COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN RE:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED	)	**Case No. 2004-0044**

JOINT PETITIONERS' POST-HEARING BRIEF

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SUMMARY

Joint Petitioners' Initial Brief ("JP Br.") in this proceeding anticipated and refuted almost every argument that appears in BellSouth's Brief ("BST Br."). Thus, the record already supports adoption of Joint Petitioners' proposed language for every remaining disputed Item. The focus of this Brief is to address those few points not discussed in Petitioners' Initial Brief, in order to demonstrate further that BellSouth's positions in this arbitration are without legal or evidentiary support.

Petitioners' Initial Brief made clear that their core aim in this case is simply to ensure that the rights already guaranteed to them are incorporated into and protected by this Agreement. Conversely, the bulk of BellSouth's positions are aimed at stripping Joint Petitioners of those rights. BellSouth cloaks its efforts in unsupported rhetoric, such as "industry standard" and "not business impacting," as well as myopic and tortured rule interpretation, typified by the "properly seen as" argument that would enable BellSouth to eliminate all Line Conditioning in Kentucky. Laid bare of such pretenses, BellSouth's arguments are revealed as little more than a monopolist's attempt to keep competitors – Joint Petitioners – out of its market. That attempt cannot prevail against the clear weight of authority, established by FCC rules, the doctrine of contracts, and decisions of this Commission, all of which favor Joint Petitioners.

In their Initial Brief, Petitioners provided a thematic presentation of their positions to demonstrate the uniformity of rationale that they have maintained throughout the negotiation and arbitration of this Agreement. Petitioners repeat those themes here to show that BellSouth's positions are linked by a combined misunderstanding of prevailing law and the desire to price, delay, and otherwise force Joint Petitioners out of the Kentucky telecommunications market.

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

Many of BellSouth's positions simply represent a wish to deprive Joint Petitioners of their rights under the Constitution and other prevailing law. **Item 9** evidences BellSouth's attempt to strip Petitioners' right to go to court over their objection and in the face of constitutional grants of plenary jurisdiction to state and federal courts. **Item 12** represents BellSouth's attempt to omit (or create a non-negotiated exception from) a fundamental tenet of Georgia law, despite BellSouth's having agreed that Georgia law governs this Agreement. **Item 26** is an attempt by BellSouth to avoid compliance with federal unbundling law by inventing a tariffing exception in order to deprive Joint Petitioners of their full right to commingle section 251 loops with any other wholesale services, including section 271 transport and other section 271 elements. **Item 36** involves BellSouth's refusal to comply with the FCC's clear mandate to condition copper loops upon the request of a CLEC. **Item 37** similarly involves BellSouth's desire to avoid removing load coils as required by the FCC or at Commission-approved TELRIC-compliant rates. **Item 38** is an attempt by BellSouth to impose usurious Special Construction rates on bridged tap removal rather than adhere to existing Commission-approved TELRIC-compliant rates. **Items 51B and 51C** represent BellSouth's attempt to eviscerate FCC standards for EEL audits in favor of one-sided, unfair, and biased audits of Joint Petitioners' circuits. **Item 65** relates to BellSouth's wish to impose a Transit/Tandem Intermediary Charge ("TIC") that is neither Commission-approved nor TELRIC-compliant and that does not recover any identified or legitimate BellSouth costs. Finally, **Item 88** represents BellSouth's attempt to impose prohibitively expensive, non cost-based fees for the performance of Service Date Advancements (a/k/a "expedites") that BellSouth admittedly provides for its own retail customers on a routine basis.

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

BellSouth's desire to unfairly leverage its continued control over the local network is demonstrated by its insistence in several items that Joint Petitioners should remain vulnerable to BellSouth's power to shut down service to Joint Petitioners and their Kentucky customers. **Item 86** is one of three "pull the plug" provisions in which BellSouth requests the right to terminate all service to Joint Petitioners and their customers – this one based on a suspicion of improper CSR access. **Item 100** regards BellSouth's less-than-candid position that Petitioners must guess at the precise amount of all unpaid amounts across hundreds of accounts on pain of total service shutdown. **Item 101** is BellSouth's attempt to impose onerous and unnecessary deposit provisions in order to tie up Joint Petitioners' capital and, consequently, divert their funds from facilities deployment. **Item 102** demonstrates that BellSouth sees no inequity in requiring large deposits from Petitioners even while BellSouth disputes and fails to pay amounts legitimately billed to BellSouth by the Petitioners. Finally, **Item 103** represents another BellSouth request for the ability to terminate service to Joint Petitioners for the failure to remit a deposit neither agreed to nor found to be reasonable based on the circumstances (the Agreement contains no scale for setting a precise deposit amount; it will merely have factors to consider in triggering a right to a deposit between zero and the maximum to be set upon resolution of Item 101).

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

BellSouth's position on several issues represents little more than its desire to prevent this Agreement from attaining any semblance of commercial reasonableness. First, in **Item 4**, BellSouth seeks to foist the entire financial burden of its own negligence onto Joint Petitioners, thereby increasing their cost of service as well as their business risk. **Item 5** is an

attempt to hamstring Joint Petitioners' ability to compete effectively by tying them to the extremely stringent limitation-of-liability terms in BellSouth's tariffs while BellSouth itself provides more customer-friendly liability terms to both its own customers and Joint Petitioners' potential customers through the use of custom service agreements ("CSAs"). **Item 6** is a clear example of BellSouth's unwillingness to agree to the most basic and reasonable liability language in furtherance of its insistence that it not be held accountable for damages directly and foreseeably caused by any of its own negligent acts. **Item 7** demonstrates that BellSouth believes that it should be entitled to flip universally accepted principles of indemnification and require that the recipient of services indemnify the provider for the provider's negligence. Finally, **Item 97** involves BellSouth's request to impose unreasonably short payment deadlines on Joint Petitioners simply because "it has always been done that way." BellSouth's positions on these items are simply an unprincipled request to maintain the *status quo* regardless of fairness or commonly accepted principles of commercial contracting.

PRELIMINARY STATEMENT

In its brief, BellSouth requests that several issues, which were already fully litigated in this proceeding, be moved to the Commission's Generic Change of Law Proceeding, Case No. 2004-00427 (the "Generic Proceeding"). *E.g.*, BST Br. at 3. BellSouth also filed a separate motion with the Commission, requesting that the issues be moved. *See* BellSouth's Motion to Move *TRO* Arbitration Issues to Generic Proceeding (filed May 20, 2005). Specifically, BellSouth asks that the Commission remove Items 26 (Commingling), 36 to 38 (Line Conditioning), and 51 (EEL Audits) from this proceeding and move them to the Generic Proceeding on the ground that "similar, if not identical" issues have been raised in that proceeding. BST Br. at 3.

Joint Petitioners opposed BellSouth's motion on May 31, 2005, explaining that these issues were actually negotiated and thus properly included within this arbitration. Opposition at 3. In addition, Joint Petitioners made clear that Section 252 entitles them to expeditious resolution of these issues, *id.* at 2 (quoting 47 U.S.C. § 252(b)(1)), and that removing them or deferring the Commission's decision would significantly prejudice Joint Petitioners. *Id.* at 6. Petitioners also explained in detail that the Generic Proceeding in this Commission does not in fact contain issues that are "similar, if not identical" to each of the Items BellSouth now seeks to move. *Id.* at 4.

Joint Petitioners also note that the Georgia Public Service Commission and Florida Public Service Commission have denied similar BellSouth Motions; the Florida Commission's written order concludes that moving Items 26, 36, 37, 38 and 51 would be inappropriate given that the parties had already filed testimony, conducted depositions, and responded to Staff's discovery. That rationale applies with even greater weight in Kentucky, as the parties as of today will have concluded all proceedings, including two rounds of briefing, thus rendering these issues fully ripe for decision. To delay decision, or force Joint Petitioners to re-litigate these issues from scratch in the Generic Proceeding, would be unfair, prejudicial, and wasteful. In addition, the North Carolina Utilities Commission and the Tennessee Regulatory Authority also declined to grant BellSouth's request to move issues.[1] Accordingly, BellSouth's Motion and its reiterated requests on brief to move Items 26, 36, 37, 38 and 51 should be denied.

[1] The South Carolina Public Service Commission and a panel appointed by the Mississippi Public Service Commission granted BellSouth's request. However, neither state had held a hearing on the issues BellSouth sought to move and so each of these decisions is distinguishable from the circumstances here in Kentucky where the parties and the Commission already have invested substantial resources in the hearing (and briefing) on these issues.

EVIDENCE RELIED UPON

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

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

Cites to deposition transcripts refer to (1) BellSouth's deposition of Joint Petitioners December 14-17, 2005, and (2) Joint Petitioners' deposition of BellSouth's witnesses on June 28-29, 2005, and December 8-10, 2005.

Please note that all cites to the pre-filed written testimony and post-hearing briefs of any party refer only to those filed with this Commission.

DISCUSSION

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

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

As Joint Petitioners' brief makes plain, the liability language that it proposes is entirely appropriate for a wholesale telecommunications agreement such as the one being arbitrated in this proceeding. *See generally* JP Br. at 6-14. Contracting parties are typically owed some measure of relief for damages caused by negligence; BellSouth's elimination-of-liability language is not, as it purports, "industry standard." *Id.* at 7-8. It is the "BellSouth standard" and Joint Petitioners will not voluntarily accept it. Moreover, BellSouth's language is not commercially reasonable, because it forces Petitioners to bear, without limitation, the costs of BellSouth's negligence. *Id.* at 11-12. Joint Petitioners do not seek "perfect service," but rather a modest and limited degree of relief from damages that they do not cause. Further, the rates that BellSouth charges CLECs – including UNE rates – cover BellSouth's costs of providing this relief, *id.* at 11-12, and presume the non-negligent provision of service by BellSouth. Having paid these rates, Joint Petitioners are entitled to at least partial relief when negligent service in fact occurs. The 7.5% cap that Joint Petitioners propose is a modest and reasonable means for providing a modest and reasonable level of relief.

1. The Wireline Competition Bureau's Decision in the Verizon Arbitration Does Not Bind This Commission.

BellSouth's reliance on the *Verizon Arbitration Order*[2] bears little, if any, relevance to this issue. BST Br. at 6-7. It is factually inapposite. While it may be that WorldCom sought "perfect" service from Verizon-Virginia, Petitioners do not seek such service from BellSouth here. If that were true, Petitioners would seek 100% liability for damages caused by BellSouth's negligence. In fact, Petitioners seek only a 7.5% cap, "so that's not requesting or requiring perfect service," as Mr. Russell explained in response to questioning. GA Tr. at 389:17-18.

Moreover, expecting "perfect" service is not commercially reasonable. Yet it *is* commercially reasonable to expect a service provider to provide a modicum of remedy when their negligence injures the receiving party. The Wireline Competition Bureau did not contemplate such language – WorldCom had not proposed it – and thus its decision cannot be deemed to reject, even impliedly, Joint Petitioners' proposed 7.5% cap. As such, the Commission should give no weight to the *Verizon Arbitration Order* in resolving Item 4.

2. BellSouth's Wish to Eliminate Its Liability Is Not Industry Standard, and BellSouth's Witness Could Not Refute that BellSouth Gives Preferential Liability Language to Certain Customers.

Joint Petitioners have already proven that BellSouth's refusal to provide any relief for damages caused by its own negligence is ***not*** "industry standard." BST Br. at 5, 6. The template contract that Xspedius has offered to its customers includes damages of $100,000 or five(5) month's worth of paid monthly recurring charges" for harm caused by "mistakes, omissions, interruptions, delays, errors or defects in the service" – in other words, for negligence. JP Br. at 8 (providing excerpt as Attachment 1). In addition, the NewSouth-AllTel Agreement,

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[2] *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Comm'n Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, DA 02-1731, 17 FCC Rcd. 27039 (W.C. Bur. 2002).

excerpted at Attachment 2 of Petitioners' Initial Brief, provides up to $250,000 in relief for negligence. JP Br. at 8 (providing excerpt as Attachment 2).[3] BellSouth's only retort to the AllTel Agreement is that AllTel is a rural ILEC. BST Br. at 9. Yet NuVox has entered that Agreement as an attachment to discredit BellSouth's assertion of what is "industry standard." JP Br. at 8; BST Br. at 7 (Petitioners' language is "not the standard in the industry"). The fact that AllTel may not be required to charge TELRIC prices (BST Br. at 9) is irrelevant, first because BellSouth's bold "industry standard" assertion was not limited to entities charging TELRIC rates, and secondly because BellSouth has conceded that its TELRIC rates cover the cost of insurance. *See infra* at 9.

Thus, the evidentiary record proves that Joint Petitioners are not, as BellSouth suggests, "attempting to the change the standard in the telecommunications industry," BST Br. at 5, but rather it is BellSouth that is attempting to ignore "the standard in the industry."

3. BellSouth's Witness Kathy Blake Admitted that BellSouth's Costs of Insurance Are Factored into TELRIC Rates.

Contrary to the testimony of its own witness, BellSouth persists in asserting, incorrectly, that UNE rates do not cover the cost of providing a remedy for damages caused by its own negligence. BST Br. at 12-13. Yet BellSouth's witness, Kathy Blake, acknowledged at the hearing that BellSouth has business insurance to cover liability, and that the costs of maintaining such insurance are included in TELRIC rates: "I know there's a shared and common cost for those type of factors." GA Tr. at 1002:1-16. This testimony directly contradicts BellSouth's assertion

[3] BellSouth instructs the Commission to "disregard" this agreement on the ground that it was not produced in discovery. BST Br. at 8. Yet, BellSouth never propounded a discovery request that would have required such production. Moreover, BellSouth acknowledges that NuVox's witness, Bo Russell, was not aware of this agreement until after Petitioners provided not only their initial discovery responses, but their supplemental responses (on December 7, 2004) as well. BellSouth thus has no basis to attempt to strike or discredit Petitioners' reliance on the NewSouth-AllTel Agreement, and it is telling that BellSouth has not attempted to do so. The Commission should therefore give the NewSouth-AllTel Agreement full consideration.

on brief that such costs "were not taken into consideration when establishing BellSouth's UNE costs." BST Br. at 12.[4]

BellSouth's reliance in its brief on a costing decision by the Iowa Utilities Board cannot undo this damage. Whatever costs are or are not included in Qwest's UNE rates in Iowa has no bearing on the costing factors that BellSouth has conceded were included in its UNE rates in Kentucky. In having paid those UNE rates, NuVox and Xspedius are thus entitled to benefit from the insurance for which they have paid a premium. That is, Joint Petitioners should be afforded a small measure of relief – capped at 7.5% of revenues already paid or owed[5] – when BellSouth's negligence forces them to incur losses.

4. Joint Petitioners' Position and Intent in Item 4 Is Unified and Clear.

Unbelievably, after hearing contrary testimony from Joint Petitioners' witnesses in nine hearings in this multi-state arbitration, BellSouth once again raises its argument that Joint Petitioners' position on Item 4 is not uniform. BST Br. at 13. Specifically, BellSouth asserts that Joint Petitioners did not agree on the meaning of "paid or payable" and "on the day the claim arose" as proposed in their language for Item 4. Yet Joint Petitioners have spoken with one voice at every hearing in BellSouth's nine-state region, testifying that (1) "paid or payable" means that the 7.5% cap is calculated based on the amounts that Joint Petitioners have paid or already owe BellSouth under the Agreement, and (2) "on the day the claim arose" means that the parties will

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[4] Even if BellSouth's contradiction of its witness is accepted, there is nothing in section 251, the FCC Rule's or this Commission's Rules that entitles BellSouth to recover the costs of providing UNEs, interconnection and collocation negligently through TELRIC rates.

[5] It bears emphasis that this number is a cap, and not a guaranteed award of damages or liquidated damages. KY Tr. at 25:15-16 ("It's a cap. It's not a guaranteed maximum.") (Russell). The injured Joint Petitioner, if able to prove causation attributable to BellSouth negligence, would obtain the amount of its injury, which could be far less than 7.5% of amounts paid or payable but in no event would exceed that amount. Thus, if NuVox simply gave a customer "a $60 credit, then BellSouth's liability, if you will, to NuVox would be $60," if such damage was caused by BellSouth's negligence. GA Tr. at 404:8-11 (Russell).

determine the date on which BellSouth committed negligence and base the 7.5% cap on the amounts paid or owed up to that date. These positions are very clear, and this language is very common contractual language. As such, this Agreement will indeed have one meaning and be enforced by both Joint Petitioners in the same way.

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

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

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

Joint Petitioners' proposed language for Item 5 is a necessary procompetitive and proconsumer measure for the Kentucky telecommunications market. *See generally* JP Br. at 15-18. It gives Joint Petitioners the ability to compete with BellSouth, via alternative yet commercially reasonable liability terms, and gives consumers a meaningful choice of service terms and conditions. *Id.* at 16-17. BellSouth, by contrast, is attempting to ensure that all CLEC tariffs and end user contracts are made in the image of its own legacy tariffs even while it simultaneously gives sweeter deals through the use of CSAs to its own favored customers (to keep them from switching to competitors). *Id.* at 15-16. The Commission therefore should adopt Joint Petitioners' language in order to level the playing field and give all parties the flexibility to compete effectively.

1. In a Competitive Market, BellSouth Is Not Permitted to Dictate the Terms By Which Its Competitors Do Business.

BellSouth is very candid that it asks this Commission to shield it from the effects of competition: it wants to be "in the same position that it would be in it the CLEC end user was a BellSouth end user." BST Br. at 15. This is not a legitimate position which the Commission can or should embrace. BellSouth may want to be in this position, but the 1996 Act mandates that BellSouth's monopoly status be displaced. As such, when an end user chooses to reject BellSouth in favor of a CLEC, BellSouth cannot continue to dictate (indirectly) the terms of the end user's service. The CLEC – in this case, Joint Petitioners – must not be punished (through the imposition of indemnification obligations) as a result.

Joint Petitioners deserve the flexibility to offer different limitation-of-liability terms to end users in order to compete. This flexibility is especially warranted now that it is apparent that BellSouth itself offers customers more favorable liability terms; Ms. Blake's remarkable and persistent inability to answer questions about BellSouth's custom contracts looks increasingly like an attempt to avoid admitting this fact. JP Br. at 15-16 (quoting GA Tr. at 999:11-12). *See also* FL Tr. at 947:20-22 ("Again, I don't know the details of every contract service arrangement."). For BellSouth to force Joint Petitioners to mirror its tariffed liability language even as BellSouth deviates from that language to win customers it serves through CSAs is blatantly unfair, anti-competitive and anti-consumer.

2. Joint Petitioners' Language Would Require Them to Retain Commercially Reasonably Liability Language in All Tariffs and Contracts; BellSouth's Hypothetical $1000 Late Penalty Is Absurd.

Besides its obviously anticompetitive rationale, BellSouth's only other response to Joint Petitioners' language for Item 5 is the allegation that such language would allow Petitioners to make outrageous promises to their end users and impose the costs of those promises on

BellSouth. BST Br. at 16-17. Joint Petitioners' position requires that such terms be commercially reasonable. JP Br. at 17. To use what Mr. Russell of NuVox recognized as a "ridiculous hypothetical" (GA Tr. at 403:14-15), if a Petitioner promised to pay an end user $5000 for late loop installation, that Petitioner would have no right to seek reimbursement from BellSouth. The same is true for the $1000 example in BellSouth's brief. BST Br. at 16-17. On their face those promises are not commercially reasonable, and they are a gross mischaracterization of what Petitioners seek to accomplish here. All Joint Petitioners seek is **the right not to eliminate a customer's right to relief** and to compete effectively with BellSouth's CSA offerings without being punished for it. JP Br. at 17.

For all these reasons, the Commission should adopt Joint Petitioners' position for Item 5.

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

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

Joint Petitioners' proposed language for Item 6 simply makes clear that all parties shall remain responsible for damages that are direct and foreseeable; such responsibility should not be avoided on the ground that there has been an agreement to eliminate damages that are "indirect, incidental, and consequential." *See generally* JP Br. at 18-21; Exhibit A at 3. Given that a chief aim of contract drafting is to make provisions – especially their defined terms – as clear as

possible, it is reasonable that the definition of "indirect, incidental and consequential damages" expressly excludes direct and foreseeable damages.

1. BellSouth Agrees That Direct Damages Are Not "Indirect, Incidental and Consequential."

BellSouth's position on this item virtually matches the Petitioners' position: "[i]f damages are direct and foreseeable then they cannot also be indirect, incidental or consequential." BST Br. at 19. As such, the parties apparently have a meeting of the minds on Item 6, in that both understand that direct damages shall be compensable and indirect damages shall not. Because a central aim in drafting any contract is to achieve as much clarity as possible, adoption of Joint Petitioners' language would be a sensible decision.

BellSouth should not be insulated from liability when its conduct directly and foreseeably injures anyone, be it a Petitioner or an end user. *See* JP Br. at 19 (citing Ky. Rev. Stat. § 355.2-715 authorizing incidental and consequential damages). This Agreement should expressly codify that proposition which BellSouth itself articulated in its brief, as noted above. It is not unreasonable to predict that, absent Petitioners' language, BellSouth would use this Agreement as a defense to a Petitioner's claim by arguing that foreseeable damages are indirect and thus not compensable. Curiously, BellSouth includes in its brief a colloquy on this point from the Florida hearing, in which Bo Russell notes that BellSouth's proposed language "could force the Joint Petitioners to be responsible for damages related to BellSouth's own negligence." BST Br. at 18 (quoting FL Tr. at 209-210). In other words, Petitioners' language is in fact necessary and would have legal effect, contrary to BellSouth's assertion. *See* BST Br. at 18.

It is also not unreasonable to predict that BellSouth would rely on this Agreement as collateral evidence against a claim by an end user of a Petitioner; though BellSouth is quick to argue that this Agreement cannot affect third parties, it may ignore that maxim to defend an end

user suit in or force protracted litigation another forum and argue that this Agreement bars liability. In other words, BellSouth wants to leave the Agreement incomplete, and then capitalize on its silence, to deprive end users of what may be a valid claim. If that is not BellSouth's intent, then it should have no objection to stating explicitly what it already accepts: that direct and foreseeable damages are not indirect, incidental, or consequential, and are compensable under the Agreement.

2. Placing Liability for Direct, Foreseeable Damages on Offending Parties Does Not "Gut" Limitation-of-Liability Provisions.

Because, as just explained, BellSouth recognizes the clear delineation that Petitioners' language creates between recoverable and non-recoverable damages, its characterization that Petitioners' language "guts any limitation of liability protections ultimately ordered" is demonstrably false. BST Br. at 19. Joint Petitioners' language does not expand any party's liability, but rather defines that liability more precisely. BellSouth agrees that direct and foreseeable damages are compensable. *See id.* It also agrees that foreseeable damages cannot be indirect. *Id.* Joint Petitioners' language merely codifies that agreed-upon set of definitions.

Joint Petitioners' proposal would not make compensable in Item 6 any damages that are not compensable in Item 4. Indirect damages would not become direct damages; unforeseeable damages do not become direct damages. As such, there is no expansion of liability for any party, and no limitation of liability has been "gutted."

For all these reasons, the Commission should adopt Joint Petitioners' language for Item 6.

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

POSITION STATEMENT: The Party receiving services should be indemnified, defended and held harmless by the Party providing services against any claims, loss or damage to the extent

reasonably arising from or in connection with the providing Party's negligence (subject to limitation of liability for negligence), gross negligence or willful misconduct.

Item 7 indemnification provisions must hold a party harmless when damage is caused to a third party by virtue of the other party's negligence. *See generally* JP Br. at 21-23. Both provisions are necessary to protect innocent parties from loss, and thus the provisions should provide the same level of protection. Just as BellSouth is wrong to propose complete elimination of damages to Joint Petitioners for its own negligence in Item 4, it is wrong to deny Joint Petitioners indemnification when they are sued for BellSouth's own negligence. Accordingly, BellSouth should indemnify Joint Petitioners from third-party claims up to a 7.5% cap (applicable to negligence).[6]

1. Contrary to BellSouth's Assertions, Evidence Shows that Petitioners Indemnify Their Customers for Damages Caused by Petitioners' Negligence.

BellSouth incorrectly asserts that Joint Petitioners' proposed language for Item 7 is "hypocrisy" because they do not offer similar terms to their own customers. BST Br. at 20. To the contrary, Joint Petitioners' business practices, which are evidenced in this record, comport exactly with the position they take in this arbitration. Joint Petitioners' Initial Brief quotes from and attaches documents demonstrating that Petitioners indemnify customers for Petitioners' own negligence. JP Br. at 22. It first quoted a sample NewSouth contract which states that the company indemnifies its end users against "damages and losses, to the extent directly caused by or arising out of the negligence or willful misconduct of NewSouth Communications." *Id.* (providing excerpt as Attachment 5). The brief also cited the tariffs and the template contract of Xspedius, all of which require end users to indemnify Xspedius only for the *end users'* own conduct. *Id.*

[6] BellSouth has deliberately left its proposal vague so that it may be construed to require Joint Petitioners to defend BellSouth and hold it harmless where BellSouth commits gross negligence or willful misconduct. Exhibit A at 4.

(providing excerpt as Attachment 3). BellSouth's demonstrably false statement therefore should be given no weight by this Commission.

Joint Petitioners are not asking more of BellSouth than is common or reasonable. Contracting parties typically are not able to avoid liability when their own negligence lands the other party in court. Rather, BellSouth has imposed this result on CLECs by virtue of its position as a monopolist with control over the local network. It is BellSouth who has flouted the industry standard, which as Petitioners' evidence shows is to indemnify other party for one's own negligence. Joint Petitioners' modest proposal of a 7.5% cap for such indemnification is a modest step toward creating a commercially reasonable Agreement.

2. Interconnection Agreements Are Contracts that Should Contain Common and Reasonable Indemnification Terms.

BellSouth's remaining argument is that this Agreement is not a "typical commercial" agreement and thus apparently should require Joint Petitioners to indemnify BellSouth for damages caused by BellSouth's negligence. BST Br. at 22-23. This argument, however, provides no support for BellSouth's position. Joint Petitioners have never denied that this Agreement is in large part governed by regulation. *See* JP Br. at 12 (acknowledging that BellSouth is "subject to regulation"). But that fact does not absolve BellSouth of any obligation to agree to commercially reasonable terms, most notably the standard practice whereby a party providing service bears an indemnification obligation for its own negligence.

As Joint Petitioners' own contracts and tariffs confirm, it is commercially reasonable to ask BellSouth to protect Joint Petitioners from third-party claims arising out of BellSouth's own negligence. Again, despite BellSouth's contention, Petitioners are not seeking "perfect service," rendering the *Virginia Arbitration Order* inapposite to this Item. *See* BST Br. at

21. Rather, Joint Petitioners simply ask that they have some ability to recover judgments or the costs of defending suits brought against them by virtue of BellSouth's negligence.

For these reasons, the Commission should adopt Joint Petitioners' language for Item 7.

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

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

Joint Petitioners cannot be stripped of their right to go to court above their objections. *See generally* JP Br. at 24-27. BellSouth's language, which would do precisely that (Exhibit A at 5), invites the Commission to subvert the jurisdiction of state and federal courts in violation of the Constitutions of the United States and the State of Kentucky. JP Br. at 25-26. This obviously wrong result, could occur for each and every claim that Joint Petitioners may assert, because BellSouth's language precludes seeking relief in court if one party – BellSouth – refuses to consent to the court's jurisdiction. Joint Petitioners' language, which permits adjudication in any competent forum, including this Commission, is by far the more appropriate provision.

1. <u>The Clear Expertise of This Commission in Resolving Regulatory Matters Does Not Provide Any Grounds For Denying Joint Petitioners Their Right to Go to Court</u>.

BellSouth's chief argument for denying Joint Petitioners' right to seek relief in court is that "state commissions are in the best position to resolve disputes" under interconnection agreements. BST Br. at 24. Joint Petitioners have never questioned this Commission's expertise.

Joint Petitioner Initial Testimony at 37:24-25 (Nov. 19, 2004) ("the Commission and the FCC are obviously the expert agencies"). While Joint Petitioners readily agree that the Commission is an expert agency on all matters related to interconnection, Petitioners cannot agree that all claims arising out of or related to the Agreement must be heard and resolved in this forum.

For this reason, Joint Petitioners cannot accept BellSouth's quite vague and potentially empty offer that "such matters which lie outside the jurisdiction or expertise of the Commission or FCC" may be heard in court; this language does not protect Petitioners' fundamental right to go to court intact. Exhibit A at 5. Indeed, BellSouth witness Kathy Blake has not in any hearing been able to identify, with any specificity, a claim that certainly may be heard in court under BellSouth's language. JP Br. at 25 (quoting Deposition of Kathy Blake at 348:7-10 (Dec. 8, 2004)). Joint Petitioners' language, by contrast, is quite clear that the parties may resort to any competent forum to adjudicate claims and would in no event exclude a party from its choice of forum. Given that the right to be heard in court is inviolate, as is the plenary jurisdiction of the courts, Joint Petitioners' language is the more prudent.

2. Primary Jurisdiction Referrals Do Not Divest Courts of Jurisdiction Nor Do They Enable Complainants to Obtain the Same Relief Available in Court.

BellSouth's alternative ground to keep claims out of court is the spectre of a primary jurisdiction referral. It argues that because a court may seek the input of a State Commission or the FCC in resolving claims, all claims should be forced to originate at one of those commissions. BST Br. at 25-26. This argument is legally incorrect. A primary jurisdiction referral does not demonstrate that the referring court lacks jurisdiction over the matter. Nor does a referral require dismissal of the case or deprive the court of jurisdiction for the remainder of the case. Rather, the doctrine of primary jurisdiction provides the court with a fact-finding tool, and enables the court to stay – not dismiss – a case pending the resolution of questions within the

expertise of an agency. *E.g.*, *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (primary jurisdiction referrals "stay[] further proceedings so as to give the parties reasonable opportunity to seek administrative ruling"). Thus, even if a court sought the opinion of this Commission via a primary jurisdiction referral, the substantive claim would remain under the jurisdiction of the court, and the parties would return to court for final resolution of the matters of liability and damages. The potentiality of such referrals therefore does not warrant stripping Joint Petitioners of the right to go to court from the outset.

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

Item No. 12, Issue No. G-12 *[Section 32.2]: Should the Agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?*

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

BellSouth has not provided any legitimate grounds for the Commission to hold that this Agreement, which the parties agree must be construed under Georgia law, should not follow Georgia doctrine regarding applicable law. That doctrine plainly states that all laws in effect at the time of contracting are deemed to apply to that contract unless the parties make the opposite intention clear. JP Br. at 28-29 (quoting, *inter alia*, *Magnetic Resonance Plus, Inc. v. Imaging Systems, Int'l*, 273 Ga. 525, 543 S.E.2d 32, 34-35 (2001); *Farmers' & Merchants' Bank of Monroe, N.C. v. Federal Res. Bank of Richmond*, 262 U.S. 649, 660 (1923)). Having already agreed to construe and enforce the Agreement in accordance with Georgia law, BellSouth cannot simply refuse to abide by one of the central doctrines of Georgia law. Joint Petitioners do not

voluntarily agree to the massive and novel exception BellSouth seeks to carve-out of applicable Georgia contact law.

1. BellSouth Has Testified That It Will Comply with the Law, and It Is Legally Presumed To Know the Law That Govern This Agreement.

BellSouth, which has repeatedly assured State Commissions that it intends to comply with the law, JP Br. at 32 (citing GA Tr. at 1060:23-24), is legally presumed to know what law applies to the Agreement. *Magnetic Resonance*, 543 S.E.3d at 34-35. Ms. Blake has testified that "[w]e will comply with the Commission's rules and orders." GA Tr. at 1061:22-23. *See also* BST Br. at 27 n.20. And she is aware of no laws that BellSouth intends to violate or ignore. GA Tr. at 1062:17-18; KY Tr. at 194:5-25. Further, BellSouth does not dispute that Georgia law will govern this Agreement. *See* BST Br. at 27. BellSouth therefore has no reason to block the application of Georgia contract law doctrine, which as a matter of law incorporates all statutes and rules extant at time of contracting, unless expressly exempted or displaced, to the Agreement.

The "certainty" that BellSouth purports to seek, BST Br. at 27, is already provided in Georgia law. BellSouth has not disputed the legal principles outlined in Georgia law. *See id.* Nor has it expressed confusion as to the principles contained in Georgia precedent governing the laws of contracts. BellSouth's professed "confusion" about which laws apply to this Agreement is thus revealed as an attempt to avoid complying with the law. Laws of general application are not mysteries, and they are not being obscured by Joint Petitioners. BellSouth should therefore be required to follow them, and should not succeed in denying Petitioners the benefit that laws of general application provide to competitors in the telecommunications environment.

2. BellSouth's "Compromise" Language Would Render the Vast Bulk of Applicable Law, Which Would Be Extremely Cumbersome to Reproduce Within the Agreement, Inapplicable.

BellSouth's more recent offer for Item 12 states that if one party wishes to apply "substantive Telecommunications law" to this Agreement, that party must petition this Commission for an affirmative ruling to that effect. Exhibit A at 6. If the Commission agrees, such "substantive Telecommunications law" applies only prospectively. *Id.* In other words, (1) laws and regulations enacted by Congress or the Kentucky Legislature, and (2) rules promulgated by the FCC and this Commission that predate this Agreement will not apply to this Agreement absent further litigation between the parties. BST Br. at 27. Furthermore, even where such litigation results in a finding that these laws apply, that law will only govern the parties' rights prospectively. Exhibit A at 6.

Under BellSouth's proposal, Joint Petitioners may only avail themselves of the rights already provided to them under the law if those rights are "expressly memorialized in the interconnection agreement." BST Br. at 27. According to BellSouth, every statute and regulation must be cited and reproduced within the four corners of this Agreement. This purported requirement is unreasonable, and likely impossible. To incorporate all law of general application regarding interconnection and unbundling would add hundreds, if not thousands, of pages to the Agreement. JP Br. at 29. It is moreover unnecessary as a matter of law; Georgia law presumes that BellSouth knows the law with which it must comply. *Magnetic Resonance*, 543 S.E.2d at 34-35.

BellSouth's position turns fundamental contracting principles on their head: sophisticated parties are absolved from following effective law unless a tribunal tells them that they must do so – implied exceptions to applicable law become the rule under BellSouth's

proposal. Georgia law plainly provides otherwise, *e.g.*, *Magnetic Resonance*, 543 S.E.2d at 34-35, and BellSouth has agreed to follow Georgia law. Joint Petitioners' language, which follows Georgia law to the letter, should therefore be adopted.

3. Joint Petitioners Are Not Seeking to Take Unfair Advantage by Reopening Settled Language.

BellSouth argues that Joint Petitioners' aim in Item 12 is to obtain the right to negotiate the Agreement "in a manner that BellSouth could not have anticipated." BST Br. at 27.[7] Yet as an entity that proclaims intent to follow the law, Tr. at 1060:23-24, BellSouth surely has anticipated applying generally applicable law to this Agreement. The law deems them to have done so. *Magnetic Resonance*, 543 S.E.2d at 34-35. Moreover, Joint Petitioners have made clear that the law they seek to incorporate in this Agreement does not comprise every arbitration or adjudication between a CLEC and an ILEC, but rather only laws of general application – federal and state statutes and regulations. JP Br. at 31. BellSouth's stalwart opposition to Joint Petitioners' language is thus little more than an attempt to avoid compliance with law or to at least create exceptions to applicable law that were never negotiated nor agreed upon (such exceptions may not be imposed on any party involuntarily).

Joint Petitioners' proposed language for Section 32.2 of the General Terms should therefore be adopted.

Item No. 26, Issue No. 2-8 *[Section 1.7]: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?*

POSITION STATEMENT: BellSouth is required to permit commingling and to perform the functions necessary to commingle a section 251 UNE or UNE combination with any wholesale

[7] The contrary is in fact true. The Joint Petitioners did not negotiate based on the unorthodox premise of implied exceptions to applicable law that BellSouth is attempting to insert into this Agreement.

service, including those BellSouth is obligated to make available pursuant to section 271 (*e.g.*, section 271 transport commingled with section 251 loops).

FCC Rules 51.309(e) and (f) give Joint Petitioners the right to connect Section 251 UNEs with Section 271 elements (JP Br. at 33-34); BellSouth can provide no legitimate ground to deny Petitioners this right. The only way that the Commission can adopt BellSouth's position is if it is willing to rule that 271 elements are not wholesale items (BST Br. at 35) – an obviously absurd conclusion that even BellSouth's own witness has ceased asserting. JP Br. at 35 (quoting GA Tr. at 1073:13-19). Further, to adopt BellSouth's position, the Commission would have to accept and embrace BellSouth's premise that it is entitled to avoid federal law by deliberately neglecting to tariff certain network elements: an untariffed element – according to BellSouth – cannot be a wholesale element. BST Br. at 35-36.[8] Joint Petitioners' language requires neither of these clearly erroneous premises and therefore should be adopted for this Agreement.

1. Commingling Is a State Issue Under the 1996 Act, and Moreover Was a Negotiated Item That Is Now Subject to Arbitration Under Section 252.

This issue is not about which network elements are available under Section 271, but rather whether Joint Petitioners may commingle such elements with Section 251 UNEs. Joint Petitioners are not in this issue requesting that this Commission identify and set prices for 271 elements. Accordingly, all of the precedent upon which BellSouth relies to dispute this Commission's jurisdiction over Item 26 is inapposite. BST Br. at 36-37 (quoting decisions from the Utah Public Service Commission and Illinois Commerce Commission). Commingling is a Section 251 obligation and it involves Section 251 elements and non-Section 251 elements.

[8] As related in Petitioners' Initial Brief, when asked during the Georgia hearing why certain elements, such as switching, are not tariffed, Ms. Blake simply responded "it's not the way we offer switching." JP Br. at 36 (quoting GA Tr. at 1074:25). This response demonstrates that BellSouth's interpretation of the FCC's commingling rule would allow it to eliminate the entire obligation at its whim.

The question whether Section 251 UNEs may be commingled with Section 271 elements is an issue that arises out of an FCC rule enacted to implement Section 251 and the issue was negotiated at length prior to this arbitration. Having been negotiated, this issue is properly included in this arbitration. *Coserv Ltd. Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 287 (5th Cir. 2003). As such, BellSouth is flatly incorrect in asserting that this Commission has no authority to decide this item; to the contrary, the Commission is required under Section 252 to rule on this matter, and to do so in accordance with federal law. 47 U.S.C. § 252(b)(4)(C).

2. The FCC Has Not, Contrary to BellSouth's Characterization of the *TRO*, Held That Only Tariffed Elements Are Wholesale.

BellSouth seeks to avoid connecting de-listed UNEs with UNEs. It thus argues, as it must, that de-listed UNEs are not "wholesale" and thus do not fall within the mandate of FCC Rule 51.309(e) and (f). BST Br. at 36. BellSouth's purported bright-line test for whether an element is "wholesale" is whether it is tariffed. *Id.* This test, which is found nowhere in the FCC's rule or order, would require complete abdication of regulatory enforcement by both the FCC and this Commission, as it would empower BellSouth to decide the degree of its own compliance with federal commingling rules depending on what it decided to tariff.

First, the FCC's statement that CLECs may "convert tariffed incumbent LEC services to UNEs" in no way prescribes or supports BellSouth's proposed limit on commingling. BST Br. at 35 (quoting *TRO* ¶ 585). The FCC's decision on conversion is something quite different than its holding that commingling of Section 251 elements with non-Section 251 elements (including Section 271 elements) is lawful. BellSouth's argument is thus inapposite from the outset.

Second, the phenomenon of Section 271 elements, in the absence of Section 251 elements, is wholly new; the FCC only recently de-listed certain UNEs. The fact that Section 271

transport or switching in BellSouth territory is thus "not offered as a wholesale service pursuant to a tariff" is both irrelevant and inconsequential. GA Tr. at 1071:15-16 (Blake). Surely the lack of a tariff for Section 271 checklist items no longer required to be unbundled under Section 251 would not excuse BellSouth from performing its commingling obligations.

Finally, to accept BellSouth's logic that "wholesale" means "tariffed" would be to allow it to set the parameters of its own regulatory compliance. If tariffing were the operation that defined what is "wholesale," then BellSouth could avoid commingling Section 251 elements with non-Section 251 elements altogether by declining to tariff non-Section 251 elements, including Section 271 elements. Surely the FCC did not intend to give BellSouth this unilateral, unchecked power.

For all these reasons, the Commission should adopt Joint Petitioners' proposed language for Item 26.

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

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

The FCC's Line Conditioning Rule, 47 C.F.R. § 51.319(a)(1)(iii), is not limited by what BellSouth chooses, today, to do with a local loop in serving its customers. *See generally* JP Br. at 38-44. That rule could not be clearer in requiring BellSouth to perform whatever line conditioning is necessary to ensure that a copper loop is suitable for *Joint Petitioners'* choice of service. JP Br. at 39. The FCC's stated rationale for the rule is also unambiguous in explaining

why it is a competitive, as well as a public interest, necessity that ILECs condition loops upon request, as such conditioning is "intrinsically linked to the local loop" and thus a fundamental component of unbundling. *Id.* (quoting *TRO* ¶ 643). BellSouth's language, which would empower it to refuse to perform line conditioning altogether, directly contravenes the FCC's Line Conditioning and TELRIC pricing mandates and therefore should be rejected.

1. BellSouth's Improper Interpretation of the *TRO* Would Enable It to Avoid Compliance with Federal Law Altogether.

BellSouth's language states that it must condition a loop only to the extent that it would do so for its retail operations. Exhibit A at 10. BellSouth is unapologetic in asserting that its wholesale division has no obligation to comply with the FCC's rule that it "***shall*** condition a copper loop at the request of the carrier seeking access," 47 C.F.R. § 51.319(a)(1)(iii), if BellSouth's retail division would not have made the same request so that such conditioning can be performed for the benefit of BellSouth's own customers. BST Br. at 41. Thus, in BellSouth's rationale, somehow the term "shall condition" in Rule 51.319(a)(1)(iii) becomes optional.

BellSouth purports that the basis for this position is "nondiscrimination" (BST Br. at 41) – yet the hearing testimony of BellSouth's witness Eric Fogle before the Georgia Commission suggests that BellSouth is actually engaging in blatant discrimination. *See* JP Br. at 43 & n.13. He stated that "**we no longer routinely remove load coils.**" GA Tr. at 813:16-17. The clear implication of his careful phrasing is that BellSouth at one time ***was*** routinely removing load coils in preparation to market its own advanced services. Perhaps BellSouth no longer performs such conditioning because its entire local network is now suitable for the services it has decided to offer, using the technology that it has decided to deploy. BellSouth, in order to defend its refusal to condition loops, therefore is forced to read Rule 51.319(a)(1)(iii) on a prospective basis only, such that what matters is what it will do tomorrow – which is extremely limited. Thus,

a CLEC is essentially foreclosed from obtaining line conditioning as ordered by the FCC because its request came later in time. The discriminatory design of this plan is obvious.

Commissioner Burgess of the Georgia Commission astutely observed at hearing that "literally [BellSouth] could wipe away [its] requirement and obligation." GA Tr. at 816:13-14. Commissioner Burgess then observed that BellSouth is attempting "to change the standard" for line conditioning without any legal basis. *Id.* at 812:18; *see also* JP Br. at 45. Commissioner Burgess's colloquy with Mr. Fogle aptly demonstrated that BellSouth's position on Item 36 is unlawful and unsupportable. BellSouth's refusal to allow competitors the same ability that BellSouth has to decide whether or not they want to condition loops at the same TELRIC rates that reflect the costs that BellSouth would incur if it decided to do additional line conditioning is blatantly discriminatory and is in plain violation of Section 251(c)'s non-discriminatory access mandate.

2. BellSouth Witness Eric Fogle Admitted at Hearing that the FCC Did Not State that Line Conditioning Can Only Be a Routine Network Modification.

BellSouth's primary argument in seeking to curtail its line conditioning obligations is its extraordinarily heavy reliance on one phrase from the text of the *TRO*: that line conditioning is "properly seen as" an activity that ILECs do for themselves. BST Br. at 41. As Joint Petitioners have already explained in their Initial Brief, this explanatory statement cannot erase the clear mandate "shall condition copper loops." JP Br. at 41-42. Further, this phrase describes BellSouth's quite separate Routine Network Modification obligation, codified at 47 C.F.R. § 51.319(a)(8), that does in part depend on what ILECs do for themselves. *Id.* at 41. But the line conditioning rule and obligation in 47 C.F.R. § 51.319(a)(1)(iii) permits no such comparison. The obligation is absolute.

In fact, Mr. Fogle conceded during cross examination in Georgia that the **FCC did not state or imply** that line conditioning "is never anything but a routine network modification." GA Tr. at 805:15-20; *see also* JP Br. at 41 (quoting FL Tr. at 690:6-7). Thus, BellSouth's own witness fatally undercut the company's entire argument on this Item. Mr. Fogle's concession demonstrates that BellSouth's proposed language for Item 36 is unreasonable and baseless.

In addition, BellSouth's reliance on the D.C. Circuit's decision in *USTA II*[9] on this point is dangerously misleading. BST Br. at 42. BellSouth provides a large block quote in which the Court of Appeals explain why an FCC rule does not require creation of a "superior network" and is therefore a permissible rule. The rule discussed in that passage is the Routine Network Modification rule, 47 C.F.R. § 51.319(a)(8), ***and not*** the Line Conditioning Rule at issue in Items 36 to 38. The paragraph immediately preceding that quoted by BellSouth paraphrases the rule at issue, and its language comes from Rule 51.319(a)(8) – ***exactly the rule that does not apply to line conditioning***. Thus, the quote that BellSouth uses has nothing to do with this Item, and should not be considered in the Commission's deliberations.

For all these reasons, the Commission should adopt Joint Petitioners' language for Item 36.

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

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

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9 *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

Because, as Joint Petitioners have demonstrated, Rule 51.319(a)(1)(iii) provides CLECs with the right to request the Line Conditioning they desire, all load coil removal must be performed at Commission-approved TELRIC-based rates. *See generally* JP Br. at 44-47. This Commission already has set such rates, as Mr. Fogle acknowledged, and BellSouth should not be permitted to ignore or refuse those rates simply because BellSouth has invented an "out" based on a creative and willful misreading of federal law. *Id.* at 44-45. The Commission's already-approved TELRIC rates must apply regardless of loop length; BellSouth cannot require Petitioners to pay exorbitant Special Construction rates that are set on an unpredictable individual case basis. *Id.* at 47 & n.15. Joint Petitioners' proposed language, which applies Commission-approved TELRIC-based rates for all load coil removal, is exactly in keeping with FCC rules and thus should be adopted.

1. The Line Conditioning Rule Is Technologically Neutral.

BellSouth's chief argument in Item 37 is that Joint Petitioners presently do not provide service over loops over 18,000 feet that require load coil removal, which BellSouth maintains somehow proves that the Petitioners are not entitled to such load coil removal at TELRIC rates. BST Br. at 45. Again for this Item we see BellSouth's "not business impacting" argument. BST Br. at 40. Yet Rule 51.319(a)(1)(iii) imposes no requirement on the requesting CLEC that it have some sort of time-sensitive business plan in order to obtain line conditioning. BellSouth "shall condition a copper loop at the request of the carrier seeking access," 47 C.F.R. § 51.319(a)(1)(iii), and that is the end of the matter.

Nor is it relevant that Joint Petitioners are exploring some advanced services that may not always require line conditioning. *See* BST Br. at 45. The fact that Etherloop may be able to run over load coils (and it may not) does not mean that Joint Petitioners do not have the right to

line conditioning under FCC rules. And in any event, Joint Petitioners are not required under Rule 51.319(a)(1)(iii) to vet their choices of technology with BellSouth or obtain its unsolicited engineering advice. The rule is plainly technology-neutral, and the type of service that Joint Petitioners seek to provide over a loop has no bearing whatever on BellSouth's obligation to condition it. BellSouth's attempt to avoid line conditioning based on its parochial view of what is a viable technology is therefore unavailing.

2. This Agreement Will Govern BellSouth's Loop Provisioning Through 2009, and Thus Must Address All Unbundling-Related Activities.

As summarized above, BellSouth seeks to avoid removing load coils on loops over 18,000 at TELRIC rates by noting that Petitioners do not presently provide services on such loops. BST Br. at 45. That fact may be true today. But this Agreement will govern the parties' relationship through 2009 or longer, and no one can predict the technologies or business opportunities may develop in that period. Joint Petitioners' language would ensure that they can provide innovative services to consumers over the life of the Agreement, while BellSouth's language would limit Joint Petitioners to only today's technology (and only to what BellSouth has decided it is willing to do with that technology). Clearly Joint Petitioners' language is the more beneficial to Kentucky consumers, and there is nothing in the law that says that BellSouth is entitled to cordon off competition and innovation by others by raising their costs in a manner that violates the FCC's unbundling and pricing rules.

For all these reasons, the Commission should adopt Joint Petitioners' language for Item 37.

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

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

The first argument that BellSouth advances as to Item 38 asserts that Joint Petitioners should be forced to accept the result of the CLEC Shared Loop Collaborative regarding bridged tap removal. BST Br. at 46. Petitioners' Initial Brief demonstrated that this argument is meaningless as a matter of law. JP Br. at 49. Rule 51.319(a)(1)(iii) is the governing standard for line conditioning, which includes bridged tap removal. In addition, the fact that some CLECs accepted something less than that rule via the Shared Loop Collaborative does not negate the FCC's mandate. *Id.* at 49. Nor does the rule require Joint Petitioners to participate in such collaboratives in order to invoke their line conditioning rights. BellSouth has therefore provided this Commission with no grounds to excuse BellSouth from removing bridged taps of all lengths at the TELRIC-compliant rates already properly established.

BellSouth then embarks on another iteration of its argument that Joint Petitioners presently do not require loops that are free of all bridged taps. BST Br. at 46. As explained above, this argument bears no relevance to the FCC's unconditional mandate that ILECs "shall condition copper loops." 47 C.F.R. § 51.319(a)(1)(iii). The rule cares not whether any CLEC has previously ordered such line conditioning, nor whether CLECs could choose a technology that is not impeded by accreted devices. BellSouth's persistent attempts to tie Petitioners to today's technologies and business practices are simply a baseless gambit for evading federal law.

The Commission should accordingly adopt Joint Petitioners' language for Item 38.

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

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

Joint Petitioners seek to permit only EEL audits that comply with the audit standards set forth by the FCC. *See generally* JP Br. at 49-57. The first such standard, articulated in the *Supplemental Order Clarification*,[10] is that BellSouth must have just cause to conduct the audit. *Id.* at 49-50. That standard plainly requires some rational, legitimate, and demonstrable cause to suspect non-compliance with the new high capacity EELs eligibility criteria – it cannot be met with conclusory statements or mere suspicions. *Id.* at 51. Joint Petitioners' language thus would require BellSouth to identify the circuits for which it has cause to suspect non-compliance and to provide available documentation to support the allegation of cause. Exhibit A at 12. This requirement is necessary to give meaning to the FCC's "for cause" standard for EEL audits, is therefore the appropriate language to govern EEL audits.[11]

1. Joint Petitioners Have Never Stated that BellSouth's Audit Rights Would Be Strictly Limited to those Circuits Identified in the Initial Notice of Audit.

BellSouth's chief argument for Item 51B is to mischaracterize Joint Petitioners as scofflaws seeking to block BellSouth from conducting EEL audits. It asserts that Petitioners wish to limit audits "to the circuits identified in the audit [notice]." BST Br. at 48. That assertion is

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[10] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd. 9587 (2000).

[11] BellSouth's claim that it will have cause to audit all circuits annually renders the FCC's "for cause" auditing standard a nullity. Indeed, Ms. Blake admitted at hearings in Georgia, Florida, and before this Commission that BellSouth seeks to audit 100% of Petitioners' EELs every single year. JP Br. at 51 (citing KY Tr. at 201:8-13; GA Tr. at 1093:16-25; FL Tr. at 997:8-10).

inaccurate in that it is incomplete. Mr. Russell stated at the hearing that BellSouth can expand the audit to cover additional circuits if the initial audit of identified circuits reveals sufficient cause to warrant an audit of additional circuits. JP Br. at 528 (citing GA Tr. at 456:9-13; FL Tr. at 238:8-14). BellSouth's persistent suggestion that Petitioners would limit BellSouth, regardless of the circumstances, to auditing only the circuits identified in the Notice is both hyperbolic and inaccurate.

2. EEL Audits Impose Costs Far Beyond What the *TRO* May Require BellSouth to Reimburse.

BellSouth also tries to persuade the Commission to grant it a regime of unlimited EEL audits by pointing out that FCC rules require BellSouth "reimburse the CLEC for its costs" if the audit does not reveal non-compliance. BST Br. at 50. The FCC's reimbursement requirement was adopted alongside, and not in lieu of, its "for cause" auditing standard. BellSouth's willingness to pay for audits does not translate into a CLEC obligation to grant BellSouth's wish for an annual fishing expedition.

Mr. Russell also discredited BellSouth's reimbursement excuse at the hearing by explaining that the direct costs of audits, such as copying charges and auditors' fees, are a small portion of the actual costs. Audits, as he explained, "are 'very intrusive' and create 'lost business opportunities,'" JP Br. at 52 (quoting GA Tr. at 40:9, 462:3-4), as well as "interruptions to the business" that are significant and yet not quantifiable. GA Tr. at 461:13. Nor is the competitive injury, whereby Petitioners' biggest competitor "went through all [their] business records," quantifiable. GA Tr. at 463:4. Thus, the FCC's rule that CLECs be reimbursed is small consolation when a Petitioner is audited without just cause.

Accordingly, Joint Petitioners' language for Issue 51B comports with the orders of both the FCC and this Commission orders and should be adopted.

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

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

BellSouth acknowledges that EEL audits must be conducted by an independent auditor, BST Br. at 50, and yet, in this context, refuses to agree to a tried-and-true contract provision that would ensure that result. To protect against abusive ILEC EEL audits, the FCC requires that EEL auditors be independent. JP Br. at 55. This issue is not about whether Joint Petitioners' or the Commission approves of BellSouth's selection, rather it is about whether BellSouth's selection complies with the law that governs at the outset, during and at the conclusion of an audit. It serves no party well to find out after the fact that the audit was unlawful or had to be suspended (or redone) because the auditor had conflicts or other circumstances prevented it from complying with AICPA standards for independence. Joint Petitioners' proposed language is necessary to give meaning to the FCC's independent auditor requirement and to ensure that the independence of any auditor and compliance with this federal mandate is assessed **prior to the start** of the audit and that audits are not conducted by auditors that are not independent. Exhibit A at 12. Without this protection, conflicts cannot be vetted, disputes cannot be avoided, identified or resolved, and no real meaning can be given to the FCC's independent auditor requirement. BellSouth's refusal to agree to this safeguard, which it willingly proposes in the context of other audits allowed under the Agreement, is cause for alarm to the Joint Petitioners and it should be for the Commission, as well.

A Truly Independent Auditor, Which the *TRO* Requires, Cannot Be Chosen in a Vacuum.

BellSouth argues that the parties' existing agreement to apply AICPA independence standards to EEL audits is sufficient to guarantee lack of bias. BST Br. at 50. Yet simply citing to a standard is insufficient; the standard must be *applied* to the actual circumstances of the audit. *See* JP Br. at 56. This review cannot be done in a vacuum – the presence of conflicts of interest cannot be predicted, or ruled out, in advance. It is therefore unremarkable that Petitioners cannot agree, today, that any specific auditor or auditing firm is certain to be independent. *See* BST Br. at 51. That determination can only be made after the need for an audit is shown and the identity of a proposed auditor is provided. There may be cases where an auditor would be acceptable for an audit of NuVox that was not acceptable for an audit of Xspedius. For example, BellSouth, Xspedius and NuVox each have financial auditors and potential conflicts stemming from such relationships should be vetted and discussed before a resource-intensive audit is conducted.

BellSouth's baseless attempt to claim that NuVox's recent objections to KPMG as an auditor demonstrate that NuVox would not agree that *any* auditor was independent, BST Br. at 51, is unavailing and demonstrative of the patent and irresponsible fabrication that has characterized BellSouth's advocacy in support of its unlawful campaign to conduct annual audit fishing expeditions designed to create mischief and financial uncertainty for NuVox and other CLECs. BellSouth fails to disclose that NuVox's objections to KPMG resulted from KPMG's breach of a non-disclosure agreement governing its conduct of the audit. Notably, but not surprisingly, given BellSouth's seemingly insatiable appetite for meddling, KMPG's breach involved BellSouth. KPMG itself recognized that its independence had been compromised and it

suspended work on the audit until the matter was resolved.[12] BellSouth also fails to disclose that NuVox has provided the names of several auditors with which it has no challenge regarding their independence. BellSouth's suggestion that NuVox's initial suggestion of KPMG was inappropriate, *see* BST Br. at 51, is baseless and, in any event, belied by its own hiring of that firm. In this regard, BellSouth fails to disclose that NuVox suggested KPMG and other well known firms as alternatives to the unknown ILEC consulting shop that BellSouth selected and that the Georgia Commission rejected after a full evidentiary hearing on the matter. BellSouth and NuVox could have discussed potential conflicts, but they did not. The process proposed by NuVox attempts to ensure that they will do so the next time. No party is well served by discovering conflicts that render independence impossible after the audit has been conducted.

BellSouth's reliance on decisions by this Commission and the North Carolina Commission regarding the issue of an independent auditor in complaint cases filed before both commissions by BellSouth is misplaced. *See* BST Br. at 51-52. First, and with due respect to this Commission and the North Carolina Commission, BellSouth fails to disclose that both of the orders cited by BellSouth have been stayed by federal district courts. Second, those orders interpret an existing interconnection agreement[13] – and they do not opine on the best way to ensure that the independent auditor requirement established in the *TRO* is effectuated in the new Agreement. Finally, "suffer first and complain later" is not a requirement of the *TRO*. Nor can it

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[12] NuVox and KPMG did resolve the matter and KPMG has resumed work on the Georgia audit with new personnel.

[13] Both orders in effect rejected BellSouth's claim that the independent auditor requirement did not apply. However, both appeared to ignore the agreement's dispute resolution provisions and graft onto the agreement a requirement that compliance with that particular requirement could only be enforced after a violation of the independent auditor requirement had been suffered. Neither the agreement at issue in those cases nor the FCC's *Supplemental Order Clarification* adopted a suffer a violation first and complain later regime that undoes the protection from abusive EEL audits that the rule was designed to provide in the first place. In any event, the Commission, in determining what the language of a new Agreement shall be is not bound by any prior determination of what another agreement required.

be one that is grafted onto the Agreement. Indeed, it essentially guts the very protection against abusive ILEC audits that the independent auditor requirement was designed to protect against. Rights are to be upheld and protected at the outset and at any time they are threatened. Nothing in the *TRO* suggests that the right to an independent auditor is a protection worth any lesser degree of protection. This Agreement, just like the one it replaces, should allow parties to seek dispute resolution and to protect their rights at a time of their choosing. The Commission should reject BellSouth's attempt to tie Joint Petitioners' hands in a manner that not only was not contemplated by the FCC's *TRO*, but that in fact decidedly undermines the protections established in that order.

The fact that BellSouth is unwilling to consider conflicts or other concerns that may be raised by Joint Petitioners with respect to BellSouth's choice of auditor is telling. If BellSouth is committed to complying with the FCC's independence requirement, it should not be hesitant to agree to terms that would best ensure compliance with the requirement at the outset of an audit. Joint Petitioners' language, which provides for mutual agreement on the chosen auditor, serves that purpose. This same protection has worked well for years in the context of jurisdictional factors audits. JP Br. at 56-57. Far from a means of "abuse and delay," this provision simply implements and complies with the FCC's independence standard in a many designed to avoid BellSouth's prior abuses and delay resulting from disputes that evolved over BellSouth's selection of an auditor that the Georgia Commission rejected after full evidentiary hearing (thus, clearly demonstrating that the only abuse and delay associated with the independent auditor issue in the past has been BellSouth's inexplicable and indefensible insistence on using a hired gun in place of a qualified independent auditor).

Accordingly, Joint Petitioners' language for Issue 51C should be adopted.

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

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

The TIC is a needless additive charge, arbitrarily derived without any regard to costs (let alone TELRIC or any other just and reasonable pricing principles), and therefore should not appear in this Agreement. *See generally* JP Br. at 57-63. Joint Petitioners presently pay, and will continue under this Agreement to pay, Commission-approved TELRIC rates for the switching and common transport associated with transiting traffic (*id.* at 57); BellSouth voluntarily agreed to these rates and the Commission in this arbitration may not upend that agreement.[14] Moreover, BellSouth deserves no additional payments from Petitioners. The Commission certainly should not require Joint Petitioners to pay for BellSouth's provision of switch records to *other* carriers, when Joint Petitioners themselves have not requested such records and have invested in facilities that obviate the need for such records. JP Br. at 62. The impropriety of the TIC charge – which BellSouth has never charged to Joint Petitioners previously (*id.* at 61) – is described in detail in Petitioners' Initial Brief.

BellSouth's defense of the TIC relies almost exclusively on the Georgia Commission's recent adoption of a $.0025/minute ***composite*** transiting rate ***on an interim basis***.

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[14] BellSouth futilely raises an old argument on this item, that Petitioners can avoid the TIC by connecting directly with every other carrier in the network. BST Br. at 54. Direct interconnection is both economically and operationally infeasible. Moreover, BellSouth has already agreed to perform transiting – that agreement is no longer disputable – and thus this argument seems rather more a threat to unlawfully withhold service than an argument on the merits of the TIC.

BST Br. at 50.[15] This decision is inapposite to this arbitration; the $.0025 composite rate that was adopted by the Georgia Commission was not the one proposed by BellSouth during the negotiations that led to the filing of this arbitration issue. For BellSouth now to ask the Commission to impose this rate on Petitioners is wholly improper, as the Commission may not lawfully impose it. This new composite TIC rate was neither litigated nor discussed prior to arbitration;[16] under *Coserv*, it cannot be arbitrated within this case. 350 F.3d at 487. State Commissions may arbitrate only issues that were negotiated by the parties and that implement, or are required for the implementation of, the obligations of the pro-competitive provisions of the 1996 Act. Thus, the issue to be decided in this case is whether BellSouth's additive TIC of $.0015 can lawfully be imposed on Joint Petitioners in addition to the TELRIC rates the parties already have voluntarily agreed applies to transit service.

Indeed, adoption of this new TIC rate would unlawfully dismantle the existing agreement of the parties regarding the rates applied to tandem switching and common transport – the two functionalities used to provide transit service. JP Br. at 57, 61. Allowing BellSouth to repudiate this agreement and substitute a new, non-negotiated rate into the Agreement would (if not overturned) set a dangerous precedent for future arbitrations – the parties could create new issues by refusing to honor agreed-upon language where it suited them. And, at bottom, it would be patently unfair. The Commission should therefore require BellSouth to adhere to its promise to transit traffic and charge Petitioners the established, TELRIC-compliant rates for tandem switching and common transport already included in this Agreement.

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[15] The $.0015 per minute of use rate proposed by BellSouth in this proceeding would apply in addition to the already agreed-upon TELRIC rates for the functionalities used in providing transiting service. It is not the same as, nor is it comparable to, the $.0025 composite rate that was at issue in the Georgia Commission's transit case.

[16] Ms. Blake admitted at the Georgia hearing that this rate had never been proffered for negotiation. JP Br. at 59 (citing GA Tr. at 1104:10-16).

For all these reasons, the Commission should reject the TIC for this Agreement.

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

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

Joint Petitioners are as committed as BellSouth in complying with all regulations regarding access to customer service records ("CSRs"); Petitioners' proposal for Item 86 merely ensures that their service is protected while the validity of BellSouth's allegations of CSR abuse is verified. *See generally* JP Br. at 63-68. Petitioners have agreed to provide a letter of authority ("LOA") upon request, and have never given BellSouth cause for concern in the past. *Id.* at 64. Yet because disputes may still arise, even when an LOA is provided, Joint Petitioners must remain protected from service suspension or termination unless they are proven to be in violation of law. *Id.* BellSouth's language does not afford them that protection, but rather continues to entitle BellSouth to suspend or terminate all Joint Petitioner services at its whim. *Id.* at 64-65; *see also* Exhibit A at 15.

Joint Petitioners simply cannot live with the uncertainty and unpredictability of BellSouth's language that Vice Chairman Baker of the Georgia Commission himself recognized. JP Br. at 65 (quoting GA Tr. at 688:16-22). Moreover, Joint Petitioners have modified their language to reflect commitments made by BellSouth witness Ferguson in subsequent hearings, yet, BellSouth mysteriously refuses to memorialize these commitments by accepting Joint Petitioner's proposed language in Kentucky. Instead, BellSouth, for some mysterious and unexplained reason clings to its own ambiguous proposal that does not adequately reflect the commitments of its own

witness. But, as the Commission knows, it is the contract language that must be relied upon and the statements of BellSouth's witness will provide no enforceable protections to the Joint Petitioners if BellSouth's deliberately ambiguous language is adopted.

BellSouth focuses its argument on Item 86B on the issue of producing LOAs. It argues that "[t]wo weeks is more than a sufficient amount of time to produce documentation[.]" BST Br. at 55. Joint Petitioners agree and that is why that issue has never been in dispute. Instead, the danger, which Petitioners have tried unsuccessfully to communicate to BellSouth, is that the mere production of an LOA may not be enough under BellSouth's language. JP Br. at 65. That language states that BellSouth may "discontinue to provisioning of existing services" if the allegedly unlawful conduct "is not corrected or ceased by the tenth (10^{th}) calendar day following the date of the initial notice." Exhibit A at 15.

Nothing in this language assures Petitioners that an LOA will save them from termination. This observation is not "paranoia," as BellSouth suggests. BST Br. at 56. It stems from a reasonable reading the language for Item 86B that BellSouth refuses to change (indefensibly, given the testimony offered by Mr. Ferguson in the later Florida hearing).

Moreover, at the earlier Georgia hearing, Mr. Ferguson was much less reassuring. He could not explain for the panel "how severe does the violation have to be?" in order to warrant termination of service. JP Br. at 65 (quoting GA Tr. at 688:16-22 (Vice Chm. Baker)). He also could not explain why, given BellSouth's inability to identify the circumstances that it believes warrant termination, the right to terminate nonetheless remains in BellSouth's proposal. JP Br. at 65. Given that, as Vice Chairman Baker stated, BellSouth is "going to put companies out of business" under this provision, GA Tr. at 703:21-22, BellSouth's language (even as revised after the Georgia hearing) is simply unacceptable.

Joint Petitioners' language merely prevents BellSouth from suspending or terminating service during the pendency of a dispute over alleged CSR misuse. Exhibit A at 14. This language in no way would absolve Petitioners for such unlawful conduct, if proven (to date BellSouth has never even made such as allegation). Rather, it protects Joint Petitioners and the customers whom they serve from total service shutdown while a dispute over unproven allegations is unresolved.

For all these reasons, the Commission should adopt Joint Petitioners' proposed language for Item 86B.

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

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

Item 88, which was negotiated in full and thus properly brought within this arbitration, seeks to prevent BellSouth from imposing usurious, non-cost based, and discriminatory fees for provisioning an element more quickly than the standard interval. *See generally* JP Br. at 68-73. BellSouth has already agreed to perform Service Expedites for Petitioners, *id.* at 68, and has conceded that it performs Service Expedites for customers of its retail service unit. *Id.* at 71. Service Expedites thus fall within BellSouth's Section 251 obligation to provision network elements in a nondiscriminatory manner at cost-based rates. *Id.* at 72-73. There is no justification, and certainly no evidentiary support, for BellSouth to impose a $200 per-circuit, per-day charge for an activity that it routinely does for itself.

BellSouth argues that Service Expedites are somehow impacted by or inconsistent with its SQM/SEEM obligations. BST Br. at 58. Service Expedites have nothing to with SQM or SEEM. Joint Petitioners are not guaranteed to receive Service Expedites upon request (they must, however, be provided on a non-discriminatory manner), and certainly not where BellSouth would violate state law. Accordingly, BellSouth's rationale that it must charge an exorbitant $200 rate to keep Service Expedites prohibitively expensive is not a means of complying with SQM/SEEM, but rather a discriminatory and anticompetitive attempt to drive up Petitioners' cost of service. JP Br. at 71.

Further, the fact that BellSouth is not required to honor every Service Expedite request does not render the offering "optional" or outside the realm of the Section 251 nondiscrimination requirement. *See* BST Br. at 59 ("an optional service offering cannot be considered a Section 251 obligation"). Having admitted to performing expedites for its own retail service unit, GA Tr. at 1116:7-23, BellSouth is obligated to perform the same service, where possible, by the mandate in Section 251 to provide "nondiscriminatory access to network elements." 47 U.S.C. § 251(c)(3). BellSouth has repeatedly professed its intent to remain nondiscriminatory within this Agreement (*e.g.*, BST Br. at 59); the Commission should ensure that its provision of Service Expedites comports with this intention.

As Joint Petitioners noted in their Initial Brief, presently there are no Commission-approved, TELRIC-compliant rates for Service Expedites. JP Br. at 73. That circumstance is principally due to BellSouth's unwillingness, including within this arbitration, to provide any cost support for this charge. *Id.* Joint Petitioners nonetheless wish to emphasize that they remain willing to a pay a TELRIC-compliant rate (which can be established in a subsequent Commission pricing case) for all Service Expedites provisioned under this Agreement. *Id.*

For all these reasons, the Commission should reject BellSouth's proposed fee for Service Expedites and require BellSouth to provision Service Expedites at TELRIC-compliant rates.

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

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

The Agreement should give Joint Petitioners a reasonable period of time in which to review, pay, and if necessary, dispute a BellSouth bill prior to incurring late penalties. *See generally* JP Br. at 73-76. Presently Joint Petitioners generally have 22 to 24 days to review literally hundreds of BellSouth invoices per month, *id.* at 72, most of which are comprised of several hundred pages. JP Br. at 75 & n.32; JP Hearing Exhibit 2. This payment window is far too brief and too unpredictable to provide Joint Petitioners with a reasonable and adequate period of time in which to review, dispute and pay their bills on a timely basis. Indeed, as shown in Petitioners' Initial Brief, both the Alabama and Georgia Commissions have agreed in the context of BellSouth's arbitration with ITC^DeltaCom. JP Br. at 76 (Georgia ordered BellSouth to allow 30 days "after the date the bill is sent out," and Alabama ordered payment 30 days after receipt of invoice). BellSouth can provide no reasonable basis for refusing to give Joint Petitioners the same provision. Certainly its argument that Petitioners' request is discriminatory (BST Br. at 63) utterly fails in light of the rulings of multiple state Commissions involved in the *ITC^DeltaCom* arbitrations (the North Carolina Utilities Commission and the Tennessee Regulatory Authority also ruled against BellSouth on this issue, but declined to give DeltaCom the full thirty days it had requested).

Having realized that its language is too onerous and likely to be rejected under the ITC^DeltaCom precedent, BellSouth has offered new language for Item 97. That is, BellSouth offers to forego late payment fees, in limited circumstances, for 30 days if and after a Petitioner notifies BellSouth of invoice delivery that is more than eight days past the invoice date. BST Br. at 64. This offer is insufficient, for it does not in fact give Petitioners a reasonable payment window and technically continues to render any payment not received in 22 days "untimely." Four state commissions already have determined that 22 days is **not** a reasonable period within which to require payment. Moreover, BellSouth's new language could result in Petitioners' being forced to remit larger deposits due their "untimely" bill payments. In other words, though Petitioners may avoid some late payment charges, BellSouth could easily penalize them for failing to adhere to the 22-day payment cycle in a different way. Joint Petitioners therefore cannot accept BellSouth's eleventh-hour revisions to its proposed language.

Joint Petitioners have demonstrated that BellSouth does not consistently deliver invoices – even electronic invoices – in a reasonable amount of time. JP Br. at 73-74. Ms. Blake could not avoid admitting in Georgia that "generally" Petitioners have only 22 days to pay. *Id.* at 74 (quoting GA Tr. at 1125:19). This amount of time is insufficient and BellSouth's new language proposal does not cure the deficiency..

The Commission should therefore adopt Joint Petitioners' proposed language for Issue 97, or in the alternative should adopt the same payment provision that it ordered in the ITC^DeltaCom arbitration.

***Item No. 100, Issue No. 7-6** [Section 1.7.2]: Should CLEC be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?*

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

Joint Petitioners' proposal for Item 100 simply ensures that they are informed, in a complete and timely fashion, of the exact amount they must pay in order to avoid service suspension or termination. *See generally* JP Br. at 77-82. When something as serious as complete shut-down is threatened, BellSouth should be required to provide all account information without delay and without having to be cajoled. *Id.* at 80-81. In fact, requiring Joint Petitioners – the customers – responsible for making the correct calculation of amounts due is not only onerous, but somewhat backward, as Commissioner Burgess of the Georgia Commission observed. *Id.* at 79 (quoting GA Tr. at 532:11, 21). There is no legitimate reason that BellSouth should not be forthcoming about exactly the amount that must be paid to avoid service termination, and the Commission should require BellSouth to do so. And given the extremely short deadline to pay – 30 days or less – the fact that "a CLEC that fails to timely pay undisputed amounts owed is in constant communication with BellSouth's collections group" (BST Br. at 66) is small solace; the CLEC should simply be informed on the notice of the proper amount to pay and such amounts should not include the acceleration of amounts due on potentially hundreds of other accounts (as BellSouth proposes).

The so-called "aging reports" that BellSouth purports to send do not resolve this issue. JP Br. at 81-82. BellSouth sends aging reports only at the affirmative request of the CLEC (BST Br. at 66) and even then stamps the legend "**Not an Official BellSouth Document**" on them,

calling into question Petitioners' ability to rely upon them (and clearly establishing that BellSouth does not intend to be encumbered by them). Given that BellSouth plainly does not intend to forgive Petitioners for mathematical errors, it should take the minimal effort to make clear, "in dollars and cents" (Exhibit A at 17), the amount that Joint Petitioners must pay to avoid service termination.

Further, as explained in Petitioners' Initial Brief, BellSouth's insistence on combining all past due amounts into one payment obligation has the effect of accelerating Petitioners' payments unreasonably – amounts that become due after the initial Notice of Suspension must be paid in a matter of days. JP Br. at 78. This acceleration invites confusion and enormous potential for error, *id.* at 79, and is neither addressed nor resolved in BellSouth's recent "aging report" proposal. Indeed, such aging reports make even clearer that BellSouth is attempting to accelerate Petitioners' payment obligations contrary to already agreed-upon terms. This conduct is unreasonable and places Kentucky consumers' service at undue and extreme risk.

For all these reasons, the Commission should adopt Joint Petitioners' language for Item 100.

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

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

BellSouth should not be entitled to excessive, onerous deposits under this Agreement. *See generally* JP Br. at 83-85. As Joint Petitioners have explained, deposits have competitive consequences – they tie up capital and preclude Petitioners from investing in the deployment of facilities and provision of services. *Id.* at 84. Although Petitioners have never

disputed BellSouth's right in certain circumstances to the financial security of a deposit, *id.* at 83, they are not willing to entertain demands for millions of dollars in up-front payments when their payment history and longstanding business relationships with BellSouth do not warrant such treatment. Rather, Petitioners are willing to accept a maximum deposit cap of one month for services billed in advance and two months for services billed in arrears. BellSouth already has agreed to this cap in the ITC^DeltaCom agreement. *Id.* at 84-85 (providing excerpt as Attachment 15). There is no evidence in the record indicating that Joint Petitioners should be subject to a more onerous maximum deposit provision.

Yet, BellSouth continues to demand that Petitioners' Agreement contain a two-month deposit requirement. Exhibit A at 18. While that deposit cap may be appropriate for a new CLEC with an unproven track record, it is not appropriate for Joint Petitioners, as they have longstanding business relationships with BellSouth. Indeed, BellSouth's purported financial risk here is minimal. *See* BST Br. at 68 (acknowledging that BellSouth has ceased requiring the maximum deposit from Petitioners). Joint Petitioners have always paid BellSouth and they have been doing it for nearly ten years. On the record, BellSouth itself averred that Joint Petitioners' payment history, particularly that of NuVox, has been "stellar." JP Br. at 83 (quoting GA Tr. at 1134:9-12 (Blake)). And to the extent that this agreement may be adopted by another CLEC, BST Br. at 67, BellSouth can certainly seek recourse from this Commission if that CLEC is not as reliable as Joint Petitioners. Moreover, Petitioners have proposed language that would enable BellSouth to request a larger deposit from new CLECs that opt in to the agreement. JP Br. at 85; Exhibit A at 18. BellSouth therefore has no reasonable basis to seek a full two-months' deposit from Joint Petitioners, and its attempt to do so is none other than an attempt to force Joint Petitioners to divert resources from facilities deployment and customer service innovation.

BellSouth's chief argument on this Item is that both BellSouth's and Joint Petitioners' tariffs require two months' billing as a deposit. BST Br. at 67. Petitioners' tariffs are not a credible reference, however, because the record is clear that Petitioners rarely actually sell services via tariff. Bo Russell of NuVox, for example, has testified that "99 percent of our customers purchase out of customer service agreements." JP Br. at 16 (quoting GA Tr. at 16). *See also* FL Tr. at 203:22-24. In addition, Petitioners' tariffs contain a refund mechanism that BellSouth does not offer: Mr. Russell explained in Georgia that NuVox will "give the customer their deposit back after one year of good payment history." GA Tr. at 538:5-6. Accordingly, Petitioners' tariffs in no way demonstrate that a two-month deposit is necessary.

For all these reasons, the Commission should adopt one of Joint Petitioners' alternative approaches: (1) the result reached by the parties to the ITC^DeltaCom arbitration requiring deposits of up to **one month's billing** for services paid in advance and up to **two months' billing** for services paid in arrears (Joint Petitioners are willing to combine this language with language that requires new CLECs to provide a deposit of up to two months for all services); or (2) establishing a maximum deposit amount of up to **one-and-a-half months' billing** for established CLECs such as the Joint Petitioners, while new CLECs that adopt the Agreement and do not have a record as established as those of the Joint Petitioners, would be subject to maximum deposit of **two-months** billings.

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

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

Joint Petitioners' request that any deposit demand be offset by amounts owed to them is fair, reasonable, and demonstrably necessary. JP Br. at 85-88. Just as BellSouth is entitled to protect itself from bad debt, so are Joint Petitioners. *Id.* at 86. Joint Petitioners are not able to request a deposit under the agreement, and this offset provision was developed as an alternative, more administratively practicable approach. Joint Petitioners have demonstrated that BellSouth has accrued multi-million dollar figures in unpaid charges to Petitioners (sometimes invalidly disputed and sometimes not disputed at all), yet purported to need yet a further capital outlay from those same Petitioners in the form of a deposit. *Id.*

The competitive consequences of this double-dipping is clear: Petitioners are both deprived of moneys owed to them as well as forced to go out-of-pocket by remitting a deposit. JP Br. at 86. Petitioners are therefore limited in their ability to use their limited capital to deploy facilities and to develop innovative services. *Id.* at 84. This situation is far from hypothetical: Xspedius witness James Falvey has testified that the predecessor to Xspedius was owed $25 million by BellSouth and yet BellSouth asked for a multi-million dollar deposit. *Id.* at 86. BellSouth's recent effort, mounted during the pendency of this arbitration, to become current on accounts payable to Xspedius (BST Br. at 70) does not ensure that its timeliness will continue. This initiative was doubtless inspired by this arbitration Item and cannot erase the millions of dollars in past due or overcharged amounts (Xspedius was recently owed $2.6 and overcharged by $2 million) for which BellSouth was responsible. JP Br. at 86.

As stated in Petitioners' Initial Brief, two State Commissions have agreed that a deposit offset is necessary. JP Br. at 86-87 (quoting and attaching decisions of Arbitrator Lehr (Kansas Corporation Commission) and an Administrative Law Judge from the Oklahoma Corporation Commission). Joint Petitioners therefore ask that this Agreement contain a similar

mechanism by which BellSouth's dilatory payments are balanced, in the form of reduced deposits. Once BellSouth establishes the same "good payment history" that it requires of the Joint Petitioners, any deposit offset would be returned.[17]

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

Item No. 103, Issue No. 7-9 *[Section 1.8.6]: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?*

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

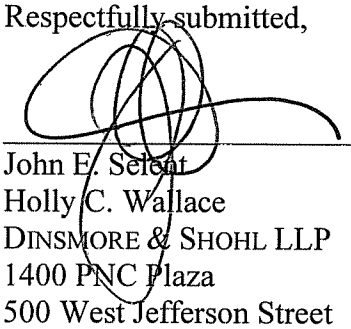
BellSouth should not be entitled to terminate service to a Joint Petitioner for failure to pay a deposit within 30 days unless (1) the Petitioner agreed to submit the requested amount, or (2) the Commission ordered the Petitioner to submit the requested amount. JP Br. at 88-89. Suspension or termination of service is too grave a remedy for what amounts to a dispute over, or failure to agree on, the precise amount requested. *Id.* at 89. And despite the fact that the parties agree on the general criteria for triggering deposits, BST Br. at 71, the fact also remains that legitimate disputes often arise over the precise dollar amount that BellSouth requests. JP Br. at 89 n.37. Indeed, BellSouth essentially concedes that its past deposit requests have been well in excess of the amount to which it was entitled, BST Br. at 68, and they have routinely been based on erroneous information. *See* GA Tr. at 540:10-14 (BellSouth refunded $800,000 of NuVox's deposit after initially requesting an increase in deposit of several million dollars). Accordingly,

[17] Notably, BellSouth refuses to amend its offset provision which is designed not only to provide no meaningful offset (BellSouth would simply dispute what it does not wish to pay), but to also trigger payment of deposits in excess of those negotiated and agreed to by the parties (the language proposed by BellSouth is not in accord with the provision BellSouth describes in its brief).

Joint Petitioners should not be forced, on pain of summary termination, to remit a deposit that has not been agreed to and may reasonably be determined to be excessive and unnecessary.

For these reasons, and because the services of Kentucky consumers and businesses hang in the balance, the Commission should adopt Joint Petitioners' language for Item 103.

Respectfully submitted,



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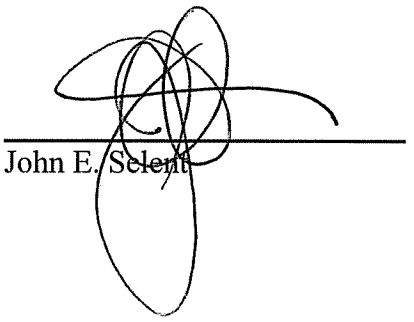
Certificate of Service

The undersigned hereby certifies that on this 12th day of August, 2005, a true and correct copy of the foregoing **JOINT PETITIONERS' POST-HEARING REPLY BRIEF** has been forwarded via first class U. S. Mail, overnight delivery, and electronic transmission to the attached service list.



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KENTUCKY PUBLIC SERVICE COMMISSION
CASE NO. 2004-00044

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