paper bills generally 8 days later (stating that **CLECs generally have 22 days to pay their invoices**). Morillo (Blake) Rebuttal Test. at 9:11-13. At the Georgia hearing, Ms. Blake – who fully adopts Mr. Morillo's written testimony as the BellSouth witness for Item 97 – first stated that "the average delivery time is three to four days," GA Tr. at 1122:16, but then admitted that "generally" CLECs have 22 days to review their bill. *Id.* at 1125:19. *See also* FL JP Exhibit 31 at 9:12-13 (excerpt of Morillo written testimony for Georgia Commission). So, it seems undisputed that the 22 day figure is – on average – about right.

BellSouth's attempt to recant its prior testimony by entering Exhibit 3 during the questioning of Mr. Mertz was unsuccessful. That exhibit, entitled "Billing Invoice Timeliness," states "4.29" in the column labeled "CLEC Measure" for CABS billing. BST KY Exhibit 3. BellSouth counsel purports that this notation means that CLECs receive their bills in an average of 4.29 days. KY Tr. at 144:14-16. Similar notations are listed for resale and UNE invoices. KY BST Exhibit 3. Yet as Petitioner counsel made clear on redirect, that Exhibit does not break out BellSouth's billing record for any specific Petitioner, nor does it explain the statistical

methodology. KY Tr. at 148:1-18. Accordingly, there is no evidence that BellSouth's average invoice delivery to Petitioners takes is less than 8 days as BellSouth previously testified. The fact that NuVox has been able to scramble and pay their 1,100 monthly invoices on time (KY Tr. at 175:23-25 (Blake)) does not make this time lag any more acceptable.[30]

Requiring payment in less than 30 days is unacceptable in most commercial settings. JP Direct Test. at 106:15-19. Arbitrator Robert L. Lehr of the Kansas Corporation Commission agrees, who observed in a recent multi-CLEC arbitration that "[t]he problem for the CLECs is that they never have 30 days from the bill date to audit their bills." *In the Matter of the Petition of the CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b) of the Telecommunications Act of 1996*, Docket No. 05-BTKT-365-ARB), Arbitrator's Determination of Issues ¶ 33 (Kan. Corp. Comm'n Feb. 16, 2005) ("*Kansas Decision*") (**Attachment 13**). He found that "CLECs require more time to audit their bills," and thus held that "CLECs shall have 45 days after the bill date by which time payment must be received by SWBT." *Id.*

The alternative to Petitioners' paying on time is to have valuable capital tied up in security deposits and to pay substantial late payment penalties. *Id.* at 106:17-19. Thus, BellSouth's payment requirements abuse "its monopoly legacy and bargaining position to force CLECs to either remit payment faster than almost any other business or in the alternative face substantial late payment penalties and increased security deposits." *Id.* at 106:23 – 107:2.

Notably, BellSouth does not itself abide by the payment due date that it seeks to impose on Joint Petitioners. In its written testimony, BellSouth stated that it either pays or disputes bills within 30 days ***of receiving them***. BellSouth's own testimony shows that BellSouth measures

[30] Mr. Russell testified that "we get 1,100 bills a month from BellSouth." KY Tr. at 47:5-6. Each of these bills can be massive.

timely bill payment based on date of ***receipt*** rather than bill issue date. Morillo Rebuttal Test. at 21:24 – 22:2.[31] Ms. Blake's attempt at the Georgia and Florida hearings to diminish this clear disparity was nonsensical and unavailing.[32] However, in this arbitration, BellSouth is asking the Commission to apply a higher standard to Joint Petitioners. That is a patent violation of parity — BellSouth is not treating itself the way it seeks to treat Petitioners. *See* 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.311(a).

The Commission should order that the Agreement provide for payment of invoices within 30 days of receipt or website posting of a complete and fully readable bill. Indeed, the Georgia Commission has ordered BellSouth to allow ITC^DeltaCom to pay invoices 30 days "after the date the bill is sent out by BellSouth;" an Alabama Commission panel has ordered payment within 30 days of receipt of the invoice. **Attachment 14** (*Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 16583-U Order at 15 (Ga. P.S.C. Nov. 20, 2003); *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 28841, Arbitration Panel Recommendations at 53-56 (Ala. P.S.C. Apr. 27, 2004)). The Commission should similarly find that Joint Petitioners' proposed language for Issue 97 is just, reasonable and should be adopted.

---

[31] BellSouth's own testimony demonstrated that for a period it only managed to pay KMC's invoices within 30 days of its receipt of such invoices 38% of the time. GA Tr. at 1136:19 – 1137:2 (Blake). Thus, although Joint Petitioners are only asking for payment to be due 30 days from receipt of an invoice, it appears that **BellSouth** actually needs even more time and that a request for 45 day payment terms would be quite reasonable in this context.

[32] Ms. Blake stated in Georgia that this metric "was just an internal way we calculated that particular percentage." GA Tr. at 1136:10-11. In Florida she stated that it "was just the basis of a calculation here ... BellSouth is not supporting a payment due date of 30 days from receipt." FL Tr. at 1041:15-17. So BellSouth advocates a 30-days-from-invoice requiring, it just does not use it when measuring its own payment timeliness.

***Item No. 100, Issue No. 7-6** [Section 1.7.2]: Should CLEC be required to calculate and 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?*

POSITION STATEMENT: Petitioners should not be required to calculate and pay past due amounts in addition to those specified in dollars and cents on BellSouth's notice of suspension/termination for nonpayment in order to avoid suspension or termination. Otherwise, Petitioners will risk suspension or termination due to possible calculation and timing errors.

<u>BellSouth Should Not Be Permitted to Suspend Access or Terminate a Joint Petitioner's Service for Non-Payment for Services Provided Unless It Makes Clear the Exact Amount That Must Be Remitted to Avoid Termination</u>.

BellSouth seeks in this Agreement the right to terminate Joint Petitioners' service if any of their accounts become past due. Exhibit A at 17. Notably, it refuses to accept Petitioners' proposed language that would make the right reciprocal. (Petitioners concede however, that they cannot imagine a scenario where it would make sense to cut off services to BellSouth and as a result cut their customers off from the overwhelmingly dominant share of customers served by BellSouth. The point is, however, that BellSouth finds the prospect of facing such drastic measures itself to be unacceptable.) It is also notable that this is the sole instance where Joint Petitioners have agreed to incorporate the right for BellSouth to impose such drastic remedies into the Agreement. That is because Joint Petitioners are committed to paying for the services they order and receive from BellSouth. With such remedies available – and knowing that they not only threaten the very existence of each Petitioner and that they would, if imposed disrupt services to Kentucky businesses and consumers served by the Petitioners – it is imperative that all possible guesswork is eliminated from the steps needed to avoid imposition of potentially business destroying remedies.

Service discontinuance is the most serious possible course of action for any utility. It is no hyperbole to say that service discontinuance threatens lives. For these reasons, service

discontinuance is governed by both federal and state statutes. Section 214 of the Communications Act states that "[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the [FCC] a certificate[.]" 47 U.S.C. § 214(a). As the FCC has held, "Section 214(a) has an essential role in the Commission's efforts to protect consumers. Unless the Commission has the ability to determine whether a discontinuance of service is in the public interest, it cannot protect customers from having essential services cut off without adequate warning, or ensure that these customers have other viable alternatives." *In re Arbros Communications Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd. 3251, 3254 ¶ 7 (2003). This state has an analogous service discontinuance rule. Commission Rule 515-1201-.06 states that a carrier must "be notified and allowed a reasonable time in which to comply" with a demand for payment prior to discontinuance. Thus, while BellSouth may have the right to terminate service for nonpayment, that permission is subject to restrictions that BellSouth's language would not include.

BellSouth's proposal builds in guesswork and only adds to its ability to use the proposed provisions in a coercive and inappropriate manner. According to BellSouth's proposed language for Section 1.7.2 of Attachment 7, once any account (Petitioners each have several hundred separate accounts with BellSouth) goes unpaid for 31 days, a Petitioner will receive an automatically generated Notice and will have 30 days to pay not only the amount due on that account, but all amounts that may become past due **on that and all other accounts**, in order to avoid service termination. Exhibit A at 17. The Petitioner would have only 15 days (or less) to process, dispute, calculate, and pay all of these amounts before BellSouth will start rejecting all new service orders, and only 30 days to avoid termination of all services (no matter how related to the services for which payment was not made). *Id.* Moreover, there should be no doubt that

BellSouth wholly intends to invoke this right to pull the plug. KY Tr. at 213:8-20 (Blake) ("[W]e need to protect our financials.").

The catch in all this is that the Notice will not state the full amount that will become due on all accounts, but only the amount due under the initial past due account. As such, BellSouth is "putting the onus on the CLEC to recalculate his bill," which Commissioner Burgess of the Georgia Commission found "a little strange." GA Tr. at 532:11, 21.[33] Moreover, Joint Petitioners object to BellSouth's proposal to effectively collapse and consolidate subsequent past due notices into a single notice (even though its systems will continue to spit-out notices subsequent to the initial one). This accelerated payment provision denies proper notice on subsequent amounts due and creates enormous potential for confusion and error. The stakes are too high for short notice, confusion or error. As is evident from BellSouth's refusal to accept Petitioners' proposed language, BellSouth refuses to include in its notice the amount that needs to be paid in order to avoid total service shut down.

BellSouth also builds into the "game" guesswork as to whether disputes will be properly and timely recognized, and as to when BellSouth will recognize receipt of payment. BellSouth then compounds and complicates all of this by attempting to have a single notice connected to a single account apply to potentially hundreds of other accounts. It is potentially as disorienting and as dangerous as a cyclone. BellSouth's proposal creates an opportunity for error and gamesmanship that is unreasonable, unacceptable and contrary to the public interest.

BellSouth attempts to minimize this significant termination risk by stating that "we have weekly contact with their billing folks," such that "[t]here's no guesswork at all in this process[.]"

[33] Commissioner Burgess went on to observe that "I don't know of any on the retail side where the provider puts the onus on the customer to calculate their own bill and send a payment in." GA Tr. at 533:15-16.

KY Tr. at 176:20 – 177:1. Yet testimony at the hearing showed that this communication has been exaggerated. First, Petitioners submitted as an exhibit a notice of termination – termination of all services that BellSouth provides to NuVox – over $65. KY Tr. at 78:12-23; JP KY Exhibit 1A. Sending such a letter over a mere $65 payment discrepancy does not suggest "weekly contact." Secondly, that $65 notice was addressed to NewSouth Communications, an entity that NuVox acquired in 2004 and that did not exist in May 2005 when the notice was sent. KY Tr. at 79:21 – 80:1. It thus seems that this threat to shut down service to NuVox completely was auto-generated, and the billing system had not even been updated to reflect the correct CLEC. These facts tend to refute Ms. Blake's assertion that the question of service termination is handled cautiously and with individual attention.

Based on statutory service disconnection requirements, the underlying public policy considerations, and the potential that application of the remedies proposed in Item 100 could cause discontinuance of services to customers without adequate notice, the Commission may strike the proposal or at the very least the remedies contained therein. *See* 47 U.S.C. § 252(e)(2)(A)(ii). In such instance, disputes would be resolved pursuant to the dispute resolution provisions of the Agreement, which would bring the matter before the Commission, the FCC or a Court of competent jurisdiction (unless, of course, the Commission accepts BellSouth's invitation to strip courts jurisdiction under Issue 9).

As Joint Petitioners have explained, BellSouth's proposed language for Section 1.7.2 would create "nothing less than a 'fire drill.'" JP Direct Test. at 110:9. It would require Petitioners to calculate and pay "the precise amount that BellSouth calculated" as being past due or that may become past due in the future. *Id.* at 111:9. Petitioners must engage in this high-stakes exercise despite the fact that "only BellSouth can know (and control) the answer to that

calculation." *Id.* at 111:12. A "shell game" would ensue "that could easily be rigged or abused by BellSouth." JP Rebuttal Test. at 96:9-10. Even leaving that possibility aside, the calculation that the Petitioner would be forced to perform carries a "substantial risk of calculation errors" (*id.* at 96:2-3) that, under BellSouth's language, could result in termination of service to a Petitioner and the Petitioner's customers. As Mr. Russell observed from the witness stand, under BellSouth's proposed language, "you may make payment, but, because of some calculation error, ... you could still get terminated." KY Tr. at 7:14-17. It's a "Damocles sword" hanging over Petitioners' heads. *Id.* at 51:11.

BellSouth recently proposed new language for Section 1.7.2 that evidences a partial and unsatisfactory attempt to address Petitioners' concerns. This language includes a new sentence at the end of the provision, which provides that "Upon request, **BellSouth will provide information** to [Petitioner] **of the Additional Amounts Owed** that must be paid prior to the time periods set forth in the written notice to avoid suspension of access to ordering systems or discontinuance of the provision of existing services as set forth in the initial written notice." Exhibit A at 17. This language does not solve the problems of inadequate notice and the elevated potential for error and confusion created by BellSouth's attempt to have notice on a single account suffice for the notice that would be required on all others (potentially hundreds of others). Notwithstanding that fatal flaw, BellSouth offers only to "provide information" of other amounts due and only "upon request." KY Tr. at 211:24-25 (Blake). It is not offering to provide such information with its notice and it makes no commitment as to how timely and accurate it will be in response to such a request. And though Ms. Blake testified in this state that an "aging report" will accompany all termination notices, KY Tr. at 210:22-25, she conceded that the report still will not state the exact amount due, and that the Petitioner must call to request it. *Id.* at 212:11-13. Thus, BellSouth's

new language does not eliminate the potential for errors and gamesmanship. (Indeed, the samples of such information Joint Petitioners have seen include the disclaimer "Not an Official BellSouth Document," thus rendering the information therein completely unreliable.) Accordingly, the Commission should reject BellSouth's language, even as amended.

Acceleration and calculation of payment and disputes are not the only problems. As Mr. Russell explained, if a payment or dispute is not "posted," or officially registered in the BellSouth system, then a Petitioner is deemed not to have paid or disputed. NuVox has had problems with late posting in the past. GA Tr. at 531:17-19 (Russell); FL Tr. at 260:15-19 (Russell). BellSouth's new proposal, like its previous offers, does not account in any way for uncontrollable and unpredictable BellSouth-controlled variable of posting payments and disputes.

The Commission should therefore adopt Petitioners' language for Item 100. It states quite simply that either party may send a notice of nonpayment to the other, and may require such amounts "as indicated on the notice in dollars and cents" to be paid within 15 days to avoid suspension of ordering access, and within 30 to avoid service termination. Exhibit A at 17. This language eliminates the potential for gamesmanship and grave harm to competitors and Kentucky consumers.

Item No. 101, Issue No. *7-7 [Section 1.8.3]: How many months of billing should be used to determine the maximum amount of the deposit?*

POSITION STATEMENT: The maximum deposit should not exceed one month's billing for services billed in advance and two months' billing for services billed in arrears (as in the new DeltaCom/BST Agreement). Alternatively, the maximum deposit should not exceed two months' estimated billing for new CLECs or one and one-half month's actual billing for existing CLECs.

BellSouth Is Not Entitled to Request a Deposit for Greater Than One Month for Services Billed in Advance and Two Months for Services Billed in Arrears.

BellSouth seeks the right to collect a deposit from each Joint Petitioner equal to two months' worth of billing. Exhibit A at 18. But the Petitioners' well-established business relationships with BellSouth warrant that a less onerous deposit policy be implemented. Petitioners have conducted business with BellSouth now for many years, and BellSouth has not attempted to assert, either in written testimony or at hearing, that they have a payment history that somehow aggravates BellSouth's risk. *See* Morillo Rebuttal Test. at 17:10 – 18:5. Yet it went unrefuted at hearing that NuVox "paid BellSouth every dime we've owed them." KY Tr. at 52: 16-17 (Russell). In fact, BellSouth acknowledges that NuVox has a "stellar" payment record. GA Tr. at 1134:9-12 (Blake).

Petitioners have already agreed with BellSouth on the individual criteria by which a deposit request may be triggered, including their payment history, liquidity, and bond rating. Agreement, Att. 7, Section 1.8.5.[34] But the fact that the parties agree on the deposit criteria does not moot the issue of maximum deposit, because the application of those criteria may create disputes as to the appropriate amount up to the maximum (triggering the criteria does not automatically trigger the maximum deposit amount – **there is no set formula**). As Mr. Russell stated in Georgia, BellSouth may erroneously apply these criteria, resulting in what is essentially a "wrongful deposit," thus leading to a legitimate dispute. GA Tr. at 542:19-21.

It is noteworthy that BellSouth only can ask for a maximum of a one-month deposit for services billed in advance (*i.e.*, UNEs) from ITC^DeltaCom regionally, and a maximum of a one-

---

[34] Joint Petitioners note that a 2-month maximum deposit provision ordinarily is attached to provisions requiring full refund of the deposit upon establishment of a good payment history. Since Joint Petitioners already have compromised by agreeing to BellSouth's demands for the inclusion of other factors, it is evident that comparison to "BellSouth standard" two-month deposit provisions is inapposite.

month deposit from local retail end users, and two months' deposit for retail toll end users, in both Florida and in Alabama. KY Tr. at 181:8-18 (Blake); GA Tr. at 987:6-9 (Blake).

BellSouth's concerns about risk of nonpayment are of somewhat dubious origin. That is, Ms. Blake has testified that CLECs in the past have declared bankruptcy, including WorldCom, Adelphia, Cable and Wireless and Global Crossing. Morillo Rebuttal Test. at 17:19-21. By this testimony Ms. Blake seems to be suggesting that BellSouth was not paid for services rendered to these companies. Yet in his deposition Mr. Morillo (the previously designated witness for Item 101) was not able to testify that BellSouth was denied payment in *any* of these bankruptcies. Morillo Depo. Tr. at 225:22-24. This kind of unsupported allegation cannot justify BellSouth's continued demands for unduly large, capital-consuming and business impacting deposits from Joint Petitioners. Moreover, it fails to acknowledge that in fact it was BellSouth who owed the estate of a defunct CLEC, e.spire, for unpaid awards of intercarrier compensation totalling almost $30 million. Falvey Depo. Tr. at 321:2-7.

For deposits have competitive consequences. Deposits tie up capital that could be used for other purposes, including the deployment of new facilities, expansion of footprint, and improvement of services. JP Direct Test. at 113:14 (Petitioners "need to limit tying-up capital in such deposits"). As such, deposits should be reasonably curtailed in proportion to the relative risk. In Joint Petitioners' cases, that risk is demonstrably small.

Accordingly, the language in Section 1.8.3 of Attachment 7 should provide for a less onerous deposit than what BellSouth requests. As indicated above, BellSouth has agreed to accept lesser deposits maximums with other CLECs. ITC^DeltaCom, for example, has secured an agreement for a maximum of **one months'** deposit for services paid in advance, and **two months'**

deposit for services paid in arrears. **Attachment 15** (DeltaCom/BST Agreement Excerpt). Joint Petitioners should be eligible for the same maximum deposit provision.

In the alternative, Joint Petitioners ask that the Commission adopt their proposed language for Section 1.8.3: Petitioners must remit a deposit equal to one and one-half month's billings, and any new (as opposed to an established) CLEC that adopts the Agreement must remit a two-month's deposit. Exhibit A at 18. This bifurcated approach allows Petitioners to enjoy the benefits of the long-term business relationship they already have established with BellSouth, while simultaneously granting BellSouth more risk protection from any new or less established CLEC.[35] Accordingly, Joint Petitioners' proposal is eminently reasonable and should be adopted.

Item No. 102, Issue No. 7-8 *[Section 1.8.3.1]: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC?*

POSITION STATEMENT: Because BellSouth's payment history with CLECs is often poor, the amount of deposit due, if any, should be reduced by amounts past due to CLEC by BellSouth. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in the Agreement.

Equity Requires That BellSouth Set Off Outstanding Amounts It Owes to Joint Petitioners from the Deposit It Requests Joint Petitioners to Pay.

Item 102 presents an issue of simple fairness: when BellSouth owes past due amounts to the Joint Petitioners, should it be able to demand a deposit from them up to the limit provided in the Agreement?[36] Joint Petitioners' language would address this imbalance by requiring a "set off" of the past due amounts BellSouth owes against the deposit that Joint Petitioners must remit.

---

[35] Petitioners' inclusion of harsher deposit language for unproven CLECs fully resolves BellSouth's worry that a less conscientious CLEC may opt into this Agreement and pose a financial risk. KY Tr. at 55:25 – 55:9 (Meza).

[36] Joint Petitioners do not under the Agreement have a right to collect a deposit from BellSouth to protect them form financial risk and harm created by BellSouth's failure to pay for services provided.

Such set off would be restored once BellSouth demonstrates compliance with the "good payment history" standard already agreed to by the parties.

BellSouth is far from timely in paying CLEC invoices. According to BellSouth's own testimony, it had been timely for only 38% of the invoices provided by KMC (as measured 30 days from BellSouth's receipt of KMC's invoices). GA Tr. at 994:8-16 (Blake). As to Xspedius, BellSouth recently was past due by $2.6 million, and had overbilled Xspedius by $2 million, meaning that BellSouth had laid claim on to $4.6 million belonging to Xspedius. KY Tr. at 105:16-21 (Falvey). And yet BellSouth purported to be owed a deposit.

During the pendency of this arbitration proceeding, BellSouth has "cleaned up its act," so to speak, to some extent and has improved its payment record. *See* GA Tr. at 994:16-18 (Blake) (payment record to KMC has improved recently). However, there are no assurances that BellSouth will not relapse into the poor payment patterns it historically has had. *See* GA Tr. at 549:11-17 (Falvey). Indeed, BellSouth's amounts owed to Xspedius's predecessor e.spire in unpaid reciprocal compensation totaled **$25 million**, which Xspedius only recouped after filing multiple actions across the BellSouth region. Falvey Depo. Tr. at 318:21- 319:21. Thus, BellSouth was "sitting on over $20 million of [e.spire's] revenue" and yet continued to seek a deposit. *Id.* at 319:2-3. This history, "where [BellSouth] dispute[s] millions upon millions and then you lose time and time and time again," is why a deposit offset is necessary. Tr. at 549:12-14.

BellSouth has created this unimpressive and unproven payment history as to Petitioners, thus increasing their financial risk, yet it will continue to request a maximum deposit from Joint Petitioners on the ground that it must mitigate its own financial risk. GA Tr. at 976:4-9 (Blake); FL Tr. at 1064:14-16 (Blake). This imbalance is neither fair nor commercially reasonable. It

means that Joint Petitioners are out of pocket twice — once in the form of bills not paid, and again when the deposit is posted.

Joint Petitioners' proposed language seeks nothing more than to correct this imbalance. It would require BellSouth, when it requests a deposit, to set off amounts past due to Petitioners. This set-off would be revisited on an annual or semi-annual basis, just as Petitioners' deposits are reviewed on an annual or semi-annual basis. The off-set would be restored once BellSouth demonstrates a good payment history as defined in the Agreement

Notably, at least two recent decisions support the Joint Petitioners' position that, where BellSouth has not paid its bills to the CLEC — whether disputed or undisputed — this must be taken into consideration as an offset to the deposit required. In the Kansas arbitration quoted above regarding Item 97, Arbitrator Lehr found that:

> [I]mposition of a deposit upon a previously creditworthy CLEC due to failure to pay some unquantified level of bill may be so out of balance and so vague as to be unacceptable in any corner of the market. The Arbitrator also disagrees with SWBT that the claim of Xspedius is a red herring that should be determined elsewhere. The Arbitrator finds that Xspedius' testimony is on point. **If its position is accurate [that SWBT owes Xspedius substantial sums at the time the deposit was requested], requiring a deposit of Xspedius would be extremely unfair.**

Kansas Decision ¶ 52 (**Attachment 16**).

Likewise, an Oklahoma arbitrator recently reached the same conclusion, and ordered the following language: "3.7.1 In no event will Xspedius be subject to an assurance of payment to SBC OKLAHOMA that exceeds two months' projected average billing by SBC OKLAHOMA to Xspedius, ***less the amount of billings by Xspedius to SBC OKLAHOMA. If SBC owes Xspedius more than $500,000, then a deposit would not be required until such time as the outstanding balance is reduced below this amount.***" Decision of Administrative Law Judge, Oklahoma

Corporation Commission Docket No. 2004-493 (emphasis added) (Apr. 12, 2005) (excerpt appended hereto as **Attachment 17**).

BellSouth has amended its proposed language in a dubious manner. BellSouth's exclusion of disputed amounts from the offset would permit it to obviate the provision by simply disputing what it does not wish to pay. The restoration provision proposed works further injustice, as it would require posting of the full amount of deposit originally requested by BellSouth, even if that amount was disputed and even if the parties had subsequently agreed to a lesser amount. Moreover, BellSouth's proposal continues to avoid acceptance of the very same definition of "good payment history" that the Joint Petitioners and BellSouth have agreed to in the criteria used to trigger deposit and deposit refund requests. KY Tr. at 217:23-25 (Blake) ("It's not appropriate to incorporate good payment history in this issue[.]").

For these reasons, the Commission should adopt Petitioners' language for Item 102.

Item No. 103, Issue No. 7-9 *[Section 1.8.6]: 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?*

POSITION STATEMENT: BellSouth should be permitted to terminate services for failure to remit a requested deposit **only** if: (a) CLEC agrees that the deposit is required, or (b) the Commission has ordered payment of the deposit. As agreed to by the parties, **all** deposit disputes will be resolved via the Agreement's Dispute Resolution provisions and not through "self-help".

BellSouth Must Not Terminate a Petitioners' Service Based on a Deposit Dispute Unless the Petitioner Is in Violation of a Deposit Order Issued by the Commission or the Petitioner Has Failed to Abide by an Agreement to Post an Agreed-Upon Amount.

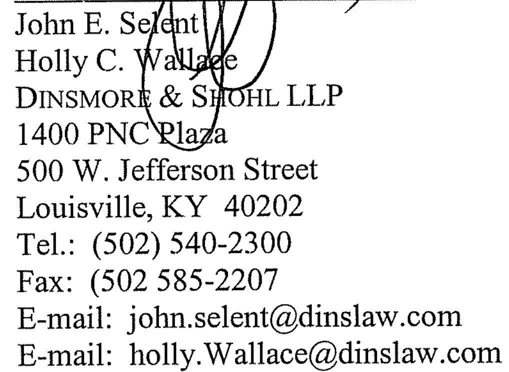
BellSouth seeks the right to terminate Joint Petitioners' service if they fail to remit the deposit amount that BellSouth requests within 30 days. Exhibit A at 19. This right is far too onerous, and would be a wholly non-proportional response to what simply would be a failure to agree to deposit amounts needed to protect BellSouth from relatively modest financial risk. It has

nothing to do with "non-payment" for services provided. Petitioners therefore have proposed language that grant BellSouth the right to terminate service *only* if Petitioners fail to comply with a resulting order within 30 days. Petitioners also have provided that BellSouth could seek such a remedy if one of them reached an agreement with BellSouth (memorialized in writing) and then simply failed to make good on it. In the absence of an agreement on an appropriate deposit amount, there would be a dispute that would be governed by the now agreed-upon language requiring use of the standard dispute resolution process.

As explained above, Petitioners are constrained from discontinuing service absent adequate notice to an end user with opportunity to cure. *See* 47 U.S.C. § 214(a); Rule 515-12-1-.06. BellSouth is subject to the same constraints. *Id.* Therefore, BellSouth's demand that it be permitted under this Agreement to terminate service for a mere 30-day failure to remit a requested deposit is excessive, and likely unlawful.[37] If there is no agreement on a deposit amount, then the request should be deemed disputed and the dispute should be addressed through the standard dispute resolution process. Petitioners are not trying to evade their contractual obligations to post deposits upon the triggering of the agreed-upon criteria, but rather want the deposit requirements to be fair and sensible. Obtaining this Commission's decision as to a proper deposit amount is not onerous. Rather, it is the normal course of resolving disputes between BellSouth and CLECs.

---

[37] Not only is it improper, BellSouth's proposed language is unnecessary. None of Joint Petitioners' existing interconnection agreements give BellSouth the right to terminate their service over a deposit dispute, GA Tr. at 597:13-16 (Russell), and yet BellSouth has secured deposits from them. *Id.* at 537:21-23 (Russell) (NuVox deposit is $1.5 million); Falvey Depo. Tr. at 314:9-14.



John E. Selent
Holly C. Wallace
DINSMORE & SHOHL LLP
1400 PNC Plaza
500 W. Jefferson Street
Louisville, KY 40202
Tel.: (502) 540-2300
Fax: (502 585-2207
E-mail: john.selent@dinslaw.com
E-mail: holly.Wallace@dinslaw.com

John J. Heitmann
Stephanie A Joyce
Garret R. Hargrave
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036

COUNSEL TO JOINT PETITIONERS