Certificate of Service

The undersigned hereby certifies that on this the 15th day of July, 2005, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, overnight delivery, and electronic transmission to the following.

James Meza III
BellSouth Telecommunications, Inc.
150 South Monroe Street
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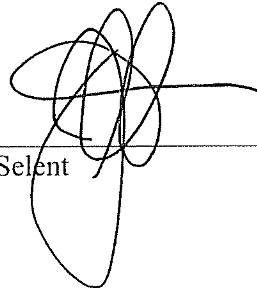
Tallahassee, FL 32301



John E. Selent

ATTACHMENT 1

PLEASE SEE

CONFIDENTIAL DOCUMENTS

XSP 000004 & XSP 000005

FILED UNDER SEAL ON JULY 15, 2005 WITH

PETITION FOR CONFIDENTIAL TREATMENT

ATTACHMENT 2

INTERCONNECTION AGREEMENT

BETWEEN

ALLTEL SOUTH CAROLINA, INC.

&

NEWSOUTH COMMUNICATIONS CORPORATION

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7.0 Liability and Indemnification

7.1 Limitation of Liabilities

With respect to any claim or suit for damages arising out of mistakes, omissions, defects in transmission, interruptions, failures, delays or errors occurring in the course of furnishing any service hereunder, the liability of the Party furnishing the affected service, if any, shall be the greater of two hundred and fifty thousand dollars ($250,000) or the aggregate annual charges imposed to the other Party for the period of that particular service during which such mistakes, omissions, defects in transmission, interruptions, failures, delays or errors occurs and continues; provided, however, that any such mistakes, omissions, defects in transmission, interruptions, failures, delays, or errors which are caused by the gross negligence or willful, wrongful act or omission of the complaining Party or which arise from the use of the complaining Party's facilities or equipment shall not result in the imposition of any liability whatsoever upon the other Party furnishing service.

7.2 No Consequential Damages

EXCEPT AS SPECIFICALLY PROVIDED IN THIS AGREEMENT, NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, OR SPECIAL DAMAGES SUFFERED BY SUCH OTHER PARTY (INCLUDING WITHOUT LIMITATION DAMAGES FOR HARM TO BUSINESS, LOST REVENUES, LOST SAVINGS, OR LOST PROFITS SUFFERED BY SUCH OTHER PARTY), REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, WARRANTY, STRICT LIABILITY, OR TORT, INCLUDING WITHOUT LIMITATION NEGLIGENCE OF ANY KIND WHETHER ACTIVE OR PASSIVE, AND REGARDLESS OF WHETHER THE PARTIES KNEW OF THE POSSIBILITY THAT SUCH DAMAGES COULD RESULT. EACH PARTY HEREBY RELEASES THE OTHER PARTY (AND SUCH OTHER PARTY'S SUBSIDIARIES AND AFFILIATES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS) FROM ANY SUCH CLAIM. NOTHING CONTAINED IN THIS SECTION WILL LIMIT EITHER PARTY'S LIABILITY TO THE OTHER PARTY FOR (i) WILLFUL OR INTENTIONAL MISCONDUCT (INCLUDING GROSS NEGLIGENCE) OR (ii) BODILY INJURY, DEATH, OR DAMAGE TO TANGIBLE REAL OR TANGIBLE PERSONAL PROPERTY.

7.3 Obligation to Indemnify

7.3.1 Each Party shall be indemnified and held harmless by the other Party against claims, losses, suits, demands, damages, costs, expenses, including reasonable attorneys' fees ("Claims"), asserted, suffered, or made by third parties arising from (i) any act or omission of the indemnifying Party in connection with its performance or non-performance under his Agreement; and (ii) provision of the indemnifying Party's services or equipment, including but not limited to claims arising from the provision of the indemnifying Party's services to its end users (e.g., claims for interruption of service, quality of service or billing disputes) unless such act or omission was caused by the negligence or willful misconduct of the indemnified Party. Each Party shall also be indemnified and held harmless by the other Party against claims and damages of persons for services furnished by the indemnifying Party or by any of its subcontractors, under worker's compensation laws or similar statutes.

7.3.2 Each Party, as an Indemnifying Party agrees to release, defend, indemnify, and hold harmless the other Party from any claims, demands or suits that asserts any infringement or invasion of privacy or confidentiality of any person or persons caused or claimed to be caused, directly or indirectly, by the Indemnifying Party's employees and equipment associated with the provision of any service herein. This provision includes but is not limited to suits arising from unauthorized disclosure of the end user's name, address or telephone number.

7.3.3 ALLTEL makes no warranties, express or implied, concerning NewSouth's (or any third party's) rights with respect to intellectual property (including without limitation, patent, copyright and trade secret rights) or contract rights associated with NewSouth's interconnection with ALLTEL's network use or receipt of ALLTEL services.

7.3.4 When the lines or services of other companies and carriers are used in establishing connections to and/or from points not reached by a Party's lines, neither Party shall be liable for any act or omission of the other companies or carriers.

7.4 Obligation to Defend; Notice; Cooperation

Whenever a claim arises for indemnification under this Section (the "Claim"), the relevant Indemnitee, as appropriate, will promptly notify the Indemnifying Party and request the Indemnifying Party to defend the same. Failure to so notify the Indemnifying Party will not relieve the Indemnifying Party of any liability that the Indemnifying Party might have, except to the extent that such failure prejudices the Indemnifying Party's ability to defend such Claim. The Indemnifying Party will have the right to defend against such Claim in which event the Indemnifying Party will give written notice to the Indemnitee of acceptance of the defense of such Claim and the identity of counsel selected by the Indemnifying Party. Except as set forth below, such notice to the relevant Indemnitee will give the Indemnifying Party full authority to defend, adjust, compromise, or settle such Claim with respect to which such notice has been given, except to the extent that any compromise or settlement might prejudice the Intellectual Property Rights of the relevant Indemnities. The Indemnifying Party will consult with the relevant Indemnitee prior to any compromise or settlement that would affect the Intellectual Property Rights or other rights of any Indemnitee, and the relevant Indemnitee will have the right to refuse such compromise or settlement and, at such Indemnitee's sole cost, to take over such defense of such Claim. Provided, however, that in such event the Indemnifying Party will not be responsible for, nor will it be obligated to indemnify the relevant Indemnitee against any damages, costs, expenses, or liabilities, including without limitation, attorneys' fees, in excess of such refused compromise or settlement. With respect to any defense accepted by the Indemnifying Party, the relevant Indemnitee will be entitled to participate with the Indemnifying Party in such defense if the Claim requests equitable relief or other relief that could affect the rights of the Indemnitee and also will be entitled to employ separate counsel for such defense at such Indemnitee's expense. In the event the Indemnifying Party does not accept the defense of any indemnified Claim as provided above, the relevant Indemnitee will have the right to employ counsel for such defense at the expense of the Indemnifying Party, and the Indemnifying Party shall be liable for all costs associated with Indemnitee's defense of such Claim including court costs, and any settlement or damages awarded the third party. Each Party agrees to cooperate and to cause its employees and agents to cooperate with the other Party in the defense of any such Claim.

REDACTED

ATTACHMENT 3

8 of 100 DOCUMENTS

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LIMITATION OF LIABILITY FOR INTERRUPTION OF SERVICE FOR REGULATED TELEPHONE COMPANIES: AN OUTMODED PROTECTION?

NAME: Rendi L. Mann-Stadt

SUMMARY:
... Historically, local telephone companies have enjoyed a broad limitation of liability for service outages. ... Finally, the author argues that despite the dramatic shift in the nature of telephone regulation, a modified limitation of liability tariff provision is still warranted. ... Yet, although the degree of telephone company regulation is abating at the state level, the limitation of liability still persists in most jurisdictions. ... Part IV proposes that limitation of liability continues to have a legitimate place in local operating telephone company regulation, albeit with some modification. ... Many telephone company tariffs contain limitation of liability language which protects the corporation from damage claims arising from errors or omissions in service. ... Although a detailed discussion of the policy shift in state telephone regulation is well beyond the scope of this note, certain elements of the new regulatory schemes impact the analysis of the limitation of liability tariff clauses. ... Highlighting the interrelation between limited damage awards and economical telephone rates, the California Supreme Court found that the utility commission relies upon the validity of the limitation of liability as a general policy in setting rates. ... An additional distinction between a manufacturer's liability and the liability of a telephone company is the nature of the customer. ...

TEXT:
[*629]

Historically, local telephone companies have enjoyed a broad limitation of liability for service outages. This protection evolved along with the strict oversight and regulation that characterized the predivestiture telecommunications industry. In exchange for the required universal service obligation, state utility commissions limited recovery of damages against the utility, partially as a method of keeping telephone rates reasonable. As the modern telecommunications industry undergoes regulatory reform, however, the historic basis for limitation of liability may no longer exist. The author of this note explores the historical underpinnings of limitation of liability in telephone regulation and discusses public policy considerations for the protection. Next, the author examines the justification for limitation of liability in the context of the new forms of utility regulation. Finally, the author argues that despite the dramatic shift in the nature of telephone regulation, a modified limitation of liability tariff provision is still warranted.

I. Introduction

In 1988, a fire destroyed the telephone switching station in the Chicago suburb of Hinsdale, Illinois. n1 The fire completely devastated the communications facility, which had routinely routed and directed up to 3.5 million calls daily. n2 After the fire, the damage completely suspended telephone service to and from the western and southwestern suburbs of Chicago, and for approximately one month after the disaster, the residences and businesses in the affected area still had disrupted service. n3

As a result of the outage, businesses in this high-tech corridor sustained enormous financial losses estimated beyond ten million dollars. n4 Alleging negligence and seeking economic damages, numerous customers filed a class action suit against Illinois Bell Telephone Company. n5 In seeking a dismissal of the claim, Illinois Bell cited exculpatory language [*630] in its tariff filed with the Illinois Commerce Commission. n6 Relying in large part upon this limitation of liability in the tariff, the trial court granted Illinois Bell's motion for summary judgment and the appellate court affirmed. n7 The Illinois Supreme Court, however, reversed and remanded, holding that the facts as pleaded presented a valid cause of action based on another section of Illinois law. n8

Similar exculpatory language in tariffs in many other jurisdictions has been interpreted to extend protection from outage-related claims to utilities in general, and telephone companies in particular. n9 Thus, in most jurisdictions, even if a telephone company's conduct is negligent, regardless of the extent of the damage, it can completely avoid liability. The limitation of liability tariff language and the protection it extends to the respective utility is an outgrowth of the structure of utility regulation, and is frequently justified as compensation for the "rigors" of regulation. n10

Most states have statutory provisions that burden local operating telephone companies with strict oversight and require telephone companies to provide universal service within their franchise area. n11 In ex [*631] change, many states also regulate utility liability, limiting recovery of damages against utilities and thereby avoiding the imputation of such costs into customer rates. n12 But strict telephone regulation, which represents the burden that limitation of liability serves to alleviate, is shifting. Both competition and deregulation now characterize segments of the industry, and many state utility commissions have approved regulatory schemes with more flexible pricing and regulation. n13 Yet, although the degree of telephone company regulation is abating at the state level, the limitation of liability still persists in most jurisdictions.

This note examines whether the limitation of liability is still appropriate for local operating telephone companies within the current regulatory framework. Part II explores the origins of the limitation of liability doctrine in telephone regulation and provides an overview of the nature of current limitation of liability provisions. n14 Part II also discusses the public policy considerations and legal doctrines utility commissions and courts use to justify limited liability in the telephone company context. n15 Part III analyzes the limitation policy in light of the present structure and status of telephone regulation. n16 Part IV proposes that limitation of liability continues to have a legitimate place in local operating telephone company regulation, albeit with some modification. n17 Part V concludes that even in light of shifting trends in regulatory oversight, limitation of liability tariff provisions are still conscionable and necessary so long as protection is not extended to cases of wilful or wanton misconduct by a utility. n18

II. Background: Historical Origins of Telephone Regulation and the Limitation of Liability

Many telephone company tariffs contain limitation of liability language which protects the corporation from damage claims arising from errors or omissions in service. n19 These provisions evolved as a compo [*632] nent of the regulatory structure of telephony. n20 This section traces the evolution of telephone regulation, the genesis of the limitation of liability concept, and the weight the judiciary has afforded such clauses.

A. Telephone Regulation

In 1910, Congress delegated responsibility for telephone and telegraph regulation to the Interstate Commerce Commission. n21 In 1934, Congress established the Federal Communications Commission which assumed responsibility for telephone regulation. n22 Currently, interstate telephone operations remain under the jurisdiction of the Federal Communications Commission, n23 while regulatory commissions in each state oversee the intrastate operations of telephone companies. n24 States typically classify corporations which provide telephone service as regulated monopolies, subject to governmental agency oversight of operations and rate making. n25

Most state legislatures have enacted public utility statutes which create and authorize state utility commissions to regulate the intrastate operations of the natural telephone monopoly. n26 As a regulated utility, a telephone company is obligated to serve all customers in the franchise area, under the same terms and conditions, and under rates approved by [*633] the regulatory commission. n27 Historically, state regulatory agencies emphasized the public policy of universal service, n28 and used rate of return regulation n29 with a subsidized pricing structure to ensure economical residential service. n30

The underlying goal of universal service was the provision of optimum penetration of service at reasonable rates. n31 In 1982, however, government antitrust litigation against AT&T resulted in the divesture of that company and the

formation of the "Baby Bells." n32 The settlement of the AT&T antitrust suit, the Modified Final Judgment, n33 not only changed the structure of telecommunications, but also created a shift in the power of regulatory oversight of the local exchange companies from the federal arena to the state level. n34 Since the divestiture of AT&T in 1984, n35 state utility commissions have followed the national procompetition movement and have approved a variety of regulatory reforms. n36 Regulatory commissions still maintain the role of overseer of the tele [*634] phone companies. Strict rate of return regulation, however, has ceded in many jurisdictions to alternative paradigms of regulatory oversight including price cap, n37 incentive, n38 or rate stabilization regulation. n39

Although a detailed discussion of the policy shift in state telephone regulation is well beyond the scope of this note, certain elements of the new regulatory schemes impact the analysis of the limitation of liability tariff clauses. For purposes of evaluating limitation of liability, the important characteristics of this transformation are lessened regulatory constraints, an increased ability for telephone companies to retain revenues, and a restricted ability to raise rates. n40 These characteristics generally indicate a lessening of the burden of regulation on local telephone companies. n41

While state utility commissions have not addressed limitation of liability as a facet of any of these new regulatory plans, several states have imposed quality of service standards as a component of more flexible regulation. n42 Other quality oversight measures have been precipitated by [*635] large outages. n43 For example, in reaction to the Hinsdale fire, n44 the Illinois Commerce Commission enacted a rule requiring certain maintenance and disaster response procedures. n45

Another pertinent and interesting outgrowth of the increase in telecommunications competition is that many local telephone companies have explored alternative routing (called route diversity) to enhance reliability and avoid paralyzing outages resulting from a single facility loss. n46 While not directly mandated by the regulatory body, this technological enhancement reduces the risk of outage. To meet their nonregulated competitors' offerings, many local telephone companies may offer customers who rely heavily on telecommunications the option of paying for specific route "insurance." n47

Quality of service standards and service enhancements may ease the amount of litigation regarding limitation of liability clauses. Despite these efforts, however, courts do not analyze companies' efforts to reduce risk of outage, but merely apply the blanket limitation of liability. n48 This limitation, developed as compensation for the more traditional regulatory environment, n49 remains virtually unchanged n50 despite the altered regulatory approaches.

B. Limitation of Liability Clauses

1. Tariffs as Force of Law: Source of Limitation of Liability Clauses

Despite the procompetition movement in telephone regulation, traditional tariff filing requirements still prevail in most jurisdictions. n51 [*636] Most states have statutes which require local exchange telephone companies to file comprehensive schedules of rates, rules, classifications, and regulations with the administrative agency charged with public utility oversight. n52 Provisions dictated by these jurisdictional statutes and tariffs curtail and govern the rights and privileges that a utility might seek if it were an unregulated corporation entering into ordinary contractual relationships with customers in the open marketplace. n53

A telephone company's official tariff binds both the company and its subscribers. n54 Most courts recognize the delegation of authority by the legislature to the utility commission, and hold that the tariff exclusively dictates the extent of the utility's duty to its customers. n55 Therefore, when a limitation of liability rule is properly approved by the jurisdictional regulatory body, most courts hold that liability provisions, if reasonable, operate to limit the telephone company's liability. n56

2. Traditional Support for Limitation of Liability Provisions

Inclusion of tariff provisions limiting telephone company liability evolved from doctrines established in telegraph law. n57 In Primrose v. [*637] Western Union Telegraph Co., n58 a seminal case in telegraph regulation, the U.S. Supreme Court distinguished between telegraph companies' duties and those of other common carriers. n59 The Court stated that although telegraph companies have a clear duty to the public, they are not completely analogous to common carriers because message carriers move something with no recognizable intrinsic value to the carrier. n60 The Court went on to say that because message carriers cannot foresee the value of the cargo, telegraph companies are not subject

to the same liabilities as other common carriers. n61 Thus, the Court concluded that because telegraph companies are unaware of the value a message might have, and are unable to take commensurate precautions for highly valued transmissions, the message carrier cannot be expected to assume a potentially unlimited liability for a subscriber's valuable message in unforeseeable circumstances. n62

Historically, many jurisdictions recognized the quid pro quo of limited liability as a component of the burdens and constrictions of telephone regulation. n63 For example, in Correll v. Ohio Bell Co., n64 an Ohio appellate court noted:

A public utility is, by law, regulated strictly in its operation. Rights and privileges which it might seek under ordinary contractual relations are curtailed by provisions of the statutes. Its liabilities are likewise regulated and limited by provisions of the statutes. The theory is that, since it renders service affecting the public, the state shall regulate and control it in order to prevent injustice, and further, in consideration of such regulation and control, its liability is and should be defined and limited. In a sense it is a matter of contract, on the one hand by the utility and on the other by the state representing all of its citizens. n65

Courts in most states consistently find that limitation of liability rules are constitutional and legal when applied to cases of telephone outages or errors involving negligence. n66 Where such forbearance is a com [*638] ponent of the tariff appropriately filed and is approved by the appropriate utilities commission, most courts have held that this tariff clause is binding. n67 The substantial deference most courts give to an agency's approval of a limitation of liability clause is often based on the premise that the tariff defines the legal duty of the utility and that no other contractual basis exists for a cause of action. n68

3. Types of Limitation of Liability Clauses

Although most courts generally uphold utility commission approved limitation of liability tariff provisions, the language and character of these clauses varies among jurisdictions. n69 A majority of states limit telephone company liability for service interruptions to a rebate of the service charges during the outage period. n70 Some jurisdictions make distinctions based on the level of negligence, or intent, upholding the limitation only if the plaintiff fails to prove gross negligence, or wilful or wanton behavior. n71 Other jurisdictions distinguish the type of suit to be brought, sustaining immunity for claims alleging contractual breach, but waiving the limitation for actions brought using tort theories. n72 Generally, limitation of liability does not apply to situations involving illegality, or fraudulent, wilful, or wanton misconduct. n73 For example, the Califor [*639] nia Public Utilities Commission promulgated a rule requiring tariffs to inform customers that the limitation of liability rules do not apply to situations involving wilful misconduct, fraudulent conduct, or violations of the law. n74

Thus, historically, state utility commissions approve limitation of liability clauses for telephone companies, and courts sustain their validity. n75 An evaluation of their continued applicability must, however, progress beyond the statement of prevalence and analyze the motives underlying these limitations. The following section surveys the policy justifications for limitation of liability provisions.

4. Justifying Limitation of Liability for Regulated Utilities

The willingness of most courts to uphold limitation of liability provisions depends on a variety of public policy considerations regarding the particular character and responsibilities of regulated telephone companies. n76 Primarily courts view the limitation as a key element of the regulatory process, in particular as necessary compensation for the economic burden imposed by the universal service requirement and the strictures of regulation, n77 and as a vital limiting component of the rate-making process. n78 Some courts also cite the unique vulnerability telephone companies have because of their intense reliance on technology, n79 and acknowledge the inability to foresee damages related to the transmission of messages that are unknown as to content and value. n80 This section considers those theories associated with regulation and rate making that have been used to justify limitation of liability. [*640]

A. Limited Liability as Compensation for Strict Regulation

The basic theory supporting exculpatory clauses for damages arising from service interruptions is that "a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges, shall likewise

be regulated and limited as to its liabilities." n81 The limitation of liability is seen, to some extent, as necessary to an equitable balance between the benefits and burdens of regulation. n82 Underlying this premise is the principle that property devoted to public use, or a use in which the public has an interest, grants to the public an interest in the use, which can be controlled by the public for the common good. n83

The appropriate regulatory body effectuates this control, and is charged with the duty to ensure that utilities render both reasonable and adequate service. n84 Thus, the telephone company is in a class of corporations strictly limited in its rights and privileges. Therefore, some argue it must be regulated, at least to the extent of its static known exposure to liabilities arising from its duty to serve its customers. n85

A telephone company cannot be selective about its customers; it is required to offer universal service without weighing the cost against the benefit of serving a particular customer. n86 A California appellate court, discussing this theory in the context of limited liability for errors in directory listings, held that because the state regulates and controls the telephone company, the utility's liabilities should be defined and limited. n87

A variation of the burden/benefit theory characterizes the limitation clause as not solely a limit on damage claims, but rather a limitation and definition of the duty of the telephone company to provide service. n88 Ac [*641] cording to this theory, the limitation clause sets out what type of service the utility will supply and the scope of the service it is required to furnish. n89 In this context, a telephone company is charged with the duty of providing service upon application, but in exchange for such responsibility, the corporation will not be required to provide completely uninterrupted or perfect quality service. n90

B. Limited Liability as a Rate Component

Most frequently, courts refer to the interrelationship between potential liability and rate structure as justification for limitation of liability for utilities. n91 The U.S. Supreme Court, in Western Union v. Esteve Bros. & Co., n92 limited a telegraph company's damage liability for an unreceived message. n93 Justice Brandeis, writing for the majority, stated, "the limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service ...". n94 Similarly, in Southwestern Sugar Co. v. River Terminals Corp., n95 the Supreme Court, in discussing common carrier obligations, noted, "the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the ... carrier of the expense of insuring itself against liability for damage ... and it is a reasonable rate so computed." n96

The goals of uniformity and equality are additional principles of telephone regulation and rate making that implicate limitation of liability. n97 The Court in Esteve Bros. n98 emphasized the uniform nondiscriminatory application of utility rates, and held that uniformity demanded that the rate as set in the tariff be the sole legal indicator of the company's liability and duty. n99 The Esteve Bros. Court further indicated that to allow some customers to recover for damages related to interrupted service provides a higher standard of service to those customers, and in effect, [*642] provides unequal treatment to a particular class of customers. n100

When validating company exculpatory clauses, state courts generally defer to utility commissions' powers created either under the state constitution or by the state legislature. n101 According to the Georgia Court of Appeals, the power to legislate rates and to determine what limitations of liability are necessary to establish the rates rests exclusively with the appropriate commission. n102 Highlighting the interrelation between limited damage awards and economical telephone rates, the California Supreme Court found that the utility commission relies upon the validity of the limitation of liability as a general policy in setting rates. n103 Thus, the court could not entertain suits for damages as a result of telephone service outages without thwarting the policy of economical telephone rates. n104

Another basis for limitation of liability that is a function of the rate-making rationale is the principle of risk compensation. n105 Many courts recognize that regulating agencies set a utility's rates commensurate with the risk assumed, n106 and reasonable rates are dependent in part upon upholding the limitation of liability rule. n107 Unlike a corporation competing in the open marketplace, the structure of utility regulation does not allow telephone companies to select a particular population to serve by assessing the risks associated with providing service to a specific location or customer. n108 Instead, telephone companies have a duty to serve all [*643] customers within their franchise area. n109 When courts uphold limitation of liability for common carriers or utilities, they often focus on the ultimate economic impact on the average ratepayer. n110

Broadened liability exposure inevitably raises costs, and thereby the rates of service. n111 For example, in a case where a business owner sought damages for losses resulting from a burglary, alleging a telephone company employee

negligently tagged the lines connected to the alarm system, a Louisiana court of appeals held that if unlimited liability is placed upon public utilities for every service they provide, the general public as a whole would bear the burden. n112 Because state legislatures charge utility commissions with the duty of setting reasonable rates, commissions have the discretion to design regulations to minimize risks and costs which would be reflected in rates. n113 For example, if telephone company liability was extended for all subscribers suffering any measure of pecuniary loss, the burden of this cost, through rate of return regulation, would ultimately be shifted to each ratepayer. n114 This basis for restricting recovery against telephone companies is deeply ingrained in the notion that recovery for a few customer losses unjustly burdens all ratepayers.

This section considered the theories upon which courts rely to limit the ability of subscribers to recover damages from telephone companies and the relation of those theories to public policy and the regulatory process. n115 In the context of the technological burst of the last twenty years n116 and the accelerating move to deregulation in telecommunications, n117 however, the foundation and rationale for this limitation requires closer scrutiny. n118 The following section examines the appropriateness of continuing to limit liability as the form of telephone regulation shifts. n119 [*644]

III. Analysis

A. Present Day Justification: Is It Ceteris Paribus? n120

Two significant factors have had a profound impact on American telecommunications in the last ten years. First, sensational technological advancements in the industry have dramatically increased both competition and customer participation, and created an explosion of new products and capabilities. n121 Second, the watershed divestiture of AT&T in 1984 marked a dramatic change in telephone regulation. n122 The breakup of AT&T, n123 the formation of the "Baby Bells," n124 and the structural separations of the Modified Final Judgment, n125 created a transformation in the methodology of telephone regulation. n126 In light of these very critical changes, previous justifications for telephone company protection from liability merit review.

1. Do the Benefit and Burden Still Balance?

As indicated in part II, n127 one of the cornerstones of the justification for limitation of liability is the balance between the burdens and benefits of regulation. n128 In the current environment, however, many state regulatory commissions are allowing telephone companies greater flexibility in service provision and earnings, n129 and the lessened burden may no longer justify such a strict limitation of liability.

a. The Degree of Regulatory Stricture

The public policy rationale for limiting liability is often described as compensation for the encumbrances of restrictive regulation. n130 Judicial justification for endorsing limitation of liability focuses on the "imposition" of regulation upon the utility. n131 In fact, this scenario of a utility company as victim is questionable if one adopts the theory of some com [*645] mentators who suggest that regulation of the telecommunications industry was a desirable arrangement engineered by the Bell system to protect market dominance. n132 In fact, faced with ruthless competition in the early 1900s, AT&T viewed regulation as a protective milieu where monopolistic advantages could thrive. n133 This affirmative participation in self-regulation makes questionable the protectionist underpinnings of the balancing theory of limitation of liability.

Public policy theorists also point to the ability of regulated entities to influence the very administrative agencies charged with their oversight. n134 On the other hand, the history of telecommunications regulation is often cited as an exception to the "self-interest" theory of regulation where the telephone companies, particularly in recent years, have been unable to influence the regulatory agency to the extent of placing the regulators in the role of "cartel manager." n135 Perhaps a middle ground between the self-interest regulation theory and the passive disciplinary view of the restrictions of regulation is more realistic. Even such a moderate view, when interposed with a shift in the extent of actual regulation, makes questionable the degree of protection against liability warranted by telephone companies.

b. Risk Assumption Revisited

One element of the balancing of burden rationale is risk assumption. n136 Historically, utility commissions restricted telephone company rates and earnings levels while protecting the utility from competitive risk. n137 Modern state regulatory schemes, however, are premised upon a new contract of regulation. This new contract often allows a utility to earn and retain a higher rate of return in exchange for less protection from competition. n138 If an important component of the new regulatory frameworks is to "free" the local telephone companies to participate in the competitive marketplace, n139 should they still enjoy the guaranteed protection against liability arising from service disruption?

The essential question is still one of balancing benefits and burdens - weighing the appropriate risk with the appropriate return. It is [*646] possible that the risk appropriately correlated with the permission to retain more of the generated revenue is found in other areas such as lack of guaranteed rate increases, lack of ability to unilaterally change the price of its services, or competitors not saddled with regulated portions of the business. n140 If the risk and revenue levels are altered, however, sound public policy requires a re-examination of the appropriate degree of protection.

2. Is Rate Protection Still Necessary?

The dominant argument in favor of limitation of liability is the economic impact of insuring a few customers at the expense of all. n141 The major motivation for allowing limitation of liability in rate of return regulation is the fear that all costs create upward pressure on rates and ultimately increase prices. n142 In many jurisdictions, however, the modern state regulatory structure does not support this premise. An example of a new regulatory scheme that maintains rate protection is California where the two largest telephone companies have the ability to retain some measure of earnings at a higher rate of return with certain restrictions. n143 One of these restrictions is that local service rates are placed in a category of services that still require utility commission approval for any increases. n144 Another example is Illinois where in late 1992 Illinois Bell proposed a new method of regulation n145 that included a three year freeze on local rates. n146 These examples illustrate that if increased liability were imposed, upward pressure on rates might not affect the average ratepayer directly, or would at least be measurably delayed. n147

Because of the changes in regulatory structure, the basis for upholding strict limitation of liability provisions is less convincing. For many companies the threshold of allowed return has risen, n148 suggesting a company should be required to accept commensurate risk, possibly in the [*647] form of an expanded duty to customers. Other policy considerations and legal principles, however, suggest that some measure of limitation, even in the current regulatory environment, n149 is still valid.

3. Tort Principles: Argument Against Expanding Liability

Although the new forms of state telephone regulation suggest the need to curtail the limitation of liability, the relative capacity of the telephone companies and their customers to bear loss requires a moderate approach to any alteration of the limitation of liability. n150 The relative capacity is not so much a matter of the relative wealth of the parties, but a matter of the relative ability of the parties to avoid the loss, absorb it, or distribute it among a larger group. n151

At first glance, an obvious parallel to the situation of utilities and their consumers is that of a product manufacturer and its customers. In products liability, the extension of liability to the ultimate consumer is aided by the feeling that the manufacturer is best able to bear and distribute the loss. n152 However, the nature of the output is a significant difference between a manufacturer's product liability and the enormous liability that would be imposed on a telephone company. n153 When a manufacturer offers a product for sale, the customer can determine whether the price - which theoretically includes a premium to cover potential product liability damages - is worth the utility of the product. The customer can decide to forego the purchase or shop for a substitute product at a lower price. The typical utility consumer in today's environment however, is not similarly situated, but is still largely a captive consumer at the only price offered. n154

In the case of the telephone customer, because telephone service has become a necessity, n155 with few or no alternatives, n156 the customer can [*648] not forego the service. Rather, the customer must pay the predetermined rate, even if the rate includes the cost of defending liability suits and damage payments. Thus, a telephone company's limitation of liability for negligence cannot be completely removed because the resulting increase in damage costs would be distributed via increased rates to all customers, many of whom would be unable to bear the loss. This is unjust in the context of a monopoly where subscribers have few, if any, alternatives. Eliminating the limitation of liability

might distribute the cost of liability across the entire ratepaying public. It would also, however, create an undesirable tension with the historical goal of universal telephone service n157 by burdening those customers who can barely afford existing rates.

An additional distinction between a manufacturer's liability and the liability of a telephone company is the nature of the customer. Consumer products are typically sold to individual households that are not in a position to insure against potential injury or loss resulting from faulty manufacturing. The manufacturer is in a better position to insure against loss. In those situations where goods are sold to large industrial customers, however, equal bargaining power enables the parties to make any liability or limitation thereof a contractual matter under the terms of the transaction. n158 Conversely, typical telephone customers n159 who would incur significant loss as a result of an outage such as the service interruption following the Hinsdale fire n160 are large industrial and commercial customers who can insure against losses. The telephone company, however, is probably not in a position to insure itself against liability. The California Public Utilities Commission recognized this when it cited the unavailability of insurance for utilities against liability of this kind as a significant factor in its decision to sustain telephone company limitation of liability for service and directory errors. n161 [*649]

Although new regulatory paradigms n162 still limit utilities' ability to pass all costs directly to the ratepayer, n163 the changes are not significant enough to subject local telephone companies to unchecked liability, n164 especially in light of the magnitude and complexity of the service they provide. n165 Thus, opposing interests must be carefully weighed in developing the correct degree of liability a telephone company should be exposed to under the current regulatory framework. Increased earning potential and limits on rate increases suggest local telephone companies should assume commensurate risk. n166 On the other hand, established tort principles continue to provide sound arguments against a carte blanche assumption of liability n167 and suggest caution when contracting the broad limitation currently in place in many jurisdictions.

IV. Proposal

Assuming that the cost of unlimited liability is too great an imposition on the telephone company and its ratepayers, a more appropriate method of risk sharing under current regulatory scenarios is a moderate expansion of telephone company liability. Moderation is warranted because many telephone customers could not absorb the rate increase that would be necessary to protect the telephone company from the increased cost due to complete liability.

Illinois House Bill 4026, proposed in April of 1992, n168 illustrates an attempted but unsuccessful alteration of the limitation of liability. In pertinent part, the proposed bill would have prevented the regulatory commission from approving any rate, charge, classification, or tariff that would limit a utility's liability for direct or indirect losses due to disrup [*650] tion of service that exceeds twenty-four hours. n169 The bill's failure n170 was probably attributable to its broad language.

Such sweeping language removes all limitation of liability for outages over twenty-four hours, and signals too dramatic a change because unlimited recovery of damages in the instance of service failure or telephone company error is inconsistent with both regulatory needs and principles of common law. n171 Although legislation might be a solution to constricting the unbridled indemnity that currently exists, language in any such legislation should be carefully constructed to tailor the limitation instead of eliminating it.

A more practical alternative would be to follow the practice of several states that have refused to uphold limitation of liability provisions unless the corporation is still liable for acts of gross negligence. n172 This expansion of duty on the part of telephone companies increases the level of customer protection without imposing theoretically unlimited liability. It further provides a measure of incentive for utilities to maintain adequate service quality standards and to continue technological efforts to provide alternative routing. n173

Under this system, once the plaintiff proves gross negligence or wanton misconduct, the tariff provision might subject the company to a penalty, dependent on the length of outage. Thus the telephone company is forced to compensate some customers, but not to the extent that rates are dramatically increased. A system similar to this proposal is the tariff clause mandated by the California Utilities Commission which limits recovery to $ 10,000 when a plaintiff proves gross negligence. n174 This "limited limitation" is consistent with new forms of telephone regulation, allowing local telephone companies to operate less as a regulated monopoly, but affording adequate protection in the areas which are still under relatively strict oversight.

Utility commissions should also mandate telephone company quality standards that reduce the chance of an interruption. Many of the new regulatory scenarios include quality standards as factors in the earnings formula. n175 The necessity of such mandates may abate as true competitive market conditions penetrate the local telephone marketplace. In the short term, however, regulatory commissions should oversee service quality levels to ensure that new regulatory paradigms, which allow in [*651] creased earnings levels, do not compromise system reliability. Additionally, nonmandated technological service "insurance," such as customer specific route diversity, n176 should be encouraged because such services can have the effect of passing the cost of insurance directly to those customers who most need and can most afford this protection. Such technological offerings allow the demands of the marketplace, rather than regulatory mandates, to ultimately drive the quality of service.

V. Conclusion

Historically, the public policy justification for limiting telephone company liability for outages and errors is founded on the traditional regulatory model. n177 Since the divesture of AT&T and the rapid changes in telecommunications regulation, however, telephone companies have been given greater flexibility in earnings and pricing. n178 Due to the easing of regulatory strictures, complete limitation of liability for telephone company errors and outages is less compelling in today's regulatory environment. The nature of the telecommunications industry and the local telephone companies, however, necessitates a moderate alteration of the limitation. Thus, telephone companies should suffer some financial penalty for damages resulting from gross negligence, and utility commissions should include quality standards as a requisite index in any price sharing or earnings formula.

FOOTNOTES:

n1. Maria Hunt et al., Fire Wipes Out Phones in West Suburbs, Chi. Trib., May 9, 1988, 1, at 1.

n2. *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65*, at *2-3 (Ill. Aug. 26, 1993).

n3. Id. at *4.

n4. Stevenson Swanson et al., Phone Repair Woes Mount Bell Problems Reach Out and Touch Millions, Chi. Trib., May 15, 1988, 1, at 1.

n5. *In re Ill. Bell, No. 73999, 1993 Ill. LEXIS 65*, at *4.

n6. Id. at *11-12. The tariff provides:

The liability of the Company for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in transmission occurring in the course of furnishing service or other facilities, and not caused by the negligence of customer, shall in no event exceed an amount equivalent to the proportionate charge to the customer for the period of service during which such mistake, omission, interruption, delay, error or defect in transmission occurs. No other liability shall in any case attach to the Company.

Id. The appellate court also held that the "economic loss" doctrine articulated in *Moorman Manufacturing Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982)*, precluded recovery. The Illinois Supreme Court, however, reasoned that the doctrine did not bar recovery. Id. at 15-16. *In re Ill. Bell, No. 73999, 1993 Ill. LEXIS 65*, at *4. The discussion of economic recovery in tort, however, is beyond the scope of this note.

n7. Id. at *1.

n8. Id. at *12. The Illinois Supreme Court held that the plaintiffs asserted a valid claim for civil damages pursuant to 5-201 of the Public Utilities Act. Id. The statute provides:

In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Illinois Commerce Commission, issued under authority of this Act, the public utility shall be liable to the persons or corporations affected thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by way of punishment.

220 ILCS 5/5-201 (West 1992).

In In re Illinois Bell, the court distinguished previous appellate court rulings where exculpatory provisions were held to preclude the recovery of consequential damages for interruption of phone service, because, in contrast to the In re Illinois Bell claim, the previous cases did not involve statutory damages claims brought under 5-201 of the *Utilities Act. In re Ill. Bell, No. 73999, 1993 Ill. LEXIS 65*, at *8. At the time of this writing, a motion for rehearing is pending before the Illinois Supreme Court.

n9. *In re Ill. Bell Switching Station Litig., 234 Ill. App. 3d 457, 463-64, 596 N.E.2d 678, 682, 173 Ill. Dec. 54, 58 (1st Dist. 1992)*, rev'd, *No. 73999, 1993 Ill. LEXIS 65* (Ill. Aug. 26, 1993).

n10. See *Correll v. Ohio Bell Tel. Co., 27 N.E.2d 173, 174 (Ohio Ct. App. 1939)* (justifying tariff limitation of liability for telephone company directory omissions and errors in partial consideration for state regulation and control).

n11. Robert B. Horowitz, The Irony of Regulatory Reform 132 (1989) ("Regulation granted local telephone monopoly franchises and secured the stabilization of business risk ... In return, regulation was able to "extract" from telephone companies the public interest obligation of service to all - 'universal service.' "); see also Paul E. Teske, After Divestiture 2 (1990).

n12. Ithiel de Sola Pool, Technologies of Freedom 101 (1983).

n13. Walter G. Bolter et al., Telecommunications Policy for the 1990s and Beyond 131 (1990).

n14. See infra notes 19-75 and accompanying text.

n15. See infra notes 76-119 and accompanying text.

n16. See infra notes 120-67 and accompanying text.

n17. See infra notes 168-76 and accompanying text.

n18. See infra notes 177-78 and accompanying text.

n19. Ronald A. Case, Annotation, Liability of Telephone Company to Subscriber for Failure or Interruption of Service, *67 A.L.R. 3d 76, 83 (1975)*; see also *Helms v. Southwestern Bell Tel. Co., 794 F.2d 188, 192-93 n.9 (5th Cir. 1986)* (citing cases from 29 states regarding limitation of liability provisions in telephone company tariffs); *Wilhite v. South Cent. Bell Tel., 693 F.2d 340, 342 (5th Cir. 1982)* (citing jurisdictions where, absent wilful or wanton conduct, courts uphold limitation of liability clauses); *University Hills Beauty Academy v. Mountain States Tel. & Tel. Co., 554 P.2d 723, 726 n.1 (Colo. Ct. App. 1976)* (providing an extensive list of decisions upholding limitation of liability clauses in telephone company yellow page advertising cases).

n20. Horowitz, supra note 11, at 100.

n21. See Richard M. Owen & Ronald Braeutigam, The Regulation Game 200 (1978). The Mann-Elkins Act extended the Interstate Commerce Commission's (ICC) jurisdiction to include the telephone, telegraph, and cable companies engaged in transmission of interstate (or intercountry) messages.

n22. Pub. L. No. 416, ch. 652, 48 Stat. 1064 (1934). The administrative deficiencies both of ICC oversight of wired communications and oversight of radio saw legislative proposals as early as 1929 to consolidate federal authority over communications in one agency. In response, Congress created the Federal Communications Commission (FCC) under the Communications Act of 1934. The Communications Commission's mandate was vague, requiring that carriers provide good service at reasonable rates. Horowitz, supra note 11, at 122, 126. The 1934 Communications Act authorized continuing federal institutional involvement in telephone regulation by establishing the FCC, thereby articulating the goal of universal, affordable service. Teske, supra note 11, at 2.

n23. *47 U.S.C.S. 152* (1989).

n24. See Horowitz, supra note 11, at 100. State telephone regulation began in 1907 with establishment of the New York and Wisconsin public utility commissions. Most states formed public utility commissions shortly thereafter. Teske, supra note 11, at 2.

n25. Telephony in the United States has not always had a monopolistic structure. The expiration of the Bell patents in 1893 sparked fierce competitive battles as the number of telephones increased 1000% between 1893 and 1907. In many instances, as a result of the growth, numerous telephone companies operated in concurrent locales. Bell, however, began an aggressive consolidation, and reduced the number of "independent" telephone companies and emerged the dominant force in the market. Alarmed at these developments, public policy makers at the state and federal level intervened. Bolter et al., supra note 13, at 75-76.

n26. See, e.g., *Or. Rev. Stat. 756.040* (1992) ("The commission is vested with power and jurisdiction to supervise and regulate every public utility ... and to do all things necessary and convenient in the exercise of such power and jurisdiction."); *Va. Code Ann. 56-35* (Michie 1993) ("The Commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all public service companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies.").

n27. This doctrine of universal service is the common underpinning of legislative intent and scholarly analyses of the history of regulatory origin and is called the "public interest" theory of regulation. The public

interest theory of regulation views the administrative agency as functioning as a watchdog for the general welfare through oversight of rates and profit levels. Horowitz, supra note 11, at 23-25.

n28. "Universal service meant that telephone service must be made available to and be generally affordable by everyone." Id. at 132. The statutory basis for this is usually found in the language of state public utility acts. For example, in California, the Public Utility Code provides: "The Legislature finds and declares that ... the offering of high quality basic telephone service at affordable rates to the greatest number of citizens has been a longstanding goal of the state." *Cal. Pub. Util. Code 871.5* (West 1993).

n29. The justification for regulating telephone companies' return on investment has been that they are monopoly providers. Theoretically, in the absence of regulation, they could command prices significantly above what a competitive market would allow. Rate of return regulation attempts to make the incentive for investing in a monopoly service similar to that possible in nonmonopoly services. Greatly simplified, this process consists of determining the rate base - the cost of providing service including depreciation and taxes - and adding to that a reasonable profit or return sufficient to attract the capital necessary for investment. There are a number of problems associated with this method, including the incentive for the firm to overinvest since its rate of return is based on total capital investment, and the discouragement of operating efficiencies because the benefits of cost-saving techniques flow to the consumers rather than providing additional profit to the firm. David Twenhafel et al., Introduction to Telecommunications Policy and Economic Development 1, 4 (Jurgen Schmandt et al. eds., 1989).

n30. Bolter et al., supra note 13, at 131.

n31. See *Southern Bell Tel. & Tel. v. Ivenchek, Inc., 204 S.E.2d 457 (Ga. Ct. App. 1974)* (indicating utility commission must require a level of service and reasonable rates).

n32. Teske, supra note 11, at 5.

n33. Amid a growing trend towards deregulation and mounting competitive interest in telecommunications, the U.S. Department of Justice brought suit against AT&T to end its powerful vertical integration through divesture of Western Electric and the Bell operating companies. *United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982)*. Between 1974 and 1982, AT&T lobbied heavily to defeat the antitrust case, but was unsuccessful in its bid to have legislation passed protecting the monopoly structure. On January 8, 1982, the Department of Justice and AT&T reached a settlement in the case, resulting in the divesture of both Western Electric and the operating companies, which were spun off as the seven separate and independent regional monopolies. Horowitz, supra note 11, at 241. For an in depth discussion of the AT&T antitrust action and divesture, see Steve Coll, The Deal of the Century: The Breakup of AT&T (1986).

n34. Twenhafel et al., supra note 29, at 1.

n35. *AT&T, 552 F. Supp. at 131.*

n36. Bolter et al., supra note 13, at 131.

n37. Price caps can be a feature of incentive regulation plans, see infra note 38, but the term generally refers to a method of capping basic prices. Dawn Bushaus, State Regulators: Incentive Regulation Local Competition a Top Agenda - What's Best for Ratepayers?, CommunicationsWeek, Aug. 26, 1991, at 22F hereinafter Bushaus, Incentive Regulation. Under such plans, regulatory commissions set ceiling and floor rates for competitive services and let telephone companies adjust their rates within the limits. Dawn Bushaus, States Easing Local Regulations - New Incentive Plans Allow Pricing Flexibility in Return for Productivity Guarantees, CommunicationsWeek, July 27, 1992, at 27 hereinafter Bushaus, States Easing.

n38. Incentive regulation means letting a telephone company keep a certain portion of their profits, provided they can keep costs down. Bushaus, Incentive Regulation, supra note 37, at 22F.

n39. Under the rate stabilization approach, carrier rates are generally reduced if earnings exceed authorized levels and, conversely, rates will rise if earnings are deficient. Bolter et al., supra note 13, at 137; see also Gail G. Schwartz & Jeffrey H. Hoagg, Virtual Divestiture: Structural Reform of an RHC, *44 Fed. Comm. L.J. 285 (1992)*.

n40. These characteristics are evident in examples of innovation in telephone regulation in Vermont, Alabama, and Nebraska. In 1987, Vermont entered negotiations leading to a "social contract" between the Vermont Service Board and New England Telephone Company (NET). Twenhafel et al., supra note 29, at 185. The terms of the Vermont agreement require stabilized local rates, shifting of the risk associated with inflation to the telephone company, and limited increases for certain services. Although the plan does not guarantee New England Telephone Company a reasonable return on its investment, neither does it limit NET's ability to earn. Bolter et al., supra note 13, at 132. In 1990 the Alabama Public Service Commission extended a form of incentive regulation, called a "Rate Stabilization and Equity Plan," for South Central Bell. The plan allows several tiers of rates of return and includes service measurements. Alabama Continues SCB Alternative Regulation Plan Three More Years With Minor Changes, Telecommunications Reports, Nov. 19, 1990, at 24. An even more radical regulatory shift occurred in Nebraska where the Supreme Court of Nebraska recently refused to void legislation totally deregulating telecommunications. The court's decision followed several years of legislative and judicial activity and provides Nebraska telephone companies considerable freedom from rate of return regulation. 1990 A.B.A. Sec. Pub. Util., Comm. & Transp. L. Ann. Rep., at 147.

n41. Mary Nagelhout, Incentive Regulation of Local Exchange Telephone Carriers, Pub. Util. Fort., July 1, 1991, at 46.

n42. Id. For example, the California Public Utilities Commission adopted an incentive-based regulation framework for that state's two largest telephone companies which included Commission oversight of the quality of service. Id. The Nevada Public Service Commission approved an alternative regulatory scheme in 1990 that included as a goal the improvement of the quality of telephone service to customers. The plan also was intended to encourage local exchange telephone companies to take maximum advantage of modern telecommunications technology. Id. at 48.

n43. Andrew Fegelman, New Rules Aim to Prevent Fires That Would Snarl Phone Service, Chi. Trib., Sept. 25, 1991, 2, at 4.

n44. See supra notes 1-3 and accompanying text.

n45. Fegelman, supra note 43, at 4.

n46. Dennis L. Weisman, The Emerging Market for "Faultless" Telecommunications, Telecommunications Pol'y, Aug. 1990, at 333, 336.

n47. Id. at 338.

n48. See infra notes 52-68 and accompanying text.

n49. See infra notes 76-119 and accompanying text.

n50. The Illinois Supreme Court's recent holding refusing to limit liability despite exculpatory language in Illinois Bell's tariff was unrelated to the form of regulation. *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65* (Ill. Aug. 26, 1993). See infra notes 1-8 and accompanying text.

n51. Brooks B. Albery & Peter J. Grandstaff, Local Transport Competition in U.S. Telecommunications, Telecommunications Pol'y, Dec. 1989, at 355 (noting divestiture has actually increased telecommunications regulation). For example, in 1992, the Chesapeake & Potomac Telephone Company (C&P) of Maryland asked the Maryland Public Service Commission to extend the current price-cap plan (in operation the past two years) for another six years. C&P of Maryland Makes Case for Rate Changes, CommunicationsWeek, June 1, 1992, at 3. However, under the plan, C&P must still gain Commission approval of rate changes for many services such as residential service, business lines, and advanced calling services such as call waiting and call forwarding. Id. In California, an incentive-based regulation framework placed basic monopoly services in a category subject to fixed rates, and indexed other rates to an indexing mechanism. Nagelhout, supra note 41, at 46. In Illinois, in 1993, Illinois Bell Telephone Company proposed a price cap plan that would freeze local rates for three years and allow other rates to change based on a formula considering inflation, Bell's efforts to cut overhead costs, and the quality of service. Rob Karwath, Bell Seeks Rate Overhaul, Chi. Trib., Dec. 1, 1992, 1, at 1. Few states have reached the extreme deregulatory stance of Nebraska, where local telephone companies can increase local prices up to 10% annually, with 90 days notice, unless 2% of affected consumers sign a petition opposing the increase. Some services are nearly free of any rate of return regulation. Teske, supra note 11, at 116-17.

n52. An example of such a statute is as follows:

No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical areas or areas in which the service shall be offered or provided. The Commission may prescribe the form of such tariff and any additional data or information which shall be included therein.

220 ILCS 5/13-501 (1993).

n53. *Correll v. Ohio Bell Co., 27 N.E.2d 173, 174 (Ohio Ct. App. 1939).*

n54. *Illinois Bell Tel. Co. v. Miner, 11 Ill. App. 2d 44, 136 N.E.2d 1 (2d Dist. 1956).*

The company's official tariff filed with the state utility commission ... is a part of the terms and conditions upon which telephone service is rendered, is necessarily a component and integral part of its contracts and

relationships with its subscribers, expressly or by implication or by operation of law; the subscribers are bound thereby, as is the company; it cannot deviate and its subscribers cannot deviate therefrom; ...

Id. at 58, 136 N.E.2d at 8. But see *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65*, at *12 (Ill. Aug. 26, 1993) ("Nothing in the Public Utilities Act or the Commission's regulations authorizes a utility to exempt itself from this liability by means of a tariff.").

n55. See *Cole v. Pacific Tel. & Tel. Co., 94 P.2d 216, 218-19 (Cal. Ct. App. 1952)* (citing *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571-72 (1921)*).

n56. See *Riaboff v. Pacific Tel. & Tel. Co., 102 P.2d 465* (Cal. App. Dep't Super. Ct. 1940). Limitation of liability clauses are not unique to telephone companies, and can be found in the tariffs of other utilities and common carriers. See *Lee v. Consol. Edison Co. of N.Y., 413 N.Y.S.2d 826 (N.Y. App. Div. 1978)* (sustaining electric utility's provision of limitation of liability where tariff exempts utility from liability for ordinary negligence and renders it liable for gross negligence only). But see *Boston & Me. R.R. v. Piper, 246 U.S. 439, 445 (1918)* (finding railroad's liability limitation invalid as in violation of specific statutory language prohibiting exculpatory clauses); *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65*, at *2-3 (Ill. Aug. 26, 1993) (holding state statute negated effect of exculpatory tariff language).

n57. Pool, supra note 12, at 101. Telegraph companies are classified as instruments of commerce, transporting messages across state lines. Similar to telegraph companies, telephone companies are obligated to serve all interested customers; they owe a clear duty to the public to provide quality message service at reasonable rates. *Primrose v. Western Union Tel. Co., 154 U.S. 1, 14 (1893)*; see also *Telegraph Co. v. Texas, 105 U.S. 460, 464 (1881)*.

n58. *154 U.S. 1 (1893)*.

n59. *Id. at 14*.

n60. *Id. at 14-15*.

n61. Id.

n62. *Id. at 14-15, 33-34*.

N63. See *Waters v. Pacific Tel. Co., 523 P.2d 1161, 1164-66 (Cal. 1974)* (citing numerous California court cases upholding telephone companies' right to limited liability on the theory that strict regulation necessitates curtailed liability); *Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457, 459-60 (Ga. Ct. App. 1974)* (holding reasonable limitation of liability for damages for interrupted telephone service is part of the rate-making function).

n64. *27 N.E.2d 173, 174 (Ohio Ct. App. 1939)*.

n65. Id.

n66. *Helms v. Southwestern Bell Tel. Co., 794 F.2d 188, 192 n.9 (5th Cir. 1986)* (citing 26 jurisdictions where courts have ruled favorably for defendants in cases involving directory errors or omissions). The majority of courts hold limitation of liability clauses to be valid; the exception is the few instances where certain jurisdictions refuse to uphold the limitation in cases of directory listing errors and/or omissions, particularly for yellow pages listings. See *Underwood v. South Cent. Bell Tel. Co., 590 So. 2d 170 (Ala. 1991)* (holding limitation of liability clause unconscionable in directory omission case); *Anchorage v. Locker, 723 P.2d 1261 (Alaska 1986)* (holding tariff provisions protecting regulated subjects from liability did not apply to yellow page advertising); *Allen v. Michigan Bell Tel. Co., 171 N.W.2d 689 (Mich. Ct. App. 1969)* (relying on monopolistic nature of yellow pages and holding clause limiting liability unenforceable due to disparity of bargaining power between parties).

n67. *Cole v. Pacific Tel. & Tel. Co., 246 P.2d 686, 687 (Cal. Ct. App. 1952)* (denying claim for telephone directory omission based on telephone company exculpatory tariff clause).

n68. See generally *Southwestern Sugar & Molasses Co. v. River Terminals, 360 U.S. 411, 417 (1959)* (giving effect to exculpatory clause in tariff filed by common carrier with Interstate Commerce Commission); *Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457, 460 (Ga. Ct. App. 1974)* (finding fixing of utility rates is not a matter of private contract, and limited liability for damages for interrupted telephone service is an inherent part of rate).

n69. Case, supra note 19, at 83.

n70. Id.

n71. See, e.g., *Robinson v. Southwestern Bell Tel. Co., 366 F. Supp. 307, 311 (W.D. Ark. 1972)* (stating that in Arkansas liability limitation will not stand in the face of wilful and wanton misconduct or gross negligence); *Wheeler Stuckey Inc. v. Southwestern Bell Tel. Co., 279 F. Supp. 712, 714-15 (W.D. Okla. 1967)* (holding that telephone company may limit its liability in tariff language approved by the Oklahoma Corporation Commission so long as it does not seek immunity from gross negligence or wilful conduct); *Waters v. Pacific Tel. Co., 523 P.2d 1161, 1167 n.9 (Cal. 1974)* (noting California's imposition of liability for gross negligence); *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 590 (Nev. 1992)* (holding Nevada Bell tariff limitation of liability provision does not apply to wilful, wanton or gross negligence); *Abraham v. New York Tel., 380 N.Y.S.2d 969, 972 (N.Y. Civ. Ct. 1976)* (upholding New York Public Service Commission's limitation of liability to acts or omissions of gross negligence).

n72. *Valentine v. Michigan Bell Tel. Co., 199 N.W.2d 182 (Mich. 1972)* (holding tariff provision unconscionable as to tort claim, but in dicta stating pleadings indicated a lack of proof of negligence on part of telephone company). But cf. *Ivenchek, Inc., 204 S.E.2d at 457* (denying plaintiff's contention that tariff limitation of liability was invalid).

n73. *Wheeler Stuckey, Inc., 279 F. Supp. at 714* (denying telephone customer's claim for actual and punitive damages for alleged negligent conduct by telephone company in yellow pages publishing); Proposed Report Regarding Limitation of Liability for Telephone Corporations, Adopted, Cal. Pub. Util. Commission, Dec. No. 77406, Case No. 8593, (1970) hereinafter California PUC Report.

n74. In 1970, the California Public Utilities Commission undertook an intensive investigation into limitation of liability and concluded the rule has worked reasonably well and has enabled the telephone companies "to provide service to the public at a lesser cost than would be the case if the rules permitted greater liability for errors and omissions." California PUC Report, supra note 73, at 18.

n75. *Bulbman, Inc., 825 P.2d at 590* (noting that most jurisdictions hold that liability limitation should be upheld when the claim is for simple negligence).

n76. See infra notes 77-115 and accompanying text.

n77. *Garrison v. Pacific N.W. Bell Tel. Co., 608 P.2d 1206, 1211 (Or. Ct. App. 1988)* (holding that regulation of liabilities to some extent is necessary to "strike an equitable balance of benefits and burdens").

n78. *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921)* (holding limitation of liability is an inherent part of regulated telegraph rates).

n79. *Wilkinson v. New England Tel. & Tel. Co., 97 N.E. 413, 416 (Mass. 1950)*. The rationale for limitation of liability adopted by a few courts, especially in the earlier years of telephony, focused on the technological nature of the telephone industry. In Wilkinson the plaintiff alleged faulty service, including erroneous busy signals and failure of the telephone to ring when a call was placed. The court held the failure of the plaintiff to sufficiently allege wanton or wilful misconduct on the part of the defendant precluded recovery under the limitation of liability clause because of the telephone company's inability to control all sources of potential service failure. Id.

n80. *Waters v. Pacific Bell Tel. Co., 523 P.2d 1161 (Cal. 1974)*.

n81. *Cole v. Pacific Tel. & Tel. Co., 246 P.2d 686, 688 (Cal. Ct. App. 1952)* (holding customer could not recover for damages allegedly suffered from telephone directory error when telephone company tariff contained limitation of liability clause).

n82. *Garrison v. Pacific N.W. Bell Tel. Co., 608 P.2d 1206, 1211 (Or. Ct. App. 1980)* (justifying limitation as necessary to offset regulatory burdens).

n83. *Great N. Util. Co. v. Public Serv. Comm'n, 293 P. 294, 298 (Mont. 1930)* (explaining utility commission powers to regulate and control utilities (citing *Munn v. Illinois, 94 U.S. 113, 140 (1877)*)).

n84. See *Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457 (Ga. Ct. App. 1974)* ("It is the responsibility of the commission to require a regulated utility to provide a level of service within its service area ... consonant with this responsibility the commission must approve utility rates ....") (quoting *Georgia Power Co. v. Public Serv. Comm'n, 201 S.E.2d 423, 427 (Ga. 1973)*).

n85. See *State ex rel. Mountain States Tel. & Tel. Co. v. District Court, 503 P.2d 526, 528-29 (Mont. 1972)*.

n86. Horowitz, supra note 11, at 132.

n87. *Cole v. Pacific Bell Tel. & Tel. Co., 246 P.2d 686, 687 (Cal. Ct. App. 1952).*

Since the telephone company renders a service affecting the public, the state shall regulate and control it in order to prevent injustice, and further, in consideration of such regulation and control its liability is and should be defined and limited ... In a sense it is a matter of contract, on the one hand by the utility; and on the other by the state representing all its citizens.

Id. (quoting *Correll v. Ohio Bell Tel. Co., 27 N.E.2d 173, 174 (Ohio Ct. App. 1939)).*

n88. *Wilkinson v. New England Tel., 97 N.E.2d 413, 416 (Mass. 1951)* ("This regulation is not solely a limitation of damages in case of failure of service. Its purpose is rather to limit and define the duty ... to supply service."); see also *Julington Creek Marina, Inc. v. Southern Bell Tel. & Tel. Co., 35 Fla. Supp. 183, 185 (Cir. Ct. 1971).*

n89. *Julington Creek Marina, 35 Fla. Supp. at 185.*

n90. *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 591 (Nev. 1992)* (recognizing company would be subject to enormous liability if responsible for every telephone service disruption).

n91. *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921)* (allowing limited liability of telegraph company for unrepeated telegraph messages); *Davidian v. Pacific Tel. & Tel. Co., 94 Cal. Rptr. 337, 339 (Ct. App. 1971)* (noting commissions take into consideration limitation of liability when fixing rates for telephone service); *Cole v. Pacific Bell Tel. & Tel. Co., 246 P.2d 686, 687 (Cal. Ct. App. 1952)* (recognizing reasonable rates are dependent on limitation of liability rules).

n92. *256 U.S. 566.*

n93. *Id. at 571.*

n94. Id.

n95. *360 U.S. 411 (1959).*

n96. *Id. at 417-18.*

n97. See *Esteve Bros., 256 U.S. at 573.*

n98. *Id. at 566.*

n99. *Id. at 572.*

Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement, still less by ... lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but as a matter of law by which uniform liability was imposed.

Id.

n100. *Id. at 573* ("Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all."); see also *Western Union Tel. Co. v. Priester, 276 U.S. 252, 259 (1928)* ("The established rates ... thus became the lawful rates and the attendant limitation of liability became the lawful condition upon which messages might be sent."); *Sims v. Western Union Tel. Co., 236 N.Y.S.2d 192, 195 (Sup. Ct. 1963)*.

n101. *Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co., 664 P.2d 994, 997 (N.M. Ct. App. 1983)* ("The limitation exists as an integral part of the rate-making function, a function that is totally regulated by state and federal agencies.") (quoting *Pilot Indus. v. Southern Bell Tel. & Tel. Co., 495 F. Supp. 356 (1979)*).

n102. *Southern Bell Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457, 459 (Ga. Ct. App. 1974)*. "What is just and reasonable to be charged, what is actuarially sound, what limitations of liability are necessary to reach this result, are matters which need to be taken into account in the determination of public utility rates, just as there are proper actuarial considerations in fixing insurance premiums." Id.

n103. *Waters v. Pacific Tel. & Tel. Co., 523 P.2d 1161, 1166 (Cal. 1974)*.

n104. *Id. at 1166.*

It stands undisputed that the commission has approved a general policy of limiting the liability of telephone utilities for ordinary negligence to a specified credit allowance, and has relied upon the validity and effect of that policy in exercising its ratemaking function. It also appears clear that to entertain suits for damages as a result of service interruption ... would thwart the foregoing policy.

Id.

n105. *State ex rel. Western Union Tel. Co. v. Public Serv. Comm'n, 264 S.W. 669, 671 (1924)* ("The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of common law.").

n106. Id.; see also Horowitz, supra note 11, at 132 (discussing regulation of AT&T as a monopoly and noting "the stabilization of business risk was accomplished through a guaranteed fair rate of return and a policy of long-term capitalization.").

n107. See *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 572 (1921)*.

n108. See *Waters v. Pacific Tel. & Tel. Co., 523 P.2d 1161, 1164 n.5 (Cal. 1974)* (acknowledging "that considerations of public policy which might be applicable to disputes between public parties are not necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body.") (citing *E. B. Ackerman Importing Co. v. Los Angeles, 394 P.2d 566, 569 (Cal. 1964)*).

n109. See Horowitz, supra note 11, at 132.

n110. *Waters, 523 P.2d at 1164* (noting that reasonable telephone rates are in part dependent on limitation of liability rules); see also *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 591 (Nev. 1992)* (recognizing telephone companies would be forced to raise rates to cover increased cost of providing service absent limitation of liability); California PUC Report, supra note 73, at 18 (noting that one effect of limitation of liability rules has been to enable telephone companies to provide service to the public at a lesser cost than if greater liability were permitted).

n111. *Abraham v. New York Tel. Co., 380 N.Y.2d 969, 972 (Civ. Ct. 1976); Garrison v. Pacific Northwest Bell, 608 P.2d 1206 (Or. Ct. App. 1980).* Rate of return regulation is cost based - thus all costs of service are imputed into the rate base, and ultimately made part of the rate. See generally Twenhafel et al., supra note 29, at 4.

n112. *Peacock's, Inc. v. South Cent. Bell, 455 So. 2d 694, 698 (La. Ct. App. 1984).*

n113. See *Great N. Util. Co. v. Public Serv. Comm'n, 293 P.2d 294 (Mont. 1930).*

n114. See *Peacock's, Inc., 455 So. 2d at 698 (La. Ct. App. 1984)* (denying recovery for alleged failure of telephone lines connected to alarm system).

n115. See supra notes 81-113 and accompanying text.

n116. Bolter et al., supra note 13, at 84-85.

n117. Horowitz, supra note 11, at 241.

n118. See infra notes 119-76 and accompanying text.

n119. See infra notes 120-67 and accompanying text.

n120. "Other things being equal." Webster's Third New International Dictionary 368 (1981).

n121. Roger M. Noll, The Future of Telecommunications Regulation in Telecommunications Regulation Today and Tomorrow 41, 44 (Eli M. Noam ed., 1983); see also Bolter et al., supra note 13, at 84-85.

n122. See generally Teske, supra note 11 (analyzing state telecommunications regulatory decisions following the industry wide change precipitated by the divestiture of local telephone operating companies from AT&T in 1984).

n123. See supra notes 33-35 and accompanying text.

n124. See supra notes 33-35 and accompanying text.

n125. *United States v. Western Electric Co., No. CIV.A.82-0192, 1982 WL 1882* (D.D.C. Aug. 24, 1982); see Horowitz, supra note 11, at 241.

n126. Teske, supra note 11, at 13-14.

n127. See supra notes 19-119 and accompanying text.

n128. See supra notes 82-90 and accompanying text.

n129. Bushaus, States Easing, supra note 37, at 27 ("As the local telecommunications environment grows more competitive, state utility commissions nationwide are opening up their regulations to encourage innovation and lower the cost of services.").

n130. See supra notes 81-90 and accompanying text.

n131. See, e.g., *State ex rel. Mountain States Tel. & Tel. Co. v. District Court, 503 P.2d 526, 529 (Mont. 1972).*

n132. Horowitz, supra note 11, at 102-03. "Regulation substituted a guaranteed return on capital and management freedom for the uncertainties of the marketplace. This was precisely the kind of regulation Vail president of AT&T had sought." Id. at 103. "AT&T did not actively oppose ... regulation. In fact, it suggested that regulation might serve as a substitute for competition by, among other things helping to resolve the problems posed by duplicated services." Owen & Braeutigam, supra note 21, at 200.

n133. Owen & Braeutigam, supra note 21, at 200.

n134. Id. at 11.

n135. Bolter et al., supra note 13, at 43.

n136. See supra notes 105-14 and accompanying text.

n137. See, e.g., *Peacock's, Inc. v. South Cent. Bell, 455 So. 2d 694, 698 (La. Ct. App. 1984).*

n138. Bushaus, Incentive Regulation, supra note 37, at 27.

n139. Nagelhout, supra note 41, at 46 (stating that as the competitive telecommunications market continues to evolve, state regulators are increasingly willing to ease the regulatory burden imposed on local telephone carriers.").

n140. Alain de Fontenay et al., Local Competition and Resale of Network Services in the USA, Telecommunications Pol'y, Mar. 1987, at 45, 53, 56 (noting differential regulatory treatment between local telephone companies and their competitors).

n141. See supra notes 112-14 and accompanying text.

n142. *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 590-91 (Nev. 1992)* (indicating that absent liability limitations, broad liability exposure would create tremendous pressure on utility service rates).

n143. Nagelhout, supra note 41, at 46.

n144. Id.

n145. Karwath, supra note 51, at 1. Illinois Bell proposed a plan with prices tied to a formula based on such variables as inflation, company productivity, and quality of service. Id. The proposal also includes a three-year freeze on local rates. Id. Under the proposed scheme, Illinois Bell would be able to earn above the current fixed 13.1% rate of return. Id.

n146. Id.

n147. Arguably, if certain rates are frozen for a period of years, a telephone company and a commission could study more accurately the actual impact of increased liability for outages to make a more informed assessment of the degree of increased costs the change creates. The speculative assessment of the cost of increased liability may not match the actual experience.

n148. Rob Karwath, Bell Rate Plan Appears Right on Line, Chi. Trib., Dec. 2, 1992, 1, at 1 (noting new regulatory plans allow telephone companies to earn higher profits).

n149. See supra note 40.

n150. W. Page Keeton et al., Prosser and Keeton on the Law of Torts 4, at 24 (5th ed. 1984).

n151. Id.

n152. Id. at 25.

n153. A telephone company does not have a duty to provide flawless, uninterrupted service, but is only required to provide "reasonable" or "adequate" service. See, e.g., *Or. Rev. Stat. 759.035* (1992) ("Every telecommunications utility is required to furnish adequate and safe service"); *Va. Code Ann. 56-234* (Michie 1993) ("It shall be the duty of every public utility to furnish reasonably adequate service and facilities"). While technological innovation has created a much more reliable network, the vastness and interconnective nature of the system are inconsistent with imposition of such a broad duty. If a telephone company were required to provide perfect service, such a duty would impose a standard of strict liability. This is not only economically infeasible with such an intangible product, but unjustified without the traditional rationales of strict liability such as an abnormally dangerous enterprise. Keeton et al., supra note 150, at 546 (strict liability has been said many times to be confined to things or activities which are "extraordinary," "exceptional," or "abnormal").

n154. See supra notes 97-100 and accompanying text.

n155. *Waters v. Pacific Tel. Co., 523 P.2d 1161, 1166 n.8 (Cal. 1974)* ("Telephone service is a business and a personal necessity, and the subscriber thereto ordinarily would not be motivated by the availability of damages in the event of negligent service.").

n156. As technological innovations bring competition to even local service, alternatives may be more reasonably priced. Currently, while pagers and cellular telephone service are local service alternatives, the average customer views such services as adjunct, specialized services, and not as a substitute for local residential service. Jennifer Jarrutt & Joseph F. Coates, Future Use of Cellular Technology, Telecommunications Pol'y, Feb. 1990, at 78.

n157. See supra note 28.

n158. See, e.g., U.C.C. 2-509(4) (1978) (allowing parties to enter into contractual agreements shifting risk of loss).

n159. When examining the risk of liability, or the extent of the duty to a customer, one of the troubling issues is the heterogenous mixture of the customer base. Telephone usage valuation varies from one customer to another. The spectrum of utility of the service is broad, from luxury item (i.e., fixed income household) to a major source of revenue (i.e., telemarketing firms). With such a variety of uses, the value of a telephone outage will vary drastically between different customer groups. Bolter et al., supra note 13, at 43. For example, a three-hour outage may be transparent to a residential customer who is not home at the time of the interruption, but the same outage could result in a major loss of both current and future profits for a stock brokerage firm. Assuming that all costs eventually find their way into increased rates, it is questionable if equity is served by requiring all ratepayers to insure the relatively few customers who would experience great loss in the event of service interruption.

n160. See supra notes 1-4 and accompanying text.

n161. California PUC Report, supra note 73, at 12 ("at the present time, no liability insurance is available to insure against service or directory errors. If a change in the limitation of liability rule results in payouts greater than at present the money must come from the revenues of the company affected.").

n162. See, e.g., supra notes 40-42.

n163. See supra notes 143-47 and accompanying text.

n164. The concepts of actual and proximate cause are also inconsistent with creating carte blanche recovery for customer service failure. For example, if a home is burglarized, can the plaintiff adequately prove that static on the line was the actual cause of a significant delay in the signal reaching the police station in order to sustain a claim against the utility with the static? Another classic example is the residential fire, where the customer is unable to summon the fire department because of an outage. Is the delay in reaching the fire department the "but for" cause of the loss, or was the nature of the blaze such that the house would have been demolished even without the delay? Of even more difficult proof is proximate cause. How can a telephone company reasonably foresee the value of the communication lost, or the ensuing damages? The "floodgates of litigation" argument surfaces, but in fact, the pervasive number of telephone company customers coupled with the duty of ubiquitous service makes the company assume near unlimited risk, without any ability of the company to manage that risk. *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 591 (Nev. 1992)*. This does create potential for an explosive volume of litigation for all utilities.

n165. *Bulbman, 825 P.2d at 591* (noting that defects and disruption are inevitable when providing service to hundreds of thousands of customers); Keeton et al., supra note 151, at 663 (explaining that in light of the cost-based regulatory process of utilities their civil liability was unique).

n166. See supra notes 137-41 and accompanying text.

n167. See supra notes 150-61 and accompanying text.

n168. H.B. 4026, 87th General Assembly, Illinois, 1992.

n169. Telephone Interview with Pat O'Brien, Public Utilities Committee Clerk, Springfield, Ill. (Feb. 8, 1993).

n170. H.B. 4026, 87th General Assembly, Illinois, 1992.

n171. See supra notes 21-50 and accompanying text.

n172. See, e.g., *Holman v. Southwestern Bell, 358 F. Supp. 727 (D. Kan. 1973); Stern v. General Tel. Co. of Cal., 123 Cal. Rptr. 373, 376 (Ct. App. 1975); Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co., 664 P.2d 994, 996 (N.M. Ct. App. 1983).*

n173. *Stern, 123 Cal. Rptr. at 376* (citing California Public Utilities Commission report that exposure for gross negligence might be an incentive to reduce errors for all ratepayers).

n174. *Colich & Sons v. Pacific Bell, 244 Cal. Rptr. 724, 716 n.4 (Ct. App. 1988).*

n175. See, e.g., supra note 42 and accompanying text.

n176. See supra note 47 and accompanying text.

n177. See supra notes 21-50 and accompanying text.

n178. See supra notes 120-25 and accompanying text.

ATTACHMENT 4

REGULATIONS

2.3 Obligations of the Customer (Cont'd)

2.3.2 Claims

With respect to any service or facility provided by the Company, Customers shall indemnify, defend and hold harmless the Company from and against all claims, actions, damages, liabilities, costs and expenses, including reasonable attorneys' fees for:

A) any loss, destruction or damage to the property of the Company or any third party, or death or injury to persons, including, but not limited to, employees or invitees of either party, to the extent caused by or resulting from the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees; or

B) any claim, loss, damage, expense or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Customer, including, without limitation, use of the Company's services and facilities in a manner not contemplated by the agreement between the Customer and the Company.

REGULATIONS

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2. REGULATIONS (Cont'd)

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Issued By:
James C. Falvey, Sr. Vice President
Regulatory Affairs
Xspedius Management Co., LLC
7125 Columbia Gateway Drive, Suite 200
Columbia, Maryland 21046

Issue Date: June 14, 2002 Effective Date: February 12, 2003

Issued By: James C. Falvey, Sr. Vice President Regulatory Affairs
Xspedius Management Co., LLC
7125 Columbia Gateway Drive, Suite 200
Columbia, Maryland 21046

REGULATIONS

2.3 Obligations of the Customer (Cont'd)

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REGULATIONS

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B) any claim, loss, damage, expense or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Customer, including, without limitation, use of the Company's services and facilities in a manner not contemplated by the agreement between the Customer and the Company.

ATTACHMENT 5

PLEASE SEE

CONFIDENTIAL DOCUMENTS

NVX 000051 & XSP 000052

FILED UNDER SEAL ON JULY 15, 2005 WITH

PETITION FOR CONFIDENTIAL TREATMENT

ATTACHMENT 6

RECEIVED
JUN 30 2004
EXECUTIVE SECRETARY
G.P.S.C.

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12778
73946

Docket No. 12778-U

In Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.

ORDER ADOPTING IN PART AND MODIFYING IN PART THE HEARING OFFICER'S RECOMMENDED ORDER

BY THE COMMISSION:

This matter arises from the May 13, 2002 Complaint by BellSouth Telecommunications, Inc. ("BellSouth") filed with the Georgia Public Service Commission ("Commission") against NuVox Communications, Inc. ("NuVox") to enforce the parties' interconnection agreement ("Agreement"). BellSouth asserts that it has the right under the parties' interconnection agreement to audit NuVox's records in order to confirm that NuVox is complying with its certification that it is the exclusive provider of local exchange service to its end users. The facilities that BellSouth wishes to audit were initially purchased as special access facilities but were subsequently converted to enhanced extended loops ("EELs") based on NuVox's self-certification that the facilities were used to provide a significant amount of local exchange service.

In construing the interconnection agreement, it is necessary to consider the June 2, 2000 order of the Federal Communications Commission ("FCC") in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 ("*Supplemental Order Clarification*"). The parties disagree both with respect to the meaning of the FCC order, and the extent to which the order was incorporated into the Agreement.

I. STATEMENT OF PROCEEDINGS

On May 13, 2002, BellSouth filed its Complaint to enforce the parties' Commission-approved interconnection agreement. The specific relief requested by BellSouth was that the Commission resolve the Complaint on an expedited basis, declare that NuVox breached the interconnection agreement by refusing to allow BellSouth to audit the facilities NuVox self-certified as providing "a significant amount of local exchange service," require NuVox to allow such an audit as soon as BellSouth's auditors are available and order NuVox to cooperate with the auditors selected by BellSouth. (BellSouth Complaint, pp. 5-6). NuVox filed with the Commission its Answer to the Complaint on May 21, 2002. NuVox supplemented its Answer on June 4, 2002

exceptions in 47 U.S.C. § 222(c)(1) provide that CPNI may be released with the approval of the customer or if required by law. BellSouth is not required by law to release this information to its auditor; but rather it is requesting authorization from the Commission to do so. It does not appear consistent with the intent of the law to authorize release of the information in this instance. The Staff recommended that BellSouth only be permitted to release the CPNI with the customer's approval.

The Commission adopts the Staff's recommendation with respect to the release of CPNI to BellSouth's auditor.

E. <u>The auditor proposed by BellSouth must be compliant with with the standards and criteria established by the American Institute of Certified Public Accountants.</u>

The *Supplemental Order Clarification* requires that audits must be conducted by independent third parties paid for by the incumbent local exchange provider. (*Supplemental Order Clarification*, ¶ 1). The Agreement includes the following language on BellSouth's audit rights:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] record not more than on[c]e in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements.

(Agreement, Att. 2, § 10.5.4).

This language does not specifically address the issue of the independence of the auditor. BellSouth maintained that it is not required to use a third party independent auditor. It supported this position with the same argument that it used to support its position on the "concern" requirement. That is, BellSouth argued that "the only audit requirement to which the parties agreed is that BellSouth give 30-days' notice." (BellSouth Post-Hearing Brief, p. 3) NuVox disagreed, and argued that the parties did not exempt BellSouth from its obligation to conduct an audit using an independent third party auditor. (Tr. 253) This question of contract construction poses the same question as was addressed with the concern requirement The Agreement does not expressly state either that BellSouth must show a concern or that BellSouth does not need to show a concern.

The Staff recommended that the Commission find that the *Supplemental Order Clarification* and the Agreement require that the audit be conducted by an independent third party auditor. For the reasons discussed in the analysis of the "concern" issue, the Commission adopts Staff's recommendation that the Agreement is unambiguous that the audit is required to be conducted by an independent third party.

The next question is whether the auditor selected by BellSouth is independent. NuVox vigorously objected to the Hearing Officer's conclusion that ACA satisfied this request. NuVox

argued that ACA is a small consulting shop that was dependent on ILECs for its business, and therefore could not be characterized as independent. (NuVox Post-Hearing Brief, p. 46). NuVox also claims that ACA marketing material characterizing as "highly successful" its audits that have recovered large sums for ILEC clients reflects a bias. *Id.* NuVox also complained that BellSouth's witness, Ms. Padgett admitted that she had private conversations with ACA regarding the requirements set forth in the *Supplemental Order Clarification*, before and during ongoing audits, with and without the audited party being present. (NuVox Objections, p. 19) NuVox reasons that this illustrates that ACA is subject to the influence of BellSouth. *Id.* NuVox requested that BellSouth conduct the audit using a nationally recognized accounting firm. (NuVox Post-Hearing Brief, p. 47). NuVox also contested the auditor's independence on the ground that ACA is not certified under the standards established by the AICPA. (Tr. 275).

BellSouth argues that none of these points demonstrate that ACA is not independent from BellSouth. (BellSouth Post-Hearing Brief, pp. 27-28). BellSouth counters NuVox's claims with evidence that ACA has competitive local exchange carrier clients and that BellSouth has not previously hired ACA. *Id.* BellSouth also argues that neither the Agreement nor the *Supplemental Order Clarification* required the auditor to comply with AICPA standards. *Id.* at 28.

The *Triennial Review Order*, which the FCC issued after the date of the Agreement, states that audits must be conducted pursuant to the standards established by the AICPA. (*Triennial Review Order*, ¶ 626). The question then is whether this compliance is required for audits conducted pursuant to agreements entered into prior to the issuance of the *Triennial Review Order*. NuVox's position that it should be required is based on a reading that, like with the "concern" requirement, the FCC was simply clarifying in the *Triennial Review Order* what was intended by the term "independent" in the *Supplemental Order Clarification*. (Tr. 276). BellSouth argues that the *Triennial Review Order* does not impact the parties' rights under the Agreement, and in fact, illustrates that the *Supplemental Order Clarification* did not contain this requirement. (BellSouth Post-Hearing Brief, FN 7)

The Staff recommended that the Commission find that BellSouth's auditor met the standards of independence set forth in the *Supplemental Order Clarification*, but that the Commission should consider in its evaluation of the credibility of any audit results whether the audit was conducted pursuant to AICPA standards. The Commission does not adopt the Staff's recommendation. NuVox raised serious concerns about the auditor's independence. The FCC has stated clearly not only that auditors must be independent but that the independent auditor must conduct the audit in compliance with AICPA standards. It is true that this latter standard was not clarified until after the parties entered into the Agreement; however, the parties disputed the meaning of the independent requirement prior to the issuance of the *Triennial Review Order*. NuVox always maintained that for an auditor to be independent it must comply with AICPA standards. (Tr. 275). That the FCC later identified AICPA compliance as a prerequisite of an independent audit supports a conclusion that NuVox was correct. BellSouth's argument that the inclusion of the requirement in the latter FCC Order indicates that it was not present in the former is mistaken in this instance. In the *Triennial Review Order*, the FCC gives no indication that it is reversing any portion of the *Supplemental Order Clarification*. The most logical

construction of the *Triennial Review Order* is that it is clarifying the requirement that had been in place from the prior FCC order.

In reaching this conclusion, the Commission concedes that the *Supplemental Order Clarification* did not expressly state that AICPA compliance was a prerequisite for an auditor to be deemed "independent." In fact, the *Supplemental Order Clarification* does not expound on the criteria to be considered in determining whether a third party auditor is independent. This lack of detail should not be construed to render the "independent" requirement meaningless. Rather, it leaves to the discretion of the Commission what is required to comply with the standard of independence. For guidance in reaching this determination, it is reasonable to look at other orders of the FCC. The *Triennial Review Order* gives clear guidance that compliance with AICPA standards is necessary in order for a third party auditor to be independent. The Commission finds that any audit firm selected by BellSouth itself be compliant with AICPA standards and criteria.

The Commission remains cognizant that parties are capable of negotiating and agreeing to terms and conditions that are different than the specific requirements set forth in the law. The Commission has concluded that the parties did not do so with regard to this provision of the Agreement. Therefore, the issue is whether the federal law at the time the parties entered into the Agreement required third party audits to comply with AICPA standards in order to be deemed independent. For the reasons discussed, the Commission concludes that it is a fair construction of the term "independent" to require AICPA compliance

Regardless of whether BellSouth argues it has a contractual right to conduct an audit that does not comply with AICPA standards, as the finder of fact the Commission may decide the proper weight to afford the findings of any such audit. In light of the FCC's determination that audits should be conducted pursuant to AICPA standards, the Commission concludes that it would not afford any weight to findings from an audit that was not conducted in compliance with AICPA standards. Given that BellSouth would not be able to convert loop and transport combinations to special access services until it prevailed before the Commission, it would not make any difference if the Commission were to permit BellSouth to conduct the audit with an auditor that was not AICPA compliant. As discussed above, the Commission has concluded that BellSouth does not have this right under the Agreement; however, it is important to distinguish between the parties' arguments concerning their respective contractual rights and the Commission's discretion in evaluating the evidence.

The Staff recommended that NuVox should not have to pay the costs related to adherence to AICPA standards. The Commission agrees. The Recommended Order appeared to base the conclusion that NuVox should pay for compliance with AICPA standards on the premise that such compliance was above and beyond what had been agreed to by the parties. Given the conclusion that AICPA compliance is required by the Agreement, the basis for making NuVox pay no longer exists

F. <u>NuVox's Request for a Stay is denied.</u>

ATTACHMENT 7

BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

In the Matter of: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Atlanta, LLC Of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended	)	Docket No. 18409-U Filed: July 8, 2005

BELLSOUTH TELECOMMUNICATIONS, INC. POST-HEARING BRIEF

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(Tr. 470-71). Likewise, the Kansas Commission recently refused to find that SBC had a duty to provide the transit function at a TELRIC rate. *See In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB at 102 (Feb. 16, 2005).[33] The Commission should resolve this issue the same way it did in the transit traffic proceeding.[34]

Item 86B:* (B) *How should disputes over alleged unauthorized access to CSR information be handled under the Agreement? (Attachment 6, Sections 2.5.6.2 and 2.5.6.3)

The crux of this issue is simple: within how many days should a party be required to produce a Letter of Authorization ("LOA") verifying that the party had the right to review a customer service record if such an LOA is requested? As explained below, and as conceded by the Joint Petitioners, two weeks is more than a sufficient amount of time for either party to produce such an LOA upon request.

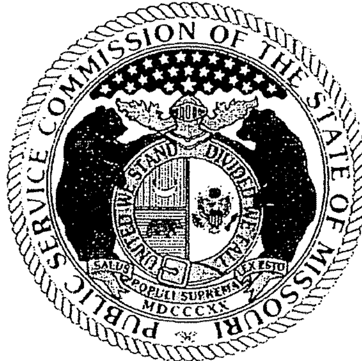
Joint Petitioners concede that customer service record ("CSR") information contains Customer Proprietary Network Information ("CPNI"), and that BellSouth and the Joint Petitioners have an obligation under federal law to protect the unauthorized disclosure of CPNI. (Tr. at 552). Given such obligations, it is no surprise that the parties have agreed to refrain from accessing CSR information without an appropriate LOA from a customer and to "access CSR information only in strict compliance with applicable laws." (Tr. at 552-553; *see* Att. 6, § 2.5.5)). Regarding LOAs, the parties have agreed that upon request, a party "shall use best efforts" to provide an appropriate LOA within seven (7) business days. (Tr. at 553-554; Att. 6, § 2.5.5.1)). Seven business days equates to at least nine (9) calendar days. (Tr. at 554).

[33] The Texas Commission reached a different conclusion in *Arbitration of Non-Costing Issues For Successor Interconnection Agreements to the Texas 271 Agreement*, T.P.U.C., Docket No. 28821 at 30 (Feb. 23, 2005).
[34] BellSouth reserves all rights relating to the Commission's authority to establish a non-TELRIC rate for the transit function.

ATTACHMENT 8

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI



Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's	)	
Petition for Compulsory Arbitration of Unresolved Issues	)	<u>Case No. TO-2005-0336</u>
for a Successor Interconnection Agreement to the	)	
Missouri 271 Agreement ("M2A").	)	

ARBITRATION ORDER

Issue Date: **July 11, 1005**

Effective Date: **July 11, 2005**

> [T]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of the trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.

Second, 47 C.F.R. 51.703(b) states that "a LEC may not assess charges on any other telecom carrier for telecom traffic that originates on the LEC's network." Together, these rules dictate that both carriers bear a cost responsibility for the interconnection facility because each party is using the interconnection facility to deliver traffic to the other party.

The Commission concurs with the Arbitrator's finding that, in general, each party is solely responsible for the facilities on its side of the POI. Nonetheless, the Commission agrees with Sprint that each party must be financially responsible for its own outgoing traffic. Where the interconnection is via a two-way trunk, the cost of that facility must necessarily be shared. The Arbitrator's Report is modified accordingly and the parties are directed to adopt Sprint's proposed language.

3. Should non-251(b) or (c) services such as Transit Services be negotiated separately?

<u>Sprint IC Issue 7</u>: **Should non 251(b) or (c) services such as Transit Services be negotiated separately?**

Discussion and Decision:

Sprint's IC Issue 7 was listed at Section I(C).1 of the Final Arbitrator's Report, but the description of the issue given there was evidently incorrect. Nonetheless, the Arbitrator did determine AT&T Network A-C 11 Issue 4(c), CLEC Coalition IC Issue 1, ITR Issue 4, and NIA Issue 5(a), and MCI RC Issue 18 in that section, all of which are identical to Sprint's IC Issue 7. Sprint is thus correct. The Arbitrator's Report is modified accordingly and the parties are directed to adopt Sprint's proposed language set out below:

> 17.2.1 Transit service providers are rightly due compensation for the use of their tandem switching and common transport elements when

providing a transit service. This compensation is based on TELRIC pricing and appears in Appendix PRICING.- All Traffic.

4. **Future declassifications:**

SPRINT UNE 3: Should changes in SBC MISSOURI'S unbundling obligation due to lawful action be incorporated into the terms and conditions pursuant to the change in law provisions in the agreements General Terms and Conditions?

Discussion:

Sprint states that there are important technical errors in the Arbitrator's decision matrix regarding UNE Issue 3 that appear to have caused a substantive error as well. The Commission should correct the technical error and adopt all Sprint's proposed language for Issue 3 while rejecting all SBC's proposed language that is disputed by Sprint.

The technical error begins on page 124-6 of the Arbitrator's UNE decision matrix, Attachment III. A. Part 1, where the Arbitrator ruled on proposed contract section 8.4.2. The Sprint language that appears on page 125 next to SBC's section 8.4.3 should actually be added to the end of Sprint's proposed Section 8.4.2 that appears in the Arbitrator's decision matrix and also in the joint DPL filed by the parties. The effect of splitting Sprint's proposed language for section 8.4.2 into two pieces in the Sprint column of the decision matrix is to throw off the alignment of the Sprint proposed language in the remainder of the Arbitrator's decision matrix. For instance, Sprint's proposed section 8.4.3 should be lined up with SBC's proposed section 8.4.3. Sprint's proposed section 8.4.3.1 gets pushed down the matrix and is improperly lined up with SBC's proposed 8.4.4 instead of SBC's proposed 8.4.3.1. Again, this should be remedied by tacking the language on page 125, which begins "If Sprint does not dispute the declassification" to the end of Sprint's section 8.4.2, and then realigning the remaining contract sections.

ATTACHMENT 9

P.U.C. DOCKET NO. 28821

ARBITRATION OF NON-COSTING ISSUES FOR SUCCESSOR INTERCONNECTION AGREEMENTS TO THE TEXAS 271 AGREEMENT	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS

ARBITRATION AWARD—TRACK 1 ISSUES

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determining the tandem interconnection rate currently in the T2A.[120] Therefore, the Commission readopts the blended tandem rate and the 3 to 1 traffic threshold rationale for calls terminated on a multifunction switch specified in Docket No. 21982.[121] Additionally, the Commission rejects the LATA-by-LATA test proposed by SBC Texas[122] because of its arbitrary nature and inconsistency with the method adopted by the Commission in Docket No. 21982.

Provision of Transit Services at TELRIC Rates (DPL Issue No. 17)

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. Furthermore, a federal court found that a state commission may require an ILEC to provide transiting to CLECs under state law.[123] Given SBC Texas's ubiquitous network in Texas and the evidence regarding absence of alternative competitive transit providers in Texas,[124] 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[125] to negotiate transit services separately outside the scope of an FTA § 251/252 negotiation may result in cost-prohibitive rates for transit service. The Commission also notes SBC Texas's concerns regarding billing disputes related to transit traffic and reaffirms its decision in Docket No. 21982 that terminating carriers must directly bill third parties that originate calls and send traffic over SBC Texas's network.[126]

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[120] Direct Testimony of Charles D. Land (Attachment 12: Compensation), CLEC Joint Petitioners Ex. 1 at 12-15.

[121] Docket No. 21982, Revised Award at 52-53 (Nov. 15, 2000).

[122] Direct Testimony of J. Scott McPhee, SBC Texas Ex. 24 at 19.

[123] *Michigan Bell Tel. Co. v. Chappelle*, 222 F. Supp. 2d 905, 918 (E.D. Mich. 2002).

[124] Tr. at 252-253 (Sept. 22, 2004).

[125] Direct Testimony of J. Scott McPhee, SBC Texas Ex. 24 at 84.

[126] Docket No. 21982, Revised Arbitration Award at 64 (Aug. 31, 2000).

ATTACHMENT 10

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-19, SUB 454

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of Verizon South, Inc., for Declaratory Ruling that Verizon is Not Required to Transit InterLATA EAS Traffic between Third Party Carriers and Request for Order Requiring Carolina Telephone and Telegraph Company to Adopt Alternative Transport Method	))))))	ORDER DENYING PETITION

BY THE COMMISSION: On January 30, 2002, the Commission issued an Order establishing extended area service (EAS) between the Durham exchange of Verizon South, Inc. (Verizon), the Pittsboro exchange of Carolina Telephone and Telegraph Company (Carolina or, collectively with Central Telephone Company, Sprint), and the Hillsborough exchange of Central Telephone Company (Central or, collectively with Carolina Telephone and Telegraph Company, Sprint) (the EAS Order).[1] This EAS was implemented on June 7, 2002. EAS from the Durham exchange to the Pittsboro exchange and zero-rated expanded local calling from the Durham exchange to the Hillsborough exchange were implemented earlier in the tax flow-through docket, Docket No. P-100, Sub 149.

Shortly after the EAS was implemented, the Public Staff began receiving complaints from customers in the Pittsboro exchange who were unable to complete calls to numbers in the Verizon Durham exchange as either local or toll calls. On investigating these complaints, the Public Staff learned that Verizon was blocking calls from the Pittsboro exchange to competing local provider (CLP) and commercial mobile radio service (CMRS) end-users in the Durham exchange. Verizon stated that it blocked the calls because "the proper interconnections between the CLPs, CMRSs and Sprint have not yet been established."[2] Subsequently, the Public Staff learned that Verizon had also begun blocking calls from Central's Roxboro exchange to CLP customers in Durham, calls that it previously had been completing. The Roxboro/Durham route is a two-way interLATA EAS route that has been in service since February 14, 1998. IntraLATA EAS calls from the Hillsborough exchange to CLP end-users in Durham have not been blocked. In its letters

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1 *In the Matter of Carolina Telephone and Telegraph Company -- Hillsborough and Pittsboro to Durham Extended Area Service, Order Approving Extended Area Service,* Docket No. P-7, Sub 894 (January 30, 2002).

2 See Verizon's letters from Joe Foster to Nat Carpenter dated July 11, 2002, and October 31, 2002, attached as Exhibits A and B to Verizon's Petition.

to the Public Staff, Verizon agreed to discontinue its blocking until the matter had been resolved by the Commission.

On December 9, 2002, Verizon filed a Petition for Declaratory Ruling (Petition) requesting "that the Commission issue a ruling clarifying that Verizon is not required to transit Sprint's InterLATA EAS traffic destined to third party CLPs/CMRS providers" and "that the Commission direct Sprint to cease delivering traffic destined for third-parties to Verizon and make alternative arrangements for proper delivery of such traffic."

On December 10, 2002, the Commission issued an Order seeking comments and reply comments. Petitions to intervene have been filed by The Alliance of North Carolina Independent Telephone Companies (the Alliance); BellSouth Telecommunications, Inc., (BellSouth); AT&T Communications of the Southern States, LLC, (AT&T); ALLTEL Carolina, Inc., and ALLTEL Communications, Inc., (collectively, ALLTEL); KMC Telecom, Inc. (KMC); ITC^DeltaCom, Inc., (ITC); Level 3 Communications, Inc., (Level 3); US LEC of North Carolina, Inc., (US LEC); and Barnardsville Telephone Company, Saluda Mountain Telephone Company, and Service Telephone Company (collectively, TDS Companies). All petitions to intervene were allowed.

ITC, Level 3 and KMC, US LEC, Sprint, the Public Staff, BellSouth, and AT&T filed initial comments. Verizon, the Alliance, Sprint, and the Public Staff filed reply comments.

On May 16, 2003, the Commission issued an Order scheduling an oral argument on June 19, 2003, to consider:

(1) Whether Verizon is legally obligated to perform a transiting function or to act as a billing intermediary in regards to third-party traffic, and

(2) If so, the principles that should inform the rates, terms and conditions for such services and the appropriate procedure for arriving at a decision about them.

On May 23, 2003, Verizon filed a Motion for Clarification requesting that the Commission make clear that the oral argument would address only legal and not factual issues. On June 3, 2003, Sprint filed a response to Verizon's Motion for Clarification in which it argued that the only issues to be resolved in this matter are legal.

On June 5, 2003, the Presiding Commissioner issued an Order clarifying that the purpose of the oral argument was to decide whether Verizon is obligated as a matter of law pursuant to the Telecommunications Act of 1996[3] and other applicable provisions of law to perform a transiting function or to act as a billing intermediary with regards to third-party traffic with particular reference to the third-party InterLATA EAS calls at issue in this docket. The Order reserved to Commissioners the right to ask questions of the

3 47 U.S.C.A. §§ 151 *et seq.*, "the Act."

participants at the oral argument bearing upon the regulatory process should the matter be decided in one way or another.

The oral argument was heard by the Commission, Commissioner Joyner presiding, on July 15, 2002.

On August 29, 2003, the Commission received briefs and/or proposed orders from the following: Verizon, BellSouth Telecommunications, Inc. (BellSouth), Sprint, the Public Staff, AT&T Communications of the Southern States, Inc. (AT&T), and US LEC of North Carolina, Inc (US LEC). Of these, Sprint, the Public Staff, AT&T, and US LEC may be classified as proponents of the duty to provide the transiting function as a matter of law, while Verizon and BellSouth may be classified as opponents. Since the arguments of the proponents are largely the same, their arguments will be summarized collectively as those of the "Proponents." Likewise, those of Verizon and BellSouth will be summarized collectively as those of the "Opponents." Since many of the citations to the law are the same, but with the Opponents and Proponents putting a different construction on them, the text of the most common citations is set out below.

Most Common Citations

Telecommunications Act of 1996 (TA96)

Sec. 251(a) General Duty of Telecommunications Carriers.—Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers....

Sec. 251(b) Obligations of All Local Exchange Carriers—Each local exchange carrier has the following duties....

(5) Reciprocal Compensation.—The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Sec. 251(c) Additional Obligations of Incumbent Local Exchange Carriers.—In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:....

(2) Interconnection.—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network–

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself...or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

State Law

G.S. 62-110(f1) The Commission is authorized to adopt rules it finds necessary to provide for the reasonable interconnection of facilities between all providers of telecommunications services....

G.S. 62-42(a) Except as otherwise limited in this Chapter, whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds: (1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory...or (5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity, the Commission shall enter and serve an order directing that such...additional services or changes shall be made or affected within a reasonable time prescribed in the order....

Rule R17-4. Interconnection. (a) Interconnection arrangements should make available the features, functions, interface points and other service elements on an unbundled basis required by a requesting CLP to provide quality services. The Commission may, on petition by any interconnecting party, determine the reasonableness of any interconnection request. (b) Interconnection arrangements should apply equally and on a nondiscriminatory basis to all CLPs....

Summary of Proponents' Arguments

The thrust of the Proponents' arguments was that Verizon is obligated under TA96 as well as under State law to perform a transiting function. They argued that this requirement is clearly in the public interest and is in fact necessary to effectuate the purposes of TA96, which include the preserving and extending of the ubiquitous telecommunications network and the encouragement of competition.

With respect to provisions in TA96, the Proponents argue that the transiting obligation follows directly from the obligation to interconnect and the right of non-incumbent carriers to elect indirect interconnection. *See,* Section 251(a)(1) (all carriers to connect directly or indirectly with other carriers) and Section 252(c)(2) (additional ILEC duties regarding interconnection). Transit traffic is an important option to have available because it offers a simple and economical method of interconnection for carriers exchanging a minimal amount of traffic. It was routinely used without objection prior to the enactment of TA96. Otherwise, such carriers would be forced to created redundant and uneconomic arrangements to deliver their traffic. As such, the obligation to provide transit service is necessary to give meaning to the right to interconnect directly

under TA96 and in fulfillment of its purposes. The right to transit service exists independently of any given interconnection agreement, although such agreements may certainly establish procedures for it.

Concerning the *Virginia Arbitration Order* of the FCC's Wireline Competition Bureau (July 17, 2002), the Proponents noted that, contrary to Verizon's representations concerning the import of that decision, the Bureau expressly refused to declare that an ILEC is not obligated to provide transit service but rather, in view of the fact that the FCC had not previously decided the issue, it declined to rule on the issue in the context of its delegated arbitration authority.

The Proponents also maintained that authority to require the transit function could be found under State law. For example, G.S. 62-110(f1) allows the Commission to enact rules regarding interconnection. Rule R17-4 expresses similar sentiments. G.S. 62-42 bears on the matter of compelling efficient service, which would certainly be impaired if there was no duty to provide transit service. Other states, notably Ohio and Michigan, have held for a transit service obligation. None of the Proponents, however, argued that there was a necessary duty for Verizon to perform a billing intermediary function.

Summary of Opponents' Arguments

The key argument of the Opponents was that the provisions of TA96 cited by the Proponents do not create obligations or duties that are separate from interconnection agreements. No such transit obligation, either explicitly or through fair inference, can be found in TA96. Any provision of transit is purely voluntary on the ILECs' part. The Opponents further argue that, since TA96 in both Sections 251 and 252 creates a comprehensive framework with the negotiation and arbitration of interconnection agreements as its centerpiece, this preempts the states from enacting other obligations, such as a transit obligation, based on state law.

With respect to the *Virginia Arbitration Order*, the Opponents contended that the gravamen of that decision was not only that transit services need not be provided at TELRIC rates, they need not be provided at all, since the Bureau stated that it did not find "clear Commission precedent or rules declaring such a duty."

The Opponents declared that at least one state, New York, had decided against a transit obligation, while several others, such as Maryland, Wisconsin, and Michigan, have expressed skepticism about any billing intermediary obligation.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to find that Verizon is obligated to provide the transit service as a matter of law for the

reasons as generally set forth by the Proponents. Accordingly, Verizon's Petition for Declaratory ruling in its favor is denied.

The Commission is persuaded that a transit obligation can be well supported under both state and federal law. The Commission does not agree with the Opponents' view that duties and obligations under TA96 do not or cannot exist separately from their incarnation in particular interconnection agreements pursuant to the negotiation and arbitration process—or, as Verizon put it, "[TA96] contemplates only duties that are to be codified in interconnection agreements, not duties that apply independent of interconnection agreements."

Aside from not being compelled by the history, structure, or real-world context of TA96, the "interconnection agreements-only" approach suggested by the Opponents would lead to a number of undesirable, even absurd, results. For example, it would call into question the status of generic dockets, which are an efficient means by which the Commission can resolve interconnection issues arising under TA96 *en masse*. Apparently, the state commissions would be limited to arbitrating interconnection agreements one-by-one. There is simply no evidence that Congress intended to abolish generic dockets by the states; indeed, quite the opposite is suggested. *See*, for example, Section 251(d)(3) (Preservation of State Access Regulations). *As* a practical consequence, adoption of the Opponents' view would immoderately multiply the number of interconnection agreements—and the economic costs relating to entering into them—because the corollary of the Opponents' view is that, in order to fully effectuate rights and obligations, everyone must have an interconnection agreement with everybody else, even if the amount of traffic exchanged is minimal. The overall impact would be a tendency to stifle competition by the imposition of uneconomic costs as, for example, by the construction of redundant facilities.

If there were no obligation to provide transit service, the ubiquity of the telecommunications network would be impaired. Indeed, in a small way this has already happened in this case when Verizon refused to transit certain traffic. It should also be noted that the privilege of initiating arbitration proceedings is not symmetrical. Even if an ILEC, such as a smaller one with less than 200,000 access lines, urgently desires an interconnection agreement from a CLP or CMRS, it may not be able to get one. These effects illustrate the ultimate unsupportability of the Opponents' view of their obligations as ILECs to interconnect indirectly—essentially, as matters of grace, rather than duty.

The fact of the matter is that transit traffic is not a new thing. It has been around since "ancient" times in telecommunications terms. The reason that it has assumed new prominence since the enactment of TA96 is that there are now many more carriers involved—notably, the new CMRS providers and the CLPs—and the amount of traffic has increased significantly. Few, if any, thought about complaining about transit traffic until recently. It strains credulity to believe that Congress in TA96 intended, in effect, to impair this ancient practice and make it merely a matter of grace on the part of ILECs, when doing

so would inevitably have a tendency to thwart the very purposes that TA96 was designed to allow and encourage.

The Opponents rely heavily on the *Virginia Arbitration Order* for the proposition that there is no obligation to provide the transit function. The *Order* was not meant to bear such a heavy burden. A close examination of the *Order* yields a more equivocal conclusion. The fact is that the FCC, as is the case in many matters, has not definitively made its mind up on the matter. In the meantime, the telecommunications market and its regulation march on. As much as we would wish for definitive guidance from the FCC, the states cannot always wait for that body to rule one way or another—or somewhere in between.

The Opponents have urged that, in any event, the states are preempted from relying on state law to create a transit obligation. This would seem to follow logically from their view that TA96 has established a comprehensive "interconnection agreements-only" approach. The Commission, as noted above, views this approach as insupportable. In fact, it should be clear that Congress contemplated that states *do* have a role in establishing interconnection obligations as long as they do not thwart the provisions and purposes of Section 251. As alluded to earlier, Sec. 251(d)(3) of TA96 specifically provides that "[i]n prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." It is significant that the wording of this provision mentions both state "policies" and the "purposes" of Sec. 251. It is also useful to observe that the Opponents' "interconnection agreements-only" view would "read out" this savings provision and render it nugatory, because anything done outside of interconnection agreements would, according to the Opponents, be contradictory to Sec. 251. This is yet another example of the consequences of the Opponents' idiosyncratic interpretation of TA96. Establishing a transit obligation and defining reasonable terms and conditions is well within a state's purview, even *arguendo* that no such positive obligation can be derived from TA96.

The real challenge facing the industry and the Commission is not whether there is a legal obligation for ILECs to provide a transit service. The Commission is convinced that there is. The Commission is confident that, should the FCC ever address the issue, it will find the same. The *real* question is what should be the rates, terms and conditions for the provision of that service. Those are matters included or includible under Docket No. P-100, Sub 151. Certainly, interconnection agreements are by and large desirable things, and as many companies as practicable should enter into them. No one really denies that. But it is not always practicable because, among other things, the privilege of petitioning for arbitration under Sec. 252 of TA96 is not symmetrical. This simply reinforces the case that, ultimately, there may need to be a default provision made for those that do not have such agreements or cannot interconnect directly. In such cases, this *may* require ILECs as intermediaries. The equities of the situation are reasonably straightforward—those that

seek to terminate traffic should pay for its termination and the one that transits should be compensated for its services. This *may* also require that an ILEC perform a billing intermediary function—again for reasonable compensation. The system of ubiquitous interconnection and the seamless telecommunications network may well be compromised without this "fail-safe" device. The Commission will move expeditiously on Docket No. P-100, Sub 151 should negotiations come to naught.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 22nd day of September, 2003.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

pb091903.01

Commissioner Robert V. Owens, Jr. did not participate.

ATTACHMENT 11

NORTH CAROLINA UTILITIES COMMISSION

TRANSCRIPT OF TESTIMONY

NEWSOUTH COMMUNICATIONS CORP., ET AL.

JOINT PETITION OF NEWSOUTH COMMUNICATIONS CORP., ET AL.
FOR ARBITRATION WITH BELLSOUTH TELECOMMUNICATIONS, INC.

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

Volume # 6

DATE January 13, 2005

1 A. It is about the TIC, but the transit function is
2 still what's being provided.
3 Q. Right. And I'm trying to focus in on what costs
4 you're trying to recover. And I asked you about
5 page 82, lines 19 through 20, and you say you want
6 to recover the costs of sending records to the CLPs
7 identifying the originating carrier. And I think
8 we just established that the CLPs would be the
9 originating carrier. Would you agree with me that
10 we know who we are?
11 A. I think you know who you are. Again, this would be
12 the CLP on the terminating end so that they could
13 understand who the traffic was coming from.
14 Q. There's a CLP on the terminating end?
15 A. There could be in the scenario of Mr. Meza, sure,
16 or any third party.
17 Q. Did we ever ask--did we, the originating CLP, ever
18 ask you to send records to the CLP on the
19 terminating end?
20 A. I don't know if you did or not, but that's part of
21 the service we offer as part of the TIC.
22 Q. If we told you we didn't want that, could we
23 eliminate the TIC?
24 A. That's not the only purpose of the TIC. The TIC is

ATTACHMENT 12

ISSUE: What rate should apply for Service Date Advancement (a/k/a service expedites)?

REQUEST: Please identify and state the amount of all costs that BellSouth incurs to perform a Service Date Advancement (or "service expedite"). Include a BellSouth cost study and cost study information compiled in accordance with FCC TELRIC rules.

RESPONSE: BellSouth objects to Interrogatory No. 6-5-2 to the extent it requires the disclosure of confidential and proprietary cost information. BellSouth also objects to the extent providing a response to this interrogatory imposes an obligation on BellSouth that does not exist under the law.

Subject to this objection and without waiving this objection, BellSouth's Service Date Advancement (or "service expedite") charge is an alternative to direct interconnection and a market based service and, thus, the Service Date Advancement rate was developed as a market based additive and there is no TELRIC cost study for this service.. Furthermore, BellSouth's costs regarding this service are not relevant to this proceeding and BellSouth objects to producing any information.

ATTACHMENT 13

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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
In the Matter of the Application of AT&T Communications of the Southwest, Inc. and TCG Kansas City, Inc. for Compulsory Arbitration of Unresolved Issues with SBC Kansas Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)	Docket No. 05-AT&T-366-ARB
In the Matter of the Request of the CLEC Joint Petitioners for Arbitration with Southwestern Bell Telephone L.P. d/b/a SBC Kansas for an interconnection Agreement that Complies with Section 251 and 271 of the Federal Telecommunications Act of 1996.	)	Docket No. 05-TPCT-369-ARB
In the Matter of the Petition of Navigator Telecommunications, LLC for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996.	)	Docket No. 05-NVTT-370-ARB

Arbitrator's Determination of Issues

The above matter comes before Arbitrator Robert L. Lehr, appointed by The State Corporation Commission of the State of Kansas (Commission) for consideration and recommendation. Being duly advised in the premises and familiar with all matters of record, the Arbitrator finds and concludes as follows.

damages not addressed by the Performance Measures, the CLEC Coalition suggests that determination of this damage issue be deferred until Phase 2 of these proceedings.[30]

27. The Joint Petitioners are a bit more aggressive, seeking three times the average monthly amount billed by SWBT to a CLEC when a customer provides the CLEC in excess of $5,000 in monthly billings when that customer is out-of-service for four hours or more due to the actions or omissions of SWBT.[31]

28. SWBT believes the CLECs are amply protected by indemnification provisions, liquidated damages under the performance measurements and remedies available under the dispute resolution process. SWBT contends that, if it should be subject to the CLECs' proposed damage provisions, its rates would need to be re-examined in light of this new, significant exposure to damages.[32]

Determination.

29. There is no evidence in the record to support the CLECs need for availability for increased damage amounts for sub-standard performance by SWBT. The Arbitrator, therefore, adopts the language of SWBT.

General Terms and Conditions--receipt of bills

CLEC Coalition GTC-15 (a & b); Joint Petitioners GTC-6 (a & b)

30. The CLEC Coalition complains that the bills from SWBT are customarily received 10 to 15 days after the bill date. Xspedius, for example, receives its bills,

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[30] CLEC Coalition Post-Hearing Brief p. 42.

[31] Joint Petitioners GTC DPL § 7.1.6 p. 11.

[32] SWBT Pellerin Direct p. 3 line 6 - p. 6 line 13.

on the average, 16 days after bill date[33] while Birch, over a two-year period, received electronic invoices on an average of seven to nine days after the bill date and received paper invoices on an average of seven to 13 days after the bill date. SWBT demands payment within 30 days of the bill date.[34] Typically, it takes 30 days to audit a bill from SWBT.[35] The due date is critical because escrow, deposit requirements and determinations of breach are tied to the due date. Although the CLEC Coalition originally proposed a bill due date of 45 days from the receipt of the bill, it is willing to compromise as long as it has 30 days to review the bills for errors.[36]

31. The Joint Petitioners have experienced similar instances of bills arriving ten days after bill date, which does not provide the CLEC sufficient time to review its bill. The Joint Petitioners propose a due date of 35 days after receipt of the bill from SWBT.[37]

32. SWBT believes that if the CLECs have 30 days to review their bill that is sufficient time to audit their bills.[38]

Determination.

33. The problem for the CLECs is that they never have 30 days from the bill date in which to audit their bills. SWBT has a commitment to "get the bills out within 6 work days" after the bill date.[39] The Arbitrator finds that the CLECs require more time to audit their bills from SWBT than what is afforded them under the current billing procedure.

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[33] CLEC Coalition Joint Direct p. 33 line 21 - p. 34 line 12.

[34] Birch Wallace Direct p. 9 line 1 - 9.

[35] Tr. Vol. 1 p. 121 line 14 - 24.

[36] CLEC Coalition Joint Direct p. 35 line 23 - 25.

[37] Joint Petitioners Schmick Direct p. 5 line 20 - p. 6 line 22.

[38] SWBT Quate Tr. Vol. 1 p. 126 line 23 - 25.

[39] SWBT Read Tr. Vol. 1 p. 142 line 3 - 5.

However, pegging a bill due date based upon receipt of the bill is not dependable and is fraught with possible disputes. The Arbitrator, therefore, concludes that CLECs shall have 45 days after the bill date by which time payment must be received by SWBT.

General Terms and Conditions--invoice medium

Joint Petitioners GTC-7

34. The Joint Petitioners want all invoices in electronic form as well as in paper form, dependent upon CLEC request, because electronic versions are physically more manageable than boxes of paper.[40]

35. SWBT advises that most, but not all, of its bills can be received in electronic form, with paper copies available upon request.[41]

Determination.

36. There appears to be little value of requiring SWBT to produce bills in electronic versions when they are, for the most part, already available, and paper copies are available upon request. The Arbitrator adopts SWBT's position.

General Terms and Conditions--billing dispute form

Joint Petitioners GTC-8(a)

37. The Joint Petitioners report that SWBT requires CLECs to use a prescribed form when submitting billing disputes. The form requires, among other things, an account identifier, bill date and end user account information. Although the Joint Petitions admit that, in many cases, there are no problems in following SWBT's procedure, they do not believe the forms are that useful in all situations. For example, if SWBT incorrectly bills each telephone line on a CLEC's account for several months,

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[40] Joint Petitioners Schmick Direct p. 8 line 16 - p. 9 line 13.

[41] SWBT Quate Direct p. 25 lines 7 - 21.

ATTACHMENT 14

Docket No. 16583-U

In Re: **Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.**

ORDER

BY THE COMMISSION:

On February 7, 2003, ITC^DeltaCom Communications, Inc. ("DeltaCom") petitioned the Georgia Public Service Commission ("Commission") to arbitrate certain unresolved issues in the interconnection negotiations between DeltaCom and BellSouth Telecommunications, Inc. ("BellSouth").

I. JURISDICTION AND PROCEEDINGS

Under the Federal Telecommunications Act of 1996 (the Federal Act), State Commissions are authorized to decide the issues presented in a petition for arbitration of interconnection agreements. In addition to its jurisdiction of this matter pursuant to Sections 251 and 252 of the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§ 46-5-160 *et seq.*, and generally O.C.G.A. §§ 46-1-1 *et seq.*, 46-2-20, 46-2-21 and 46-2-23.

The Commission approved an interconnection agreement between the parties which was in effect from May 31, 2001 until December 31, 2002. On April 22, 2003, the Commission assigned the matter to a Hearing Officer for scheduling. On May 19, 2003, the Hearing Officer issued an order scheduling direct and responsive testimony, discovery and hearings in this matter. Hearings were held before the Commission on July 9 and 10, 2003. On September 12, 2003, the parties filed briefs on the unresolved issues.

The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

II. FINDINGS AND CONCLUSIONS

The differences between DeltaCom's proposal in its brief and BellSouth's proposal do not seem substantial. Essentially, they both provide for notice in advance of any change being adopted, and an opportunity for the CLEC to object to the change. The Commission finds that the current system works efficiently and adequately protects the interests of CLECs.

Issue 58(b)

Should BellSouth be required to post rates that impact UNE services on its website?

Issue 58(b) concerns whether BellSouth must post rates that impact UNE services on its website. The concern is whether without proper notice of a rate change DeltaCom would experience disruption. This request is unnecessary because Commission orders are posted on its website.

Issue 59

Should the payment due date begin when BellSouth issues the bill or when DeltaCom receives the bill? How many days should DeltaCom have to pay the bill?

The issue in dispute is what triggers the beginning of the thirty day period that DeltaCom has to pay its bills to BellSouth. Currently, the clock starts running the date that the bill is prepared. (Tr. 105). DeltaCom proposes that the due date of a bill be thirty days from the receipt of the bill. (DeltaCom Brief, p. 40). Apparently, it is not just a matter of paying the bills as they arrive. DeltaCom explains that it needs sufficient time to analyze the 1,700 invoices in order to ensure their accuracy. *Id.* at 41. While the percentage of BellSouth's bills to DeltaCom electronically is in the high nineties, DeltaCom asserts that there is still a delay between the date the bill is prepared and the date DeltaCom receives the bill. (Tr. 105). BellSouth claims that the changes to its billing system would be costly and unnecessary. First, BellSouth argues that DeltaCom does not want to pay for the associated costs. (BellSouth Brief, p. 44). Second, BellSouth relies upon DeltaCom's good payment history to argue that change is not necessary. *Id.* BellSouth also claims that it takes a few days to "groom" a bill to track a CLEC's usage for the month. (Tr. 635).

DeltaCom's bills shall be due 30 days after the date the bill is sent out by BellSouth. Given that DeltaCom currently receives in the high nineties percentile of its bills electronically, it has the opportunity then to review the vast majority of its bills for errors from the same date the bill is sent out. The additional few days it takes to receive the remaining bills should not slow up its review process. The time it takes BellSouth to render the bill is out of DeltaCom's control and should not infringe upon DeltaCom's time to review invoices. That DeltaCom has a history of paying its bills in a timely fashion should not be held against it.

Issue 60(a)

BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION

In re:	)	
Petition for Arbitration of	)	
ITC^DeltaCom Communications, Inc.	)	
with BellSouth Telecommunications, Inc.	)	**Docket No. 28841**
Pursuant to the Telecommunications	)	
Act of 1996	)	

ARBITRATION PANEL RECOMMENDATIONS

INTRODUCTION

This arbitration proceeding is pending before the Alabama Public Service Commission ("Commission") pursuant to Section 252(b) of the Telecommunications Act of 1996 (the "Act").[1] On January 24, 2003, ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom and d/b/a Grapevine (hereinafter "DeltaCom") filed a Petition for Mediation in Docket No. 28828. BellSouth filed its response to DeltaCom's request for mediation on January 31, 2003. The Commission appointed Ms. Judy McLean, Director of the Commission's Advisory Division as mediator. The parties met on February 6 and 20 of 2003, and mediated and resolved several issues.[2]

DeltaCom filed a Verified Petition for Arbitration of an Interconnection Agreement with BellSouth Telecommunications Inc., (hereinafter "BellSouth") pursuant to Section 252(b) of the Telecommunications Act of 1996 on February 7, 2003 (hereinafter referred to as the "Petition.") BellSouth filed its Answer on May 6, 2003

[1] The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 codified at 47 U.S.C. § 151 et.seq.

[2] Issues that were resolved in mediation included Issues 5, 7, 61, 65 and 69.

ISSUE 59: PAYMENT DUE DATE

Should the payment due date begin when BellSouth issues the bill or when DeltaCom receives the bill? How many days should DeltaCom have to pay the bill?

Position of DeltaCom

DeltaCom seeks a payment due date of thirty days from receipt of a bill. DeltaCom receives approximately 1,700 invoices from BellSouth every month, 94% to 97% of which are transmitted electronically. (T-259, 262-265, 1836). Through this electronic billing, BellSouth is aware of when DeltaCom receives its bills. BellSouth provides a 30-day payment period, but it runs from the time the bill is generated within BellSouth – the "bill date." Both parties acknowledged, however, that even with electronically transmitted invoices, the actual date the bill is rendered to DeltaCom is a different date than the "bill date," sometimes not until several days later. (T-1836).

BellSouth argues that DeltaCom's proposal is "unnecessary" because "DeltaCom receives over 94% of its bills from BellSouth electronically." BellSouth Brief, p. 69. BellSouth further incorrectly states that electronic billing "obviously results in DeltaCom having even more time between the date they receive the bill and the payment due date." Id. It is precisely *because* most bills are provided electronically that a 30-day payment period from receipt is appropriate. The obvious pretense of BellSouth's argument is that DeltaCom receives an electronic bill quickly and has a full 30 days to pay it – thus the language sought by DeltaCom is "unnecessary." As admitted by both parties at the hearing, however, this is patently false because the actual date the bill is transmitted is

not the same as the "bill date," the date the bill is generated and the date on which the payment clock begins. Due to the prevalence of electronic billing, it is now quite easy to determine a date that is 30 days from the receipt of the invoice.

In support of their argument, DeltaCom asserts that reviewing BellSouth's bills consumes significant time and resources. BellSouth admitted that the 1,700 invoices sent to DeltaCom every month are extremely voluminous. (T-1837). Further, DeltaCom has approximately 4,000 current billing disputes with BellSouth, perhaps evidencing a high number of errors. (T-259). BellSouth's position that DeltaCom should meet the "due date," which is the next "bill date" (again, the time the bill is generated within BellSouth), regardless of when DeltaCom actually receives the bill, is unfair and unworkable on its face. At a minimum, a 30-day period from receipt is appropriate with regard to electronic invoicing because the due date will be easily and readily known by both parties.

Position of BellSouth

BellSouth maintains that the payment should be due by the next bill date. BellSouth explained that it invoices DeltaCom every 30 days, and based on that bill date, DeltaCom knows exactly what date the payment is due for each of those invoices. BellSouth stated in its Post-Hearing Brief that its billing systems are programmed around that bill date and BellSouth's anticipated cash flows are based on receiving payments on particular days of the month. BellSouth argues that DeltaCom now seeks to change this

system and does not want to pay for any costs associated with making this type of massive regional billing system modification. Aside from involving a dramatic change to complex billing systems, BellSouth asserts that DeltaCom's request is unnecessary. BellSouth notes that through DeltaCom's own testimony, DeltaCom admitted to having "years of timely payment to BellSouth for wholesale services." Thus, BellSouth argues, if BellSouth's bill payment terms were onerous, as DeltaCom implies, it is doubtful that DeltaCom would have the good payment history that it touts.

In addition, BellSouth contends that its long-standing billing practice in no way limits DeltaCom's ability to review and dispute invoices received from BellSouth, as DeltaCom can dispute invoices long after the payment due date and, in fact, DeltaCom has filed such disputes. BellSouth states that, to the extent DeltaCom has questions about its bills, BellSouth cooperates with DeltaCom to provide responses in a prompt manner and resolve any issue. Furthermore, BellSouth points out that DeltaCom acknowledges that it receives 95% of its billings from BellSouth electronically, which results in DeltaCom having even more time between the date it receives the bill and the payment due date.

Further, BellSouth notes that DeltaCom acknowledges that the Commission and the FCC had both considered all of BellSouth's billing practices during the course of BellSouth's Section 271 long-distance application and concluded that BellSouth's billing practices (including this one) were nondiscriminatory. BellSouth also observes that

DeltaCom acknowledges that the Commission has performance metrics, and associated penalties, in place that measure whether BellSouth is providing timely and accurate bills to DeltaCom. Consequently, BellSouth contends that it is reasonable for payment to be due before the next bill date.

Discussion of Issue 59

It is important to encourage the Parties to render accurate and timely bills and also to allow the Parties adequate time to review the bills for any inaccuracies. Therefore, the Panel recommends that the bill shall be due 30 days after the date the bill is transmitted by BellSouth. The record reflects that DeltaCom currently receives over 90 percent of its bills electronically. DeltaCom then has the opportunity to review the vast majority of its bills for errors from the same date the bill is sent out. If, on the other hand, the due date was calculated based on the billing date, as proposed by BellSouth, then BellSouth has less motivation to post the bills to DeltaCom as soon as possible.

Conclusion to Issue 59

The Panel concludes that the payment due date should be 30 days from the date of receipt of the bill. Accordingly, the Panel recommends that the Commission require DeltaCom and BellSouth to properly amend the proposed language in the agreement to reflect this conclusion.

ATTACHMENT 15

By and Between

BellSouth Telecommunications, Inc.

And

ITC^DeltaCom Communications, Inc.
d/b/a ITC^DeltaCom d/b/a Grapevine

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AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, and ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom d/b/a Grapevine, hereinafter referred to as ("ITC^DeltaCom") an Alabama corporation, and shall be deemed effective on the Effective Date, as defined herein. This agreement may refer to either BellSouth or ITC^DeltaCom or both as a "Party" or "Parties."

WITNESSETH

WHEREAS, BellSouth is an incumbent local exchange telecommunications company authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, ITC^DeltaCom is a competitive local exchange telecommunications company ("CLEC") authorized to provide telecommunications services in the state of Georgia; and

WHEREAS, the Parties wish to interconnect their facilities, purchase unbundled elements and/or resale services, and exchange traffic pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 ("the Act").

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and ITC^DeltaCom agree as follows:

Definitions

Access Service Request or "ASR" means an industry standard form used by the Parties to add, establish, change or disconnect trunks for the purposes of interconnection.

Act means the Communications Act of 1934, 47 U.S.C. 151 et seq., as amended, including the Telecommunications Act of 1996, and as interpreted from time to time in the duly authorized rules and regulations of the FCC or the Commission/Board.

Advanced Intelligent Network or "AIN" is Telecommunications network architecture in which call processing, call routing and network management are provided by means of centralized databases.

Affiliate is an entity that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another entity. For purposes of this paragraph, the term "own" or "control" means to own an equity interest (or equivalent thereof) of more than 10 percent.

Attachment 7

Billing and Billing Accuracy Certification

CLEC in the state and does not include any parents or separate affiliates. Notice, for purposes of this Deposit Policy, is defined as written notification to the Chief Financial Officer, General Counsel, and Vice President of Line Cost Accounting of ITC^DeltaCom.

1.11.1 New Customers and existing Customers may satisfy the requirements of this section with a D&B credit rating of 5A1 or through the presentation of a payment guarantee executed by another existing customer of BellSouth and with terms acceptable to BellSouth where said guarantor has a credit rating equal to 5A1. Upon request, Customer shall complete the BellSouth credit profile and provide information, reasonably necessary, to BellSouth regarding creditworthiness.

1.11.2 With the exception of new Customers with a D&B credit rating equal to 5A1, BellSouth may secure the accounts of all new Customers as set forth in subsection 1.11.4. In addition, new Customers will be treated as such until twelve months from their first bill/invoice date, and will be treated as existing Customers thereafter.

1.11.3 If a Customer has filed for bankruptcy protection within twelve (12) months of the effective date of this Agreement, BellSouth may treat Customer, for purposes of establishing a security on its accounts as a new customer as set forth in subsection 1.11.7.

1.11.4 The security required by BellSouth shall take the form of cash, an Irrevocable Letter of Credit (BellSouth Form), Surety Bond (BellSouth Form), or, in BellSouth's sole discretion, some other form of security proposed by Customer. The amount of the security shall not exceed one months' estimated billing for services billed in advance and two months billing for services billed in arrears and if provided in cash, interest on said cash security shall accrue and be paid in accordance with the terms in the Commission approved General Subscriber BellSouth tariff for the appropriate state.

1.11.5 Any such security shall in no way release Customer from the obligation to make complete and timely payments of its bill.

1.11.6 No security deposit shall be required of an existing Customer who has a good payment history and meets two (2) liquidity benchmarks sets forth below in Sections 1.11.6.2 and 1.11.6.3. BellSouth may secure, pursuant to Section 1.11.9, the accounts of existing Customers where an existing Customer does not have a good payment history as defined in Section 1.11.1.6.1. If an existing Customer has a good payment history but fails to meet the two (2) liquidity benchmarks defined in Sections 1.11.6.2 and 1.11.6.3, BellSouth may secure the Customer's accounts, pursuant to Section 1.11.9.

ATTACHMENT 16

2005.02.17 09:43:49
Kansas Corporation Commission
/S/ Susan K. Duffy

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

STATE CORPORATION COMMISSION
FEB 1 6 2005

Docket Room

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
In the Matter of the Application of AT&T Communications of the Southwest, Inc. and TCG Kansas City, Inc. for Compulsory Arbitration of Unresolved Issues with SBC Kansas Pursuant to Section 252(b) of the Telecommunications Act of 1996.)	Docket No. 05-AT&T-366-ARB
In the Matter of the Request of the CLEC Joint Petitioners for Arbitration with Southwestern Bell Telephone L.P. d/b/a SBC Kansas for an interconnection Agreement that Complies with Section 251 and 271 of the Federal Telecommunications Act of 1996.)	Docket No. 05-TPCT-369-ARB
In the Matter of the Petition of Navigator Telecommunications, LLC for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996.)	Docket No. 05-NVTT-370-ARB

Arbitrator's Determination of Issues

The above matter comes before Arbitrator Robert L. Lehr, appointed by The State Corporation Commission of the State of Kansas (Commission) for consideration and recommendation. Being duly advised in the premises and familiar with all matters of record, the Arbitrator finds and concludes as follows.

customers of SWBT in Kansas. The term "back-billed" is not programmed as a phrase code in the billing system. Back-billing, then, cannot be set out separately on CLEC bills and it would be expensive and time-consuming to make that change. However, SWBT will provide a spreadsheet detailing the back-billing upon request.[47]

Determination.

43. Based upon the recommendations and testimony of the parties, the Arbitrator finds that parties are permitted a 12-month back-billing window. To the extent that SWBT can separately identify back charges on a bill, the Arbitrator finds that it should do so. In all other regards, the Arbitrator finds that the record evidence supports SWBT's position and the Arbitrator, therefore, adopts SWBT's proposed language.

General Terms and Conditions—deposit/escrow

CLEC Coalition GTC-8, 15(c); Joint Petitioners GTC-8(c), 9; Navigator GTC- 3, 4

44. The CLEC Coalition accepts the notion that SWBT is entitled to request a deposit from a CLEC, but only under limited circumstances and at an amount that would not exceed two months of billings to the CLEC by SWBT. The CLEC Coalition believes that it should be the CLEC's choice to provide the deposit amount in cash or irrevocable letter of credit as SWBT is protected equally well with either assurance device. The CLEC Coalition is concerned about SWBT's ability to call in the deposit if, in "SWBT"s reasonable judgment"[48], the CLEC's credit worthiness is impaired. The CLEC Coalition

[47] SWBT Quate Direct p. 26 line 16 - p. 28 line 2; Rebuttal p. 17 line 6 - p. 18 line 5.

[48] CLEC Coalition GTC DPL § 3.2.2 p. 19, SWBT language.

notes that SWBT did not quantify any losses that it might have suffered with the 180 CLECs that ceased conducting business since 2000 throughout SWBT's 13-state region.[49]

45. With respect to SWBT's proposal to require CLECs to escrow an amount equal to the amount of a bill being disputed, the CLEC Coalition points to the poor quality of SWBT's bills. For instance, Birch Telecom lodged over 1,000 billing disputes in Kansas in 2004 totaling $500,000. Birch noted that 80% of its disputes with SWBT-Kansas and other SBC ILECs are decided in its favor. Birch claims that CLECs generally do not have sufficient financial resources to fund SWBT's billing errors. The CLEC Coalition recommends that escrows not be required until SWBT improves its billing systems.[50]

46. The Joint Petitioners propose a standard deposit of $17,000 and do not believe that a single missed payment should trigger invocation of a deposit equal to three months of billing.[51]

47. The Joint Petitioners also oppose SWBT's ability to require the billing dispute amount to be escrowed. They propose that no escrow be required if the CLEC disputing a bill (a) does not have a proven history of late payments and has established a minimum of six months good credit history with SWBT or (b) if more that 50 percent of the billing disputes lodged by the CLEC during the most recent 12-month period are determined in the CLEC's favor.[52]

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[49] CLEC Coalition Joint Direct p. 28 line 16 - p. 30 line 9; Rebuttal p. 14 line 18 - p. 16 line 15.

[50] CELC Coalition Wallace Direct p. 10 line 16 - p. 11 line 25.

[51] Joint Petitioners Schaub Direct p. 6 line 4 - p. 7 line 3.

[52] Joint Petitioners GTC DPL § 8.7 p. 22.

48. Xspedius and SWBT appear to be in a billing dispute. Xspedius admits to owing SWBT $172,000 in undisputed amounts under its interconnection agreement, but claims that SWBT owes Xspedius approximately $1.9 million. Xspedius proposes that any time that SWBT owes Xspedius more than one month's worth of Xspedius billings, a deposit by Xspedius will not be required.[53]

49. Navigator believes that SWBT's potential financial exposure for unpaid charges of a CLEC is one month's worth of billing. Navigator is concerned about SWBT's ability to invoke its deposit requirement upon a CLEC's failure to pay even the smallest of bills.[54] Navigator also objects to SWBT's proposed ability to require escrow of the disputed amount of a bill. Navigator claims that, since beginning business in 1997, it has filed numerous billing disputes over some aspect of SWBT's bills. Because the resolution of these disputes may take one to one and a half years, Navigator is concerned with the large of amount of cash that would be tied up if Navigator is forced to provide escrow.

50. SWBT's criterion for establishing satisfactory credit is 12 consecutive months of timely payments to SWBT.[55] However, during the hearings, SWBT revised its criterion to a CLEC's credit history with SBC as a whole, saying that "deposits should not be state-specific."[56] Ms. Quate continued in her direct testimony, that SWBT's proposed triggers for determining impaired creditworthiness were based on concrete, clearly defined and objective criteria such as investment grade credit ratings and failure to timely

[53] CLEC Coalition Joint Direct p. 54 line 2 - p. 55 line 26.

[54] Navigator LeDoux Direct p. 8 line 22 - p. 10 line 9.

[55] SWBT Quate Direct p. 47 lines 18 - 26.

[56] SWBT Quate Tr. Vol. 1 p. 148 lines 11 - 14.

pay a bill. SWBT reports that the Michigan Public Service Commission approved the exact same language proposed here in its arbitration proceedings between SBC Michigan and MCI.[57]

51. SWBT claims that the escrow requirement in billing disputes is necessary because some CLECs, such as Delta Phones, Inc., have been known to "game the system" by challenging bills just to extend their time for payment. However, SWBT is willing to waive escrow for "customers with good credit histories and who have not filed a large number of disputes that were resolved in SWBT's favor" and where there has been a material billing error. Otherwise, SWBT expects the disputed amount to be escrowed by the CLEC prior to the bill due date.[58]

Determination.

52. The Arbitrator finds for the CLECs with respect to deposits. SWBT's proposal that it be permitted to use its "reasonable judgment" to determine if a CLEC's creditworthiness has been impaired is entirely too vague and subjective to provide CLECs with proper notice of when they become credit-unworthy. Furthermore, imposition 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 any 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, requiring a deposit of Xspedius would be extremely unfair.

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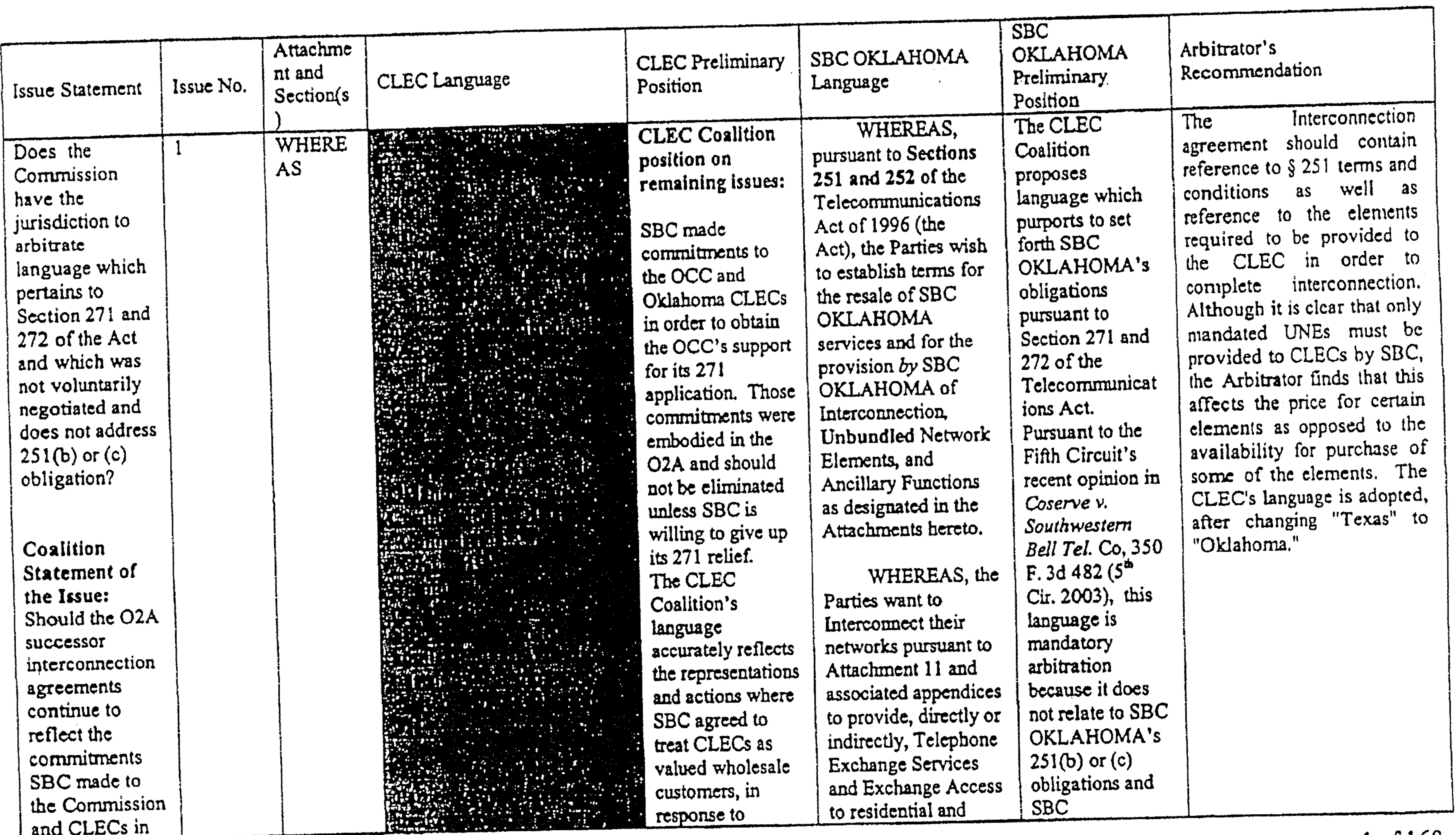
[57] SWBT Quote Direct p. 47 lines 5-12.

[58] SWBT Post-Hearing Brief p. 41.

ATTACHMENT 17

DOCKET # 2004-497
MASTER LIST OF ISSUES BETWEEN SBC AND CLEC COALITION
GT&C

Issue Statement	Issue No.	Attachment and Section(s)	CLEC Language	CLEC Preliminary Position	SBC OKLAHOMA Language	SBC OKLAHOMA Preliminary Position	Arbitrator's Recommendation
Does the Commission have the jurisdiction to arbitrate language which pertains to Section 271 and 272 of the Act and which was not voluntarily negotiated and does not address 251(b) or (c) obligation? **Coalition Statement of the Issue:** Should the O2A successor interconnection agreements continue to reflect the commitments SBC made to the Commission and CLECs in	1	WHEREAS		**CLEC Coalition position on remaining issues:** SBC made commitments to the OCC and Oklahoma CLECs in order to obtain the OCC's support for its 271 application. Those commitments were embodied in the O2A and should not be eliminated unless SBC is willing to give up its 271 relief. The CLEC Coalition's language accurately reflects the representations and actions where SBC agreed to treat CLECs as valued wholesale customers, in response to	WHEREAS, pursuant to **Sections 251 and 252** of the Telecommunications Act of 1996 (the Act), the Parties wish to establish terms for the resale of SBC OKLAHOMA services and for the provision *by* SBC OKLAHOMA of Interconnection, Unbundled Network Elements, and Ancillary Functions as designated in the Attachments hereto. WHEREAS, the Parties want to Interconnect their networks pursuant to Attachment 11 and associated appendices to provide, directly or indirectly, Telephone Exchange Services and Exchange Access to residential and	The CLEC Coalition proposes language which purports to set forth SBC OKLAHOMA's obligations pursuant to Section 271 and 272 of the Telecommunications Act. Pursuant to the Fifth Circuit's recent opinion in *Coserve v. Southwestern Bell Tel.* Co, 350 F. 3d 482 (5th Cir. 2003), this language is mandatory arbitration because it does not relate to SBC OKLAHOMA's 251(b) or (c) obligations and SBC	The Interconnection agreement should contain reference to § 251 terms and conditions as well as reference to the elements required to be provided to the CLEC in order to complete interconnection. Although it is clear that only mandated UNEs must be provided to CLECs by SBC, the Arbitrator finds that this affects the price for certain elements as opposed to the availability for purchase of some of the elements. The CLEC's language is adopted, after changing "Texas" to "Oklahoma."

Key: **Bold represents language proposed by SBC and opposed by CLECs.**
<u>Bold and Underline language represents language proposed by CLEC and opposed by SBC.</u>

Issue Statement	Issue No.	Attachment and Section(s)	CLEC Language	CLEC Preliminary Position	SBC OKLAHOMA Language	SBC OKLAHOMA Preliminary Position	Arbitrator's Recommendation
			3.10. **3.5 If during the first six (6) months of operations, CLEC has been sent one delinquency notification letter by SBC OKLAHOMA, the deposit amount shall be re-evaluated based upon CLEC's actual billing totals and shall be increased if CLEC's actual billing average:** **3.5.1 for SBC OKLAHOMA for a two (2) month period exceeds the deposit amount held; or** **3.6 Throughout the Term, any time CLEC has been sent two (2) delinquency notification letters by SBC OKLAHOMA, the deposit amount shall be re-evaluated based upon CLEC's actual billing totals and shall be increased if CLEC's actual billing**	imposition of what is nothing less than a penalty for attempting to enter into competition with SBC Oklahoma. Finally, the CLEC (and not SBC) should have the option of picking whether to satisfy any deposit requirement by using cash or a letter of credit. SBC is protected either way, so the option should be left to the CLEC. In the recent T2A proceeding, the Texas Commission agreed that giving SBC such unbridled discretion was bad policy. Consequently, the Texas PUC is	**Cash Deposit shall constitute the grant of a security interest in the Cash Deposit pursuant to Article 9 of the Uniform Commercial Code in effect in any relevant jurisdiction.** **3.6 A Cash Deposit will accrue simple interest, however, SBC OKLAHOMA will not pay interest on a Letter of Credit.** **3.7 SBC OKLAHOMA may, but is not obligated to, draw on the Letter of Credit or the Cash Deposit, as applicable, upon the occurrence of any one of the following events:** **3.7.1 CLEC owes SBC OKLAHOMA**	services between billing account numbers. SBC OKLAHOMA believes that deposits should be assessed on an overall customer basis. 3.9 SBC agrees that an irrevocable Bank Letter of Credit can satisfy its deposit requirements provided it meets the criteria specified in SBC's proposed assurance of payment language. Quate Direct pp. 40-45 Quate Rebuttal pp. 21-26	calculate CLEC's monthly average. 3.7.1 After calculating the amount equal to the average billing to CLEC for a two (2) month period in Oklahoma, SBC OKLAHOMA shall add the amount of any charges that would be applicable to transfer all of CLEC's then-existing End-Users of Resale Services to SBC OKLAHOMA in the event of CLEC's disconnection for non-payment of charges. The resulting sum is the amount of the deposit. [Xspedius only] 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

Key: **Bold represents language proposed by SBC and opposed by CLECs.**
Bold and Underline language represents language proposed by CLEC and opposed by SBC.

Issue Statement	Issue No.	Attachment and Section(s)	CLEC Language	CLEC Preliminary Position	SBC OKLAHOMA Language	SBC OKLAHOMA Preliminary Position	Arbitrator's Recommendation
			average; **3.6.1 for SBC OKLAHOMA for a two (2) month period exceeds the deposit amount held; or** **3.7 Whenever a deposit is re-evaluated as specified in Section 3.5 or Section 3.6, such deposit shall be calculated in an amount equal to the average billing to CLEC for a two (2) month period. The most recent three (3) months billing on all of CLEC's CBAs and BANs for Resale Services or Network Elements within that state shall be used to calculate CLEC's monthly average.** **3.7.1 After calculating the amount equal to the average billing to CLEC for a two (2) month period in Oklahoma, SBC OKLAHOMA shall add the amount of any charges that**	requiring SBC to make decisions on deposits for established CLECs based solely on the CLEC's payment history. Similarly, in the K2A proceeding, the Arbitrator agreed that SBC's language is unreasonable, and adopted the CLEC Coalition's language on all sub-issues. **Xspedius preliminary position:** At any given time, SBC Oklahoma owes Xspedius significantly more in reciprocal compensation that Xspedius owes SBC under the ICA. SBC is therefore more	**undisputed charges under this Agreement that are more than thirty (30) calendar days past due; or** **3.7.2 CLEC admits its inability to pay its debts as such debts become due, has commenced a voluntary case (or has had an involuntary case commenced against it) under the U.S. Bankruptcy Code or any other law relating to insolvency, reorganization, winding-up, composition or adjustment of debts or the like, has made an assignment for the benefit of creditors or is subject to a receivership or**		**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.** **3.7.3 The expiration or termination of this Agreement.** **3.8 If SBC OKLAHOMA draws on the Letter of Credit or Cash Deposit, upon request by SBC OKLAHOMA, CLEC will provide a replacement or supplemental letter of credit or cash deposit conforming to the requirements of Section 3.3.** **3.9 Notwithstanding anything else set forth in this Agreement, if SBC OKLAHOMA makes a request for assurance of payment in accordance with the terms of this Section, then SBC OKLAHOMA shall have no obligation**

Key: **Bold represents language proposed by SBC and opposed by CLECs.**
Bold and Underline language represents language proposed by CLEC and opposed by SBC.

JOINT PETITIONERS' EXHIBIT A

DISPUTED CONTRACT LANGUAGE BY ISSUE[1]

GENERAL TERMS AND CONDITIONS

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?

10.4.1 [CLEC Version] **With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by either Party, any End User of either Party, or by any other person or entity, for damages associated with any of the services provided pursuant to or in connection with this Agreement, including but not limited to the installation, provision, preemption, termination, maintenance, repair or restoration of service, and, in any event, subject to the provisions of the remainder of this Section, each Party's liability shall be limited to and shall not exceed in aggregate amount over the entire term hereof an amount equal to seven-and-one half percent (7.5%) of the aggregate fees, charges or other amounts paid or payable to such Party for any and all services provided or to be provided by such Party pursuant to this Agreement as of the Day on which the claim arose; provided that the foregoing provisions shall not be deemed or construed as (A) imposing or allowing for any liability of either Party for (x) indirect, special or consequential damages as otherwise excluded pursuant to Section 10.4.4 below or (y) any other amount or nature of damages to the extent resulting directly and proximately from the claiming Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to all applicable damages or (B) limiting either Party's right to recover appropriate refund(s) of or rebate(s) or credit(s) for fees, charges or other amounts paid at Agreement rates for services not performed or provided or otherwise failing to comply (with applicable refund, rebate or credit amounts measured by the diminution in value of services reasonably resulting from such noncompliance) with the applicable terms and conditions of this Agreement. Notwithstanding the foregoing, claims or suits for damages by either Party, any End User of either Party, or by any other person or entity, to the extent resulting from the gross**

1 This version contains the most recent proposals by all parties as of July 15, 2005.

negligence or willful misconduct of the other Party, shall not be subject to the foregoing limitation of liability.

[BellSouth Version] Except for any indemnification obligations of the Parties hereunder, **and except in cases of the provisioning Party's gross negligence or willful misconduct,** each Party's liability to **the other for any loss, cost, claim, injury, liability or expense, including reasonable attorneys' fees relating to or arising out of any negligent act or omission in its performance of this Agreement, whether in contract or in tort,** shall be limited to **a credit for the actual cost of the** services **or functions** not performed or **improperly performed.**

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?

10.4.2 [CLEC Version] **No Section.**

[BellSouth Version] **<u>Limitations in Tariffs</u>. A Party may, in its sole discretion, provide in its tariffs and contracts with its End Users, customers and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to the End User, customer or third party for (i) any loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such loss and (ii) consequential damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a loss as a result thereof, such Party shall indemnify and reimburse the other Party for that portion of the loss that would have been limited had the first Party included in its tariffs and contracts the limitations of liability that such other Party included in its own tariffs at the time of such loss.**

Item No. 6, Issue No. G-6 [Section 10.4.4]: Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customers/End Users resulting directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance of obligations set forth in the Agreement are not indirect, incidental or consequential damages

10.4.4 [CLEC Version] Nothing in this Section 10 shall limit a Party's obligation to indemnify or hold harmless the other Party set forth elsewhere in this Agreement. Except in cases of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages **provided that neither the foregoing nor any other provision of this Section 10 shall be deemed or construed as imposing any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder and were not and are not directly and proximately caused by or the result of such Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage.** In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the services or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

[BellSouth Version] Nothing in this Section 10 shall limit a Party's obligation to indemnify or hold harmless the other Party set forth elsewhere in this Agreement. Except in cases of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the services or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

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

10.5 [CLEC Version] Indemnification for Certain Claims. The Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim **for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications. The Party receiving services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party providing services hereunder against any claim, loss or damage to the extent arising from (1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent caused by the providing Party's negligence, gross negligence or willful misconduct.**

[BellSouth Version] Indemnification for Certain Claims. The Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, **except to the extent caused by the providing Party's gross negligence or willful misconduct,** defended and held harmless by the Party receiving services hereunder against any claim**, loss or damage arising from the receiving Party's use of the services provided under this Agreement pertaining to (1) claims** for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications, **or (2)** any claim, loss or damage **claimed by the End User or customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations** arising out of this Agreement.

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?

13.1 [CLEC Version] Except **as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the FCC, the Commission or a court of law for a resolution of the dispute. Either Party may seek expedited resolution by the Commission, and may request that resolution occur in no event later than sixty (60) calendar days from the date of submission of such dispute. The other Party will not object to such expedited resolution of a dispute. If the FCC or Commission appoints an expert(s) or other facilitator(s) to assist in its decision making, each party shall pay half of the fees and expenses so incurred to the extent the FCC or the Commission requires the Parties to**

bear such fees and expenses. Each Party reserves any rights it may have to seek judicial review of any ruling made by the FCC, the Commission or a court of law concerning this Agreement. **Until the dispute is finally resolved,** each Party shall continue to perform its obligations under this Agreement, **unless the issue as to how or whether there is an obligation to perform is the basis of the dispute, and shall continue to provide all services and payments as prior to the dispute** provided however, that neither Party shall be required to act in any unlawful fashion.

13.1 [BellSouth Version] Except **for procedures that outline the resolution of billing disputes which are set forth in Section 2 of Attachment 7 or as otherwise set forth in this Agreement, each Party agrees to notify the other Party in writing of a dispute concerning this Agreement. If the Parties are unable to resolve the issues relating to the dispute in the normal course of business then either Party shall file a complaint with the Commission to resolve such issues or, as explicitly otherwise provided for in this Agreement, may proceed with any other remedy pursuant to law or equity as provided for in this Section 13.**

13.2 **Except as otherwise stated in this Agreement, or for such matters which lie outside the jurisdiction or expertise of the Commission or FCC, if any dispute arises as to the enforcement of terms and conditions of this Agreement, and/or as to the interpretation of any provision of this Agreement, the aggrieved Party, to the extent seeking resolution of such dispute, must seek such resolution before the Commission or the FCC in accordance with the Act.** Each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Either Party may seek expedited resolution by the Commission. **During the Commission proceeding** each Party shall continue to perform its obligations under this Agreement; provided, however, that neither Party shall be required to act in an unlawful fashion.

13.3 **Except to the extent the Commission is authorized to grant temporary equitable relief with respect to a dispute arising as to the enforcement of terms and conditions of this Agreement, and/or as to the interpretation of any provision of this Agreement, this Section 13 shall not prevent either Party from seeking any temporary equitable relief, including a temporary restraining order, in a court of competent jurisdiction.**

13.4 **In addition to Sections 13.1 and 13.2 above, each Party shall have the right to seek legal and equitable remedies on any and all legal and equitable theories in any court of competent jurisdiction for any and all claims, causes of action, or other proceedings not arising: (i) as to the enforcement of any provision of this Agreement, or (ii) as to the enforcement or interpretation under applicable federal or state telecommunications law. Moreover, if the Commission would not have authority to grant an award of damages after**

issuing a ruling finding fault or liability in connection with a dispute under this Agreement, either Party may pursue such award in any court of competent jurisdiction after such Commission finding.

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?

32.2 [CLEC Version] **Nothing in this Agreement shall be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, except in such cases where the Parties have explicitly agreed to an exception to a requirement of Applicable Law or to abide by provisions which conflict with and thereby displace corresponding requirements of Applicable Law. Silence shall not be construed to be such an exemption to or displacement of any aspect, no matter how discrete, of Applicable Law.**

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

ATTACHMENT 2

NETWORK ELEMENTS AND OTHER SERVICES

Item No. 23, Issue No. 2-5 [Section 1.11.1]: What rates, terms, and conditions should govern the CLECs' transition of existing network elements that BellSouth is no longer obligated to provide as UNEs to other services?

[CLEC Version] In the event section 251 UNEs or Combinations are no longer offered pursuant to, or are not in compliance with, the terms set forth in the Agreement, including any transition plan set forth herein or established by the FCC or Authority, BellSouth may provide notice ("transition notice") to <<customer_short_name>> identifying specific service arrangements (by circuit identification number) that it no longer is obligated to provide as section 251 UNEs and that it insists be transitioned to other service arrangements. <<customer_short_name>> will acknowledge receipt of such notice and will have 30 days from such receipt to verify the list, notify BellSouth of initial disputes or concerns regarding such list, or select alternative service arrangements (or disconnection). <<customer_short_name>> and BellSouth will then confer to determine the appropriate orders to be submitted (i.e., spreadsheets, LSRs or ASRs). Such orders shall be submitted within 10 days of agreement upon the appropriate method (i.e., spreadsheets, LSRs or ASRs) and such agreement shall not be unreasonably withheld or delayed. There will be no service order, labor, disconnection, project management or other nonrecurring charges associated with the transition of section 251 UNEs to other service arrangements. The Parties will absorb their own costs associated with effectuating the process set forth in this section. In all cases, until the transition of any section 251 UNE to another service arrangement is physically completed (which, in the case of transition to another service arrangement provided by an entity other than BellSouth or one of its affiliates, shall be the time of disconnection), the applicable recurring rates set forth in the parties' interconnection agreement that immediately preceded the current Agreement or that were otherwise in effect at the time of the transition notice shall apply.

[BellSouth Version] **In the event that <<customer_short_name>> has not entered into a separate agreement for the provision of Local Switching or services that include Local Switching, <<customer_short_name>> will submit orders to either disconnect Switching Eliminated Elements or convert such Switching Eliminated Elements to Resale within thirty (30) calendar days of the last day of the Transition Period. If <<customer_short_name>> submits orders to transition such Switching Eliminated Elements to Resale within thirty (30) calendar days of the last day of the Transition Period, applicable recurring and nonrecurring charges shall apply as set forth in the appropriate BellSouth tariff, subject to the appropriate discounts described**

in Attachment 1 of this Agreement. If <<customer_short_name>> fails to submit orders within thirty (30) calendar days of the last day of the Transition Period, BellSouth shall transition such Switching Eliminated Elements to Resale, and <<customer_short_name>> shall pay the applicable nonrecurring and recurring charges as set forth in the appropriate BellSouth tariff, subject to the appropriate discounts described in Attachment 1 of this Agreement. In such case, <<customer_short_name>> shall reimburse BellSouth for labor incurred in identifying the lines that must be converted and processing such conversions. If no equivalent Resale service exists, then BellSouth may disconnect such Switching Eliminated Elements if <<customer_short_name>> does not submit such orders within thirty (30) calendar days of the last day of the Transition Period. In all cases, until Switching Eliminated Elements have been converted to Comparable Services or disconnected, the applicable recurring and nonrecurring rates for Switching Eliminated Elements during the Transition Period shall apply as set forth in this Agreement. Applicable nonrecurring disconnect charges may apply for disconnection of service or conversion to Comparable Services.

1.11.2 Other Eliminated Elements. Upon the end of the Transition Period, <<customer_short_name>> must transition the Eliminated Elements other than Switching Eliminated Elements ("Other Eliminated Elements") to Comparable Services. Unless the Parties agree otherwise, Other Eliminated Elements shall be handled in accordance with Sections 1.11.2.1 and 1.11.2.2 below.

1.11.2.1 <<customer_short_name>> will identify and submit orders to either disconnect Other Eliminated Elements or transition them to Comparable Services within thirty (30) calendar days of the last day of the Transition Period. Rates, terms and conditions for Comparable Services shall apply per the applicable tariff for such Comparable Services as of the date the order is completed. Where <<customer_short_name>> requests to transition a minimum of fifteen (15) circuits per state, <<customer_short_name>> may submit orders via a spreadsheet process and such orders will be project managed. In all other cases, <<customer_short_name>> must submit such orders pursuant to the local service request/access service request (LSR/ASR) process, dependent on the Comparable Service elected. For such transitions, the non-recurring and recurring charges shall be those set forth in BellSouth's FCC No. 1 tariff, or as otherwise agreed in a separately negotiated agreement. Until such time as the Other Eliminated Elements are transitioned to such Comparable Services, such Other Eliminated Elements will be provided pursuant to the rates, terms and conditions applicable to the subject Other Eliminated Elements during the Transition Period as set forth in this Agreement.

1.11.2.2 **If <<customer_short_name>> fails to identify and submit orders for any Other Eliminated Elements within thirty (30) calendar days of the last day of the Transition Period, BellSouth may transition such Other Eliminated Elements to Comparable Services. The rates, terms and conditions for such Comparable Services shall apply as of the date following the end of the Transition Period. If no Comparable Services exist, then BellSouth may disconnect such Other Eliminated Elements if <<customer_short_name>> does not submit such orders within thirty (30) calendar days of the last day of the Transition Period. In such case <<customer_short_name>> shall reimburse BellSouth for labor incurred in identifying such Other Eliminated Elements and processing such orders and <<customer_short_name>> shall pay the applicable disconnect charges set forth in this Agreement. Until such time as the Other Eliminated Elements are disconnected pursuant to this Agreement, such Other Eliminated Elements will be provided pursuant to the rates, terms and conditions applicable to the subject Other Eliminated Elements during the Transition Period as set forth in this Agreement.**

1.11.3 **To the extent the FCC issues an effective Intervening Order that alters the rates, terms and conditions for any Network Element or Other Service, including but not limited to Local Switching, Enterprise Market Loops and High Capacity Transport, the Parties agree that such Intervening Order shall supersede those rates, terms and conditions set forth in this Agreement for the affected Network Element(s) or Other Service(s).**

1.11.4 **Notwithstanding anything to the contrary in this Agreement, in the event that the Interim Rules are vacated by a court of competent jurisdiction, <<customer_short_name>> shall immediately transition Local Switching, Enterprise Market Loops and High Capacity Transport pursuant to Section 1.11 through 1.11.2.2 above, applied from the effective date of such vacatur, without regard to the Interim Period or Transition Period.**

1.11.5 **Notwithstanding anything to the contrary in this Agreement, upon the Effective Date of the Final FCC Unbundling Rules, to the extent any rates, terms or requirements set forth in such Final FCC Unbundling Rules are in conflict with, in addition to or otherwise different from the rates, terms and requirements set forth in this Agreement, the Final FCC Unbundling Rules rates, terms and requirements shall supercede the rates, terms and requirements set forth in this Agreement without further modification of this Agreement by the Parties.**

1.11.6 **In the event that any Network Element, other than those already addressed above, is no longer required to be offered by BellSouth pursuant to Section 251 of the Act, <<customer_short_name>> shall immediately transition such elements pursuant to Section 1.11 through 1.11.2.2 above, applied from the effective date of the order eliminating such obligation.**

Item No. 26, Issue No. 2-8 [Section 1.13]: 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?

1.7 [CLEC Version] **BellSouth shall permit <<customer_short_name>> to commingle a UNE or Combination of UNEs with any wholesale service, consistent with 47 C.F.R. 51.309(e). BellSouth shall perform the functions necessary to commingle a UNE with any wholesale service, consistent with 47 C.F.R. 51.309(f).**

[BellSouth Version] **Notwithstanding any other provision of this Agreement, BellSouth will not commingle UNEs or Combinations of UNEs with any service, Network Element or other offering that it is obligated to make available only pursuant to Section 271 of the Act. Nothing in this Section shall prevent <<customer_short_name>> from commingling Network Elements with tariffed special access loops and transport services.**

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?

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

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

Item No. 37, Issue No. 2-19 [Section 2.12.2]: Should the Agreement contain specific provisions limiting the

availability of load coil removal to copper loops of 18,000 feet or less?

2.12.2 [CLEC Version] BellSouth will remove load coils on copper loops and sub loops **of any length at the rates set forth in Exhibit A.**

[BellSouth Version] **BellSouth will remove load coils only on copper loops and sub loops that are less than 18,000 feet in length. BellSouth will remove load coils on copper loops and sub loops that are greater than 18,000 feet in length upon <<customer_short_name>>'s request at rates pursuant to BellSouth's Special Construction Process contained in BellSouth's FCC No. 2 as mutually agreed to by the Parties.**

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?

2.12.3 [CLEC Version] Any copper loop being ordered by <<customer_short_name>> which has over 6,000 feet of combined bridged tap will be modified, upon request from <<customer_short_name>>, so that the loop will have a maximum of 6,000 feet of bridged tap. This modification will be performed at no additional charge to <<customer_short_name>>. Line conditioning orders that require the removal of **other** bridged tap will be performed at the rates set forth in Exhibit A of this Attachment.

[BellSouth Version] Any copper loop being ordered by <<customer_short_name>> which has over 6,000 feet of combined bridged tap will be modified, upon request from <<customer_short_name>>, so that the loop will have a maximum of 6,000 feet of bridged tap. This modification will be performed at no additional charge to <<customer_short_name>>. Line conditioning orders that require the removal of bridged tap **that serves no network design purpose on a copper loop that will result in a combined level of bridged tap between 2,500 and 6,000 feet** will be performed at the rates set forth in Exhibit A of this Attachment.

2.12.4 [CLEC Version] <<customer_short_name>> may request removal of any unnecessary and non-excessive bridged tap (bridged tap between 0 and 2,500 feet which serves no network design purpose), at rates **set forth in Exhibit A.**

[BellSouth Version] <<customer_short_name>> may request removal of any unnecessary and non-excessive bridged tap (bridged tap between 0 and 2,500 feet which serves no network design purpose), at rates **pursuant to BellSouth's Special Construction Process contained in BellSouth's FCC No. 2 as mutually agreed to by the Parties.**

Item No. 51, Issue No. 2-33 [Sections 5.2.6, 5.2.6.1]: (A) ***This issue has been resolved.***

(B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?

(C) Who should conduct the audit and how should the audit be performed?

5.2.6 [CLEC Version] To invoke its limited right to audit, BellSouth will send a Notice of Audit to <<customer_short_name>>, identifying **the particular circuits for which BellSouth alleges non-compliance and** the cause upon which BellSouth rests its allegations. **The Notice of Audit shall also include all supporting documentation upon which BellSouth establishes the cause that forms the basis of BellSouth's allegations of noncompliance.** Such Notice of Audit will be delivered to <<customer_short_name>> **with all supporting documentation** no less than thirty (30) calendar days prior to the date upon which BellSouth seeks to commence the audit.

[BellSouth Version] To invoke its limited right to audit, BellSouth will send a Notice of Audit to <<customer_short_name>> identifying the cause upon which BellSouth rests its allegations. Such Notice of Audit will be delivered to <<customer_short_name>> no less than thirty (30) calendar days prior to the date upon which BellSouth seeks to commence the audit.

5.2.6.1 [CLEC Version] The audit shall be conducted by a third party independent auditor **mutually agreed-upon by the Parties** and retained and paid for by BellSouth. The audit shall commence at a mutually agreeable location (or locations).

[BellSouth Version] The audit shall be conducted by a third party independent auditor retained and paid for by BellSouth. The audit shall commence at a mutually agreeable location (or locations).

ATTACHMENT 3

INTERCONNECTION

Item No. 65, Issue No. 3-6 [Section 10.11. 1 (KMC/XSP), 10.8.1 (NSC/NVX)]: Should BellSouth be allowed to charge the CLEC a Transit Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

10.10.1 [CLEC Version] Each Party shall provide tandem switching and transport services for the other Party's Transit Traffic. Rates for Local Transit Traffic and ISP-Bound Transit Traffic shall be the applicable Call Transport and Termination charges (i.e., common transport and tandem switching charge; end office switching charge is not applicable) as set forth in Exhibit A to this Attachment. Rates for Switched Access Transit Traffic shall be the applicable charges as set forth in the applicable Party's Commission approved Interstate or Intrastate Switched Access tariffs as filed and effective with the FCC or Commission, or reasonable and non-discriminatory web-posted listing if the FCC or Commission does not require filing of a tariff. Billing associated with all Transit Traffic shall be pursuant to MECAB guidelines.

[BellSouth's Version] Each Party shall provide tandem switching and transport services for the other Party's Transit Traffic. Rates for Local Transit Traffic and ISP-Bound Transit Traffic shall be the applicable Call Transport and Termination charges (i.e., common transport and tandem switching charges and **tandem intermediary charge**; end office switching charge is not applicable) as set forth in Exhibit A to this Attachment. Rates for Switched Access Transit Traffic shall be the applicable charges as set forth in the applicable Party's Commission approved Interstate or Intrastate Switched Access tariffs as filed and effective with the FCC or Commission, or reasonable and non-discriminatory web-posted listing if the FCC or Commission does not require filing of a tariff. Billing associated with all Transit Traffic shall be pursuant to MECAB guidelines.

ATTACHMENT 6

ORDERING

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?*

2.5.5.2 [CLEC Version] Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice by email to **all notice recipients designated in the General Terms and Conditions** to the other Party specifying the alleged noncompliance.

[BellSouth Version] Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice by email to the other Party specifying the alleged noncompliance.

2.5.5.3 [CLEC Version] Disputes over Alleged Noncompliance. In its written notice to the other Party **(with an additional copy to be sent by email to all notice recipients designated in the General Terms and Conditions),** the alleging Party **may** state that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth (5th) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice **(with an additional copy to be sent by email to all notice recipients designated in the General Terms and Conditions)** to the person designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision of access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10th) calendar day following the date of the initial notice. **BellSouth will not invoke any remedy specified in this Section unless its allegations pertain to systemic rather than isolated instances of unauthorized access to CSR information and unless it first provides notice to the Commission of its intent to impose such remedies.** If the other Party disagrees with the alleging Party's allegations of unauthorized use, the alleging Party **shall not invoke any remedy specified in this paragraph and shall instead** proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the

Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

[BellSouth Version] Disputes over Alleged Noncompliance. In it's written notice to the other Party the alleging Party **will** state that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth (5th) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice **by email** to the person designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision of access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10th) calendar day following the date of the initial notice. If the other Party disagrees with the alleging Party's allegations of unauthorized use, the alleging Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

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

2.6.5 [PARTIES DISAGREE ON THE RATE, NOT THE LANGUAGE] Service Date Advancement Charges (a.k.a. Expedites). For Service Date Advancement requests by <<customer_short_name>>, Service Date Advancement charges will apply for intervals less than the standard interval as outlined in Section 8 of the LOH, located at http://interconnection.bellsouth.com/guides/html/leo.html. The charges shall be as set-forth in Exhibit A of Attachment 2 of this Agreement and will apply only where Service Date Advancement has been specifically requested by the requesting Party, and the element or service provided by the other Party meets all technical specifications and is provisioned to meet those technical specifications. If <<customer_short_name>> accepts service on the plant test date (PTD) normal recurring charges will apply from that date but Service Date Advancement charges will only apply if <<customer_short_name>> previously requested the order to be expedited and the expedited DD is the same as the original PTD.

ATTACHMENT 7

BILLING

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

1.4 [CLEC Version] Payment Due. Payment **of charges** for services rendered will be due **thirty (30) calendar days from receipt or website posting of a complete and fully readable bill or within thirty (30) calendar days from receipt or website posting of a corrected or retransmitted bill in those cases where correction or retransmission is necessary for processing** and is payable in immediately available funds. Payment is considered to have been made when received by the billing Party.

[BellSouth Version] Payment Due. **Payment for billed services sent electronically is due on or before the next bill date (Payment Due Date). If <<customer_short_name>> does not receive BellSouth's bill within eight (8) days of the bill date <<customer_short_name>> may notify its BellSouth billing contact. Upon BellSouth's notification to <<customer_short_name>> of a failure to receive a payment and <<customer_short_name>>'s determination that the bill has not been received, <<customer_short_name>> will inform BellSouth of the non-receipt of that particular bill. Although the actual bill date on the bill will not change as a result of such notification by <<customer_short_name>> or BellSouth's notification to <<customer_short_name>>, BellSouth shall waive late payment charges and defer normal collections for such payment for thirty (30) days after <<customer_short_name>>'s notification to BellSouth or BellSouth's notification to <<customer_short_name>>. Information required to apply payments must accompany the payment including the Billing Account Numbers (BAN) to which the payment is to be applied; the invoices paid; and the amount to be applied to each BAN and invoice (Remittance Information).** Payment is considered to have been made when received by BellSouth. **Payment for billed services sent manually will be due** on or before **the next bill date and is payable in immediately available funds.** Payment is considered to have been made when received by BellSouth.

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?

1.7.2 [CLEC Version] **Each Party** reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the **Due Date, the billing Party may** provide written notice **to the other Party** that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, **as indicated on the notice in dollars and cents**, is not received by the fifteenth (15th) calendar day following the date of the notice. In addition, **the billing Party** may, at the same time, provide written notice that **the billing Party** may discontinue the provision of existing services to **the other Party** if payment of such amounts, **as indicated on the notice (in dollars and cents),** is not received by the thirtieth (30th) calendar day following the date of the Initial Notice.

[BellSouth Version] **BellSouth** reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the **bill date in the month after the original bill date, BellSouth** will provide written notice to **<<customer_short_name>>** that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, **and all other amounts not in dispute that become past due subsequent to the issuance of the written notice ("Additional Amounts Owed"),** is not received by the (15th) calendar day following the date of the notice. In addition, **BellSouth** may, at the same time, provide written notice that **BellSouth** may discontinue the provision of existing services to **<<customer_short_name>>** if payment of such amounts, **and all other Additional Amounts Owed that become past due subsequent to the issuance of the written notice**, is not received by the thirtieth (30th) calendar day following the date of the initial notice. **Upon request, BellSouth will provide information to <<customer_short_name>> 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.**

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?

1.8.3 [CLEC Version] The amount of the security shall not exceed two (2) month's estimated billing for new CLECs or **one and one-half month's** actual billing **under this Agreement** for existing CLECs **(based on average monthly billings for the most recent six (6) month period)**. Interest shall accrue per the appropriate BellSouth tariff on cash deposits.

[BellSouth Version] The amount of the security shall not exceed two (2) month's estimated billing for new CLECs or actual billing for existing CLECs. Interest shall accrue per the appropriate BellSouth tariff on cash deposits.

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?

1.8.3.1 [CLEC Version] **The amount of security due from an existing CLEC shall be reduced by amounts due <<customer_short_name>> by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in Section 1.8.5.1, and subject to the standard set forth in Section 1.8.5.**

[BellSouth Version] The amount of the security due from **<<customer_short_name>>** shall be reduced by **the undisputed** amounts due **to** <<customer_short_name>> by BellSouth **pursuant to Attachment 3 of this Agreement that have not been paid by the Due Date at the time of the request by BellSouth to <<customer_short_name>> for a deposit. Within ten (10) days of BellSouth's payment of such undisputed past due amounts to <<customer_short_name>>, <<customer_short_name>> shall provide the additional security necessary to establish the full amount of the deposit that BellSouth originally requested.**

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?

1.8.6 [CLEC Version] In the event <<customer_short_name>> fails to remit to BellSouth any deposit requested pursuant to this Section **and either agreed to by <<customer_short_name>> or as ordered by the Commission** within thirty (30) calendar days **of such agreement or order**, service to <<customer_short_name>> may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to <<customer_short_name>>'s account(s). **Any disputes regarding deposit amounts requested by Bellsouth shall be addressed as set forth in Section 1.8.7 below.**

[BellSouth Version] **Subject to Section 1.8.7 following,** in the event <<customer_short_name>> fails to remit to BellSouth any deposit requested pursuant to this Section within thirty (30) calendar days **of <<customer_short_name>>'s receipt of such request,** service to <<customer_short_name>> may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to <<customer_short_name>>'s account(s).

SUPPLEMENTAL ISSUES
(ATTACHMENT 2)

Item No. 108, Issue No. S-1: How should the final FCC unbundling rules be incorporated into the Agreement?

Language to be provided by the Parties.

Item No. 109, Issue No. S-2: (A) How should any intervening FCC Order adopted in CC Docket 01-338 or WC Docket 04-313 be incorporated into the Agreement? (B) How should any intervening State Commission order relating to unbundling obligations, if any, be incorporated into the Agreement?

Language to be provided by the Parties.

Item No. 110, Issue No. S-3: If FCC 04-179 is vacated or otherwise modified by a court of competent jurisdiction, how should such order or decision be incorporated into the Agreement?

Language to be provided by the Parties.

Item No. 111, Issue No. S-4 What post Interim Period transition plan should be incorporated into the Agreement?

Language to be provided by the Parties.

Item No. 112, Issue No. S-5: (A) What rates, terms and conditions relating to switching, enterprise market loops and dedicated transport were "frozen" by FCC 04-179? (B) How should these rates, terms and conditions be incorporated into the Agreement?

Language to be provided by the Parties.

Item No. 113, Issue No. S-6: (A) Is BellSouth obligated to provide unbundled access to DSI loops, DS3 loops and dark fiber loops? (B) If so, under what rates, terms and conditions?

Language to be provided by the Parties.

Item No. 114, Issue No. S-7: (A) Is BellSouth obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport? (B) If so, under what rates, terms and conditions?

Language to be provided by the Parties.