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October 17, 2005

VIA HAND DELIVERY

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

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

Dear Ms. O'Donnell:

Enclosed for filing in the above-styled case is the original and ten copies of the Joint Petitioner's Petition for Reconsideration and Clarification.

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

Very truly yours,

DINSMORE & SHOHL LLP

Holly C. Wallace

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Enclosure
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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMIS

ORIGINAL

IN RE:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED	)	Case No. 2004-00044

PETITION FOR RECONSIDERATION AND CLARIFICATION

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October 17, 2005

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NuVox Communications, Inc. ("NuVox") and Xspedius Communications, Inc., with its operating subsidiaries ("Xspedius"), collectively the "Joint Petitioners," hereby file this Petition for Reconsideration and Clarification of certain findings in the Kentucky Public Service Commission's ("Commission's") September 26, 2005 Order in this docket.[1] Joint Petitioners focus this discussion on points in the Order that are not clear as to their implementation, may not fully reflect evidence in the record, or are out of keeping with laws and rules governing interconnection and unbundling, particularly the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("1996 Act") and the implementing rules and orders of the Federal Communications Commission ("FCC").

Joint Petitioners believe that the Commission's findings for Issues 4, 5, 6, 7, 9, 12, 88, 97 and 102 require further consideration. Joint Petitioners respectfully request that the Commission modify the Order on these items, and adopt Joint Petitioners' position and proposed language. Moreover, the Joint Petitioners request the Commission to clarify its findings with regard to issues 36 and 51.

REQUEST FOR RECONSIDERATION

ISSUE NO. 12

Issue Statement: *Should the agreement state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?*

The importance of this issue cannot be overstated, as it goes to the very fabric of the Agreement and as the conclusion proposed by the Commission threatens to upend the foundation upon which negotiations were conducted and agreed-upon language was crafted. Moreover, the Commission's finding is contrary to Georgia contract law, which, by agreement of the Parties,

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[1] Kentucky Public Service Commission Order, Case No. 2004-00044 (Sept. 26, 2005) ("Order").

governs the Agreement and requires that exceptions to Applicable Law be negotiated by the Parties and be expressly incorporated into the Agreement. The Commission's apparent assumption that it may impose on the Joint Petitioners exceptions to Applicable Law, through this 252 interconnection arbitration, is erroneous and should be reconsidered. The Commission is confined to imposing arbitration results that are consistent with 251 obligations and cannot impose the creation of exceptions to those obligations, as BellSouth has proposed.

The Commission wants to encourage "meeting of the minds" between the Parties regarding the Agreement. Order at 8. For this very reason, the Commission should reconsider its initial decision and adopt the language proposed by the Joint Petitioners. The Joint Petitioners seek cover of Applicable Law, as defined in the Agreement, including Georgia contract law, the 1996 Act and the FCC's rules implementing it, to the extent they have not freely and voluntarily agreed to abide by other terms. *See* Section 32.1 of the General Terms and Conditions. The Parties reached a "meeting of the minds" to define Applicable Law, as defined in Section 32.1. And furthermore, where the Parties have reached a "meeting of the minds" to deviate from Applicable Law, the Parties have expressly memorialized such deviation in the Agreement. There has been no "meeting of the minds" on exceptions or deviations from any other aspect of Applicable Law other than what is expressly memorialized in the Agreement. Accordingly, whereas the Commission wants to encourage "meeting of the minds" and "understanding of the Agreement," by adopting BellSouth's language, the Commission will cause uncertainty as to the meaning of Applicable Law and will ultimately cause unnecessary disputes between the Parties. Accordingly, the Commission should reconsider its decision.

Joint Petitioners' Post-Hearing Brief explicates in detail the core legal doctrines that their proposed language is intended to replicate. JP Br. at 28-29. To recap, the Supreme Court of

Georgia has held that "[l]aws that exist at the time and place of the making of a contract, **enter into and form a part of it** ... and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter." *Magnetic Resonance Plus, Inc. v. Imaging Systems, Int'l*, 273 Ga. 525, 543 S.E.2d 32, 34-35 (2001)(emphasis added). This legal theory comports with contract law as viewed by the United States Supreme Court, which has held that "[l]aws which subsist at the time and place of the making of a contract ... **enter into and form a part of it** ...; this principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Farmers' & Merchants Bank of Monroe, N.C. v. Federal Res. Bank of Richmond*, 262 U.S. 649, 660 (1923)(emphasis added). The Supreme Court also held more recently that such laws apply to the contract "as if fully they have been incorporated in its terms[.]" *Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991). Further, although Parties have the right to waive or repudiate elements of applicable law, these waivers and repudiations "**must be expressly stated** in the contract." *Jenkins v. Morgan*, 100 Ga. App. 561, 112 S.E.2d 23, 24 (1959) (emphasis added). Stated differently, parties are "presumed to contract under existing laws, and **no intent will be implied** to the contrary unless so provided by the terms of their agreement." *Jenkins*, 100 Ga. App. at 562 (emphasis added).

This body of law demonstrates that, contrary to the Commission's conclusion, there is a "meeting of the minds" and "understanding in the interconnection agreement" as to what Georgia law, the governing law of the Agreement, requires. Order at 8. The Joint Petitioners do not disagree with the Commission that disputes over compliance with Applicable Law should be brought to the Commission, *id.* (or the FCC or a court of competent jurisdiction), but the Commission has an obligation to issue rulings in this arbitration that are consistent with

BellSouth's 251 obligations and may not impose exceptions to those obligations, as BellSouth's proposed language would allow. To do so, would be arbitrary and capricious and would not withstand appeal.

For these reasons, the Joint Petitioners request that the Commission reconsider its conclusion and adopt the language proposed by the Joint Petitioners for Issue No. 12.

ISSUE NO. 5

***Issue Statement**: Where a Party does not include specific limitation of liability terms in its tariffs and contracts, should it be obligated to indemnify the other Party for liabilities not limited?*

This is an issue of critical importance for both competitors and consumers. The Commission's conclusion that the Joint Petitioners adhere to some BellSouth declared "industry standard" in their "relationship with their end-users," Order at 4, severely limits the Joint Petitioners' ability to gain and maintain customers by offering more flexible and commercially reasonable liability terms. The Commission's assumption that there is a specific industry standard for limitation of liability that applies to all carriers is erroneous. Indeed, the record in this proceeding demonstrates that both the Joint Petitioners and BellSouth develop varying limitation of liability provisions in their Customer Service Arrangements ("CSAs"). The Commission should not require the use of an "industry standard" that does not exist, but rather should require that the Joint Petitioners' limitation of liability provisions be "commercially reasonable." At a minimum, the Commission's finding, and the subsequent implementing contract language, should be limited to the liability provisions contained in the Joint Petitioners' tariffs and not their CSAs. To do otherwise, would unfairly restrict the Joint Petitioners' ability to negotiate limitation of liability provisions in their CSAs when they already do so in order to compete with BellSouth, and BellSouth cannot deny that it does the same. Thus, the

Commission's Order would create an unfair advantage to BellSouth and would in effect penalize the Joint Petitioners for continuing to offer commercially reasonable limitation of liability provisions that are more flexible than those BellSouth prefers to impose – except when BellSouth finds it necessary to negotiate such terms in order to win a customer from or keep a customer from switching to a competitor such as one of the Joint Petitioners.

The Commission's basic assumption that there is a so-called "industry standard" limitation of liability is erroneous and not supported by the record in this proceeding. Despite its arguments to the contrary, the liability provisions included in BellSouth's tariffs do not constitute an "industry standard" which the Joint Petitioners should be forced to incorporate in their tariffs and CSAs. The Commission's reliance on BellSouth's defined "industry standard" will only serve to hinder the Joint Petitioners' ability to compete for customers in Kentucky that may insist on more favorable limitation of liability terms. If there were an industry standard for liability, and the Joint Petitioners maintain there is not, then it would not apply to CSAs, which are designed to be competitive agreements, individually negotiated outside of the Joint Petitioners' tariffs.

The Joint Petitioners have maintained throughout this proceeding that in order to compete with BellSouth, the incumbent, they must have the flexibility to negotiate CSAs with less stringent limitation of liability provisions. JP Br. at 16, JP Reply Br. at 12. Moreover, ***BellSouth is unable to assert that it subjects all of its own customers to the same rigid limitation of liability provisions contained in its tariffs.*** *See* GA Tr. at 1000:8-23, FL Tr. at 947:20-22, KY Tr. at 65:1-3. This demonstrates that both the Joint Petitioners and BellSouth incorporate liability provisions into their CSAs that may vary from what BellSouth includes in its

tariffs to win a customer in the competitive marketplace.[2] Accordingly, the Commission should not strip the CLECs of their competitiveness by forcing them to use BellSouth's *tariffed* limitation of liability provisions in their relationship with their customers. At a minimum, the Commission should limit this holding to the Joint Petitioners' tariffs and provide that a standard of commercial reasonableness applies to both Parties' use of limitation of liability provisions used in CSAs.

The Commission need not require the Joint Petitioners to adhere to an "industry standard," dictated by BellSouth, in order to limit BellSouth's potential exposure to liability. Moreover, BellSouth's concept that liability provisions should be crafted as though all customers are BellSouth customers is an affront to the 251 competitive standards the Commission must impose through this arbitration. Order at 4 ("BellSouth believes that it is appropriate that it be placed in the same position in which it would have been if the customer were a BellSouth customer rather than a Joint Petitioner customer."). Rather than impose BellSouth's "industry standard," the Commission should require that the Joint Petitioners' limitation of liability provisions meet a clear "commercially reasonable" standard. As stated in the their Post-Hearing Brief, the Joint Petitioners "believe that it is incumbent upon them to incorporate 'commercially reasonable' limitation of liability terms in all tariffs and contracts." JP Br. at 16; *see also* JP Reply Br. at 12. Accordingly, under the Agreement and applicable commercial law, BellSouth is protected from any damages to the extent the Joint Petitioners fail to act with due care and commercial reasonableness. *Id. See also*, JP Direct Test. at 28:7-9, 10-11.

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[2] In responding to questions before the Georgia Commission, BellSouth witness Kathy Blake stated that she is "not familiar with any of the details in a specific contract" regarding liability, but she has never denied that BellSouth's customer contracts sometimes provide more than mere bills credits. *See* GA Tr. at 999:11-12. Moreover, witness Blake acknowledged that more favorable terms may be offered where "other provisions in there that kind of justify accepting that additional risk." *Id.* at 1000:13-14.

For these reasons, the Joint Petitioners request that the Commission reconsider its conclusion and reject the language proposed by BellSouth for Issue No. 5. To the extent any language should be included in this Agreement that purports to limit directly or indirectly the terms of service under which CLECs such as the Joint Petitioners provide service to their Kentucky customers, such language should state nothing more than that the limitation of liability language included in Joint Petitioners' tariffs and CSAs must be commercially reasonable.

ISSUE NO. 7

Issue Statement: *What should the indemnification obligations of the Parties be under this Agreement?*

The Commission's finding that BellSouth's language should be adopted for this indemnification issue should be reconsidered and reversed. Order at 6. Adoption of BellSouth's language would be arbitrary and capricious as there is no support or rational basis for forcing the Joint Petitioners to indemnify BellSouth for BellSouth's negligent acts or violation of Applicable Law. There is absolutely no basis in the record or in Section 252 for this Commission to impose such draconian obligations on Joint Petitioners. Moreover, the result defies reason: BellSouth has statutory obligations that are implemented through interconnection agreements such as the one at issue here; the Commission's Order proposes to make Joint Petitioners responsible for damages that result as of BellSouth's failure to meet those obligations.

The Commission claims that, "the Joint Petitioners' proposal is too broad and too vague" Order at 6. Joint Petitioners respectfully ask the Commission to take a second and closer look, as the Joint Petitioners' proposal is not at all vague and is in fact much less broad than the BellSouth-proposed indemnification language that the Commission adopts. BellSouth's proposal, which the Commission adopts, requires Joint Petitioners to indemnify BellSouth for

any claim, loss or damage resulting from a Joint Petitioner's reliance on BellSouth's performance under the Agreement. In other words, with this language, which the Commission's Order adopts, Joint Petitioners are on the hook for all damages associated with ***BellSouth's*** failure to comply with the Agreement. As stated in the Joint Petitioners' Post Hearing Brief, this result "amounts to [BellSouth] foisting upon [the Joint Petitioners] the obligation to act as BellSouth's insurance carrier. It means that when BellSouth or its service causes harm, Joint Petitioners must pay. This cannot be the right result in any commercial context, even a regulated one." JP Br. at 23.

Finally, the Commission should be aware that both the Florida Public Service Commission ("FPSC") and the North Carolina Utilities Commission ("NCUC") have rejected BellSouth's proposed language. In its recommended arbitration order, the NCUC recommended rejecting BellSouth's proposed language and adopting the Joint Petitioners' language. NCUC Recommended Arbitration Order, Docket No. P-772, Sub 8, *et al.*, at 15 (July 26, 2005). The NCUC agreed with the Joint Petitioners' position that BellSouth, as the providing party, should indemnify the Joint Petitioners as the receiving parties to the extent they become liable due to BellSouth's "negligence, gross negligence, willful misconduct, or failure to abide by applicable law." *Id.* The FPSC also rejected BellSouth's proposal and held that "a party shall be indemnified, defended and held harmless against any claims, loss or damage to the extent reasonably arising from or in connection with the other party's gross negligence or willful misconduct." FPSC Final Order Regarding Petition for Arbitration, Docket No, 040130-TP, at 13 (Oct. 11, 2005). These state commissions effectively recognize that BellSouth's proposal could not be adopted in a Section 252 arbitration.

For these reasons, the Joint Petitioners request that the Commission reconsider its conclusion and adopt the language proposed by the Joint Petitioners for this Issue No. 7.

ISSUE NO. 88

***Issue Statement**: What rate should apply for service date advancement (a/k/a service expedites)?*

The Commission must reconsider its conclusion regarding the rates for service date advancement (a/k/a service expedites). At the onset, the Commission's basic premise that service expedites are not a Section 251 obligation, priced at TELRIC, is unsupported and is contrary to law. Order at 17. BellSouth has an obligation to provide nondiscriminatory access to UNEs at TELRIC rates and service expedites are part and parcel of that obligation. 47 U.S.C. §251(c)(3), JP Br. at 68, JP Reply Br. at 44. Contrary to BellSouth's claim, the nondiscriminatory access obligation is not limited to providing access to UNEs in standardized intervals. Order at 17, *see also* JP Br. at 71-73, JP Reply Br. at 44-45. The Commission indicates that it agrees with BellSouth but provides no legal basis for its conclusion (and BellSouth supplies none either). Order at 17. In this arbitration, the Commission cannot embrace a legally unsupported and unsupportable argument as a basis for a conclusion that no Section 251 obligation exists. To do so would be legal error.

The Order must be reconsidered and reversed on this issue as the imposition of tariffed, non-TELRIC compliant rates for expedites violates Section 251(c)(3), as well as federal TELRIC pricing mandates. 47 U.S.C. § 252(d)(1); 47 C.F.R. § 51.501 *et seq.*; *see also* JP Br. at 68, JP Reply Br. at 43. These violations are starkly evident as BellSouth itself does not incur the same costs in order to provide expedites to its own retail service unity. JP Br. at 71-72. Moreover, the imposition of such tariffed charges on Joint Petitioners does not reflect the degree to which

BellSouth waives imposing them on its retail unit (which is all the time) or the degree to which BellSouth waives its tariffed charges for its customers (which happens, but BellSouth failed to supply a witness that would say how often). GA Tr. at 1118:12-13 (Blake) (There "could be circumstances" where the expedited charge is waived.). Thus, by adopting BellSouth's federally tariffed rate for this Section 252 interconnection agreement, the Commission's decision permits the continuation of an unlawful and discriminatory practice in violation of Section 251(c)(3), and adopts a rate that fails to comport with the standards of Sections 251 and 252. This finding puts the Joint Petitioners at a distinct competitive disadvantage and is unlawful, arbitrary and capricious.

For these reasons, the Joint Petitioners request that the Commission reconsider its conclusion and adopt the language proposed by the Joint Petitioners for this Issue No. 88.

ISSUE NO. 9

***Issue Statement**: Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the interconnection agreement?*

The Commission must reconsider this issue as its conclusion upends a venue right that is included in the Parties' existing agreements and has been included in interconnection agreements since the passage of the 1996 Act. Moreover, the Commission's conclusion unlawfully strips federal and state courts of their jurisdiction and requires that the Parties bring all disputes under the Agreement to the Commission before proceeding to any court. Order at 7.

The Commission concludes that it has primary jurisdiction over issues regarding implementation of the Agreement. Order at 7. As discussed by the Joint Petitioners, the range and scope of disputes that could arise under the Agreement is tremendous, JP Reply Br. at 18, and although it is likely that the Commission will be the appropriate venue for many disputes

arising out of the Agreement, it is not the case that it will be the proper forum for all disputes and the Commission should not foreclose the Joint Petitioners' options to seek resolution in alternative venues. GA Tr. at 417:14-17 (Falvey) ("...there may be federal rules implicated...we just want the option to take a federal rule dispute to federal court...."), *Id.* at 418 ("...you might have a Robinson Patman claim or some kind of other non-telecom claims mixed with the telecom claims and then the Commission might feel that it's not within its expertise."); JP Br. at 26 ("Adjudication in a court of law may also, in certain circumstances, be more efficient."). In addition, Chapter 278 of the Kentucky Revised Statutes does not grant the Commission the authority to award damages resulting from tortious conduct or breach of contract, for example. "KRS 278.260 grants the Commission only 'original jurisdiction over complaints as to rates or service of any utility.'" *In the Matter of: John Arthur Yarbrough v. Kentucky Utilities Company*, Case No. 2004-00189, 2005 Ky. PUC LEXIS 609 (July 13, 2005). Moreover, as discussed in the Joint Petitioners' Reply Brief, even if the Joint Petitioners seek resolution in a court of law and the court makes a primary jurisdiction referral to the Commission, under the doctrine of primary jurisdiction, the court could look to the Commission for guidance while retaining jurisdiction. JP Reply Br. at 19-20.

As with Issue No. 7 discussed above regarding the Parties' indemnification provisions, the two other commissions that already have opined on this issue have rejected BellSouth's position and prudently declined to accept BellSouth's invitation to strip states and federal courts of their inherent jurisdiction. The FPSC concluded that "either party shall be able to file a petition for resolution of a dispute ***in any available forum***." FPSC Final Order Regarding

Petition for Arbitration, Docket No, 040130-TP, at 15 (Oct. 11, 2005).[3] In addition, the NCUC has issued a recommended order proposing to adopt the language proposed by the Joint Petitioners concluding that it "appears questionable whether the ***Commission could approve an agreement depriving either set of courts [state and federal] of their jurisdiction to hear claims from parties seeking dispute resolution***." NCUC Recommended Arbitration Order, Docket No. P-772, Sub 8, *et al.*, at 18 (July 26, 2005).

The NCUC decision underscores the fundamental legal error in the Commission's conclusion. With all due respect, this Commission may not lawfully restrict the jurisdiction of Kentucky state or federal courts. Based on the record in this proceeding and in consideration of the FPSC and NCUC decisions, the Commission should reconsider its Order and adopt Joint Petitioners' proposal which maintains the status quo, JP Br. at 24 ("Joint Petitioners' existing agreements afford them the right to go to court, as BellSouth concedes."); s*ee also* GA Tr. at 1036:20 (Blake) ("I believe it's in at least one of them."); FL Tr. at 965:14-16 (Blake) ("I have seen it in at least one of them I recall.") by allowing the Parties, and not the Commission, to decide the proper venue to file their claims.

For these reasons, the Joint Petitioners request that the Commission reconsider its conclusion and adopt the language proposed by the Joint Petitioners for this Issue No. 9.

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[3] The FPSC's order included *dicta* indicating that it believes that it has primary jurisdiction over many disputes and that petitions filed in an improper forum would be subject to dismissal, but nevertheless, the FPSC not foreclose any venue options of the Parties. *Id.* (As discussed above, under the doctrine of primary jurisdiction, dismissal is not typically the result of a primary jurisdiction referral.) In any event, Joint Petitioners continue to expect that most disputes will be brought first to state commissions; however, they refuse to voluntarily foreclose their right to bring a claim to a court of competent jurisdiction.

ISSUE NO. 97

Issue Statement: *When should payment of charges for service be due?*

In its Order, the Commission found that BellSouth's proposed due date is reasonable and that Joint Petitioners have been able to comply with this standard. Order at 17. Joint Petitioners respectfully request reconsideration and reversal of this decision by adopting Joint Petitioners' proposed language, as it is patently reasonable to start the 30 day window on the day BellSouth posts a bill electronically (or upon which the postal service or other courier service confirms delivery). The record shows that BellSouth, on average, takes 7 days to post or deliver a bill. JP Br. at 74. *See also* JP Direct Test. at 105:9-10 (Nov. 19, 2004). It further shows that the continuation of the current regime, as proposed by BellSouth, subjects Joint Petitioners to unpredictable and abbreviated times in which to review pay or dispute BellSouth's bills. JP Br. at 74, JP reply Br. at 46.

The record does not show anything to reasonably support adoption of BellSouth's position. To begin with, in stating that Joint Petitioners have been able to comply with BellSouth's standard, the Commission relies on that portion of the record wherein BellSouth witness Blake notes that BellSouth hasn't had trouble with NuVox paying its bills. Order at 17, *citing* T.E. 175. Notwithstanding the fact that this is BellSouth's testimony, and the fact that it does not reflect NuVox's behind-the-scenes painstaking efforts to pay timely over 1,100 BellSouth monthly bills to avoid late payment charges, the Commission mistakenly combines NuVox's ability to comply with the standard with Xspedius's ability to comply with the standard. The Commission's Order states that "Joint Petitioners" have been able to comply with the standard when, in reality, there is no record evidence that Xspedius has been able to comply. Accordingly, the Commission's analysis is in error, and it should reconsider its initial finding.

Moreover, although NuVox is diligent in paying its monthly BellSouth bills, this does not mean a heavy burden would not be lifted with the extra few days a 30-days-from-receipt payment period would give NuVox. The Commission should not penalize NuVox for its extraordinary efforts. These extra few days will allow NuVox (and Xspedius for that matter) to review bills more thoroughly, pay those bills, and, when necessary, dispute those bills prior to incurring late payment charges. Even BellSouth knows the importance of the extra few days allotted in a 30-days-from-receipt payment period, for BellSouth measures its payment of Joint Petitioner bills within 30 days from the ***receipt*** of an invoice. JP Br. at 75. Indeed, based on BellSouth's payment history, it appears that BellSouth, too could use the extra few days and predictability inherent in the Joint Petitioners' proposal. JP Br. at 76, footnote 31 (emphasis added).

Contrary to the Commission's Order, the record also contains no evidence of the "difficult system changes which would be required if Joint Petitioners prevail." Order at 17. At best, the record contains a claim that unspecified changes would be difficult. BST Test. at 6:3-12 (Morillo), BST Rebuttal Test. at 7:11-20 (Morillo). Nobody knows what is entailed or really how difficult it would be. Given the BellSouth did not even object to the NCUC's decision to impose a due date measured from receipt of bills (at least with respect to electronic bills), it is evident that the changes required would not be very difficult at all. BellSouth Telecommunications Inc.'s Comments to Joint Petitioner' Objections to Recommended Arbitration Order, Docket No. P-772, Sub 8, et al. (Oct. 14, 2005).

For these reasons, the Joint Petitioners request that the Commission reconsider its conclusion and adopt the language proposed by the Joint Petitioners for this Issue No. 97.

ISSUE NO. 4

***Issue Statement**: What should be the limitation on each party's liability in circumstances other than gross negligence or willful misconduct?*

In its Order, the Commission concluded that BellSouth's proposed language, which limits BellSouth's liability to service credits, is reasonable. Order at 3. With due respect, BellSouth's proposed language is far from reasonable, and there is no basis for it to be found in Sections 251 or 252 of the Act. To be sure, there is nothing in Section 251 of the Act that indicates that BellSouth's negligent failure to comply with its obligations should be of no consequence to BellSouth and that the costs associated with such failures should be assigned solely to the Joint Petitioners. In short, BellSouth's proposal, which leaves Joint Petitioners solely responsible for 100% of the costs associated with BellSouth's negligence, is not reasonable in any context, even a regulated one. JP Br. at 11, 13; JP Reply Br. at 7.

Moreover, Joint Petitioners did indeed explain why their proposed cap of 7.5% of amounts paid or payable was commercially reasonable. JP Br. at 10-14. As noted in Joint Petitioners' Post Hearing Brief, service contracts generally include liability terms that provide relief for harm caused through negligence. JP Br. at 10. At hearing, Mr. Russell explained that Joint Petitioners' proposal is in keeping with "contracts of other vendors and service providers." *Id.* citing Tr. at 376:10-11. Joint Petitioners filed written testimony discussing these contracts, which often include liability for negligence up to "15% to 30% of the total revenues actually collected or otherwise provided for over the entire term of the relevant contract." What Joint Petitioners propose is a compromise between the liability provisions of these contracts and the terms proposed by BellSouth.

The proposed 7.5% liability cap is a reasonable and proportional balance between the risk of incurring harm versus the revenues that will be generated under this Agreement. Accordingly,

the Commission should rehear this issue and adopt Joint Petitioners' proposed language. At the very least, the Commission should resolve this issue by stating that each party will be responsible for their own negligent acts in performing services under the Agreement.

ISSUE NO. 6

Issue Statement: *How should indirect, incidental or consequential damages be defined for purposes of the agreement?*

In its Order, the Commission found that the language proposed by the Joint Petitioners is "not necessary" and should not be placed in the interconnection agreement. Order at 5. Considered in context, Joint Petitioners do not take the Commission's decision to constitute a rejection of Joint Petitioners' position. Indeed, Joint Petitioners applaud the Commission's acknowledgement that BellSouth cannot use its proposed language to limit its liability to any end users, including those of the Joint Petitioners, and by indicating that such end users will have redress in courts of general jurisdiction. *See id.*

ISSUE NO. 102

Issue Statement: *Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owned by BellSouth to CLEC?*

In its Order, the Commission found that the issue of the amount owed by a CLEC to BellSouth and the amount owed to a CLEC by BellSouth are distinct issues. With this finding, the Commission declined to accept the Joint Petitioners' position. Joint Petitioners respectfully disagree with the Commission that there are two distinct issues. The record shows that BellSouth has a history of amassing giant amounts past due. JP Br. at 86 ("BellSouth is far from timely in paying CLEC invoices."); Falvey Depo. Tr. at 318:21-319:21 (BellSouth owed Xspedius's predecessor, e.spire, $25 million in unpaid reciprocal compensation); GA Tr. at 994:8-16 (Blake) (BellSouth has only been timely for 38% of the invoices provided by KMC as

measured 30 days from BellSouth's receipt of KMC's invoices). The fact that these amounts may be disputed should not be dispositive, as these amounts often go unpaid for weeks, months and years. JP Br. at 86, *citing* Falvey Depo. Tr. at 318:21-319:21 (Xspedius only recouped the $25 million it was owed in unpaid reciprocal compensation after it filed multiple actions across the BellSouth region.). While such amounts are withheld, BellSouth holds onto capital that otherwise could be dedicated to a deposit or to demonstrating that there is no need for a deposit. *Id.*, *citing* Falvey Depo. Tr. at 319:2-3 ("BellSouth was 'sitting on over $20 million of [e.spire's] revenue' and yet continued to seek a deposit."). Since these issues are not separate and are instead quite interrelated, Joint Petitioners respectfully request rehearing on this issue and that the Commission adopt Joint Petitioners' position and proposed language.

In the event that the Commission is not persuaded that BellSouth control of amounts past due to Joint Petitioners (whether disputed or not) is interrelated to the deposits issue, Joint Petitioners respectfully request that the Commission modify its order so as to address the appropriate language to implement the Commission's decision. Joint Petitioners respectfully request that the Commission order the Parties to adopt Joint Petitioners proposed language modified so that it applies only to undisputed past due amounts. As discussed in Joint Petitioners' briefs, BellSouth's proposal should be rejected as it fails to subject BellSouth to the same good payment history standard that applies to Joint Petitioners (and as such, it is discriminatory). BellSouth's proposal also works injustice in that it appears to require not just restoration of the offset, but it also would require a Joint Petitioner to remit the full amount of deposit originally requested (even if the Parties agreed or this Commission found that a lesser amount was appropriate). JP Br. at 88. Although BellSouth has made numerous representations that this is not BellSouth's intent and that the restoration of the offset would not trigger

collection of the full deposit amount requested, BellSouth has inexplicably refused to modify its language on this issue.

For the foregoing reasons, Joint Petitioners request that the Commission rehear and reverse its initial decision on this issue. At a minimum, the Commission, for the foregoing reasons, should modify its order to clarify that the Joint Petitioners' proposed language will be adopted with the caveat that offsets will pertain only to undisputed past due amounts.

REQUEST FOR CLARIFICATION

ISSUE NO. 36

Issue Statement: *How should line conditioning be defined and what should BellSouth's obligations be with respect to line conditioning?*

In its Order, the Commission found that line conditioning is a routine network modification, not the creation of a superior network, and that BellSouth must provide line conditioning when requested by the Joint Petitioners as specified in 47 C.F.R. 52.319(a). Order at 11. Joint Petitioners hereby request that the Commission clarify its decision so that it sets forth Joint Petitioners' proposed language as the language the Commission adopts for incorporation into the Agreement. As the Order now stands, it finds in favor of Joint Petitioners, but it does not specifically conclude that Joint Petitioners' proposed language is to be adopted in the Agreement. This clarification will be consistent with the Commission's findings on Issues 37 and 38, where the Commission adopts Joint Petitioners' position that line conditioning must be approved at the Commission's already set TELRIC rates. Order at 12 and 13.[4]

[4] All parties agree that Issues 36, 37 and 38 should be decided uniformly; that is one side's position prevails on all three issues (as the Commission has found in its Order). JP Br. at 47 ("Like Item 37, this issue [38] is resolved in the Joint Petitioners' favor with the proper resolution of Item 36."); *see also* BST Br. at 40, footnote 33 ("Because all of these issues [36, 37 and 38] are interrelated as they address BellSouth's line conditioning obligations in both a general and specific fashion, BellSouth will brief them together.").

ISSUE NO. 51

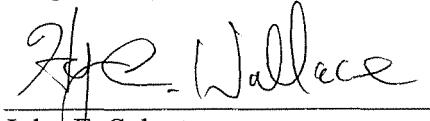
Issue Statement: *Should there be a notice requirement for BellSouth to conduct an audit and who should conduct the audit?*

In its Order, the Commission declined to address this issue due to pending litigation on the subject matter in federal court where NuVox, BellSouth, and the Commission are named Parties. Joint Petitioners request that the Commission clarify its decision to find that no audit language will be included in the Agreement (or that such audit provisions will be inoperative)[5] until such time as the Commission decides the issue in this arbitration docket. It would be unfair and unjust to conclude otherwise as the EEL audit provisions will remain incomplete until the Commission completes its arbitration of this issue or until the parties negotiate a resolution to it.

CONCLUSION

For all these reasons, Joint Petitioners respectfully request that the Commission's Order be modified as to issues 12, 5, 7, 88, 9, 97, 4, 6, and 102, as well as clarified with regard to Issues 36 and 51, as explained herein.

Respectfully submitted,



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and

[5] In making this request, Joint Petitioners are seeking to temporarily suspend BellSouth's audit rights while this issue remains unresolved.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of October 2005, a true and correct copy of the foregoing has been forwarded via first class U.S. Mail, to the following.

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