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December 17, 2004

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

Re: ***In the matter of Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries, Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, before the Public Service Commission of the Commonwealth of Kentucky, Case No. 2004-00044***

Dear Ms. O'Donnell:

Enclosed for filing in the above-staled case with the Public Service Commission of the Commonwealth of Kentucky is an original and eleven copies of the Rebuttal Testimony of the Joint Petitioners.

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

Very truly yours,

DINSMORE & SHOHL LLP

John E. Selent

JES/bmt
Enclosures

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 AND XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC	)	CASE NO. 2004-0044

REBUTTAL TESTIMONY OF THE JOINT PETITIONERS

Marva Brown Johnson on behalf of KMC Telecom V, Inc. & KMC Telecom III LLC
Raymond Chad Pifer on behalf of KMC Telecom V, Inc. & KMC Telecom III LLC
John Fury on behalf of NuVox Communications, Inc. and
NewSouth Communications Corp.
Hamilton Russell on behalf of NuVox Communications, Inc. and
NewSouth Communications Corp.
Jerry Willis on behalf of NuVox Communications, Inc. and
NewSouth Communications Corp.
James Falvey on behalf of the Xspedius Companies

ORIGINAL

December 17,

PRELIMINARY STATEMENTS

WITNESS INTRODUCTION AND BACKGROUND

KMC: Marva Brown Johnson

Q. PLEASE STATE YOUR FULL NAME, TITLE, AND BUSINESS ADDRESS.

A. My name is Marva Brown Johnson. I am Senior Regulatory Counsel for KMC Telecom Holdings, Inc., parent company of KMC Telecom V, Inc. and KMC III LLC. My business address is 1755 North Brown Road, Lawrenceville, Georgia 30043.

Q. IN YOUR DIRECT TESTIMONY, YOU WERE ASKED A SERIES OF QUESTIONS REGARDING YOUR POSITION AT KMC, YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND AND THE COMMISSIONS BEFORE WHICH YOU PREVIOUSLY HAVE TESTIFIED. IF ASKED THOSE SAME QUESTIONS TODAY, WOULD YOUR ANSWERS BE THE SAME?

A. Yes, the answers would be the same.

Q. PLEASE IDENTIFY ALL ISSUES FOR WHICH YOU ARE OFFERING TESTIMONY.

A. I am prepared to sponsor and adopt all testimony sponsored by my colleague Mr. Pifer. Mr. Pifer and I will be sharing the duty of serving as KMC's regulatory policy witness in all nine of the BellSouth arbitrations. Depending on the hearing schedule adopted by the Commission, I may appear at the hearing as a substitute for Mr. Pifer.[1]

[1] The following issues have been settled: 1/G-1, 3/G-3, 10/G-10, 11/G-11, 13/G-13, 14/G-14, 15/G-15, 16/G-16, 17/1-1, 18/1-2, 19/2-1, 20/2-2, 21/2-3, 22/2-4, 24/2-6, 25/2-7, 28/2-10, 29/2-11, 30/2-12, 31/2-13, 32/2-14, 33/2-15, 34/2-16, 35/2-17, 39/2-21, 40/2-22, 41/2-23, 42/2-24, 44/2-26, 45/2-27, 47/2-29, 48/2-30, 49/2-31, 51/2-33(A), 52/2-34, 53/2-

General Terms and Conditions	2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 8/G-8, 9/G-9, 12/G-12
Attachment 2: Unbundled Network Elements	23/2-5, 26/2-8, 27/2-9, 36/2-18, 37/2-19, 38/2-20, 43/2-25, 46/2-28, 50/2-32, 51/2-33(B)&(C), 57/2-39
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Supplemental Issues	108/S-1 thru 114/S-7

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position, as set forth herein, and associated contract language on the issues indicated in the chart above by rebutting the testimony provided by various BellSouth witnesses.

KMC: Raymond Chad Pifer

Although Ms. Johnson sponsors this testimony on behalf of KMC, Mr. Pifer submits his profile in addition to Ms. Johnson's as he may appear as the live witness at the hearing.

Q. PLEASE STATE YOUR FULL NAME, TITLE, AND BUSINESS ADDRESS.

A. My name Raymond Chad Pifer. I am Regulatory Counsel to KMC Telecom Holdings, Inc., the parent company of KMC Telecom V, Inc. and KMC Telecom III, LLC. My business address is 1755 North Brown Road, Lawrenceville, Georgia 30043.

35, 54/2-36, 55/2-37, 56/2-38, 58/2-40, 59/2-41, 60/3-1, 61/3-2, 62/3-3, 64/3-5, 66/3-7, 67/3-8, 68/3-9, 69/3-10, 70/3-11, 71/3-12, 72/3-13, 73/3-14, 74/4-1, 75/4-2, 76/4-3, 77/4-4, 78/4-5, 79/ 4-6, 80/4-7, 81/4-8, 82/4-9, 83/4-10, 84/6-1, 85/6-2, 86/6-3(A), 87/6-4, 89/6-6, 90/6-7, 91/6-8, 92/6-9, 93/6-10, 98/7-4, 105/7-11, 107/11-1, and 115/S-8.

Q. IN YOUR DIRECT TESTIMONY, YOU WERE ASKED A SERIES OF QUESTIONS REGARDING YOUR POSITION AT KMC, YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND AND THE COMMISSIONS BEFORE WHICH YOU PREVIOUSLY HAVE TESTIFIED. IF ASKED THOSE SAME QUESTIONS TODAY, WOULD YOUR ANSWERS BE THE SAME?

A. Yes, the answers would be the same.

Q. PLEASE IDENTIFY ALL ISSUES FOR WHICH YOU ARE OFFERING TESTIMONY.

A. I am prepared to sponsor and adopt all testimony sponsored by my colleague Ms. Johnson. Ms. Johnson and I will be sharing the duty of serving as KMC's regulatory policy witness in all nine of the BellSouth arbitrations. Depending on the hearing schedule adopted by the Commission, I may appear at the hearing as a substitute for Ms. Johnson. The issues for which either I or Ms. Johnson will offer testimony include those set forth in the following chart which has been updated to reflect the settlement of issues up to the date of this filing.

General Terms and Conditions	2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 8/G-8, 9/G-9, 12/G-12
Attachment 2: Unbundled Network Elements	23/2-5, 26/2-8, 27/2-9, 36/2-18, 37/2-19, 38/2-20, 43/2-25, 46/2-28, 50/2-32, 51/2-33(B)&(C), 57/2-39
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Supplemental Issues	108/S-1 thru 114/S-7

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position, as set forth herein, and associated contract language on the issues indicated in the chart above by rebutting the testimony provided by various BellSouth witnesses.

NuVox/NewSouth: John Fury

Q. PLEASE STATE YOUR FULL NAME, TITLE, AND BUSINESS ADDRESS.

A. My name is John Fury. I am employed by NuVox as Carrier Relations Manager. My business address is 2 North Main Street, Greenville, SC 29601.

Q. IN YOUR DIRECT TESTIMONY, YOU WERE ASKED A SERIES OF QUESTIONS REGARDING YOUR POSITION AT NUVOX/NEWSOUTH, YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND AND THE COMMISSIONS BEFORE WHICH YOU PREVIOUSLY HAVE TESTIFIED. IF ASKED THOSE SAME QUESTIONS TODAY, WOULD YOUR ANSWERS BE THE SAME?

A. Yes, the answers would be the same.

Q. PLEASE IDENTIFY ALL ISSUES FOR WHICH YOU ARE OFFERING TESTIMONY.

A. I am sponsoring testimony on the following issues:

General Terms and Conditions	None
Attachment 2: Unbundled Network Elements	37/2-19, 38/2-20
Attachment 3: Interconnection	65/3-6
Attachment 6: Ordering	None
Attachment 7: Billing	None
Supplemental Issues	None

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position, as set forth herein, and associated contract language on the issues indicated in the chart above by rebutting the testimony provided by various BellSouth witnesses.

NuVox/NewSouth: Hamilton ("Bo") Russell

Q. PLEASE STATE YOUR FULL NAME, TITLE, AND BUSINESS ADDRESS.

A. My name is Hamilton E. Russell, III. I am employed by NuVox as Vice President, Regulatory and Legal Affairs. My business address is 301 North Main Street, Suite 5000, Greenville, SC 29601.

Q. IN YOUR DIRECT TESTIMONY, YOU WERE ASKED A SERIES OF QUESTIONS REGARDING YOUR POSITION AT NUVOX/NEWSOUTH, YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND AND THE COMMISSIONS BEFORE WHICH YOU PREVIOUSLY HAVE TESTIFIED. IF ASKED THOSE SAME QUESTIONS TODAY, WOULD YOUR ANSWERS BE THE SAME?

A. Yes, the answers would be the same.

Q. PLEASE IDENTIFY ALL ISSUES FOR WHICH YOU ARE OFFERING TESTIMONY.

A. I am sponsoring testimony on the following issues:

General Terms and Conditions	2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 8/G-8, 9/G-9, 12/G-12
Attachment 2: Unbundled Network Elements	26/2-8, 27/2-9, 36/2-18, 43/2-25, 46/2-28, 50/2-32, 51/2-33(B) & (C)
Attachment 3: Interconnection	63/3-4
Attachment 6: Ordering	86/6-3(B), 94/6-11
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Supplemental Issues	108/S-1 thru 114/S-7

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position, as set forth herein, and associated contract language on the issues indicated in the chart above by rebutting the testimony provided by various BellSouth witnesses.

NuVox/NewSouth: Jerry Willis

Q. PLEASE STATE YOUR FULL NAME, TITLE, AND BUSINESS ADDRESS.

A. My name is Jerry Willis. I was formerly the Senior Director — Network Development for NuVox, from May 2000 until September 2003. Since September 2003 I have been retained as a consultant to NuVox. I can be reached care of NuVox witness Hamilton Russell at 2 North Main Street, Greenville, SC 29601.

Q. IN YOUR DIRECT TESTIMONY, YOU WERE ASKED A SERIES OF QUESTIONS REGARDING YOUR RELATIONSHIP WITH NUVOX/NEWSOUTH, YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND AND THE COMMISSIONS BEFORE WHICH YOU PREVIOUSLY HAVE TESTIFIED. IF ASKED THOSE SAME QUESTIONS TODAY, WOULD YOUR ANSWERS BE THE SAME?

A. Yes, the answers would be the same.

Q. PLEASE IDENTIFY ALL ISSUES FOR WHICH YOU ARE OFFERING TESTIMONY.

A. I am sponsoring testimony on the following issues:

General Terms and Conditions	None
Attachment 2: Unbundled Network Elements	23/2-5, 57/2-39
Attachment 3: Interconnection	None
Attachment 6: Ordering	88/6-5
Attachment 7: Billing	None
Supplemental Issues	None

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position, as set forth herein, and associated contract language on the issues indicated in the chart above by rebutting the testimony provided by various BellSouth witnesses.

Xspedius: James Falvey

Q. PLEASE STATE YOUR FULL NAME, TITLE, AND BUSINESS ADDRESS.

A. My name is James C. Falvey. I am the Senior Vice President of Regulatory Affairs for Xspedius Communications, LLC. My business address is 7125 Columbia Gateway Drive, Suite 200, Columbia, Maryland 21046.

Q. IN YOUR DIRECT TESTIMONY, YOU WERE ASKED A SERIES OF QUESTIONS REGARDING YOUR POSITION AT XSPEDIUS, YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND AND THE COMMISSIONS BEFORE WHICH YOU PREVIOUSLY HAVE TESTIFIED. IF ASKED THOSE SAME QUESTIONS TODAY, WOULD YOUR ANSWERS BE THE SAME?

A. Yes, the answers would be the same.

Q. PLEASE IDENTIFY ALL ISSUES FOR WHICH YOU ARE OFFERING TESTIMONY.

A. I am sponsoring testimony on the following issues:

General Terms and Conditions	2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 8/G-8, 9/G-9, 12/G-12
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Supplemental Issues	108/S-1 thru 114/S-7

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position, as set forth herein and associated contract language on the issues indicated in the chart above by rebutting the testimony provided by various BellSouth witnesses.

GENERAL TERMS AND CONDITIONS[2]

Item No. 1, Issue No. G-1 [Section 1.6]: ***This issue has been resolved.***

Item No. 2, Issue No. G-2 *[Section 1.7]: How should "End User" be defined?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 2/ISSUE G-2.

A. The term "End User" should be defined as "the customer of a Party". *[Sponsored: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

[2] Please note that the disputed contract language for all unresolved issues addressed in this testimony is attached to Joint Petitioners Direct Testimony filed with the Commission on November 19, 2004 as **Exhibit A**. Because this is a dynamic process wherein the Parties continue to negotiate, Joint Petitioners intend to file an updated version of Exhibit A and an updated issues matrix prior to the hearing.

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT THIS ISSUE IS NOT APPROPRIATE FOR ARBITRATION. [BLAKE AT 4:17-19]

A. For all the reasons stated in our direct testimony, we cannot understand why BellSouth continues to insist that this issue is not appropriate for arbitration. This issue arose from the Parties' negotiation of EEL eligibility criteria from the TRO. During those negotiations, it became evident that BellSouth was scheming to use a restrictive definition of End User to artificially curtail its obligations and restrict Joint Petitioners' rights. Our discussions then turned to the definition in the General Terms and to various other uses of the term which is widely scattered throughout the Agreement. We would not agree to BellSouth's proposed re-wording of the FCC's EEL eligibility criteria nor would we agree to a definition of End User that was clearly going to be employed as a means to clandestinely reduce BellSouth's unbundling obligations and Joint Petitioners' rights to UNEs made available through the FCC's TRO. If BellSouth does not want to arbitrate the issue, it can accept our position and our proposed definition. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES BELLSOUTH PROVIDE ANY LEGITIMATE JUSTIFICATION TO SUPPORT ITS INSISTENCE ON A RESTRICTIVE DEFINITION OF END USER?

A. No. BellSouth has no legitimate justification for insisting on a definition of End User which it then seeks to use throughout the Agreement in a manner that at times artificially limits its obligations and restricts Joint Petitioners' rights. Ms. Blake's claim that ISPs are not End Users is illustrative of the problems BellSouth seeks to create with its definition. *See* Blake at 5:23-24. As explained in our direct testimony, BellSouth's claim

regarding ISPs is belied by the fact that the Parties agree to treat ISPs as End Users in Attachment 3 of the Agreement and that the industry has treated them as End Users for more than 20 years. If an ISP is our customer, it is the ultimate user of the telecommunications services we provide. The same holds true if our customer is a doctor's office, bakery, factory or another carrier. Our negotiations with BellSouth revealed that BellSouth will seek to use its definition to attempt to inappropriately curb Joint Petitioners' right to use UNEs as inputs to their own wholesale service offerings. There is no sound legal or policy foundation for BellSouth's position. All that is behind it seems to be pure mischief. *[Sponsored: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT THE JOINT PETITIONERS' DEFINITION OF END USER CREATES UNCERTAINTY AS IT COULD REFER TO ANY CUSTOMER? [BLAKE AT 6:8-11]

A. We disagree with BellSouth's assertion that it is our proposed definition that would create uncertainly. Our definition is simple and avoids the mischief that BellSouth seeks to create with respect to who is or isn't an "ultimate" user of telecommunications. To us, that inquiry is meaningless. Our definition is intentionally designed to refer to any customer of either Party so as to permanently upend BellSouth's attempt to essentially trick us into giving up rights to use UNEs as wholesale service inputs. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, once Joint Petitioners receive a commitment from BellSouth that its proposed definition will not be used to artificially limit BellSouth's obligations and Joint Petitions rights with respect to UNEs (*i.e.*, BellSouth will not attempt to create limitations on our ability to use UNEs as wholesale service inputs), we will endeavor to resolve this issue by visiting each use of the term End User and determining whether we can accept the use of the restrictively defined term in each instance or whether we will insist that it should be replaced with the term End User/customer (meaning any customer) or simply customer. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 3, Issue No. G-3 [Section 10.2]: ***This issue has been resolved.***

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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 4/ISSUE G-4.

A. In cases other than gross negligence and willful misconduct by the other party, or other specified exemptions as set forth in CLECs' proposed language, liability should be limited to an aggregate amount over the entire term equal to 7.5% of the aggregate fees, charges or other amounts paid or payable for any and all services provided or to be provided pursuant to the Agreement as of the day on which the claim arose. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY JOINT PETITIONERS' PROPOSED LIMITATION OF LIABILITY LANGUAGE IS APPROPRIATE.

A. Joint Petitioners have proposed language that would impose financial liability, under a clear formula based on the percentage of the aggregate fees, charges or other amounts paid or payable for any and all services provided or to be provided pursuant to the Agreement, on the Party whose negligence caused harm to the other. Liability would be assessed up to a percentage cap on this aggregate amount as of the day the claim arose. This provision is reasonable and appropriate in order to ensure that the aggrieved Party is compensated for the true value of the loss it incurred when service is disrupted or impaired. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH WITNESS BLAKE CLAIMS THAT JOINT PETITIONERS' PROPOSAL "MAKES NO SENSE" AND THAT THE JOINT PETITIONERS' POSITION IS ABSURD. [BLAKE AT 7:2, N.2] DO YOU AGREE?

A. No, obviously not. If Ms. Blake does not understand the proposal, perhaps it is because she had not participated in the negotiation sessions where it was discussed at length. If BellSouth chooses to present a witness that does not understand the issue or claims not to understand the issue, that is its prerogative. However, BellSouth's gambit does not make the Joint Petitioners' proposal incomprehensible or absurd. As explained at length in our direct testimony, Joint Petitioners' proposal is hybrid proposal that is based upon what is typically found in commercial contracts. It makes an incremental move away from the "elimination of liability" language that BellSouth has enjoyed for far too long and toward what is more typically found in commercial contracts absent overwhelming market

dominance by one party. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. ARE JOINT PETITIONERS SEEKING "TO HAVE BELLSOUTH INCUR THE PETITIONERS' COST OF DOING BUSINESS"? [BLAKE AT 9:2-3]

A. No. Ms. Blake's claim that the costs associated with *BellSouth's* negligence or "failures by BellSouth to perform exactly as the contract requires" (BellSouth's own words) can fairly be considered part of the "Petitioners' cost of doing business" is patently untenable. *See* Blake at 9:1-4. BellSouth should be fully responsible for its negligent actions and for any failure on its part to perform as the contract requires. In short, BellSouth's negligence and other non-performance should be part of *BellSouth's* cost of doing business and not that of the Joint Petitioners. Thus, it is BellSouth that seeks to engage in inappropriate cost shifting here. To properly allocate responsibility for negligence or non-performance, Joint Petitioners' proposed language for this issue should be adopted and BellSouth's proposed language should be rejected. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. MS. BLAKE SUGGESTS THAT BELLSOUTH NEGLIGENCE OR NON-PERFORMANCE IS A RISK PROPERLY ALLOCATED TO JOINT PETITIONERS AS A RESULT OF SOME BUSINESS DECISION YOU MAKE. IS THAT CORRECT? [BLAKE AT 9:1-4]

A. No, not at all. Indeed, we are here today to tell the Commission that we do not voluntarily make a business decision to accept risks associated with BellSouth's negligence or non-performance. With our proposed language, Joint Petitioners are simply seeking to ensure that BellSouth incurs a meaningful level of liability for its own

negligence/non-performance. We also are attempting to limit BellSouth's ability to improperly shift those risks and associated costs to the Joint Petitioners. Notably, Joint Petitioners' proposal applies equally to themselves as it does to BellSouth – each Party must take some measure of responsibility for its negligent actions and other non-performance. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN YOUR RECENT CHANGE IN CONTRACT LANGUAGE TO STATE THAT THE PROPOSED LIABILITY FORMULA WOULD BEGIN AS OF THE DAY THE CLAIM AROSE AS OPPOSED TO THE DAY PRECEDING THE DATE OF FILING THE APPLICABLE CLAIM OR SUIT. [BLAKE AT 7:N.2, 7:2-8:17]

A. In an effort to appease BellSouth's concern that the Joint Petitioners' proposed language could provide incentive to Joint Petitioners to wait to file claims until several months after the harm occurred in order to increase BellSouth's exposure, Joint Petitioners revised their language. Accordingly, as now proposed, BellSouth's liability exposure would begin the day on which the claim arose. Therefore, there could be no "gaming" of the system, whereby the Joint Petitioners could hold-off filing of a negligence claim for several months to increase the amount of potential liability under the "rolling" 7.5% cap. Despite BellSouth's claim that the Joint Petitioners' revised proposal "does nothing to cure the absurdity of the Joint Petitioners' position", *see* Blake at 7:n.2, this is a significant concession on the part of the Joint Petitioners to address BellSouth's concern.

Despite the concession offered by Joint Petitioners, BellSouth now claims that the Joint Petitioners could "inappropriately argue that the 'day the claim arose' was at the end of

the Agreement." *See* Blake at 7:16-17. BellSouth appears to be intent on creating problems where there likely will be none. To be sure, either Party could inappropriately argue a position in almost any given context. It is difficult to contract around all contingencies – especially with respect to behavior that would not be considered to be commercially reasonable. The true test, however, should not be what is possible to argue but instead should be what is probably likely to succeed when argued. In that sense, it appears that Ms. Blake's manufactured concern regarding Joint Petitioners' ability to disguise the day upon which a claim arose is both misplaced and overwrought.

Let us provide an example or two to illustrate. If one of the Joint Petitioners incurred harm due to a BellSouth negligent act, say, for example, a BellSouth truck hit one of the Petitioner's facilities, under the proposed language, there would be no question as to the day the claim arose. Similarly if a BellSouth employee negligently damaged one of the Petitioner's collocation sites, and that caused Petitioner's customers to lose service, again, there would be no question as to the day the claim arose. Under both scenarios, there is only one day on which that claim arose. BellSouth is simply searching for any means to avoid a new limitation of liability clause that provides Joint Petitioners with adequate protection from BellSouth negligent acts. It is simply time to hold BellSouth accountable for its own negligence and to stop BellSouth from shifting those costs to its competitors. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH APPEARS TO ASSERT THAT "TELRIC" PRICING NECESSITATES ITS ELIMINATION OF LIABILITY PROPOSAL. IS THAT POSITION WELL FOUNDED? [BLAKE AT 9:6-13]

A. No. BellSouth no doubt already carries insurance which is factored into its TELRIC pricing. Thus, Ms. Blake's apparent claim that BellSouth's TELRIC prices were premised on a no-insurance/no-liability scenario seems fundamentally off-base. In case there is any doubt, let us make clear that Joint Petitioners are not in the business of insuring BellSouth against any and all liability attributable to BellSouth's negligence or non-performance. Moreover, Ms. Blake ignores the fact that BellSouth refuses to provide many of the elements and services offered under the Agreement at TELRIC compliant prices. In several instances, BellSouth's refusal to offer TELRIC-based pricing has evolved into an arbitration issue. Examples of this would be multiplexing (27), line conditioning (38), the TIC (65), expedite charges (88), mass migration charges (94) and LEC identifier change charges (96). In certain other circumstances, Joint Petitioners accepted non-TELRIC-based pricing as part of a settlement of an issue or a set of issues. Examples of this would include certain aspects of interconnection trunk pricing, certain BellSouth service calls, and various instances where BellSouth tariffs are referenced for rates. In the end, this Agreement will contain certain elements and services at TELRIC-based pricing and others that are not. Thus, even if BellSouth's reliance on TELRIC as an excuse to shift responsibility for BellSouth negligence and non-performance to its competitors was valid – which, as explained above, it is not – this argument provides BellSouth with no cover whatsoever for the many aspects of the

Agreement for which TELRIC pricing does not apply. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. MS. BLAKE ASSERTS THAT JOINT PETITIONERS' POSITION WITH RESPECT TO THIS ISSUE (AS WELL AS WITH RESPECT TO ITEMS 5, 6 AND 7) IS PART OF SOME GRAND SCHEME THAT INVOLVES PUTTING CLECS AT A COMPETITIVE ADVANTAGE OVER BELLSOUTH. IS SHE RIGHT? [BLAKE AT 9:6-10:2]

A. No, not at all. Again, BellSouth's negligence or non-performance is not a risk of our business decisions. It is BellSouth that inappropriately seeks to shift risks here – not us. And, by seeking to shift the risks associated with BellSouth negligence or non-performance to Joint Petitioners, it is BellSouth that is seeking an unfair competitive advantage over Joint Petitioners. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. MS. BLAKE CLAIMS THAT JOINT PETITIONERS "DESIRE TO HAVE ALL DISPUTES HANDLED BY A COURT OF LAW". IS THAT ACCURATE? [BLAKE 9:20]

A. No. In fact, that is an affirmative misrepresentation of Joint Petitioners' position – with respect to which we are greatly offended. Although Ms. Blake did not participate in most of the meetings where the Parties discussed the dispute resolution issue (9), she has no right to use her failure to participate or BellSouth's conscious decision to keep those that did participate from appearing as witnesses, as an excuse to misrepresent Joint Petitioners' position. As Joint Petitioners explained with respect to Item 9/Issue G-9, they insist on including courts of law on the list of available venues for dispute resolution

because they may have particular expertise and powers that a State Commission may not have. Moreover, courts may present an option for more efficient regional dispute resolution. Nevertheless, as Joint Petitioners repeatedly have told BellSouth during negotiations, they anticipate that most disputes under the Agreement will be taken to the Commission (and other State Commissions). Given the difficulty in achieving efficient regional dispute resolution under past agreements, however, Joint Petitioners merely want to preserve all options and foreclose none that have jurisdiction. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Ms. Blake's testimony is largely unfounded rhetoric designed to distract and steer attention away from the real issue. BellSouth proposes an elimination of liability provision under which it seeks to saddle Joint Petitioners with the costs and risks of BellSouth's negligent acts and non-performance. When the rhetoric is stripped away, it is quite plain that Ms. Blake provides no legal or sound policy basis for BellSouth's position. It is time for BellSouth to accept the risks of and take responsibility for its own actions. Joint Petitioners' language requires both BellSouth and the Joint Petitions to do this. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 5/ISSUE G-5.

A. Petitioners cannot limit BellSouth's liability in contractual arrangements wherein BellSouth is not a party. Moreover, Petitioners will not indemnify BellSouth in any suit based on BellSouth's failure to perform its obligations under this contract or to abide by applicable law. Finally, BellSouth should not be able to dictate the terms of service between Petitioners and their customers by, among other things, holding Petitioners liable for failing to mirror BellSouth's limitation of liability and indemnification provisions in CLEC's End User tariffs and/or contracts. To the extent that a CLEC does not, or is unable to, include specific elimination-of-liability terms in all of its tariffs and End User contracts (past, present and future), and provided that the non-inclusion of such terms is commercially reasonable in the particular circumstances, that CLEC should not be required to indemnify and reimburse BellSouth for that portion of the loss that would have been limited (as to the CLEC but not as to non-contracting parties such as BellSouth) had the CLEC included in its tariffs and contracts the elimination-of-liability terms that BellSouth was successful in including in its tariffs at the time of such loss. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. IT APPEARS THAT MS. BLAKE THINKS THIS ISSUE IS ABOUT SERVICE GUARANTEES, IS THAT THE CASE? [BLAKE AT 10:12-17]

A. No. This issue is not about theoretical service guarantees that one Party or another could offer its customers to distinguish otherwise comparable products. Rather, this issue is simply about Joint Petitioners' unwillingness to guarantee (and assume indemnification obligations to the extent they cannot) that they will for the life of the Agreement be able to extract from their customers the same limitation of liability provisions that BellSouth is able to extract. Instead we have offered to abide by a "commercially reasonable" standard – which is eminently reasonable. The terms of our contracts with our customers really should not be controlled directly or indirectly by BellSouth but should instead be governed by what is commercially reasonable.

BellSouth's proposal is not commercially reasonable. Once again, BellSouth appears to insist that Joint Petitioners must serve as BellSouth's insurance company. We won't do that voluntarily. We are not insurance companies and we are unwilling to accept responsibility for BellSouth's non-performance. If there is a claim or valid theory of liability under which third parties can sue BellSouth for non-performance or other failure to abide by this Agreement, we have no legal obligation to ensure that BellSouth can quash such claims or to indemnify BellSouth if it cannot. Moreover, there is no other compelling public policy reason for us to do so. If BellSouth's actions cause consumers harm, BellSouth should be held accountable. In any event, there is simply no basis for trying, as BellSouth does, to shift some of the responsibility for and risks of BellSouth's failures to Joint Petitioners.

Finally, it bears noting that we can no more bind BellSouth to the terms of a service guarantee with a third party than we can bind third parties to the terms of this Agreement. The best resolution of this issue would be for the Agreement to contain no language on it. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. IS BELLSOUTH CORRECT THAT PETITIONERS COULD IMPOSE "SELF-CREATED LIABILITY" ON BELLSOUTH BY VIRTUE OF PROMISING PERFECTION TO THEIR CUSTOMERS? [BLAKE AT 10:22-11:9]

A. No. In refusing to agree to BellSouth's proposed language for Section 10.4.2, Joint Petitioners are not seeking to "pass on to BellSouth ... self-created liability" in the manner Ms. Blake portrays. *See* Blake at 11:2. Joint Petitioners, however, insist that they be able to conduct business in a commercially reasonable manner (which requires them to mitigate damages and not to unreasonably create liability exposure) and that BellSouth not be permitted to shirk all responsibility for its failure to abide by the Agreement and to perform as specified therein. If we make unreasonable commitments to our customers, it is not at all clear to us how we could seek to hold BellSouth accountable for such commitments. Indeed, Joint Petitioners will agree to the duty to mitigate damages, and thus BellSouth's exposure, with respect to our end users. Petitioners' willingness to take on this duty demonstrates that we are not seeking to impose unfair or unwarranted liability on BellSouth. Rather, Petitioners are simply refusing to agree that all of our tariffs and contracts contain language that BellSouth — who is not a party to any such arrangement — believes is appropriate. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But, Ms. Blake's testimony makes it evident to us that BellSouth's primary concern here is over instant payment service guarantees and BellSouth's potential for additional liability attributable to its own failure to abide by or perform as required by the Agreement. BellSouth's current proposed provision is a needlessly blunt instrument that does not squarely address that concern and creates others in the process. If BellSouth wanted to withdraw its current proposal and replace it with language to address its stated concern regarding potential liability for instant payment service guarantees, we would entertain the proposal and hopefully be able to reach an acceptable compromise on this issue. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 6/ISSUE G-6.

A. An express statement is needed because the limitation of liability terms in the Agreement should in no way be read so as to preclude damages that CLECs' customers incur as a foreseeable result BellSouth's performance of its obligations under the Agreement, including its provisioning of UNEs and other services. Damages to customers that result directly, proximately, and in a reasonably foreseeable manner from BellSouth's (or a CLEC's) performance of obligations set forth in the Agreement that were not otherwise caused by, or are the result of, a CLEC's (or BellSouth's) failure to act at all relevant

times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage should be considered direct and compensable under the Agreement for simple negligence or nonperformance purposes. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHAT TYPE OF LOSSES FOR WHICH JOINT PETITIONERS WANT TO BE MADE WHOLE BY BELLSOUTH UNDER SECTION 10.4.4.

A. Petitioners believe that BellSouth should be responsible for reasonably foreseeable damages that are directly and proximately caused by BellSouth. As stated in the Petitioners' direct testimony, this Agreement is a contract for wholesale services and, therefore, liability to customers must be contemplated and expressly included in the contract language. In our view, these types of damages are not incidental, indirect or consequential. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. MS. BLAKE STATES THAT THE PARTIES HAVE AGREED THAT THE CONTRACT SHALL PROVIDE THAT THERE WILL BE NO LIABILITY FOR INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES AND ASSERTS THAT JOINT PETITIONERS ARE IN SOME MANNER ATTEMPTING TO EVISCERATE THAT AGREEMENT. IS THAT AN ACCURATE AND FAIR REPRESENTATION OF THE DISPUTE UNDERLYING THIS ISSUE? [BLAKE AT 12:1-10]

A. No. Joint Petitioners did not agree to one thing and then attempt to gut that agreement with the added language we propose. Rather our offer is (and has been) to eliminate liability for indirect, incidental, or consequential damages, provided that it is understood

that such limitation is not to be construed in any way so as to eliminate the liability of a Party for claims or suits by damages by end users/customers of the other Party or by such other Party vis-à-vis its end users/customers to the extent that such damages "result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder". We do not view such damages as indirect, incidental, or consequential and we want the Agreement to be clear that we do not voluntarily agree to do so. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. MS. BLAKE ASSERTS OPPOSITION TO JOINT PETITIONERS' PROPOSAL BECAUSE IT IS LENGTHY, VAGUE AND IN HER WORDS "VIRTUALLY INDECIPHERABLE". DO YOU HAVE A RESPONSE TO THESE CRITICISMS? [BLAKE AT 12:22-13:5]

A. Yes. First, if Ms. Blake has any real difficulty understanding our proposal it is likely because she chooses not to understand it. Ms. Blake did not participate in the majority of negotiations session where this issue and the Joint Petitioners' proposal were discussed and explained at great length. We did not leave those discussions with the impression that BellSouth didn't understand our proposal, but rather that they simply would not agree to it. So as not to needlessly expend the Commission's or Joint Petitioners' resources, BellSouth should in the future take better care to ensure that its witnesses are fully briefed with respect to all prior negotiations.

The language proposed by Petitioners here and that is disputed by BellSouth is notably shorter than the language proposed by BellSouth and disputed by the Joint Petitioners on the previous issue. The point is that lengthy language is not necessarily good or bad.

Nor is it necessarily confusing. Sometimes, contract language becomes lengthy as a result of efforts to ensure that it is clear and fair. In this case, Joint Petitioners took care to delineate a precise standard that is neither vague nor difficult to implement. We even took care to assure BellSouth that it was our intent to conduct ourselves in a commercially reasonable manner and to accept standard duties to mitigate damages. Nevertheless, if BellSouth wants a shorter proposal, we are willing to strike the final three or so lines of it so that the disputed language would end with the clause "to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder". The remaining part of the disputed language proposed by Joint Petitioners can be stricken: "and were not and are not directly and proximately caused by or the result of such Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage". That language was intended to provide BellSouth with assurances that the proposal is fair and reasonable – we will not insist on it. At bottom, Ms. Blake does not explain why she thinks this provision would be difficult or confusing to implement or whether it is simply BellSouth's intention to make this provision difficult or confusing to implement. Neither case presents a valid reason for rejecting Joint Petitioners' proposal. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 7/ ISSUE G-7.

A. The Party providing service under the Agreement should be indemnified, defended and held harmless by the Party receiving services against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications. Additionally, customary provisions should be included to specify that the Party receiving services under the Agreement should be indemnified, defended and held harmless by the Party providing services against any claims, loss or damage to the extent reasonably arising from: (1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent cased by the providing Party's negligence, gross negligence or willful misconduct. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN THE INDEMNIFICATION LANGUAGE THAT JOINT PETITIONERS HAVE PROPOSED.

A. Joint Petitioners seek to be indemnified for claims of libel, slander, or invasion of privacy. On that, the Parties agree. Petitioners also seek to be indemnified for claims arising from (1) BellSouth's failure to comply with the law, or (2) damages or injuries arising from BellSouth's negligence, gross negligence, or willful misconduct. This level of indemnification is not unreasonable. Moreover, Joint Petitioners, as the Parties receiving/purchasing most services under the Agreement, refuse to indemnify BellSouth against all end user claims that could potentially arise as a result of our reliance on BellSouth's commitment to abide by and perform as required under this Agreement. A

Party that fails to abide by its legal obligations should incur the damages arising from such conduct. A Party that is negligent should bear the cost of its own mistakes. BellSouth should not be permitted to shift those costs to the Joint Petitioners. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. IS BELLSOUTH CORRECT IN ASSERTING THAT THE JOINT PETITIONERS' PROPOSED LANGUAGE IS INAPPROPRIATE BECAUSE THIS IS NOT A COMMERCIAL AGREEMENT? [BLAKE AT 14:4]

A. No. This Agreement, although it contains terms that are the subject of federal and state statutes and regulations, is clearly a commercial agreement. BellSouth's efforts to impart magical meaning into the words "commercial agreement" are unavailing. Indeed, we are not aware of any State Commission that has bought into BellSouth's argument that there is a body of agreements called interconnection agreements and another body of agreements called commercial agreements and that the two are mutually exclusive. Notably, there are no regulations of which we are aware governing what the indemnification provisions of interconnection agreements must be. Thus, the language in Section 10.5 should reflect and comport with general commercial practice. It is generally accepted commercial practice to ensure that one Party does not pay for or otherwise suffer as a result of the other's mistakes or misconduct. That principle is embodied in Joint Petitioners' proposed language and not in the commercially unreasonable language proposed by BellSouth. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. BellSouth once again seeks to shift to Joint Petitioners the risks and costs associated with its own non-compliance and misconduct. Joint Petitioners' proposal rejects that approach, reflects commercially reasonable practice and should be accepted. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 8, Issue No. G-8 *[Section 11.1]: What language should be included in the Agreement regarding a Party's use of the other Party's name, service marks, logos and trademarks?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 8/ISSUE G-8.

A. Given the complexity of and variability in intellectual property law, this nine-state Agreement should simply state that no patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by the Agreement and that a Party's use of the other Party's name, service mark and trademark should be in accordance with Applicable Law. The Commission should not attempt to prejudge intellectual property law issues, which at BellSouth's insistence, the Parties have agreed are best left to adjudication by courts of law (*see* GTC, Sec. 11.5). *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. ARE PETITIONERS WILLING TO ABIDE BY ALL APPLICABLE LAW WITH RESPECT TO PROTECTING BELLSOUTH'S NAME, SERVICE MARKS, LOGOS AND TRADEMARKS?

A. Yes. Petitioners have already agreed to such language for Section 11.1. We do not seek the right to violate applicable intellectual property or advertising law in this Agreement.

Similarly, we do not wish to negotiate away any rights under applicable law governing comparative advertising and related aspects of intellectual property law. By offering to comply with Applicable Law, Petitioners thought that BellSouth's concerns would have been addressed. Instead, it appears that BellSouth is still seeking to restrict or curtail Joint Petitioners' ability to engage in comparative advertising or marketing in ways not required by applicable law (initially Bellsouth proposed language that would have barred any comparative advertising).

Petitioners appreciate the fact that BellSouth seeks to "pro-actively avoid as many disputes as possible." *See* Blake at 16:9-10. We are not, however, willing to incorporate into the Agreement a set of complicated terms and conditions that were drafted by BellSouth in accordance with its own understanding of what trademark law is or perhaps what it would like trademark law to be. Such language is not necessary. We will comply with the law. We have been offered nothing in exchange for BellSouth's attempt to get us to accept potentially more stringent standards. Joint Petitioners will not give up rights in exchange for nothing. In any event, we believe it is important to preserve our right to engage in truthful and fair comparative advertising that comports with the applicable law. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. IS BELLSOUTH'S ATTEMPT TO HAVE THE COMMISSION DEFINE THE BOUNDARIES OF INTELLECTUAL PROPERTY LAW INCONSISTENT WITH THE POSITION IT HAS TAKEN WITH RESPECT TO ANY OTHER ASPECT OF THE INTELLECTUAL PROPERTY PROVISIONS OF THE AGREEMENT?

A. Yes. During our negotiations, BellSouth insisted that the Commission and other State Commissions were not experts in the field of intellectual property law and, as a result, BellSouth also insisted that disputes over intellectual property go to a court of law and not to the Commission or another regulatory body (GTC Section 11.5). We agreed to that provision in part because we accept BellSouth's contention that courts rather than State Commissions are generally better suited to discern and apply the nuances of intellectual property law. Thus, it strikes us as surpassingly strange that BellSouth would insist that the Commission (and other State Commissions) take on the role of intellectual property law expert in this arbitration so that it can go line-by-line through BellSouth's proposal to determine whether it comports with the law and requires no more and allows no less than is allowed under applicable law. Are we then to have courts second guess that work, if a dispute arises? Obviously, it is better to simply require compliance with applicable law now and to let the courts deal with any disputes that may or may not arise later (it is not our intention to invite intellectual property disputes with BellSouth). *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Due to the complex, specialized nature of intellectual property law, the Agreement should simply state that no patent, copyright, trademark or other proprietary right is

licensed, granted or otherwise transferred by the Agreement, and that a Party's use of the other Party's name, service mark and trademark should be in accordance with Applicable Law. Any resulting dispute will be heard, at BellSouth's insistence, by a court of law (*see* GTC, Sec. 11.5). *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

***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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 9/ISSUE G-9.

A. Either Party should be able to petition the Commission, the FCC, or a court of law for resolution of a dispute. No legitimate dispute resolution venue should be foreclosed to the Parties. The industry has experienced difficulties in achieving efficient regional dispute resolution. Moreover, there is an ongoing debate as to whether State Commissions have jurisdiction to enforce agreements (CLECs do not dispute that authority) and as to whether the FCC will engage in such enforcement. There is no question that courts of law have jurisdiction to entertain such disputes (*see* GTC, Sec. 11.5); indeed, in certain instances, they may be better equipped to adjudicate a dispute and may provide a more efficient alternative to litigating before up to 9 different State Commissions or to waiting for the FCC to decide whether it will or won't accept an enforcement role given the particular facts. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH HAS PROPOSED REVISED LANGUAGE THAT WOULD ALLOW DISPUTES TO GO TO A COURT OF LAW IN CERTAIN INSTANCES. WHY IS THAT LANGUAGE NOT ACCEPTABLE? [BLAKE AT 17:1-7, 18:6-13]

A. As explained in our direct testimony, BellSouth's proposal unnecessarily builds in opportunities for dispute over when the conditions for taking a case to court have been met and imposes inefficiencies by requiring that certain claims be separated. We would prefer not to close or partially restrict the option of going to a court of competent jurisdiction for dispute resolution. When faced with the decision to file a complaint at the Commission, the FCC or a court, we will have to weigh the pros and cons of each venue (expertise and scope of jurisdiction would be among the factors) and assess them based on the totality of the dispute between the Parties – which could easily extend beyond the Kentucky Agreement. We find ourselves in need of efficient and effective enforcement regionally – not just in Kentucky. Accordingly, we will not voluntarily give up the option of going to a court of competent jurisdiction, as such a court may provide a means by which we can avoid having to litigate nine times over (or more) or to discount settlement positions as a result of regional dispute resolution difficulties which BellSouth has used to its advantage and seeks to preserve. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No, not at this time. However, we will continue to consider potential compromises and may respond to BellSouth's latest proposal (which is a considerable improvement over its

initial proposal) with new language designed to settle or at least narrow the issue further. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 10, Issue No. G-10 [Section 17.4]: ***This issue has been resolved.***

Item No. 11, Issue No. G-11 [Sections 19, 19.1]: ***This issue has been resolved.***

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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 12/ISSUE G-12.

A. 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 explicitly agreed to a limitation or exemption. Moreover, silence with respect to any issue, no matter how discrete, should not construed to be such a limitation or exception. This is a basic legal tenet and is consistent with both federal and Georgia law (agreed to by the parties), and it should be explicitly stated in the Agreement in order to avoid unnecessary disputes and litigation that has plagued the Parties in the past. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH CLAIMS JOINT PETITIONERS SEEK "TWO OPPORTUNITIES TO NEGOTIATE AND/OR ARBITRATE THE TERMS OF THE CONTRACT". HOW DO YOU RESPOND TO THIS ACCUSATION? [BLAKE AT 19:3-4, 19:35-20:6]

A. Our first response is that it isn't true. The Parties have agreed to abide by Georgia law, and Georgia law – just like any other that we know of – holds that applicable law existing at the time of contracting becomes part of the contract as though expressly stated therein, unless the parties voluntarily and expressly agree to adhere to other standards that effectuate an exception to or displacement of applicable legal requirements. As explained at length in our direct testimony, BellSouth seeks to turn principles of contracting on their head by insisting on a contract where exceptions to and the displacement of applicable legal requirements is implied as a matter of course. As our counsel will surely explain in briefing, Georgia law requires exceptions, or other displacements of applicable legal requirements, to be express. They cannot be implied. In short, exceptions are not the rule.

Moreover, as we have said repeatedly, we did not conduct negotiations or engage in this arbitration so that we could give away something for nothing. If BellSouth wants to be exempt from or to displace an applicable legal requirement, it should have proposed explicit language regarding the specific aspects of any federal or state statute, rule or order to which they did not want to have to comply and they should have been prepared to offer an appropriate concession to us in exchange for the right or rights they seek to have us give up.

Instead, BellSouth's latest proposal seeks to contractualize a gambit wherein BellSouth can claim that it is not obligated to comply with Applicable Law if it is not copied into or otherwise sufficiently referenced in the Agreement (we are not clear as to what would pass muster). Petitioners' language already references all Applicable Law and it underscores their intent not to deviate from already agreed-upon Georgia law on this point. There are thousands of pages of applicable federal and state statutes, rules and orders that have not been copied into or regurgitated in some manner in the Agreement. We are not interested in providing BellSouth with the opportunity to say that the requirements contained therein apply only prospectively – after we detect and notify BellSouth of its non-compliance therewith. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. We are not prepared to trade tried and true principles of contracting for BellSouth's "catch me and we'll fix it going forward" proposal. Our agreement to abide by Georgia law did not contemplate and does not include such a perverse exception to that body of law. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 13, Issue No. G-13 [Section 32.3]: ***This issue has been resolved.***

Item No. 14, Issue No. G-14 [Section 34.2]: ***This issue has been resolved.***

Item No. 15, Issue No. G-15 [Section 45.2]: ***This issue has been resolved.***

Item No. 16, Issue No. G-16 [Section 45.3]: ***This issue has been resolved.***

RESALE (ATTACHMENT 1)

Item No. 17, Issue No. 1-1 [Section 3.19]: ***This issue has been resolved.***

Item No. 18, Issue No. 1-2 [Section 11.6.6]: ***This issue has been resolved.***

NETWORK ELEMENTS (ATTACHMENT 2)

Item No. 19, Issue No. 2-1 [Section 1.1]: ***This issue has been resolved.***

Item No. 20, Issue No. 2-2 [Section 1.2]: ***This issue has been resolved.***

Item No. 21, Issue No. 2-3 [Section 1.4.1]: ***This issue has been resolved***

Item No. 22, Issue No. 2-4 [Section 1.4.3]: ***This issue has been resolved.***

Item No. 23, Issue No. 2-5 *[Section 1.5]: What rates, terms, and conditions should govern the CLECs' transition of existing network elements that BellSouth is no longer obligated to provide as UNEs to other services?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 23/ISSUE 2-5.

A. In the event UNEs or Combinations are no longer offered pursuant to, or are not in compliance with, the terms set forth in the Agreement, including any transition plan set forth therein, it should be BellSouth's obligation to identify the specific service arrangements that it insists be transitioned to other services pursuant to Attachment 2. There should be no service order, labor, disconnection or other nonrecurring charges

associated with the transition of section 251 UNEs to other services. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. DOES BELLSOUTH PROVIDE ANY JUSTIFICATION FOR ITS POSITION THAT THE JOINT PETITIONERS SHOULD FOLLOW ITS PROPOSED CONVERSION PLAN?

A. No. Ms. Blake does not provide any justification or support for BellSouth's position on this issue, but merely restates BellSouth's position. The fact is that BellSouth cannot justify why it is that it insists that Joint Petitioners must identify service arrangements that BellSouth wants converted or disconnected or why it insists that it should be the Joint Petitioners that should pay a host of charges to implement Bellsouth's request to initiate orders for conversions and disconnections. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own. Nevertheless, our position, which is well explained in our direct testimony will be reflected in our proposed language. As such, Joint Petitioners' proposal is a compromise that places the administrative and financial burden of implementing the conversions/disconnections on both Parties. The Joint Petitioners' proposal requires work on both sides, but places the original identification obligation on BellSouth, which is logical considering it has the resources and incentive to expeditiously identify service arrangements it believe must be

converted or disconnected in order to transition to the terms of the Agreement. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Item No. 24, Issue No. 2-6 [Section 1.5.1]: ***This issue has been resolved.***

Item No. 25, Issue No. 2-7 [Section 1.6.1]: ***This issue has been resolved.***

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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 26/ISSUE 2-8.

A. BellSouth should be required to "commingle" UNEs or Combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to Section 271 of the Act. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. IS BELLSOUTH'S RELIANCE ON THE FCC'S TRO ERRATA APPROPRIATE? [BLAKE AT 26:16-27:21]

A. No. In fact, BellSouth's reliance is misplaced. There is no FCC rule or order that states that BellSouth is permitted to place commingling restrictions on section 271 elements. The FCC's errata was nothing more than an attempt to clean-up stray language from a section of the TRO addressing the commingling of section 251 UNEs with services provided for resale under section 251(c)(4). BellSouth's attempt to create by implication an affirmative adoption of commingling restrictions with respect to section 271 elements cannot withstand scrutiny, as it simply cannot be squared with the FCC's commingling

rules and the TRO language accompanying those rules. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES THE D.C. CIRCUIT'S *USTA II* HOLDING REGARDING SECTION 271 PROHIBIT THE COMMINGLING OF UNES, UNE COMBINATIONS, AND SERVICES? [BLAKE AT 27:23-29:1]

A. No. The D.C. Circuit's *USTA II* holding discussed *combining*, not *commingling*. BellSouth's reliance on the D.C. Circuit as grounds to reject Petitioners' commingling language is therefore misplaced. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. As stated in the Joint Petitioners direct testimony, the TRO concluded that CLECs may commingle UNEs or UNE combinations with facilities or services it has obtained from ILECs pursuant to a method other than unbundling under 251(c)(3) of the Act. section 271 is another method of unbundling and BellSouth's attempt to isolate and render useless section 271 elements must be squarely rejected. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

***Item No. 27, Issue No. 2-9** [Section 1.8.3]: When multiplexing equipment is attached to a commingled circuit, should the multiplexing equipment be billed per the jurisdictional authorization (Agreement or tariff) of the lower or higher bandwidth service?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 27/ISSUE 2-9.

A. When multiplexing equipment is attached to a commingled circuit, the multiplexing equipment should be billed from the same jurisdictional authorization (Agreement or tariff) as the lower bandwidth service. If the commingled circuit involves multiple segments at the same bandwidth, the multiplexing should be billed from the jurisdiction of the loop. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES MS. BLAKE PROVIDE CONVINCING JUSTIFICATION FOR BELLSOUTH'S POSITION? [BLAKE AT 29:10-30:1]

A. No. Ms. Blake does little more than restate BellSouth's position and suggest that BellSouth can dictate the applicable pricing by requiring that multiplexing be ordered in a certain way. As explained in our initial testimony, if a CLEC requests a commingled circuit in which multiplexing equipment is attached, then the multiplexing equipment should be billed at the lower bandwidth of service (*i.e.*, the jurisdiction of the loop). Indeed, paragraph 214 of the TRO states that (emphasis added) "[t]he loop may include additional components (*e.g.*, load coils, bridge taps, repeaters, **multiplexing equipment**)." At the very least, Joint Petitioners – as the Party ordering and paying for the service – should be able to choose whether they want to purchase multiplexing out of the Agreement (connected to a UNE) or out of a BellSouth tariff. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Joint Petitioners are entitled to order multiplexing at the TELRIC-based rates established by the authority and set forth in Attachment 2. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 28, Issue No. 2-10 [Section 1.9.4]: ***This issue has been resolved.***
Item No. 29, Issue No. 2-11 [Section 2.1.1]: ***This issue has been resolved.***
Item No. 30, Issue No. 2-12 [Section 2.1.1.1]: ***This issue has been resolved.***
Item No. 31, Issue No. 2-13 [Section 2.1.1.2]: ***This issue has been resolved.***
Item No. 32, Issue No. 2-14 [Sections 2.1.2, 2.1.2.1, 2.1.2.2]: ***This issue has been resolved.***
Item No. 33, Issue No. 2-15 [Section 2.2.3]: ***This issue has been resolved.***
Item No. 34, Issue No. 2-16 [Section 2.3.3]: ***This issue has been resolved.***
Item No. 35, Issue No. 2-17 [Sections 2.4.3, 2.4.4]: ***This issue has been resolved.***

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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 36(A)/ISSUE 2-18(A).

A. Line Conditioning should be defined in the Agreement as set forth in FCC Rule 47 CFR 51.319 (a)(1)(iii)(A). *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES BELLSOUTH'S PROPOSED LINE CONDITIONING DEFINITION COMPORT WITH THE GOVERNING FCC RULE? [FOGLE AT 3:24-4:6]

A. No. BellSouth ignores the FCC's line conditioning rule and instead attempts to replace it with selected language from the TRO. The FCC, however, did not choose to replace the language of its rule with the "definition" that BellSouth claims to embrace. As explained in our direct testimony, BellSouth inappropriately seeks to conflate line conditioning obligations with routine network modification requirements. The FCC's rules, however, do not support BellSouth's position, as the line conditioning rule was not replaced with the routine network modification rules and BellSouth's line conditioning obligations are not limited to those routine network modifications it undertakes to provide DSL services to its own customers. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES THE JOINT PETITIONERS' POSITION REQUIRE BELLSOUTH TO CREATE A "SUPERIOR NETWORK", AS MR. FOGLE CLAIMS? [FOGLE AT 6:7-13]

A. No. The FCC's line conditioning rules require BellSouth to modify its existing network rather than develop a superior one. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. FOGLE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. BellSouth's attempt to limit its line conditioning obligations to routine network modifications it undertakes to provide DSL to its own customers is inconsistent with the FCC's line conditioning rule and it should be rejected. Mr. Fogle claims that "the *TRO* clarifies the definition of line conditioning set forth in Rule 51.319(a)(1)(iii) by limiting its application to line conditioning 'that incumbent LECs regularly perform in order to provide xDSL services to their own customers.'" *See* Fogle at 6:23-7:2. In other words, Mr. Fogle claims that the FCC's definition of line conditioning has no meaning, as the ILECs (according to his novel theory) are not obligated to perform line conditioning. That cannot be right. BellSouth acknowledges that FCC Rule 51.319(a) sets forth the definition for line conditioning, but argues that the TRO itself only requires BellSouth to perform line conditioning that it regularly performs for its own customers. *See* Fogle at 6:20-7:5. Although the FCC, in the TRO, opines that line conditioning can be seen as a routine network modification that ILECs perform for their own DSL customers, the FCC does not say that the line conditioning obligation is limited to such routine network modifications that ILECs perform for their own DSL customers. Nor does it say that if

an ILEC refuses to provide such line conditioning to its own customers, it is relieved of its obligation to provide line conditioning to requesting CLECs. BellSouth must adhere to the definition of line conditioning in 51.319(a). The FCC in paragraph 172 of the *UNE Remand Order* held that ILECs "are required to condition loops so as to allow ***requesting carriers*** to offer advanced services." Subsequently, in paragraph 83 of the *Line Sharing Order*, the FCC expanded this obligation to apply to loops regardless of the loop length. If the FCC meant to curtail the obligation set forth therein with the TRO language Mr. Fogle quotes, it would certainly have modified the actual definition of line conditioning. The FCC did no such thing. By attempting to unilaterally limit its line conditioning obligations, BellSouth is trying to ensure that CLECs can do no more with the network than BellSouth is willing to do. As explained in our direct testimony, there are no compelling legal or policy rationales for tying us down in that manner and keeping us and our customers in that box. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 36(B)/ISSUE 2-18(B).

A. BellSouth should perform Line Conditioning in accordance with FCC Rule 47 CFR 51.319 (a)(1)(iii). *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT IT SHOULD ONLY PERFORM LINE CONDITIONING FUNCTIONS IN ACCORDANCE WITH FCC RULES TO THE EXTENT IT REGULARLY UNDERTAKES SUCH MODIFICATIONS FOR ITS OWN XDSL CUSTOMERS? [FOGLE AT 6:20-23]

A. No. Mr. Fogle plainly indicates that BellSouth is only willing to comply with the FCC's line conditioning rule to a certain extent. We insist on full compliance. As reiterated throughout our testimony on this issue, line conditioning is not synonymous with or limited to the routine network modifications BellSouth undertakes to provide xDSL to its own customers. Rather, BellSouth must provide line conditioning in accordance with FCC's Rule 51.319(a)(1)(iii), which does not contain the limiting caveat Mr. Fogle adds. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. FOGLE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. BellSouth is attempting to unilaterally limit its obligation to provide line conditioning as required by the FCC's line conditioning rule. Since Joint Petitioners are unwilling to accept it, the Commission should reject BellSouth's proposed language that would eliminate certain aspects of BellSouth's obligation to provide and Joint Petitioners' right to obtain line conditioning at TELRIC-compliant rates. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 37/ISSUE 2-19.

A. The Agreement should not contain 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. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY THE AGREEMENT SHOULD REQUIRE BELLSOUTH TO REMOVE LOAD COILS, REGARDLESS OF LOOP LENGTH.

A. Rule 51.319(a)(iii) states that load coils are a type of device that ILECs should remove from a loop at a CLEC's request. It does not state that load coils on loops over 18,000 feet in length are exempt from removal. The FCC's *Line Sharing Order* held that ILECs are required to condition loops, ***regardless of the loop length***, to allow requesting carriers to offer advanced services. BellSouth's proposed language thus once again fails to follow the FCC's line conditioning rule. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX), J. Falvey (XSP)]*

Q. IS IT RELEVANT THAT BELLSOUTH ASSERTS THAT IT DOES NOT REMOVE LOAD COILS FROM LOOPS OVER 18,000 FEET IN LENGTH FOR ITS OWN CUSTOMERS? [FOGLE AT 7:17-19]

A. No. As explained above with respect to Item 36/Issue 2-18, FCC Rule 51.319(a)(iii) does not state that line conditioning is a routine network modification. Accordingly, BellSouth is not entitled to limit line conditioning activities to only those that it does to provide xDSL to its retail customers. Notably, BellSouth claims that it will not remove load coils

on long loops, even though it concedes that load coils impair DSL service. BellSouth should not foist its unwillingness to innovate on its competitors (or their customers). *See* Fogle at 4:10-15. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. FOGLE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Once again, we urge the Commission to reject BellSouth's attempt to impose upon Joint Petitioners its own reduced obligation re-write of the FCC's line conditioning requirements. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX), J. Falvey (XSP)]*

> ***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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 38/ISSUE 2-20.

A. Any copper loop being ordered by CLEC which has over 6,000 feet of combined bridged tap will be modified, upon request from CLEC, so that the loop will have a maximum of 6,000 feet of bridged tap. This modification will be performed at no additional charge to CLEC. Line Conditioning orders that require the removal of other bridged tap should be performed at the rates set forth in Exhibit A of Attachment 2. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX), J. Falvey (XSP)]*

Q. WHAT IS THE PRIMARY DISAGREEMENT REGARDING THIS ISSUE?

A. The primary disagreement is over BellSouth's desire to charge non-TELRIC Special Construction rates when Joint Petitioners request the removal of "any unnecessary and non-excessive bridged tap (bridged tap between 0 and 2,500 feet that serves no network design purpose)". *See* Fogle at 9:13-17. As we explained in our direct testimony, these

terms are unacceptable. They leave the determination of what "serves no network design purpose" entirely to BellSouth's discretion. BellSouth would decide whether Joint Petitioners' customers can receive quality DSL or other advanced services that require clean copper. In addition, the rates contained in BellSouth's Special Construction tariff, those that Joint Petitioners are able to discern, are prohibitively expensive. Application of such rates would in effect preclude us from obtaining a loop with less than 2,500 feet of bridged tap, thus leading to the impairment of DSL or other advanced services that we could provide (as BellSouth recognizes and seeks to ensure is the case). *See* Fogle at 4:10-15. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX), J. Falvey (XSP)]*

Q. DO YOU AGREE WITH MR. FOGLE'S ASSERTION THAT "LINE CONDITIONING BEYOND WHAT BELLSOUTH PERFORMS FOR ITS OWN CUSTOMERS (WHICH IS BELLSOUTH'S ONLY OBLIGATION) OR IS WILLING TO VOLUNTARILY PROVIDE" TO CLECS IS NOT APPROPRIATELY PART OF THIS ARBITRATION, BUT SHOULD INSTEAD BE THE SUBJECT OF A SEPARATE AGREEMENT? [FOGLE AT 9:19-23]

A. No. Repetition of a false position does not make it right. BellSouth's line conditioning obligation is not limited to what BellSouth decides it will routinely do for its own customers. Under Mr. Fogle's theory, BellSouth would be free to eliminate any line conditioning obligations, and based on his testimony, it appears that BellSouth thinks that it has (there is very little line conditioning that BellSouth will do on behalf of its own customers). We see nothing in Mr. Fogle's testimony or in the FCC's rule or orders that supports BellSouth's position that it unilaterally can determine the scope of its line conditioning obligations. Moreover, since line conditioning is part of the FCC's rules

implementing section 251, it is plain to see that Mr. Fogle's claim that certain types of line conditioning are outside the scope of this arbitration is without merit. Joint Petitioners do not embrace BellSouth's attempt to undermine and avoid its agreement filing obligations under section 252. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH CLAIMS THAT BRIDGED TAP THAT IS LESS THAN 2,500 FEET DOES NOT IMPAIR THE PROVISION OF HIGH SPEED DATA TRANSMISSION. [FOGLE AT 9:25-10:13] PLEASE RESPOND.

A. BellSouth makes this assertion without any justification or support. Indeed, Mr. Fogle said previously that bridged taps may diminish the capacity of the loop or subloop to transmit high-speed telecommunications. *See* Fogle at 4:10-15. Nevertheless, BellSouth is entitled to its opinions (regardless of whether they conflict). Those opinions, however, does not change BellSouth's obligations. Joint Petitioners should not be caged by what aspects of line conditioning BellSouth thinks is or is not necessary – or by what BellSouth is reluctantly willing to offer its own retail customers. And, just because BellSouth's policy was established by the Shared Loop Collaborative and BellSouth claims it is consistent with "industry standards for xDSL services," *see* Fogle at 10:4-13, does not mean that it does not harm the Petitioners. The Petitioners are attempting to create new innovative services to compete with BellSouth's dominating market share. The services we are seeking to preserve the ability to develop are <u>not</u> Shared Loop services. For example, as discussed in our direct testimony, some of the Petitioners are exploring technologies that may need bridged taps longer than 2,500 feet such as "Etherloop" and "G.SHDSL Long" technologies. *See* Joint Petitioners Direct at 60:8-11.

Q. DID ANYTHING MR. FOGLE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Items 36, 37 and 38/ Issues 2-18, 2-19 and 2-2- essentially turn on one question: do Joint Petitioners' have the right to insist upon full and unqualified compliance with the FCC's line conditioning rule or is BellSouth permitted to re-write the rule and impose its reduced obligation re-write on Joint Petitioners. To us, the answer is obvious: Joint Petitioners need not accept less than full compliance with the FCC's line conditioning rule. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX), J. Falvey (XSP)]*

Item No. 39, Issue No. 2-21 [Section 2.12.6]: ***This issue, including both subparts, has been resolved.***

Item No. 40, Issue No. 2-22 [Section 2.14.3.1.1]: ***This issue has been resolved.***

Item No. 41, Issue No. 2-23 [Sections 2.16.2.2, 2.16.2.3.1-5, 2.16.2.3.7-12]: ***This issue has been resolved.***

Item No. 42, Issue No. 2-24 [Section 2.17.3.5]: ***This issue has been resolved.***

Item No. 43, Issue No. 2-25 *[Section 2.18.1.4]: Under what circumstances should BellSouth be required to provide CLEC with Loop Makeup information on a facility used or controlled by a carrier other than BellSouth?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 43/ISSUE 2-25.

A. BellSouth should provide CLEC Loop Makeup information on a particular loop upon request by a Petitioner. Such access should not be contingent upon receipt of an LOA from a third party carrier. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY BELLSOUTH SHOULD PROVIDE JOINT PETITIONERS WITH INFORMATION ABOUT A LOOP THAT IS IN USE BY A CLEC.

A. BellSouth is the repository of all information about all local loops in its network. The FCC has repeatedly held that ILECs must provide loop makeup information to any requesting CLEC. BellSouth should not place conditions on its provision of loop makeup information that delay or impede Joint Petitioners in providing service to customers. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES MR. FERGUSON PLACE APPROPRIATE RELIANCE ON THE POLICY BELLSOUTH CREATED AS PART OF THE SO-CALLED SHARED LOOP COLLABORATIVE AND CHANGE CONTROL PROCESS ("CCP")? [FERGUSON AT 3:24-4:22, 7:1-10:12]

A. No. Mr. Ferguson expends a great deal of time discussing the Shared Loop Collaborative and CCP process in Georgia, yet he studiously avoids explaining or acknowledging that the Shared Loop Collaborative dealt with shared loop scenarios where one CLEC would intend to provide services over the same loop simultaneously with another CLEC (as is the case when line sharing is employed and one CLEC provides DSL service and the other provides traditional voice services). The Shared Loop Collaborative did not address the scenario wherein one competitor seeks to win a customer from another competitor and in so doing will, with an LOA in hand from the customer, require loop make-up information to ensure that the available UNE loop or loops are capable of supporting the services that the CLEC seeks to provide. In this scenario, it is anticipated that one CLEC will displace another and not that they will participate in a shared loop

arrangement. Thus, whatever the result of the shared loop collaborative, it is not applicable outside the shared loop context. Moreover, the Petitioners are not required to use the CCP as a means to resolve their disputes regarding the rates, terms and conditions of this Agreement. And, since the CCP was not used to address anything outside the shared loop context, it is hard to see why the Joint Petitioners should use that process to undo something BellSouth has attempted to do outside that process. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE ADDRESS BELLSOUTH'S ASSERTION THAT IT SHOULD NOT HAVE TO PROVIDE "THIRD-PARTY" LOOP INFORMATION WITHOUT AN LOA. [FERGUSON AT 5:18-20]

A. This concept of "third party loop information" is a fiction designed by BellSouth to confuse the issue. This issue is not the "third-party LMU issue". BellSouth's LMU information does not magically become controlled by a third party the minute BellSouth unbundles a particular loop. LMU information is not part of the loop, it is instead part of the OSS UNE. When BellSouth makes OSS functionalities and information available to CLECs, those functionalities and that information does not become the property of a the CLEC.

This "third party loop information" fiction is used by BellSouth to aid its mischievous attempt to impose upon Joint Petitioners and other CLECs an LOA requirement outside the shared use context. Mr. Ferguson's assertion that BellSouth is simply complying with the consensus of the CLECs in its region is disingenuous (*see* Ferguson at 12:8-11). Rather BellSouth is attempting to take something that was developed for the shared use

context and unilaterally apply it more broadly. For the reasons explained in our direct testimony, we will not accept BellSouth's unilateral attempt to impose upon us outside the shared loop context a CLEC-to-CLEC LOA requirement. By doing so, BellSouth unlawfully imposes restrictions on our access to LMU. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. IS MR. FERGUSON RIGHT TO CHARACTERIZE THIS ISSUE AS ONE THAT IS REALLY ABOUT POTENTIAL DISAGREEMENT AMONG CLECS OVER ACCESS TO LMU INFORMATION? [FERGUSON AT 11:1-20]

A. No. This appears to be little more than an attempt to divert attention away from the real issue. BellSouth's hands are not tied and it has not been forced to restrict access to OSS, including LMU information by imposing a CLEC-to-CLEC LOA requirement outside the shared use context. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. FERGUSON HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, if it will settle the issue, we are willing to make clear that we will abide by the LOA process when we intend to engage in shared use (*i.e.*, line splitting) of a loop already in use by another CLEC. We will not, however, accept BellSouth's attempt to impose that process upon us outside the shared loop context. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 44, Issue No. 2-26 [Section 3.6.5]: ***This issue has been resolved.***

Item No. 45, Issue No. 2-27 [Section 3.10.3]: ***This issue has been resolved.***

Item No. 46, Issue No. 2-28 *[Section 3.10.4]: (A) May BellSouth refuse to provide DSL services to CLEC's customers absent a Commission order establishing a right for it to do so?*

(B) Should CLEC be entitled to incorporate into the Agreement, for the term of this Agreement, rates, terms and conditions that are no less favorable in any respect, than the rates terms and conditions that BellSouth has with any third party that would enable CLEC to serve a customer via a UNE loop that may also be used by BellSouth for the provision of DSL services to the same customer?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 46(A)/ISSUE 2-28(A).

A. In cases where a Petitioner purchases UNEs from BellSouth, BellSouth should not be permitted to refuse to provide DSL transport or DSL services (of any kind) to the Petitioner and its End Users, unless BellSouth has been expressly permitted to do so by the Commission. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH ASSERTS THAT THE COMMISSION'S PRIOR DECISION REGARDING BELLSOUTH'S OBLIGATION TO PROVIDE DSL TO CONSUMERS WHO SEEK TO SWITCH TO COMPETITORS WHO PROVISION THEIR SERVICES VIA UNES HAS BEEN VOIDED. [FOGLE: 11:N.1] PLEASE RESPOND.

A. Kentucky statute KRS 278.546 presents issues that are perhaps best handled in briefs. With respect to this new statute, this Commission must now explore how it impacts Kentucky consumers, existing interconnection agreements and new ones which contain

related language. This Commission retains jurisdiction over consumer issues as well as over arbitrations pursuant to section 251 and 252 of the Act. The Commission also must sort through the interplay between federal nondiscrimination requirements (and perhaps others), interconnection agreement filing requirements and the new state statute. BellSouth has asked the FCC to rule on a petition that may result in other considerations before we are through. In short, KRS 278.546 is not the only piece to this puzzle.

Q. DID ANYTHING MR. FERGUSON HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. We still think that this Commission should find in favor of consumer choice and preserve broadband access for those consumers who seek to choose CLECs for some services and BellSouth for others. BellSouth's "refusal to deal" with those consumers should not be countenanced. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 46(B)/ISSUE 2-28(B).

A. Where BellSouth provides DSL transport/services to a CLEC and/or its end users, BellSouth should be required to amend this Agreement to incorporate terms that are no less favorable, in any respect, than the rates, terms and conditions pursuant to which BellSouth provides such transport and services to any other entity. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. FOGLE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. The Joint Petitioners want to be in no less favorable a position than any other CLEC and we want our customers to be in no less favorable a position than any other CLEC's customers with respect to any agreement by BellSouth to provide some form of DSL transport services to a CLEC or its customers. In short, we want to ensure that we are treated in a nondiscriminatory manner and that we are not forced by BellSouth to skirt section 252 filing requirements in order to get there. Joint Petitioners also want those provisions in this Agreement subject to the General Terms and Conditions provisions we have negotiated (and arbitrated). Petitioners do not believe that such an agreement should be outside the scope of section 252's interconnection agreement filing requirements. It is in the interest of Kentucky consumers that our Agreement contain this sort of nondiscrimination/most favored nation provision. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 47, Issue No. 2-29 [Section 4.2.2]: ***This issue has been resolved as to both subparts.***

Item No. 48, Issue No. 2-30 [Section 4.5.5]: ***This issue has been resolved.***

Item No. 49, Issue No. 2-31 [Section 5.2.4]: ***This issue has been resolved.***

Item No. 50, Issue No. 2-32 *[Sections 5.2.5.2.1, 5.2.5.2.3, 5.2.5.2.4, 5.2.5.2.5, 5.2.5.2.7]: How should the term "customer" as used in the FCC's EEL eligibility criteria rule be defined?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 50/ISSUE 2-32.

A. The high capacity EEL eligibility criteria should be consistent with those set forth in the FCC's rules and should use the term "customer", as used in the FCC's rules. The term "customer" should not be defined in a manner that limits Petitioners' access to EELs, as BellSouth proposes. The FCC did not limit its term "customer" to the restrictive definition of End User sought by BellSouth. Use of the term "End User" as defined by BellSouth may result in a deviation from the FCC rules to which CLECs are unwilling to agree. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT IT IS NOT OBLIGATED TO PROVIDE HIGH CAPACITY EELS AFTER THE INTERIM PERIOD AND THEREFORE THIS ISSUE IS ONLY RELEVANT DURING THE 12-MONTH INTERIM PERIOD? [BLAKE AT 30:8-12]

A. No. BellSouth cannot unilaterally declare when and for how long it will provide access to high-capacity EELs. That is for the FCC and the Commission to decide. Moreover, no one knows what the FCC's so-called Final Rules will contain or how they will affect high-capacity EELs. BellSouth acknowledged this point and admits that the Agreement provisions relating to high-capacity EELs will be relevant if the FCC's Final Unbundling Rules require BellSouth "to continue to provide DS1 or DS3 loops or transport." *See* Blake at 30, n. 3. Finally, the EEL language agreed to by the Parties for this Agreement reflects the current state of the law with regard to high capacity EELs and the Joint Petitioners are not going to modify existing contract language to comply with future law that is not even in existence. Once the Final Rules are adopted, then the Parties will need

to negotiate how the new rules will be incorporated into the Agreement and arbitrate any disagreements. *[Sponsored by: M. Johnson (KMC); H. Russell (NVX); J. Falvey (XSP)].*

Q. DO YOU AGREE THAT AN EEL MUST TERMINATE AT AN END USER'S CUSTOMER PREMISE? [BLAKE AT 30:21-31:4]

A. Yes, with the understanding that we do not concede that the FCC defines "End User" as BellSouth does. In any event, we suspect that the real issue for BellSouth here is that it seeks to ensure that EELs include a loop component. We agree that EELs must include a UNE loop component. We also have agreed to language with BellSouth regarding what is and is not a loop. So, it remains a mystery to us as to why BellSouth still insists on re-writing the FCC's EEL eligibility criteria by replacing words used by the FCC with an ambiguous term to which the Joint Petitioners will not agree. *[Sponsored by: M. Johnson (KMC); H. Russell (NVX); J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S UNCERTAINTY AS TO WHY THE PETITIONERS ARE UNWILLING TO RESOLVE THIS ISSUE WITH BELLSOUTH'S PROPOSED REVISIONS. [BLAKE AT 31:6-15]

A. BellSouth states in its testimony that it will include language that the Joint Petitioners "may use loops, and therefore EELs to serve ISP customers." *See* Blake at 31:10-11. BellSouth also states that it will propose language to "clarify that the EEL eligibility criteria apply to the use of EELs for both wholesale and retail purposes." *See* Blake at 31:12-13. Because we have only recently received the language that reflects these new offers, we have not had adequate time to assess and review them. In concept, however, these proposals sound promising. It does not, however, appear that BellSouth's proposed revisions will alleviate the Joint Petitioners' concerns with regard to BellSouth's

insistence on replacing the FCC's use of "customer" with "End User" as amorphously defined by BellSouth. As stated with respect to Item 2/Issue G-2, addressing the definition of "End User", Joint Petitioners serve a wide variety of telecommunications customers that may or may not qualify as the ambiguous "ultimate user" of a telecommunications service. Accordingly, while the Joint Petitioners appreciate BellSouth's movement on this issue, the fact remains that BellSouth may be improperly seeking to restrict Joint Petitioners' access to EELs in a manner not intended by the FCC. However, we will continue to work with BellSouth to explore potential resolution of this issue, as well as Item 2/Issue G-2. *[Sponsored by: M. Johnson (KMC); H. Russell (NVX); J. Falvey (XSP)].*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Joint Petitioners simply want what the FCC's rules provide, and nothing less. *[Sponsored by: M. Johnson (KMC); H. Russell (NVX); J. Falvey (XSP)].*

> ***Item No. 51, 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]: (A)* ***This issue has been resolved.***
>
> *(B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?*
>
> *(C) Who should conduct the audit and how should the audit be performed?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 51(B)/ISSUE 2-33(B).

A. It is the CLECs' position that to invoke its limited right to audit CLEC's records in order to verify compliance with the high capacity EEL service eligibility criteria, BellSouth

should send a Notice of Audit to the CLECs, identifying the particular circuits for which BellSouth alleges non-compliance and demonstrating the cause upon which BellSouth rests its allegations. The Notice of Audit should also include all supporting documentation upon which BellSouth establishes the cause that forms the basis of BellSouth's allegations of noncompliance. Such Notice of Audit should be delivered to the CLECs with all supporting documentation no less than thirty (30) days prior to the date upon which BellSouth seeks to commence an audit. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. AS AN INITIAL MATTER, PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT IT IS NOT OBLIGATED TO PROVIDE HIGH CAPACITY EELS AFTER THE INTERIM PERIOD AND THEREFORE THIS ISSUE IS ONLY RELEVANT DURING THE 12-MONTH INTERIM/TRANSITION PERIOD? [BLAKE AT 31:24-32:3]

A. The current state of the law requires BellSouth to provide the Joint Petitioners access to high-capacity EELs. We do not agree that there is a 12 month cap on BellSouth's obligation to provide high capacity EELs to us. However, if BellSouth wants to include in the Agreement an express 12 month sunset on all EEL audit provisions we will not object (unless the FCC releases an order eliminating them sooner). We cannot assess the impact of the FCC's Final Unbundling Rules prior to their being released. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. BellSouth's audit notice must identify the particular circuits for which BellSouth alleges non-compliance and demonstrate the cause upon which BellSouth rests its allegations. The notice should include all supporting documentation upon which BellSouth establishes the cause that forms the basis of BellSouth's allegations of noncompliance. These requirements – which BellSouth provides no sound reason for rejecting – will contribute dramatically to curtailing EEL audit litigation that currently is consuming too many of the Parties' and the Commission's resources. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 51(C)/ISSUE 2-33(C).

A. The audit should be conducted by a third party independent auditor mutually agreed upon by the Parties. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH CLAIMS THAT A THIRD PARTY INDEPENDENT AUDITOR MUTUALLY AGREED TO BY THE PARTIES IS A "POINTLESS STEP DESIGNED ONLY AS A DELAYING TACTIC." PLEASE RESPOND. [BLAKE AT 33:21]

A. The Petitioners do not believe that their agreement as to the independence of the auditor is pointless, considering the Petitioners are the subject of the audit. While BellSouth argues that this proposal is simply a delay tactic, the Petitioners submit that BellSouth's refusal to agree to such a reasonable position is a tactic to keep CLECs out of the

decision-making process, perhaps to their detriment. As BellSouth is aware, the CLECs are subject to payment of the audit as well as circuit conversion under certain conditions. With this much at stake, the Commission should not find the Petitioners' proposal to agree to the auditor pointless, but rather essential to equality of the audit process. *[Sponsored by: M. Johnson (KMC), H. Russell, (NVX), J. Falvey (XSP)]*

Q. DO THE PARTIES HAVE OTHER OUTSTANDING DISPUTES WITH RESPECT TO ITEM 51(C)/ISSUE 2-33(C)? [BLAKE AT 33:8-12]

A. No. It appears that Ms. Blake is misinformed. The only issue that remains is whether the Agreement will include a requirement that the independent auditor must be mutually agreed-upon. BellSouth has already agreed to language that provides that "[t]he audit shall commence at a mutually agreeable location (or locations)". BellSouth also has agreed to Joint Petitioners' proposal for the reimbursement provision (Section 5.2.6.2.3). We have no idea about (and neither address nor accept) the "other requirements" and "materiality" disputes Ms. Blake claims exists. Certainly such disputes are not evident from the contract language thus far agreed to by the Parties. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, we are pleased to note that our position has been adjusted to reflect that there is no longer a disagreement with respect to when a CLEC must reimburse BellSouth and when BellSouth must reimburse a CLEC. BellSouth has accepted Joint Petitioners' language on that issue. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 52, Issue No. 2-34 [Section 5.2.6.2.3]: ***This issue has been resolved.***

Item No. 53, Issue No. 2-35 [Section 6.1.1]: ***This issue has been resolved.***

Item No. 54, Issue No. 2-36 [Section 6.1.1.1]: ***This issue has been resolved.***

Item No. 55, Issue No. 2-37 [Section 6.4.2]: ***This issue has been resolved.***

Item No. 56, Issue No. 2-38 [Sections 7.2, 7.3]: ***This issue has been resolved.***

Item No. 57, Issue No. 2-39 *[Sections 7.4]: (A) Should the Parties be obligated to perform CNAM queries and pass such information on all calls exchanged between them, including cases that would require the party providing the information to query a third party database provider?*

(B) If so, which party should bear the cost?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 57(A)/ISSUE 2-39(A).

A. The Parties should be obligated to perform CNAM queries and pass such information on all calls exchanged between them, regardless of whether that would require BellSouth to query a third party database provider. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH CLAIMS THAT IF IT CEASES TO QUERY A THIRD PARTY DATABASE PROVIDER, BELLSOUTH CUSTOMERS WILL BE AS HARMED AS CLEC CUSTOMERS. PLEASE RESPOND. [BLAKE AT 35:19-21]

A. Widespread detrimental impact to consumers is not a valid reason why BellSouth should not be obligated to perform CNAM queries. BellSouth already has an overwhelming

market dominance in Kentucky and while a BellSouth customer may continue to be a satisfied customer without receiving caller identification information associated with our relatively small base of customers, it is unlikely that a customer of the Joint Petitioners will be satisfied with its caller ID not being delivered to BellSouth's enormous base of customers. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 57(B)/ISSUE 2-39(B).

A. Each Party should bear its own costs associated with dipping CNAM providers. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH ASSERTS THAT SHOULD IT DECIDE TO PERFORM CNAM FUNCTIONS, IT SHOULD BE PURSUANT TO SEPARATELY NEGOTIATED RATES, TERMS AND CONDITIONS. PLEASE RESPOND. [BLAKE TESTIMONY AT 35:25-26:1]

A. Although the Joint Petitioners may not be adverse to entering into an agreement with BellSouth to perform CNAM functions at some point, the Joint Petitioners maintain that each carrier should bear its own costs in dipping CNAM databases and BellSouth should not attempt to assess a host of BellSouth-developed, "market-based" rates on the Joint Petitioners. Based on negotiations with BellSouth on this issue, it appears that BellSouth may be willing to offer an agreement to the Joint Petitioners, where the Joint Petitioners

would have to pay some BellSouth-developed rates, just to ensure that the Joint Petitioners' third party CNAM gets dipped by BellSouth. This appears to be a type of extortion based on monopoly-legacy that the Commission should neither condone nor tolerate. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT THIS ISSUE (BOTH PARTS) IS NOT APPROPRIATE FOR ARBITRATION. [BLAKE AT 35:5-12

A. There is no reasoned basis for BellSouth's claim that this issue is not appropriate for arbitration. As stated in our direct testimony, CNAM queries and delivery are essential to the exchange of local traffic between interconnecting LECs required under section 251. Furthermore, unless Petitioners' proposed language is adopted, they will once again be impaired without unbundled access to BellSouth's CNAM database. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Item No. 58, Issue No. 2-40 [Sections 9.3.5]: ***This issue has been resolved.***

Item No. 59, Issue No. 2-41 [Sections 14.1]: ***This issue has been resolved.***

INTERCONNECTION (ATTACHMENT 3)

Item No. 60, Issue No. 3-1 [Section 3.3.4 (KMC, NSC, NVX), 3.3.3 XSP)]: ***This issue has been resolved.***

Item No. 61, Issue No. 3-2 [Section 9.6 and 9.7]: ***This issue has been resolved.***

Item No. 62, Issue No. 3-3 [Section 10.7.4, 10.9.5, and 10.12.4]: ***This issue has been resolved.***

Item No. 63, Issue No. 3-4 *[Section 10.8.6, 10.10.6 and, 10.13.5]: Under what terms should CLEC be obligated to reimburse BellSouth for amounts BellSouth pays to third party carriers that terminate BellSouth transited/CLEC originated traffic?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 63/ISSUE 3-4.

A. In the event that a terminating third party carrier imposes on BellSouth any charges or costs for the delivery of Transit Traffic originated by CLEC, the CLEC should reimburse BellSouth for all charges paid by BellSouth, which BellSouth is obligated to pay pursuant to contract or Commission order. Moreover, CLECs should not be required to reimburse BellSouth for any charges or costs related to Transit Traffic for which BellSouth has assumed responsibility through a settlement agreement with a third party. BellSouth should diligently review, dispute and pay such third party invoices (or equivalent) in a manner that is at parity with its own practices for reviewing, disputing and paying such invoices (or equivalent) when no similar reimbursement provision applies. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES BELLSOUTH PROVIDE ANY JUSTIFICATION AS TO WHY IT CANNOT AGREE TO JOINT PETITIONERS' PROPOSED LANGUAGE?

A. No, we could not detect any. But is important to remember that the issue here is not about Joint Petitioners paying third party charges; it is about when Joint Petitioners must reimburse BellSouth for the payment of such charges. Joint Petitioners are willing to reimburse BellSouth only in those cases where it has a legal obligation to pay such

charges, excluding, of course, settlements in which BellSouth voluntarily takes on such obligations. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. MS. BLAKE SPENDS A GOOD DEAL OF TIME OPINING AS TO WHETHER OR NOT BELLSOUTH HAS AN OBLIGATION TO PROVIDE TRANSIT SERVICES TO JOINT PETITIONERS. IS THAT DISCUSSION RELEVANT TO THIS ISSUE? [BLAKE AT 38:16-40:30]

A. No. Ms. Blake's discussion about whether or not BellSouth is obligated to provide transit services to Joint Petitioners is not relevant to this issue. (We think that BellSouth is obligated to provide transit services to Joint Petitioners, in any event.) Irrespective of the Parties' differing views of what the law requires, they have agreed that transit services will be part of the Agreement. Thus, this is not an issue of whether BellSouth will provide transit services to Joint Petitioners. BellSouth already has agreed to do so. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH STATES THAT IT DOES REVIEW, DISPUTE AND PAY ICO BILLS FOR CLECS IN THE SAME MANNER IT DOES FOR ITS OWN INVOICES. PLEASE RESPOND. [BLAKE AT 41:4-16]

A. If BellSouth does, in fact, review and dispute ICO bills in a manner that is at parity with its own practices, then BellSouth should not be disputing the Petitioners' proposed language. BellSouth should not pay an ICO for charges it was not obligated to pay under its agreement with the ICO or pursuant to a Commission order and, therefore, should not agree to pay any extraneous or unauthorized charges to an ICO for the delivery of transit traffic originated by a CLEC. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 64, Issue No. 3-5 [Section 10.5.5.2, 10.5.6.2 and 10.7.4.2]: ***This issue has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 65/ISSUE 3-6.

A. BellSouth should not be permitted to impose upon CLEC a Tandem Intermediary Charge ("TIC") for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic. The TIC is a non-TELRIC based additive charge which exploits BellSouth's market power and is discriminatory. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX); J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE IS APPROPRIATE WITH REGARD TO THE TIC CHARGE?

A. The Petitioners' language – which excludes the TIC – is appropriate for the obvious reason that any charges for BellSouth's transiting services should be at TELRIC-based rates. Moreover, the Commission has never established a TELRIC-based rate for the TIC charge and BellSouth already collects elemental rates for switching and common transport to recover its costs associated with providing the transiting functionality. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX); J. Falvey (XSP)]*

Q. IS BELLSOUTH CORRECT IN ITS ASSERTION THAT IT IS NOT REQUIRED TO PROVIDE A TRANSIT TRAFFIC FUNCTION BECAUSE IT IS NOT A SECTION 251 OBLIGATION UNDER THE ACT? [BLAKE AT 41:25-42:1]

A. No, BellSouth is not correct. As explained in our direct testimony, transiting is an interconnection obligation firmly ensconced in section 251 of the Act. Moreover, this transiting functionality has been included in BellSouth interconnection agreements for nearly 8 years. BellSouth already has agreed to continue providing transit services to Joint Petitioners under the Agreement – thus, once again, this issue is not about whether BellSouth will provide transit services to Joint Petitioners.

In any event, we believe that BellSouth's transiting service is certainly an obligation under section 251 of the Act and subject to the TELRIC pricing requirements that accompany those obligations. We are aware of no FCC or Commission order that finds that transiting is not a section 251 obligation. Notably, transiting functionality is something BellSouth regularly offers in Attachment 3 of its interconnection agreements, which sets forth the terms and conditions of BellSouth's obligations to interconnect with CLECs pursuant to section 251(c) of Act.

It also is worth noting that this issue has been addressed by the North Carolina Commission in response to a Verizon Petition for Declaratory Ruling that Verizon is not required to provide InterLATA EAS traffic transit between third party carriers (Docket No. P-19, Sub 454). BellSouth filed a brief in support of Verizon's position. In consideration of Verizon's Petition, the North Carolina Commission concluded that Verizon is "obligated to provide the transit service as a matter of law." The Commission

agreed with the arguments set forth by the proponents of the transiting obligation, specifically that the transiting function follows directly from an ILEC's obligation to interconnect under 47 U.S.C. §§251(a)(1), 252(c)(2). *[Sponsored by: M. Johnson (KMC), J. Fury (NVX); J. Falvey (XSP)]*

Q. BELLSOUTH CLAIMS THAT IN PROVIDING THE TRANSIT TRAFFIC FUNCTION, IT INCURS COSTS BEYOND THOSE THAT THE TELRIC-RATES RECOVERS, SUCH AS COST OF SENDING RECORDS TO CLECS IDENTIFYING THE ORIGINATING CARRIER. PLEASE RESPOND. [BLAKE AT 42:15-18]

A. BellSouth has provided this function as part of its interconnection agreements for nearly 8 years and has not claimed to us, prior to this negotiation/arbitration, that the elemental rates for tandem switching and common transport do not adequately provide for BellSouth's cost recovery. As is typically the case with new interconnection costs, if BellSouth now believes the current rates no longer provide for adequate cost recovery, BellSouth should conduct a TELRIC cost study and propose a rate in the Commission's next generic pricing proceeding. BellSouth, however, should not be permitted unilaterally to impose a new charge without submitting such charge to the Commission for review and approval. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX); J. Falvey (XSP)]*

Q. BELLSOUTH AGUES THAT CLECS HAVE THE OPTION TO CONNECT DIRECTLY WITH OTHER CARRIERS AND DO NOT NEED TO USE BELLSOUTH TO PROVIDE A TRANSIT FUNCTION. PLEASE RESPOND. [BLAKE AT 42:10-11]

A. While Joint Petitioners could theoretically directly interconnect with every carrier in the state, it is not practical to expect them to do so. The more practical alternative is for Joint Petitioners to use BellSouth's transiting function as they have always done. As BellSouth itself states, CLECs use BellSouth transiting because it is more economical and efficient than direct trunking. *See* Blake at 42:11-13. Different CLECs have different network configurations and needs, and, therefore may choose to connect directly with other carriers or utilize BellSouth's transiting function. Regardless of a CLEC's choice, BellSouth should make its transiting function available to all CLECs on a non-discriminatory basis at TELRIC-based rates. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX); J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX); J. Falvey (XSP)]*

Item No. 66, Issue No. 3-7 [Section 10.1]: ***This issue has been resolved.***

Item No. 67, Issue No. 3-8 [Section 10.2, 10.2.1, 10.3]: ***This issue has been resolved.***

Item No. 68, Issue No. 3-9 [Section 2.1.12]: ***This issue has been resolved.***

Item No. 69, Issue No. 3-10 [Section 3.2, Ex. A]: ***This issue, in both subparts, has been resolved.***

Item No. 70, Issue No. 3-11 [Sections 3.3.1, 3.3.2, 3.4.5, 10.10.2]: ***This issue has been resolved.***

Item No. 71, Issue No. 3-12 [Section 4.5]: ***This issue has been resolved.***

Item No. 72, Issue No. 3-13 [Section 4.6]: ***This issue has been resolved.***

Item No. 73, Issue No. 3-14 [Sections 10.10.4, 10.10.5, 10.10.6,10.10.7]: ***This issue has been resolved.***

COLLOCATION (ATTACHMENT 4)

Item No. 74, Issue No. 4-1 [Section 3.9]: ***This issue has been resolved.***

Item No. 75, Issue No. 4-2 [Sections 5.21.1, 5.21.2]: ***This issue has been resolved.***

Item No. 76, Issue No. 4-3 [Section 8.1]: ***This issue has been resolved.***

Item No. 77, Issue No. 4-4 [Section 8.4]: ***This issue has been resolved.***

Item No. 78, Issue No. 4-5 [Section 8.6]: ***This issue has been resolved.***

Item No. 79, Issue No. 4-6 [Sections 8.11, 8.11.1, 8.12.2]: ***This issue has been resolved.***

Item No. 80, Issue No. 4-7 [Section 9.1.1]: ***This issue has been resolved.***

Item No. 81, Issue No. 4-8 [Sections 9.1.2, 9.1.3]: ***This issue has been resolved.***

Item No. 82, Issue No. 4-9 [Sections 9.3]: ***This issue has been resolved.***

Item No. 83, Issue No. 4-10 [Sections 13.6]: ***This issue has been resolved.***

ORDERING (ATTACHMENT 6)

Item No. 84, Issue No. 6-1 [Section 2.5.1]: ***This issue has been resolved.***

Item No. 85, Issue No. 6-2 [Section 2.5.5]: ***This issue has been resolved.***

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?*

Q. WHAT IS YOUR POSITION WITH RESPECT TO ITEM 86(B)/ISSUE 6-3(B)?

A. If one Party disputes the other Party's assertion of non-compliance, that Party should notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the Parties should cooperatively seek expedited resolution of the dispute. "Self help", in the form of suspension of access to ordering systems and discontinuance of service, is inappropriate and coercive. Moreover, it effectively denies one Party the due process contemplated by Dispute Resolution provisions incorporated in the General Terms and Conditions of the Agreement. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. WHY ARE THE JOINT PETITIONERS OPPOSED TO BELLSOUTH'S PROPOSED LANGUAGE FOR SECTIONS 2.5.6.3?

A. BellSouth's proposed language allows it to terminate Joint Petitioners' access to BellSouth OSS for an allegedly unauthorized use of a CSR. This type of "self help" is inappropriate. Joint Petitioners have therefore proposed that, if there is a dispute over an assertion of alleged noncompliance with CSR procedures, and notice of alleged non-compliance is not answered with a certification that corrective measures have been taken, the dispute shall proceed according to the Dispute Resolution procedures in Section 13 of the General Terms and Conditions. This procedure is more reasonable than the complete termination of access/self-help proposed by BellSouth. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. FERGUSON HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Although the Petitioners recognize that abuse of CSRs is serious and that such abuse could involve the access of Customer Proprietary Network Information of Kentucky consumers without their knowledge, *see* Ferguson at 14:4-10, Mr. Ferguson does not provide adequate justification for why disputes over alleged unauthorized access to CSRs cannot be handled through the dispute resolution procedures. Moreover, Mr. Ferguson's statement that "BellSouth does not suspend or terminate access to OSS interfaces on a whim", s*ee* Ferguson at 13:22-23, or that to his knowledge, BellSouth has only terminated a CLEC's access to CSRs once, *see* Ferguson as 14:20, provides no reasonable or reliable measure of assurance to Joint Petitioners. BellSouth's proposal still allows BellSouth to engage in "self help" in the form of suspension of access to

ordering systems and discontinuance of service. BellSouth's insistence on having the ability to unilaterally resolve disputes by engaging in self-help is inappropriate and coercive. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 87, Issue No. 6-4 [Section 2.6]: ***This issue has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 88/ISSUE 6-5.

A. Rates for Service Date Advancement (a/k/a service expedites) related to UNEs, interconnection or collocation should be set consistent with TELRIC pricing principles. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY SERVICE DATE ADVANCEMENTS SHOULD BE PRICED AT TELRIC-COMPLIANT RATES.

A. Unbundled Network Elements must be provisioned at TELRIC-compliant rates. BellSouth does not dispute this fact. *See* Morillo at 3:23-25. An expedite order for a UNE should not be treated any differently. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. PLEASE ADDRESS BELLSOUTH'S ASSERTION THAT BECAUSE OFFERING EXPEDITES IS NOT A 251 OBLIGATION, TELRIC RATES SHOULD NOT APPLY. [MORILLO AT 4:5-6]

A. First, it is important to make clear that this issue is not about whether BellSouth will offer expedites in this Agreement. It already has agreed to do so. There is no dispute over the language – it is merely a dispute over the appropriate rate. Second, TELRIC-based rates,

by definition, include a reasonable profit. As explained in our direct testimony, the rates proposed by BellSouth are unreasonable, excessive and harmful to competition and consumers. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. WHY IS THIS ISSUE APPROPRIATE FOR A SECTION 251 ARBITRATION?

A. As explained in our direct testimony, the manner in which BellSouth provisions UNEs is absolutely within the parameters of section 251. Moreover, the Parties already have negotiated and agreed to language providing for expedites. BellSouth cannot now argue that rates for that service cannot be arbitrated. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. MORILLO HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, the Joint Petitioners remain optimistic that BellSouth will take them up on their offer to negotiate a reasonable rate for service expedites. *[Sponsored by: M. Johnson (KMC), J. Willis (NVX); J. Falvey (XSP)]*

Item No. 89, Issue No. 6-6 [Section 2.6.25]: ***This issue has been resolved.***

Item No. 90, Issue No. 6-7 [Section 2.6.26]: ***This issue has been resolved.***

Item No. 91, Issue No. 6-8 [Section 2.7.10.4]: ***This issue has been resolved.***

Item No. 92, Issue No. 6-9 [Section 2.9.1]: ***This issue has been resolved.***

Item No. 93, Issue No. 6-10 [Section 3.1.1]: ***This issue has been resolved.***

Item No. 94, Issue No. 6-11 *[Sections 3.1.2, 3.1.2.1]: (A) Should the mass migration of customer service arrangements resulting from mergers, acquisitions and asset transfers be accomplished by the submission of an electronic LSR or spreadsheet?*

(B) If so, what rates should apply?

(C) What should be the interval for such mass migrations of services?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 94(A)/ISSUE 6-11(A).

A. Mass migration of customer service arrangements (*e.g.*, UNEs, Combinations, resale) should be accomplished pursuant to submission of electronic LSR or, if mutually agreed to by the Parties, by submission of a spreadsheet in a mutually agreed-upon format. Until such time as an electronic LSR process is available, a spreadsheet containing all relevant information should be used. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX),* ***J.*** *Falvey (XSP)]*

Q. SHOULD EVERY MASS MIGRATION BE HANDLED ON A CASE-BY-CASE BASIS, AS BELLSOUTH INSISTS? [OWENS AT 4:9-13]

A. No. Mass migrations should not be subject to a formless, uncertain ICB standard as BellSouth proposes. Though it may be true that "every merger, acquisition, or asset transfer is unique", *see* Owens at 4:10, an order is still an order and therefore, there is no reason why BellSouth cannot process mass migrations in an efficient, standardized and predictable manner via the submission of an electronic LSR or spreadsheet. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES BELLSOUTH'S PROPOSED PROCESS FOR MERGERS AND ACQUISITIONS DISTINGUISH BETWEEN ASSET TRANSFERS AND TRANSFERS OF OWNERSHIP?

A. Yes. BellSouth's recently developed mergers and acquisitions process distinguishes between transfer of assets and transfer of ownership. Additionally, during negotiations on this issue, BellSouth has repeatedly stated that it is easier for BellSouth to process a mass migration when one company is purchasing all of the assets of another company as opposed to a partial asset purchase. While this may be true for BellSouth, its process, in effect, seems to discriminate against asset purchasers who are unwilling to assume all of the sellers assets. A CLEC has the right not to assume all of the prior liabilities of the seller for each circuit and such CLEC should not be discriminated against or forced to pay higher charges for making such a business decision. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. OWENS HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. The Joint Petitioners appreciate that BellSouth has developed a mergers and acquisitions process. *See* Owens at 4:15-24. Nevertheless, BellSouth has not provided any reason why mass migrations cannot be performed pursuant to submission of standardized electronic LSR(s) or, until an electronic LSR process is available. The Joint Petitioners are willing to work upon a mutually agreeable format for the submission of service arrangements to be migrated to accommodate BellSouth's processes. However, it is time to take some of the guess work and uncertainty out of the process. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 94(B)/ISSUE 6-11(B).

A. An electronic OSS charge should be assessed per service arrangement migrated. In addition, BellSouth should only charge Petitioners a TELRIC-based records change charge, such as the one set forth in Exhibit A of Attachment 2, for migrations of customers for which no physical re-termination of circuits must be performed. Similarly, BellSouth should establish and only charge Petitioners a TELRIC-based charge, which would be set forth in Exhibit A of Attachment 2, for migrations of customers for which physical re-termination of circuits is required. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY TELRIC-COMPLIANT RATES SHOULD APPLY TO MASS MIGRATIONS.

A. All aspects of provisioning UNEs, interconnection, traffic exchange and collocation should be priced at TELRIC-compliant rates, as Joint Petitioners have consistently maintained. This obligation should include mass migrations, which are simply bulk records change orders. The Joint Petitioners have sought rates from BellSouth for services regularly involved in a migrations process, including but not limited to, OSS charges, order and project coordination, billing/records change, disconnect and re-termination orders, retagging of circuits, collocation charges and completion notifications. We also have asked BellSouth to identify and price any other activities that might need to be undertaken as a result of a mass migration. At this point, BellSouth has not provided any rates for these services or identified and priced any additional activities. As discussed above, however, any rates that BellSouth does propose for these services

should be at TELRIC-compliant rates as these services are related to the provisioning of UNEs interconnection, traffic exchange and collocation under section 251. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. OWENS HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, we have refined our position statement to account for the fact that the proper rates may not yet be, or are not yet, in Exhibit A to Attachment 2. Joint Petitioners should pay an electronic OSS charge per service arrangement migrated, and a TELRIC-based records change charge for migrations of customers for which no physical re-termination of circuits must be performed. BellSouth should only charge Petitioners a TELRIC-based rate for migrations of customers for which physical re-termination of circuits is required. The Joint Petitioners are, however, optimistic that BellSouth is working on providing a list of applicable rates that will be included as part if its mergers and acquisitions process. A list of applicable rates, and transparency as to their composition, will assist in negotiations. *See* Owens at 6:23-7:3. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 94(C)/ISSUE 6-11(C).

A. Migrations should be completed within 10 calendar days of an LSR or spreadsheet submission. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY BELLSOUTH SHOULD COMMIT TO A 10 CALENDAR-DAY INTERVAL FOR COMPLETING A MASS MIGRATION.

A. Mass migrations of customers should be treated in a manner similar to typical CLEC orders and not relegated to ICB status. Joint Petitioners should not be forced to submit to unspecified deadlines derived on a case-by-case basis in order to acquire customers. More importantly, Joint Petitioners' customers' service should not be vulnerable to or affected by any such delay. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY ITEM 94/ISSUE 6-11 IS AN APPROPRIATE ISSUE FOR ARBITRATION. [OWENS AT 3:20-23]

A. Section 251 is devoted to ensuring that CLECs obtain interconnection, collocation, and UNEs in a just and reasonable manner. Provisioning intervals are absolutely included in this requirement. Apart from that, it seems nonsensical that the migration of customers to service configurations covered by the Agreement should not be covered by the Agreement and resolved in this arbitration. Accordingly, the terms by which BellSouth switches customers and updates records associated with UNE and other serving configurations is squarely within the Commission's jurisdiction. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

BILLING (ATTACHMENT 7)

***Item No. 95, Issue No. 7-1** [Section 1.1.3]: What time limits should apply to backbilling, over-billing, and under-billing issues?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 95/ISSUE 7-1.

A. There should be an explicit, uniform limitation on a Party's ability to engage in backbilling under this Agreement. The Commission should adopt the CLEC proposed language, which would limit a Party's ability to bill for services rendered no more than ninety (90) calendar days after the bill date on which those charges ordinarily would have been billed. For purposes of ensuring that a party could reconcile backbilled amounts, the CLEC proposed language provides that billed amounts for services that are rendered more than one (1) billing period prior to the bill date should be invalid unless the billing Party identifies such billing as "backbilling" on a line-item basis. Finally, the CLEC proposed language provides an exemption to the ninety (90) day limit whereby backbilling beyond ninety (90) calendar days and up to a limit of six (6) months after the date upon which the bill ordinarily would have been issued may be invoiced under the following conditions: (1) charges connected with jointly provided services whereby meet point billing guidelines require either Party to rely on records provided by a third party and such records have not been provided in a timely manner; and (2) charges incorrectly billed due to erroneous information supplied by the non-billing Party. With respect to over-billing, the Parties have negotiated and separately agreed to a 2-year limit on filing billing disputes (thus, Petitioners do not believe that BellSouth properly has inserted this as a sub-issue here). With respect to under-billing, Petitioners believe that the sub-issue

is covered by any provisions that address backbilling. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE WITH REGARD TO BACKBILLING IS APPROPRIATE.

A. Joint Petitioners' backbilling proposal provides adequate safeguards to allow Parties to backbill for charges not rendered in the current billing period while avoiding extreme backbilling, which will likely result in numerous irreconcilable bills and financial accounting problems. Moreover, as stated in my direct testimony, it is my understanding that the Commission has ruled in favor of a 90-day backbilling limit. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT THE JOINT PETITIONERS' PROPOSAL IS "IMPRACTICAL". [MORILLO AT 5:1]

A. Joint Petitioners' proposal is not "impractical", but rather is reasonable and fair. What is impractical is to have a Joint Petitioner reopen its financial books more than a year after they have been closed to account for a backbill from BellSouth. As pointed out by Mr. Morillo, Kentucky has a 2-year statute of limitations. *See* Morillo at 4:20-21. The Commission can imagine what havoc a 2-year backbilling standard would wreak on the financials of a Joint Petitioner or any company or consumer of BellSouth services for that matter. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. MORILLO HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. The bottom line is the Joint Petitioners need to receive and pay invoices for services in a timely manner in order to keep adequate financial records and maintain business certainty. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

> ***Item No. 96, Issue No. 7-2*** *[Section 1.2.2]: (A) What charges, if any, should be imposed for records changes made by the Parties to reflect changes in corporate names or other LEC identifiers such as OCN, CC, CIC and ACNA? (B) What intervals should apply to such changes?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 96(A)/ISSUE 7-2(A).

A. Petitioners submit that a Party should be entitled to make one corporate name, OCN, CC, CIC or ACNA change ("LEC Change") in the other Party's databases, systems and records within any 12 month period without charge. For any additional "LEC Changes", TELRIC-compliant charges should be assessed. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY THE PETITIONERS' LANGUAGE IS APPROPRIATE?

A. The Petitioners' language is appropriate considering the current status of the telecommunications industry in which a corporate change requiring a name change is not a rare occurrence. Considering the frequency of corporate changes, granting the CLECs one LEC change per year without charge is reasonable. Moreover, to the extent CLECs request additional LEC Changes, they should not be forced into BellSouth's amorphous

BFR/NBR process where BellSouth is not bound to any pricing scheme and Joint Petitioners have virtually no negotiating leverage, but rather should be assessed TELRIC-based rates. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. OWENS HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Mr. Owens did not explain why adding standardization, predictability and pre-set pricing for certain tasks could not replace the current regime wherein BellSouth essentially gets to pick a number out of a hat. However, as with Mr. Owens' testimony on Item 94/Issue 6-11, above, we are hopeful that the process will become more transparent and predictable with BellSouth's inclusion of applicable rates as part of its mergers and acquisitions process. *See* Owens at 10:11-15. Moreover, at this point, we also note that Joint Petitioners are willing to abandon their contention that BellSouth should absorb up to one LEC identifier change per year, in exchange for predictable and reasonable processes and rates. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 96(B)/ISSUE 7-2(B).

A. Petitioners submit that "LEC Changes" should be accomplished in thirty (30) calendar days. Furthermore, "LEC Changes" should not result in any delay or suspension of ordering or provisioning of any element or service provided pursuant to this Agreement, or access to any pre-order, order, provisioning, maintenance or repair interfaces. Finally, with regard to a Billing Account Number ("BAN"), the CLECs proposed language provides that, at the request of a Party, the other Party will establish a new BAN within

ten (10) calendar days. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH CLAIMS THAT IT IS "EXTREMELY DIFFICULT, IF NOT IMPOSSIBLE, TO ESTABLISH AN INTERVAL [FOR A LEC CHANGE] BEFORE THE SCOPE OF THE PROJECT AND REQUIRED WORK HAS BEEN DETERMINED". [OWENS AT 11:9-11] PLEASE COMMENT.

A. The Commission should not accept BellSouth's vague and hollow attempt to alleviate itself of any intervals for completing LEC Changes. Joint Petitioners are rightfully concerned that a simple name change could result in substantial delay and disruption of service. Mr. Owens does not even attempt to address the reasonableness of intervals proposed by the CLECs or provide counter proposals, but rather attempts to preserve the cloak of ICB rates and intervals. The Petitioners maintain that, due to the prevalence of LEC Changes, the Commission must adopt intervals to ensure that the process is speedy, fair and predictable. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. OWENS HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. IS BELLSOUTH CORRECT IN ITS ASSERTION THAT THIS ISSUE (BOTH PARTS) IS NOT APPROPRIATE FOR ARBITRATION? [OWENS TESTIMONY AT 8:17-20]

A. No, BellSouth's assertion is not correct. Pursuant to section 251, BellSouth must provide nondiscriminatory access to network elements, interconnection and collocation. Regardless of whether LEC Changes are expressly mandated under section 251 or state law, this issue plainly involves BellSouth's OSS and billing for UNEs, collocation and interconnection which is clearly encompassed by section 251. Furthermore, this issue directly impacts BellSouth's billing practices and ensures that they are just and reasonable. There is no question that BellSouth's billing practices are within the Commission's purview. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 97/ISSUE 7-3.

A. Payment of charges for services rendered should be due thirty (30) calendar days from receipt or website posting of a complete and fully readable bill or within thirty (30) calendar days from receipt or website posting of a corrected or retransmitted bill, in those cases where correction or retransmission is necessary for processing. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE WITH REGARD TO PAYMENT DUE DATE IS APPROPRIATE?

A. Joint Petitioners' language is appropriate given that the Petitioners agreed to BellSouth's proposal for a 30-day payment deadline (one billing cycle). We had initially sought 45 days. Under this tight deadline it is imperative that CLECs be given the full 30 days to review and pay those bills. As Joint Petitioners demonstrated in their direct testimony, Petitioners typically have far less than 30 days to pay invoices due to a long lag time that is experienced between BellSouth's "bill date" and the date on which Joint Petitioners actually receive bills. Accordingly, the Petitioners' language provides that the Petitioners will be given 30-days to pay once a Petitioner receives a complete and fully readable bill via mail or website posting. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S SYSTEMS ARGUMENTS WHY IT CANNOT ALLOW THE JOINT PETITIONERS 30 DAYS UPON RECEIPT TO PAY A BILL. [MORILLO AT 6:3-7]

A. The Joint Petitioners should not be subject to unfair payment terms based on BellSouth's alleged systems limitations. BellSouth makes two blanket statements with no justification: (1) due date requirements listed in its access tariffs and contracts cannot be differentiated; (2) all customer due dates and treatments are the same for all customers and cannot be differentiated. *See* Morillo at 6:3-7. Neither assertion seems to be a valid reason for not providing Joint Petitioners (or any other CLECs) with reasonable payment terms. Joint Petitioners should not have to endure inconsistent and unfair payment terms because BellSouth would have to fix its systems to allow CLECs adequate time to pay

invoices. It is unreasonable for BellSouth to assert that its systems cannot be modified and improved or that it won't modify or improve them.

As stated in the Joint Petitioners direct testimony, NuVox and its NewSouth affiliate tracked the average time for BellSouth to deliver electronic invoices. It took NuVox on average 7 days after the issue date to receive BellSouth bills and it has been NewSouth's experience that once it receives a bill from BellSouth, NewSouth only has between 19-22 days to process the bill for payment. *See* Joint Petitioners Direct at 104:5-15. Moreover, it takes on average 6.45 days for Xspedius to receive bills from BellSouth. *See* Joint Petitioners Direct at 105:19-106-2. These timeframes are far from commercially reasonable and BellSouth should not be able to get away with its standard our-current-systems-don't-allow-it-SO-it-cannot-be-done argument. Joint Petitioners' request is reasonable and BellSouth should not be able to hide behind its convenient systems limitations arguments to avoid agreement on reasonable and fair payment terms *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH ASSERTS THAT IT "HAS NO WAY TO KNOW WHEN THE CUSTOMER ACTUALLY RECEIVES THE BILL; THUS, IT IS NOT REASONABLE TO EXPECT THAT TREATMENT COULD BE BASED ON THE DATE THE CUSTOMER RECEIVES THE BILL". PLEASE RESPOND. [MORILLO AT 6:7-12]

A. As with BellSouth's systems argument, BellSouth's argument here is not persuasive. Indeed, Mr. Morillo's assertion that "BellSouth has no way to know when the customer actually receives the bill" is embarrassing. *See* Morillo at 6:8-9. There is no reason why

BellSouth should not be aware when it sends and a customer receives an electronic or paper bill. It is easy to track on-line posting and receipt of mail – electronic or traditional. Such posting and "return receipt" functions are basic components of Internet-posting and electronic mail programs. Courier services, such as UPS and FedEx, and the United States Postal Service have long provided "return receipt" or delivery confirmation services to their customers. It is surprising to us that Mr. Morillo is unaware of such things and that nobody at BellSouth who reviewed his testimony bothered to point them out to him. Because posting and receipt are easily tracked, it is certainly reasonable to tie payment due dates to the posting or receipt of bills. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. MORILLO HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. The Commission should allow 30 days from posting or receipt of a bill to remit payment. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 98, Issue No. 7-4 [Section 1.6]: ***This issue has been resolved.***

Item No. 99, Issue No. 7-5 *[Section 1.7.1]: What recourse should a Party have if it believes the other Party is engaging in prohibited, unlawful or improper use of its facilities or services, abuse of the facilities or noncompliance with the Agreement or applicable tariffs?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 99/ISSUE 7-5.

A. Petitioners as well as BellSouth should have the right to suspend access to ordering systems and to terminate particular services or access to facilities that are being used in an unlawful, improper or abusive manner. However, such remedial action should be

limited to the services or facilities in question and such suspension or termination should not be imposed unilaterally by one Party over the other's written objections to or denial of such accusations. In the event of such a dispute, "self help" should not supplant the Dispute Resolution process set forth in the Agreement. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE IS APPROPRIATE.

A. The Petitioners' language is appropriate as it limits BellSouth's self-help actions to those situations where there is no dispute between the Parties. Terminating services or denying access to ordering systems are drastic measures, which must not be taken without following the standard procedures set forth in the Agreement, including the Dispute Resolution provisions, when necessary. Accordingly, the Petitioners' language allows both BellSouth to ensure the integrity of its network while protecting Joint Petitioners from BellSouth's unilateral termination of facilities or denial of access to ordering systems if there is any dispute as to the unlawfulness or improper use of its network or facilities. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH CLAIMS THAT ITS LANGUAGE STATES THAT "BELLSOUTH RESERVES THE RIGHT TO SUSPEND OR TERMINATE SERVICE – NOT THAT BELLSOUTH WILL TAKE SUCH ACTION". PLEASE RESPOND. [MORILLO AT 7:6-7]

A. BellSouth's statement that it reserves the right to suspend or terminate service – but may not utilize such right – does not give the Petitioners any assurance or peace of mind. Although the Petitioners would like to believe that BellSouth would not engage in self-help and terminate any CLEC service or deny access to ordering systems if CLEC

questions or even denies BellSouth's allegation of improper use of facilities, BellSouth curiously refuses to agree to contract language that provides such protections. This Agreement must be clear to protect the Petitioners' rights as well as BellSouth's rights. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO THE JOINT PETITIONERS APPRECIATE THE SEVERITY OF ENGAGING IN IMPROPER USE OF FACILITIES?

A. Absolutely. As pointed out by Mr. Morillo, abuses of facilities could include listening in on party lines, fraudulent impersonation and harassing, and threatening phone calls. *See* Morillo at 7:11-13. Joint Petitioners recognize that these bad acts can occur and must be stopped and Petitioners will work with BellSouth to eliminate any such abuses promptly. What BellSouth fails to recognize is the severity of a "pull-the-plug" practice whereby BellSouth may unilaterally suspend and terminate services or deny access to ordering systems. The Petitioners do not intend to dispute BellSouth's notice in order to continue engaging in any improper use of facilities. However, the Petitioners simply cannot agree to BellSouth's language, which allows BellSouth to unilaterally "pull-the-plug" on ordering access or actual services if there is a disagreement. As BellSouth seeks to protect its network, the Joint Petitioners, while working with BellSouth to protect the network, need to protect the viability and continued provision of services and access to ordering systems. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. MORILLO HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. As mentioned above, the Joint Petitioners will diligently address claims of improper use of services. However, it is possible that the Parties could have a dispute with respect to BellSouth's allegations of improper use of services. In such cases, BellSouth should invoke the Dispute Resolution provisions set forth in the General Terms and Conditions. BellSouth's attempt to establish for itself the roles of prosecutor, judge and jury should be denied. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

> ***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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 100/ISSUE 7-6.

A. CLECs should not 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. Rather, if a Petitioner receives a notice of suspension or termination from BellSouth, with a limited time to pay non-disputed past due amounts, Petitioner should be required to pay only those amounts past due as of the date of the notice and as expressly and plainly indicated on the notice, in order to avoid suspension or termination. Otherwise, CLEC will risk suspension or termination due to possible calculation and timing errors. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE IS APPROPRIATE.

A. Joint Petitioners' language is appropriate because there is a substantial risk of calculation errors or disputes and customer impacting service outages inherent in BellSouth's proposal. Payment and dispute posting are all exclusively under BellSouth's control. The Joint Petitioners, however, could do their very best to calculate the precise amount that will become past due as of the pending suspension or termination action, but any such calculation would necessarily have to include a prediction about how timely and accurately BellSouth will post payments and disputes (which can be legitimately withheld). Thus, BellSouth's proposal is tantamount to a shell game that could easily be rigged or abused by BellSouth. Too much is on the line for Joint Petitioners (and our customers) to be subject to such uncertainty. Joint Petitioners – and our customers – could be shut down based on a simple calculation error, a bad prediction about BellSouth posting performance, or by bad actions on the part of BellSouth. Suspension and termination of access to ordering systems and services are very serious events with very significant impacts that stretch well beyond the Parties. When such actions may be taken should not be determined by a shell game exclusively in control of a Party who likely would not mind if it put one or all of the Joint Petitioners out of business. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH ARGUES THAT ITS PROPOSAL IS NECESSARY FOR "INSURING THAT CUSTOMERS ARE NOT ALLOWED TO CONTINUE TO STRETCH THE TERMS OF THE CONTRACT AND INCREASE THE LIKELIHOOD OF BAD DEBT". PLEASE RESPOND. [MORILLO AT 9:14-16]

A. BellSouth's proposal is too dangerous to be necessary and it seems intentionally designed to be that way. BellSouth can adequately protect itself by diligently issuing notices indicating precise amounts due and by diligently pursuing collections. The shell game proposed by BellSouth is open to abuse tantamount to extortion. Joint Petitioners' proposal represents a reasonable and fair alternative that protects the interests of all Parties, is not subject to abuse, and does not unduly threaten Kentucky consumers' services. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. MORILLO HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. BellSouth's proposal to force the Petitioners to calculate and pay past due amounts in addition to those specified in a BellSouth notice when facing possible suspension or disconnection is patently unfair and potentially abusive. As mentioned in the Joint Petitioners direct testimony, if a CLEC receives a past due notice with the threat of suspension or termination, that CLEC's billing personnel will work as fast as possible to pay any past due amounts listed in the notice. Under BellSouth's proposal, however, the CLEC would also have to pay some "magic number" that BellSouth has calculated to avoid suspension and termination. Such risk allocation on Joint Petitioners is unreasonable and potentially harmful to Kentucky consumers. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 101/ISSUE 7-7.

A. The maximum amount of a deposit should not exceed two month's estimated billing for new CLECs or one and one-half month's actual billing for existing CLECs (based on average monthly billings for the most recent six (6) month period). The one and one-half month's actual billing deposit limit for existing CLECs is reasonable given that balances can be predicted with reasonable accuracy and that significant portions of services are billed in advance. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY IS PETITIONERS' LANGUAGE IS APPROPRIATE.

A. The Petitioners' language strikes a reasonable balance, whereby BellSouth's risk exposure is covered by a security deposit and existing CLECs such as Petitioners are not required to tie-up substantial capital in deposits. As stated in our initial testimony, Petitioners maintain that deposit terms should reflect that each Petitioner, directly and through its predecessors, has already had a long and substantial business relationship with BellSouth. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH CLAIMS THAT A MAXIMUM DEPOSIT BASED ON TWO MONTHS BILLING IS CONSISTENT WITH STANDARD PRACTICE IN THE TELECOMMUNICATIONS INDUSTRY. PLEASE RESPOND. [MORILLO AT 9:23-10:2]

A. Whether or not a two month maximum is standard BellSouth practice, we do not agree that it is appropriate or justified. In almost any other contracting scenario where one party is not attempting to leverage their monopoly legacy and overwhelming market dominance, it would not be standard practice for one side (BellSouth) to continually try to extract deposits from the other. Moreover, BellSouth has agreed to lesser maximums with at least one other CLEC. There is no reason why any of the Joint Petitioners should be subject to a higher maximum deposit. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. MORILLO HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. BellSouth's two month maximum deposit proposal is unreasonable, discriminatory and more than could possibly be justified. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

***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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 102/ISSUE 7-8.

A. The amount of security due from an existing CLEC should be reduced by amounts due to CLEC by BellSouth aged over thirty (30) calendar days. BellSouth may request

additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in the deposit provisions of Attachment 7 of the Agreement. This provision is appropriate given that the Agreement's deposit provisions are not reciprocal and that BellSouth's payment history with CLECs is often poor. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY THE PETITIONERS' LANGUAGE IS APPROPRIATE.

A. Joint Petitioners language is appropriate because it is fair and reasonable. KMC and Xspedius have had to endure a legacy of untimely payments from BellSouth, and there are no deposit provisions in this Agreement to protect Joint Petitioners from the credit risks created by BellSouth's chronically poor payment history. Any credit risk exposure that BellSouth seeks to protect itself from Joint Petitioners is certainly offset by amounts that BellSouth does not pay timely to Joint Petitioners. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES MR. MORILLO PROVIDE ANY JUSTIFICATION FOR BELLSOUTH'S REFUSAL TO AGREE TO JOINT PETITIONERS' PROPOSAL? [MORILLO 10:21-11:1]

A. No. Mr. Morillo provides no justification for BellSouth's refusal to offset deposit requests with amounts past due from BellSouth to Joint Petitioners. Instead, Mr. Morillo suggests that suspension/termination of service and assessment of late payment charges are sufficient to protect Joint Petitioners' credit risk created by BellSouth's poor payment track record. Mr. Morillo does not explain why these same mechanisms are not sufficient to protect BellSouth. If BellSouth was willing to rely exclusively on those mechanisms,

we would as well. However, BellSouth insists upon collecting deposits. Accordingly, we have every right to insist that the deposit requirements incorporated into the Agreement reflect the fact that BellSouth's risk exposure is reduced by amounts that it withholds from Joint Petitioners. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. MORILLO HAVE TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, the Petitioners recognize BellSouth's proposal that it is willing to reduce a deposit amount by amounts BellSouth owes Petitioners for reciprocal compensation payments pursuant to Attachment 3. *See* Morillo at 11:8-20. Nevertheless, the Petitioners do not want to limit their right to reduce security deposits to only BellSouth's past-due reciprocal compensation payments. There is no rational basis for such a limitation. The Petitioners, however, are willing to continue to negotiate this issue with BellSouth. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

***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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 103/ISSUE 7-9.

A. BellSouth should have a right to terminate services to CLEC for failure to remit a deposit requested by BellSouth **only** in cases where: (a) CLEC agrees that such a deposit is required by the Agreement, or (b) the Commission has ordered payment of such deposit. A dispute over a requested deposit should be addressed via the Agreement's Dispute

Resolution provisions and not through "self-help". *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY JOINT PETITIONERS' LANGUAGE IS APPROPRIATE.

A. Joint Petitioners' proposal allows BellSouth to terminate service to CLECs for failure to remit a deposit amount that has been agreed to or ordered. It does not, however, allow BellSouth to engage in self-help in those circumstances where the Parties do not agree on the amount of deposit required (if any). In those circumstances, BellSouth's proper line of recourse is to the Dispute Resolution provisions of the Agreement. In short, the Commission should decide and resolve the dispute – not BellSouth. This language is reasonable and more equitable than BellSouth's proposal, which would allow BellSouth to terminate service to CLEC under any circumstance in which CLEC has not remitted a deposit requested by BellSouth within thirty (30) calendar days. Joint Petitioners' proposal prohibits BellSouth from engaging in unacceptable self-help actions where BellSouth seeks to disregard the Dispute Resolution provisions of the Agreement (and likely the deposit criteria) and instead leverage its monopoly legacy by pulling the plug on a Joint Petitioner and all of its customers. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. MR. MORILLO ASSERTS THAT "THIRTY CALENDAR DAYS IS A REASONABLE TIME PERIOD WITHIN WHICH A CLEC SHOULD MEET ITS FISCAL RESPONSIBILITIES". PLEASE RESPOND. [MORILLO AT 12:6-7]

A. Mr. Morillo's statement does not address the issue. As stated in the Petitioners' proposal, if a Joint Petitioner has agreed to a BellSouth deposit request or the Commission has

ordered posting of a specified deposit, then BellSouth may terminate service if such deposit is not remitted by the CLEC within 30 days. However, should there be a dispute as to BellSouth's deposit request, then, under no circumstances, should BellSouth be able to "pull-the-plug" if a Joint Petitioner does not cede to BellSouth's demands (however unreasonable) within 30 days. Once again, BellSouth is trying to use its monopoly legacy to engage in self-help, without regard to the dispute resolution provisions included in this Agreement. "Pull the plug" provisions such as this one proposed by BellSouth are an inappropriate means of dispute resolution that unnecessarily threaten do disproportionate harm to Joint Petitioners and their Kentucky customers. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. MORILLO HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. The Commission should reject this and every other Machiavellian self-help/pull-the-plug provision proposed by BellSouth. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

***Item No. 104, Issue No. 7-10** [Section 1.8.7]: What recourse should be available to either Party when the Parties are unable to agree on the need for or amount of a reasonable deposit?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 104/ISSUE 7-10.

A. If the Parties are unable to agree on the need for or amount of a reasonable deposit, either Party should be able to file a petition for resolution of the dispute and both parties should cooperatively seek expedited resolution of such dispute. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE IS APPROPRIATE?

A. The Petitioners' language is appropriate as it reasonably defers to the dispute resolution provisions of the Agreement. If BellSouth is aggrieved by a Joint Petitioner's response to a deposit request it should file a complaint with the Commission for dispute resolution. BellSouth's proposal, on the other hand, seeks to force the Petitioners to file a complaint – even though we have no right to seek a deposit, and would not be the aggrieved party if a dispute arose with respect to a deposit request. (The complaint filing burden would shift to us, if a dispute arose as to whether we were entitled to the return of various deposit amounts – our position is not one-sided.) Compounding that over-reaching, BellSouth then insists that a Petitioner post a bond while the dispute is pending, and to post a payment bond, which is essentially the same as paying BellSouth the deposit outright. Reasonable and fair dispute resolution provisions do not enable one side to pronounce itself the winner at the outset. Moreover, the dispute resolution provisions agreed to by the parties (notwithstanding their dispute over the availability of courts as a venue) simply do not contemplate bond posting requirements. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. HAS MR. MORILLO PROVIDED ANY JUSTIFICATION FOR BELLSOUTH'S POSITION?

A. No. Mr. Morillo restates BellSouth's position, and essentially complains that in the event of a dispute as to whether BellSouth is entitled to a deposit or a certain level of a deposit under the Agreement, BellSouth should not have to seek and prevail in dispute resolution prior to obtaining the relief it seeks. *See* Morillo at 13:4-16. This is likely the case because there simply is no justification for the heavy-handed and one-sided provision

proposed by BellSouth. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. MORILLO HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 105, Issue No. 7-11 [Section 1.8.9]: ***This issue has been resolved.***

Item No. 106, Issue No. 7-12 *[Section 1.9.1]: To whom should BellSouth be required to send the 15-day notice of suspension for additional applications for service, pending applications for service and access to BellSouth's ordering systems?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 106/ISSUE 7-12.

A. Notice of suspension for additional applications for service, pending applications for service, and access to BellSouth's ordering systems should be sent to CLECs pursuant to the requirements of Attachment 7 and also should be sent via certified mail to the individual(s) listed in the Notices provision of the General Terms and Conditions. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE EXPLAIN WHY THE PETITIONERS' LANGUAGE WITH REGARD TO THE 15-DAY NOTICE IS APPROPRIATE?

A. The Petitioners' language is appropriate because, due to the critical nature of this 15-day notice, BellSouth is directed to provide this notice to the notice recipient identified in the General Terms and Conditions. A notice of suspension of access to ordering systems, which is vital to a CLEC's business, is too important to a CLEC's business to be sent only to the billing contact. As stated in my initial testimony, the General Terms and

Conditions provides that notices be delivered to the person identified by the Petitioners. Due to the significance of a notice of suspension to BellSouth's ordering system, the Commission must not allow BellSouth to create a non-negotiated exception to the rule for this type of suspension notice. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. HAS BELLSOUTH PROVIDED ANY JUSTIFICATION OR EXPLANATION AS TO WHY IT CANNOT PROVIDE ITS 15-DAY COMPUTER-GENERATED NOTICE TO THE CLEC CONTACT LISTED IN THE GENERAL TERMS AND CONDITIONS?

A. No. As with several other issues, BellSouth simply restates its position in its testimony without providing any justification or explanation for its position. The fact is that there is no valid justification for BellSouth's position. Once again, the Commission should not allow BellSouth to rely on its now familiar party line: we-don't-currently-do-it-SO-it-can't-be-done. As explained in Joint Petitioners direct testimony, this is too important not to be done. Joint Petitioners will not agree to an exception to the General Terms and Conditions notices requirements, so that BellSouth can bury critical notices in thick piles (or files) of billing material. If such a notice is generated, BellSouth simply needs to make a copy and send it as required by the General Terms and Conditions notice provision – it's not hard, burdensome or expensive. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MR. MORILLO HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. As pointed out in the Joint Petitioners direct testimony, Section 24.1 of the General Terms and Conditions states that "[e]very notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered by hand, by overnight courier or by U.S. Mail postage prepaid, addressed to: [identified CLEC/BellSouth recipient]." This provision was agreed to by the parties without exception. *See* Joint Petitioners Direct at 120:14-17. Moreover, as this Commission is aware, this particular notice at issue threatens the Joint Petitioners' access to ordering systems, which is vital to the Petitioners' business and their ability to provide service to Kentucky customers. Therefore, it is imperative that such a notice will be provided to the billing contact as well as the contact or contacts identified in the General Terms and Conditions. BellSouth has provided no justification for the Commission to decide otherwise. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

BONA FIDE REQUEST/NEW BUSINESS REQUEST (BFR/NBR)

(ATTACHMENT 11)

Item No. 107, Issue No. 11-1 [Sections 1.5, 1.8.1, 1.9, 1.10]:
This issue has been resolved.

SUPPLEMENTAL ISSUES

(ATTACHMENT 2)

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 108/ISSUE S-1.

A. Joint Petitioners maintain that the Agreement should not automatically incorporate the "Final FCC Unbundling Rules", which for convenience, is a term the Parties have agreed to use to refer to the rules the FCC intends to release in the near term in WC Docket No. 04-313. After release of the Final FCC Unbundling Rules, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by those rules, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BEFORE BEGINNING ITS TESTIMONY ON THE SUPPLEMENTAL ISSUES, BELLSOUTH MAKES SOME PRELIMINARY COMMENTS, ONE OF WHICH IS THAT THE SUPPLEMENTAL ISSUES SHOULD BE DEFERRED TO A GENERIC PROCEEDING WHICH BELLSOUTH PETITIONED THE COMMISSION TO OPEN ON OCTOBER 29, 2004. [BLAKE AT 43:4-14] PLEASE RESPOND.

A. If BellSouth seeks to defer resolution of certain issues to another docket for subsequent incorporation in this case, it should file a motion in this docket seeking such referral to

another. At this point, the Parties already have committed to negotiate and arbitrate issues arising in the post-*USTA II* regulatory framework in this proceeding. The Parties' commitment to do so was memorialized in the Parties' July 16, 2004 Joint Petition to Hold the Proceeding in Abeyance that was approved by the Commission on July 23, 2004. Pursuant to this agreement, the Parties have identified these supplemental issues to address the post-*USTA II* regulatory framework. It is our understanding from reviewing BellSouth's Petition for a Generic Proceeding, that the goal of such a proceeding is to amend existing interconnection agreements with Kentucky CLECs. However, as agreed to by the Parties, there will be no amendments to the Joint Petitioners' existing interconnection agreement UNE provisions (Attachment 2). Rather, the Parties will continue to operate pursuant to those existing UNE provisions until they are able to move into new interconnection agreements (incorporating the post-*USTA II* regulatory framework) that result from the conclusion of this arbitration docket.

Should the Commission decide that it would like to resolve certain of the Parties' supplemental issues – or perhaps certain aspects of them – in a generic docket, it must carefully consider and adopt appropriate procedures for participation in that proceeding, but also for importing the results of that proceeding back into this one, so that the Agreement can be finalized and the arbitration concluded. In any event, the Commission should not do so until after the FCC has issued and released Final Unbundling Rules and BellSouth and CLECs have had a reasonable amount of time in which to attempt to negotiate relevant contract provisions and to identify arbitrations issues. Obviously, the Parties cannot effectively negotiate and the Commission cannot effectively arbitrate with respect to federal law that does not exist or with respect to issues that have not been

properly framed or developed. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT THE *USTA II* DECISION VACATED THE FCC'S RULES WITH REGARD MASS MARKET SWITCHING, LOCAL SWITCHING, HIGH CAPACITY DEDICATED TRANSPORT, HIGH CAPACITY LOOPS AND DARK FIBER? [BLAKE AT 44:2-8]

A. No. BellSouth begins its testimony with an incorrect analysis of *USTA II*. As pointed out by BellSouth, the D.C. Circuit vacated the FCC's subdelegation to State Commissions to make impairment determinations and vacated and remanded the FCC's nationwide impairment findings with respect to mass market switching as well as DS1, DS3 and dark fiber transport. *See* Blake at 44:10-18. As emphasized by the Joint Petitioners in their direct testimony, *USTA II* did not vacate the FCC's high capacity loop unbundling rules. *USTA II* also did not eliminate section 251, the FCC's impairment standard, section 271 or the Commission's ability under federal and state law to require BellSouth to provide access to DS1, DS3 and dark fiber loops and DS1, DS3 and dark fiber transport. *See* Joint Petitioners Direct 162:10-14, 173:9-13. Additionally, there are ample sources of federal and state law under which BellSouth is obligated to provide access to these UNEs, none of which were upended by *USTA II*. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. BELLSOUTH ASSERTS THAT THE FCC IN FCC 04-179 SET FORTH A COMPREHENSIVE 12-MONTH PLAN INCLUDING THE INTERIM PERIOD AND THE TRANSITION PERIOD. [BLAKE AT 44:20-45:5] PLEASE RESPOND.

A. As discussed in the Joint Petitioners direct testimony in response to Item No. 111/Issue S-4 and discussed in more detail in this rebuttal testimony on that same issue, the FCC did not adopt the "Transition Period" or plan for the six months following the Interim Period. The Transition Period was merely proposed by the FCC in FCC 04-179, as the FCC used the words "we propose" in paragraph 29. Moreover, upon release of FCC 04-179, Chairman Powell commented that the "Order only seeks comment on a transition that will not be necessary if the Commission gets its work done." Accordingly, it is the Joint Petitioners' position that the Parties should maintain the status quo and operate under their existing agreements until a formal Transition Plan is adopted or the FCC issues Final Unbundling Rules. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. WHY SHOULDN'T THE FCC'S FINAL UNBUNDLING RULES BE AUTOMATICALLY INCORPORATED INTO THE AGREEMENT AS PROPOSED BY BELLSOUTH?

A. The first reason is simply because that is not the way our interconnection agreements work. BellSouth seeks to automatically incorporate future rules that are not in existence and for which the Parties do not know the impact on the Agreement. The Joint Petitioners cannot deem incorporated something that is unknown (or known only to the extent portrayed in an FCC press release (which does not modify existing law and is not

law itself)). Such an approach is illogical. The logical and statutorily required approach is that once the FCC's Final Unbundling Rules are released, the Parties should be provided a reasonable opportunity to review and assess the new rules, negotiate proposed contract language, identify issues of disagreement and if such issues cannot be resolved through negotiation, they should be resolved by the Commission through arbitration. BellSouth points to paragraphs 22 and 23 of FCC 04-179, as support for its position that the FCC "clearly intended that its Final Unbundling Rules as well as the Transition Period would take effect without delay." *See* Blake at 45:16-46:17. A closer look at the quoted language, however, indicates that the FCC merely wanted to assure BellSouth and other ILECs that they could initiate change of law proceedings consistent with their governing interconnection agreements. Joint Petitioners' agreements with BellSouth simply do not contemplate or permit a "deemed amended" or "automatically incorporated" approach to changes of law. Instead they reflect the standard and required process of negotiation and arbitration by the Commission. While that process does not happen overnight, it need not involve undue delay. Moreover, FCC 04-179 in no way upended the negotiation/arbitration process set forth in section 252 of the Act.

In addition to the Act's negotiations/arbitration mandate, there is support in numerous FCC orders and press statements regarding the important role of interconnection agreement negotiations and arbitrations. Specifically, in the TRO, the FCC specifically stated that "individual carriers should be allowed the opportunity *to negotiate specific terms and conditions* necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules." The FCC also commented in the TRO that it would refrain

from "interfering with the contract process." In adopting the "All-or-Nothing-Rule" the FCC stated in paragraph 12 that "an all-or-nothing rule would better serve the goals of sections 251 and 252 to *promote negotiated interconnection agreements* because it would encourage incumbent LECs to make trade-offs in negotiations that they are reluctant to accept under the existing rule." Moreover Chairman Powell states, in support of the rule, "[t]hrough this action, the Commission advances the cause of facilities-based competition by permitting carriers to *negotiate individually tailored interconnection agreements* designed to fit their business needs more precisely." There is obviously strong support for negotiations and "meeting of the minds" in contract negotiations. BellSouth's proposed instant arbitration and automatic incorporation of the FCC Final Unbundling Rules clearly contradicts the policy goals adopted by the FCC and is at odds with the Parties' agreements and the Act. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENT THAT THE FCC'S FINAL UNBUNDLING RULES SHOULD NOT BE THE "SUBJECT OF LONG-DRAWN-OUT NEGOTIATIONS". [BLAKE AT 46:21]

A. The Joint Petitioners would prefer not to engage in "long-drawn-out" negotiations once the FCC's Final Unbundling Rules are released. Indeed, in the negotiations the Parties have had thus far with respect to the Agreement, Joint Petitioners have been frustrated by many delays – a good number of which are attributable to BellSouth (we do not claim perfection, either – the fact is that negotiating an interconnection agreement from scratch is a complicated and time consuming process). Indeed, BellSouth took more than 4 months to deliver its most recent redline of Attachment 2. We received it more than a

month after the abatement period during which we were to spend time negotiating with respect to new Attachment 2 redlines ended.

Looking further at the Parties' current negotiations/arbitration experience as a base, it is important to note that the negotiations and arbitration schedule was mutually agreed to by the Parties, at times with some contention but ultimately without dispute. Moreover, it is BellSouth that initially proposed to abate the arbitration process for 90-days, not the Joint Petitioners. The Joint Petitioners agreed to the abatement, but the Commission should not be swayed by Ms. Blake's implication that Joint Petitioners have caused or will seek unreasonable delay. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT "FAILURE TO AUTOMATICALLY INCORPORATE THE FCC'S FINAL UNBUNDLING RULES INTO CLEC AGREEMENTS RESULTS IN DISCRIMINATION AGAINST FACILITIES-BASED CARRIERS THAT HAVE ALREADY MADE THEIR AGREEMENTS COMPLIANT WITH THE CURRENT LAW" OR THAT HAVE NEGOTIATED SO-CALLED "COMMERCIAL AGREEMENTS" WITH BELLSOUTH? [BLAKE AT 47:2-8]

A. Absolutely not. In fact, the flip side of BellSouth's argument is true. First of all, our current agreements are compliant with current law on BellSouth's unbundling obligations with respect to high capacity loops, high capacity transport and mass market switching – and the Agreement being arbitrated is fully TRO-compliant. With respect to BellSouth's so-called "commercial agreements", Joint Petitioners are unaware of any facilities-based

carrier that has entered into one. Even if there were any, Joint Petitioners' rights should not be prejudiced, dictated or compromised by voluntary agreements between BellSouth and other carriers. Those carriers (if any) made their own business decisions – they are not discriminated against merely because we don't choose to make the same ones. The simple fact is that the Joint Petitioners have a right to negotiate the rates, terms and conditions of an interconnection agreement and have any disagreements resolved by the Commission. It would obviously be discriminatory to the Petitioners, if we had to agree to less than what we are entitled to under law based on a separate voluntarily agreement between BellSouth and another carrier. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

As stated in our direct testimony, the Joint Petitioners propose to incorporate the FCC's Final Unbundling Rules into the Agreement via the process established by the Act, that is, to engage in good faith negotiations and to allow the Commission to arbitrate any issues the Parties cannot resolve through negotiations. The bulk of BellSouth's testimony on this issue is used to make incorrect allegations that the Petitioners' proposal would result in "long-drawn-out" negotiations and result in discriminatory treatment for those facilities-based carriers that have already entered into commercial agreements with

BellSouth. For the reasons stated above, BellSouth is in no position to complain about elongated or delayed negotiations and arbitrations. Nor can BellSouth pass the red-face test by asserting that following the negotiations and arbitrations procedures set forth in the Act will discriminate against carriers that attempt to opt-out of this process. Automatic incorporation of the FCC's Final Unbundling Rules would upend the negotiations and arbitration process established by the Act and consistently supported by the FCC. Accordingly, the Commission should maintain this process by adopting the Joint Petitioners' position. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 109(A)/ISSUE S-2(A).

A. Joint Petitioners' position with respect to Item 109(A)/Issue S-2(A) is much the same as that described in the above testimony regarding Item 108/Issue S-1. More specifically, Joint Petitioners maintain that the Agreement should not automatically incorporate an "intervening FCC order" adopted in CC Docket 01-338 or WC Docket 04-313. By "intervening FCC order", we mean an FCC order released in CC Docket 01-338 or WC Docket 04-313 that addresses unbundling issues but does not purport to be the "final" unbundling order released as a result of the notice of proposed rulemaking ("NPRM") released as document FCC 04-179 on August 20, 2004 or an FCC order further addressing the interim rules adopted in the FCC's order also released as document FCC

04-179 on August 20, 2004. After release of an intervening FCC order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the intervening FCC order, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. WHAT IS WRONG WITH BELLSOUTH'S POSITION THAT IN ORDER TO EFFECTUATE AN INTERVENING FCC ORDER, THE INTERCONNECTION AGREEMENT MUST AUTOMATICALLY INCORPORATE THE FCC'S FINDINGS AS OF THE EFFECTIVE DATE OF THE ORDER? [BLAKE AT 48:7-13]

A. As discussed in our direct testimony on these supplemental issues and in the foregoing rebuttal testimony on Item 108/Issue S-1, the Act sets forth procedures for negotiating and arbitrating an interconnection agreement and BellSouth's automatic incorporation proposal would circumvent this process. The Parties have already agreed to contract language regarding the provision of UNEs in this Agreement. Therefore, as with the FCC's Final Unbundling Rules, should there be an intervening FCC order that alters the Parties' obligations with respect to providing UNEs, then the Parties should engage in good faith negotiations to formulate and revise contract language as needed and then allow for arbitration and resolution by the Commission of any issues that the Parties could not resolve through negotiations. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 109(B)/ISSUE S-2(B).

A. Joint Petitioners' position with regard to Item No. 109(B)/Issue No. S-2(B) is much the same as their position with regard to Item No. 108 and 109(A)/Issue No. S-1 and S-2(A). The only difference here is that now we are dealing with the intervening order of a State Commission. Like the Final FCC Unbundling Rules, as well as any intervening FCC order, a State Commission intervening order should not be automatically incorporated into the Agreement. Upon release of an intervening State Commission order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the intervening State Commission order, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT THE COMMISSION SHOULD NOT CONSIDER ITEM 109(B)/ISSUE S-2(B) BECAUSE IT EXCEEDS THE PARTIES' AGREEMENT WITH RESPECT TO THE 90-DAY ABATEMENT PERIOD? [BLAKE AT 48:20-22].

A. Absolutely not. The Parties' abatement agreement allows for the negotiation and identification of issues related to the "post-*USTA II* regulatory framework" which is a deliberately vague and expansive term. This abatement agreement was memorialized in the Parties' Joint Petition for Abatement, that was approved by the Commission on July 23, 2004. Neither the Petition nor the Commission's order (or any of the Parties underlying communications) support Ms. Blake's contention that "the parties agreed to only add to the arbitration new issues related to *USTA II* and the *Interim Rules Order*." *See* Blake at 49:1-2. FCC 04-179 is but one aspect of the post-*USTA II* regulatory framework. As BellSouth apparently recognizes from the issues it proposed, the FCC's final rules order, intervening FCC orders, and even another court decision could become part of the post-*USTA II* regulatory framework. An order from the Commission addressing BellSouth's unbundling obligations would be no less a part of that framework. For these reasons, BellSouth's objection to the Commission's consideration of Item 109(B)/Issue S-2(B) is groundless and simply an attempt to improperly limit the scope of this arbitration to avoid addressing any possible Commission order. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT ITEM 109(B)/ISSUE S-2(B) IMPROPERLY EXPANDS THE SCOPE OF THIS ISSUE AND WILL POSSIBLY RESULT IN A CONFLICTING STATE ORDER. [BLAKE AT 49:18-20]

A. There is no reason why a Commission order could not be considered an intervening order in this arbitration. The Parties have identified "hypothetical" FCC orders and court decisions as intervening orders, yet BellSouth argues that a Commission order is beyond the scope of this proceeding. BellSouth states that State Commissions are prohibited from issuing any order that conflicts with FCC 04-179 and, furthermore, can only issue an order raising rates for frozen elements. *See* Blake at 49:11-21. As an initial matter, the Joint Petitioners have never stated that the Commission may issue an order that conflicts with FCC 04-179 or any other FCC order. The Joint Petitioners appreciate the concept of preemption. However, FCC 04-179 is not a complete preemption of State Commission authority; the Commission retains the ability to order unbundling under federal and state law. As stated in our direct testimony, "[t]he most anybody could reasonably argue (in our view) is that, for a period lasting no longer than up to March 12, 2005, the State Commissions may not approve interconnection agreements based on post September 12, 2004 State Commission orders that do anything with respect to so-called 'frozen elements', other than to raise rates for them." *See* Joint Petitioners Direct at 138:5-9. Otherwise, the Commission has power to adopt unbundling rules to the extent it does not conflict federal unbundling requirements. Notably, the FCC has never adopted rules forbidding BellSouth from unbundling high capacity loops and transport. Moreover, it is difficult to anticipate how a Commission unbundling mandate could

conflict with the lack of a similar federal mandate. Accordingly, should the Commission issue an order adopting unbundling rules or modifying the Parties' unbundling obligations, such order should be treated the same as the FCC's Final Unbundling Rules, an intervening FCC order or intervening court decision. That is, the Parties should negotiate contract language to reflect the change in law and the Commission should resolve any issues that could not be resolved by negotiations.

Ms. Blake also makes the sweeping (and erroneous) statement that the TRO decision "emphasizes and reiterates that states may not use state law to impose additional unbundling requirements." *See* Blake at 50:8-10 (referring to paragraphs 194 and 195 of the TRO). BellSouth's statement is overly broad to say the least and is an attempt to intimidate the Commission from using its sate law authority to order unbundling. Paragraphs 194 and 195 of the TRO state that state commissions cannot conflict with or "substantially prevent" implementation of section 251 of the Act. As stated above, the Joint Petitioners are not seeking the Commission to issue any order that conflicts with section 251 or any other federal law. However, in paragraph 653 of the TRO, the FCC also pointed out in the TRO that "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport and signaling regardless of any unbundling under section 271." Therefore, a Commission order that BellSouth must continue to provide unbundled access with respect to high-capacity and dark fiber loops and transport would not conflict with federal law or an FCC order as BellSouth attempts to assert.

BellSouth also points to paragraph 195 of the TRO, which states that a State Commission order that requires unbundling in the face of a finding of non-impairment or vice versa would likely conflict with the limits of section 251(d)(2) of the Act. However, as the Commission is aware, neither the FCC nor this Commission has made a finding of non-impairment with respect to high-capacity and dark fiber loops and transport at issue in this proceeding. Moreover, the FCC was very cautious with its statement and contemplated that conflicts would have to be assessed on a case-by-case basis.

Therefore, a Commission order requiring continued provision of these loops and transport would, again, not conflict with current federal law. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT ITEM 109 (B)/ISSUE S-2(B) WOULD RESULT IN BELLSOUTH HAVING TO CONTEND WITH CONTRADICTORY STATE AND FCC ORDERS? [BLAKE AT 52:2-4]

A. No, I do not. BellSouth's claim that it "would be unable to comply with FCC rules and orders and any contradictory state commission rules and orders for the same subject matter", *see* Blake at 52:2-4, is groundless. As repeated both in the Petitioners' direct testimony as well as in this rebuttal testimony, the Petitioners are not seeking the Commission to act in any way that contradicts with federal law. Despite BellSouth's emphatic assertions to the contrary, the FCC has not completely stripped State Commissions of all their authority with regard to unbundling. The Commission has the power to order unbundling pursuant to section 251 and 271 of the Act as well as under state law. And, as discussed above, the Commission is well within its purview to order

unbundling without conflicting with federal law. Indeed, there is no federal law that requires BellSouth not to unbundle DS1, DS3 and dark fiber loops or DS1, DS3 and dark fiber transport. Thus, what is contemplated is not a situation where the Commission says "you must" and the FCC says "you must not". *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

As with Issue 108/S-1, above, and as discussed with respect to Issue 110/S-3 below, the Joint Petitioners have a consistent position. That is, the Petitioners will work with BellSouth to incorporate any change of law pursuant to the procedures set forth in the Act. Whether it be incorporating the FCC's Final Unbundling Rules, an intervening FCC order, State Commission order or court decision, the Joint Petitioners will engage in good faith negotiations and arbitration of any unresolved issues by the Commission. The Joint Petitioners will not agree, however, to circumvent the process set forth in the Act and employed by the Parties since 1996 and "automatically incorporate" any of the above orders or decisions without negotiations and arbitration. Such is a reasonable position, which is consistent with the Act and which should be upheld by the Commission. As long as the Commission does not issue an order that conflicts with federal law, there is no reason the Commission could not issue an order that impacts the Parties' unbundling

obligations and that must be incorporated into the Agreement. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 110/ISSUE S-3.

A. In the event that FCC 04-179 is vacated or modified, the Agreement should not automatically incorporate the court order. Upon release of such a court order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the court order (to the extent the court order effectuates a change in law with practical consequences), or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID BELLSOUTH OFFER ANY JUSTIFICATION FOR ITS POSITION WITH RESPECT TO ITEM 110/ISSUE S-3?

A. No. BellSouth provided no justification or rationale for its position, but simply reiterated its omnipresent "automatic incorporation" position with respect to an intervening court decision. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT IN THE EVENT OF VACATUR, THE PARTIES SHOULD INVOKE THE TRANSITION PROCESS IDENTIFIED IN ITEM NO. 23 TO CONVERT VACATED ELEMENTS TO COMPARABLE, NON-UNE SERVICES? [BLAKE AT 53:3-7]

A. No, I do not. Joint Petitioners' disagree with BellSouth's proposed transition process (*see* Item 23/Issue 2-5). *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)].*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 111, Issue No. S-4 *What post Interim Period*[3] *transition plan should be incorporated into the Agreement?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 111/ISSUE S-4.

A. The "Transition Period" or plan proposed by the FCC for the six months following the Interim Period has not been adopted by the FCC, but was merely proposed in FCC 04-179. The FCC sought comment on the proposal and on transition plans in general. Upon release of the Final FCC Unbundling Rules, the Parties should endeavor to negotiate

[3] INTERIM PERIOD – as set forth in ¶29 of the FCC 04-179, is defined as the period that ends on the earlier of (1) March 12, 2005 or (2) the effective date of the final unbundling rules adopted by the FCC pursuant to the Notice of Proposed Rulemaking described in the FCC 04-179

contract language that reflects an agreement to abide by the transition plan adopted therein or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. WILL THE CERTAINTY AND STEADINESS OF THE TELECOMMUNICATIONS MARKET BE FRUSTRATED BY NOT AUTOMATICALLY INCORPORATING INTO THE AGREEMENT THE TRANSITION PERIOD? [BLAKE AT 54:21-24].

A. No, the "certainty" and "steadiness" of the telecommunications market will not be frustrated. In fact, stability of the market demands that the status quo be maintained. In other words, the rates frozen during the Interim Period should continue until release of the Final FCC Unbundling Rules or the Transition Plan is adopted and finalized. Increased rates and the inability to provide certain elements to new customers is a dramatic change for which the ultimate effects on the market are anything but certain and steady. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)].*

Q. IS THE TRANSITION PERIOD DESCRIBED IN FCC 04-179 MERELY A PROPOSAL FOR WHAT SHOULD TAKE PLACE IN THE EVENT THE INTERIM PERIOD EXPIRES?

A. Yes, the Transition Period is a proposal and nothing more. As discussed in our direct testimony, the FCC itself employed vernacular that lacked the finality necessary for the plan to be considered more. The FCC specifically used "we propose" when it discussed

the Transition Plan. Moreover, the Chairman, in a concurrent statement released with FCC 04-179, stated that the order "only seeks comment on a transition that will not be necessary if the Commission gets its work done." The foregoing considered, Joint Petitioners do not understand how BellSouth can believe the Transition Period is presently binding on the industry. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)].*

Q. BELLSOUTH TAKES THE CONTRARY POSITION AND ARGUES THAT THE TRANSITION PERIOD WAS ORDERED. [BLAKE AT 55:12-16] DO YOU DISAGREE?

A. Yes, we disagree. As we discussed above, as well as in our direct testimony, the Transition Period was and is a mere proposal the FCC put out for comment. To be ordered, there must be evidence of finality. In FCC 04-179, there is no such evidence of finality – at least not with regard to the Transition Plan. In fact, the ordering clauses found in FCC 04-179 make no mention of the Transition Period. Indeed, the Transition Period therefore cannot be deemed ordered. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)].*

Q. WHAT SHOULD OCCUR IN THE EVENT THE INTERIM PERIOD EXPIRES WITHOUT RELEASE OF THE FINAL FCC UNBUNDLING RULES?

A. Provided that the Transition Plan is not finalized, if the Interim Period lapses without release of the FCC's Final Unbundling Rules, then the status quo should be maintained. Maintaining the status quo is the only measure to ensure market stabilization. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)].*

Q. WHAT SHOULD OCCUR IN THE EVENT THAT THE FCC ADOPTS THE TRANSITION PERIOD PLAN?

A. Should the Transition Plan be formally adopted, the resulting plan should be negotiated, and if needed, arbitrated just like the FCC's Final Unbundling Rules and any intervening FCC or State Commission order or court decision. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)].*

Q. IN THE ABSENCE OF FINAL FCC UNBUNDLING RULES, BELLSOUTH CLAIMS THAT WITHOUT THE TRANSITION PLAN, JOINT PETITIONERS WILL HAVE NO LEGAL RIGHT TO OBTAIN VACATED ELEMENTS AFTER MARCH 12, 2005. [BLAKE AT 55:22-25] DO YOU AGREE WITH THIS STATEMENT?

A. No. Should there be a gap whereby there is no adopted Transition Plan and no FCC Final Unbundling Rules, the Parties should continue as they would anyway – which is to operate under the rates, terms and conditions in their existing Agreements. Further, in the absence of any controlling federal law, the Commission may order the status quo without conflicting with federal law or any FCC rule or order (FCC rules still require nationwide unbundling of DS1, DS3 and dark fiber loops – *USTA II* did not vacate those requirements). As stated above, the Commission has the power to order BellSouth to continue to provision the UNEs at issue in this arbitrations (DS1, DS3 and dark fiber loops and transport) pursuant to federal as well as state law. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)].*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 112(A)/ISSUE S-5(A).

A. The rates, terms and conditions relating to switching, enterprise market loops and dedicated transport from each CLEC's interconnection agreement that was in effect as of June 15, 2004 were "frozen" by FCC 04-179. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES BELLSOUTH PROVIDE ANY JUSTIFICATION FOR ITS POSITION, INCLUDING ITS PROPOSED MODIFICATIONS OF THE DEFINITIONS OF ENTERPRISE MARKET LOOPS AND DEDICATED TRANSPORT?

A. No. As with many issues, BellSouth merely restates its position on this issue and provides no justification or rationale in support of it. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 112(B)/ISSUE S-5(B).

A. The frozen rates, terms and conditions should be incorporated into the Agreement as they appeared in each Joint Petitioner's interconnection agreement that was in effect as of June 15, 2004. In so doing, it should be made clear that the switching rates, terms and conditions that were frozen apply only with respect to mass market switching and not with respect to enterprise market switching. It also should be made clear that the loop provisions are frozen with respect to DS1 and higher capacity level loop facilities, including dark fiber. The Parties agree that these constitute "enterprise market loops". The modified definitions proposed by BellSouth should be rejected. The frozen provisions should not be modified to reflect BellSouth's proposed more restrictive definition of dedicated transport. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENTS THAT THE RATES, TERMS AND CONDITIONS FOR MASS MARKET SWITCHING, ENTERPRISE MARKET LOOPS AND DEDICATED TRANSPORT SHOULD BE FROZEN SUBJECT TO THE CONDITIONS AND REQUIREMENTS SET FORTH IN FCC 04-179. [BLAKE AT 57:12-14, 19-22, 58:1-3]

A. BellSouth is attempting to use the caveat that the rates, terms and conditions of the Parties' June 15, 2004 agreements are subject to the conditions and requirements set forth in FCC 04-179 as a means to modify the definitions of enterprise market loops and dedicated transport that were **not** modified by FCC 04-170. Therefore, the Commission must clearly rule that the rates, terms and conditions for these elements must be incorporated into the Agreement as they existed in the Parties' June 15, 2004 agreements *in their entirety.* The Joint Petitioners do recognize the FCC's modification of the definition of mass market switching and agree that the switching provisions frozen are limited to mass market switching. However, any attempt that BellSouth makes to modify the rates, terms and conditions for enterprise market loops and especially dedicated transport as they existed in the Parties' June 15, 2004 agreements should be disregarded by the Commission. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with

respect to BellSouth's proposed language, as well as our own. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 113, Issue No. S-6: *(A) Is BellSouth obligated to provide unbundled access to DS1 loops, DS3 loops and dark fiber loops? (B) If so, under what rates, terms and conditions?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 112(A)/ISSUE S-6(A).

A. BellSouth is obligated to provide DS1, DS3 and dark fiber loop UNEs. *USTA II* did not vacate the FCC's rules which require BellSouth to make available DS1, DS3 and dark fiber loop UNEs. *USTA II* also did not eliminate section 251, CLEC impairment, section 271 or the Commission's jurisdiction under federal or state law to require BellSouth to provide unbundled access to DS1, DS3 and dark fiber loop UNEs. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT THE JOINT PETITIONERS' POSITION ON THIS ISSUE "REQUIRES THE COMMISSION TO DISREGARD BINDING FEDERAL AND FCC AUTHORITY." [BLAKE AT 58:23-25]

A. BellSouth's assertion is incorrect. On the contrary, it is BellSouth's position on this issue that would require the Commission to disregard FCC rules with regard to the provision of DS1, DS3 and dark fiber loops, BellSouth's 271 obligation to make such loops available and Kentucky state law which also provides the Commission independent authority to order BellSouth to continue to provide access to these loops. BellSouth claims that "*USTA II* vacated any requirement for BellSouth to unbundle and provide these high

capacity transmission facilities at TELRIC prices...." *See* Blake testimony at 59:1-2. As stated in the Joint Petitioners direct testimony, the D.C. Circuit in *USTA II* did not vacate the FCC's rules regarding DS1 and other high-capacity UNE loops, but merely vacated the FCC's referral of additional impairment conclusions to state regulators. Additionally, *USTA II* did not vacate the FCC's nationwide finding of impairment with respect to DS1, DS3 and dark fiber loops made in the TRO. Moreover, the Commission also has not made any finding that Kentucky CLECs are not impaired without access to these loops. Accordingly, there is no FCC or Commission finding of non-impairment with respect to DS1, DS3 and dark fiber loops and, therefore, BellSouth has no justification for its position that it is not legally obligated to provide the Joint Petitioners will unbundled access to these loops.

Since neither the FCC or the Commission has made a finding of non-impairment with respect to DS1, DS3 and dark fiber loops, the Joint Petitioners are in no way asking the Commission to "disregard binding federal and FCC authority" as BellSouth argues. The bottom line is that there are FCC rules in place that require unbundling of these loops; these rules have not been vacated and BellSouth must comply with these rules. BellSouth is trying to "imply vacatur" of these rules and intimidate the Commission into believing that by maintaining the "status quo" with respect to these loops, the Commission will be acting contrary to federal law. This is not the case, and the Commission should not be swayed by BellSouth's sweeping land baseless claims that there are no statutory obligations, FCC rules, or state laws that require BellSouth to continue to unbundle DS1, DS3 and dark fiber loops. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES BELLSOUTH ADDRESS IN ITS DIRECT TESTIMONY ITS OBLIGATION TO PROVIDE ACCESS TO DS1, DS3 AND DARK FIBER LOOPS UNDER SECTION 271 OF THE ACT OR KENTUCKY STATE LAW?

A. No. BellSouth does not even mention section 271 of the Act or Kentucky state law in its testimony on this issue. Perhaps BellSouth believes that if it doesn't raise it, it doesn't exist. The Commission must recognize and acknowledge, however, that BellSouth has an affirmative obligation to provide access to DS1, DS3 and dark fiber loops in accordance with Competitive Checklist Item No. 4 of section 271 and Kentucky state law. As discussed in our direct testimony, Competitive Checklist No. 4 requires ILECs to provide unbundled local loop transmission facilities (including DS1, DS3 and dark fiber) from the central office to the customer's premises. Moreover, the FCC held in the TRO that BOCs are under an independent obligation to provide unbundled access to local loops under Competitive Checklist Item No. 4 of section 271. There has been no federal court decision or FCC order that has modified this statutory obligation in any way. Moreover, in addition to BellSouth's statutory obligations under sections 251 and 271 of the Act and the FCC's rules to provide unbundled access to DS1, DS3 and dark fiber facilities, the Commission has independent state law authority to order BellSouth to continue to provide access to these loop facilities in Kentucky. As discussed in our direct testimony, the Kentucky statutes provide the Commission with plenary authority over the rates and regulations of intrastate telecommunications and additional authority to adopt regulations in the public interest as well as in the interest of telecommunications service

providers in Kentucky.[4] *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 113(B)/ISSUE S-6(B).

A. BellSouth is obligated to provide access to DS1, DS3 and dark fiber loop UNEs at TELRIC-compliant rates approved by the Commission. DS1, DS3 and dark fiber loops unbundled on other than a section 251 statutory basis should be made available at TELRIC-compliant rates approved by the Commission until such time as it is determined that another pricing standard applies and the Commission establishes rates pursuant to that standard. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENT THAT "THE COMMISSION IS PROHIBITED FROM ESTABLISHING A 'NEW' PRICING REGIME FOR THESE [DS1, DS3 AND DARK FIBER LOOPS] ELEMENTS THAT CONTRADICTS [FCC 04-179]". [BLAKE TESTIMONY AT 59:9-11]

A. The Joint Petitioners are in no way asking the Commission to establish any "new" pricing regime that contradicts FCC 04-179. Nor are the Joint Petitioners attempting to "convert this Section 252 arbitration into a state cost proceeding for UNEs that no longer exist and cannot be reinstated by a state commission." *See* Blake at 59:13-14. It is the Petitioners

[4] Specifically, KRS § 278.040 gives the Commission "exclusive jurisdiction over the regulation of rates and service of utilities." Moreover, KRS 278.512(1)(c) provides, "[t]he public interest requires that the Public Service Commission be authorized and encouraged to formulate and adopt rules and policies that will permit the commission, in the exercise of its expertise, to regulate and control the provision of telecommunications services to the public in a changing environment, giving due regard to the interests of consumers, the public, the providers of telecommunications services, and the continued availability of good telecommunications service." *See* Joint Petitioners Direct at 167:22-168:6.

understanding that the Commission has already established TELRIC-complaint rates for these elements and the Joint Petitioners are not challenging these rates. Indeed, the Petitioners do not see why there would be a need to change the rates for these elements. The bottom line is that BellSouth remains obligated to provide unbundled access to DS1, DS3 and dark fiber loops at TELRIC-compliant rates set by the Commission. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE (BOTH PARTS) CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

The D.C. Circuit in *USTA II* did not relieve BellSouth of its obligation to provide unbundled access to DS1, DS3 and dark fiber loops, as BellSouth purports. BellSouth provides no legal justification for its claim that it is no longer obligated to provide unbundled access to these elements. BellSouth's "we-say-so-therefore-it-is" approach is not persuasive. On the other hand, the Joint Petitioners have set forth the following justification for why BellSouth remains obligated to provide access to high-capacity and dark fiber loops: (1) *USTA II* did not vacate the FCC's unbundling rules for these elements; (2) *USTA II* did not vacate ILEC's section 251 obligations nor the FCC's impairment standard; (3) BellSouth is obligated under Competitive Checklist Item No. 4 of section 271 to provided unbundled access to local loop transmission facilities, that includes high-capacity and dark fiber loops; and (4) there is independent Kentucky state

law that obligates BellSouth to makes these facilities available to promote competition for Kentucky consumers. Moreover, the rates, terms and conditions for these loops should not be altered from the rates, terms and conditions already agreed to by the Parties in the Agreement. The Commission has already established rates for these loop facilities that are TELRIC-compliant and these rates should continue to apply. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 114(A)/ISSUE S-7(A).

A. BellSouth is obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport. *USTA II* did not eliminate section 251, CLEC impairment, section 271 or the Commission's jurisdiction under federal or state law to require BellSouth to provide unbundled access to DS1, DS3 and dark fiber transport. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENT THAT THE "JOINT PETITIONERS' ARE IMPROPERLY EXPANDING THE SCOPE OF THIS ISSUE TO INCLUDE CONSIDERATION OF AN INTERVENING, POTENTIALLY CONFLICTING STATE COMMISSION ORDER." [BLAKE TESTIMONY AT 59:22-60:1].

A. The Joint Petitioners are not "improperly expanding the scope of this issue". Contrary to BellSouth's contention, *USTA II* did not eliminate BellSouth's obligation to provide high

capacity and dark fiber transport. *See* Blake at 60:13-14. Therefore, as there is obviously a dispute among the Parties as to the impact of *USTA II* on BellSouth's obligation to continue to provide access to high capacity and dark fiber transport, the Joint Petitioners properly have identified this issue for arbitration by the Commission. BellSouth goes on to complain that the Joint Petitioners are improperly requesting the Commission to issue a "potentially conflicting state commission order" that may involve invoking state law or interpreting federal law. *See* Blake at 59:23-60:1, n. 12. BellSouth is incorrect again. First, there is no federal law requiring BellSouth to refuse to provide high capacity transport UNEs. Moreover, there are no FCC high capacity transport unbundling rules presently to conflict with. And, as stated above in regards to Item 113/Issue S-6, neither the FCC nor the Commission has made a finding of non-impairment with respect to DS1, DS3 and dark fiber transport, therefore, the Joint Petitioners are not requesting the Commission to issue any "conflicting state commission order." Finally, BellSouth makes no case for why the Commission cannot interpret federal law or invoke state law as part of its arbitration process. Section 252 not only permits, but mandates a State Commission to resolve issues raised by a party in arbitration and the Kentucky statutes allow the Commission to invoke state law as part of its plenary jurisdiction over telecommunications and to promote competition for Kentucky consumers. Accordingly, the Commission is well within its purview to consider and resolve this issue and it is BellSouth that is improperly attempting to limit the Commission's scope of jurisdiction in this arbitration in an effort to stave off any unfavorable decision. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT ITEM 114/ISSUE S-7 "EXCEEDS THE PARTIES' AGREEMENT REGARDING THE TYPE OF ISSUES THAT COULD BE RAISED AFTER THE 90-DAY ABATEMENT PERIOD"? [BLAKE TESTIMONY AT 60:2-3]

A. No. BellSouth's assertion is ridiculous considering that the reason for the abatement was to consider the post-*USTA II* regulatory framework and in light of the supplemental issues that have been raised in this arbitration at the request of BellSouth. The abatement agreement was to allow the Parties to consider and identify issues relating to the post-*USTA II* regulatory framework. How BellSouth can argue that an issue addressing how DS1, DS3 and dark fiber transport should be provisioned in the post-*USTA II* regulatory framework is beyond the scope of the abatement is beyond us. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENT THAT "THE JOINT PETITIONERS' ARGUMENTS REGARDING ALTERNATIVE SOURCES OF UNBUNDLING OBLIGATIONS CANNOT BE SUPPORTED BY A CURSORY REVIEW OF THE AUTHORITY THEY CITE." [BLAKE AT 60:16-18].

A. We are not sure what BellSouth means by a "cursory review of the authority they cite". Perhaps it is time for BellSouth to do more than a cursory review, as there is ample authority under sections 251, 271 of the Act and relevant Kentucky state law for the Commission to require BellSouth to continue unbundling DS1, DS3 and dark fiber transport. As stated in the Joint Petitioners direct testimony, section 251 is a statute that imposes a "duty" on BellSouth to provide CLECs access to network elements, which include DS1, DS3 and dark fiber transport. Moreover, pursuant to section 271, BellSouth

is under an independent obligation to provide access to local transport under Competitive Checklist Item No. 5, which requires BellSouth to provide local transport transmission from the trunk side of a wireline local exchange carries switch unbundled from switching and other services. Finally, with respect to state law, as discussed in Petitioners direct testimony and as discussed above with respect to Item 113/Issue S-6, the Commission has plenary authority over telecommunications services in the state of Kentucky and may require BellSouth to provision of DS1, DS3 and dark fiber transport UNEs. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 114(B)/ISSUE S-7(B).

A. Pursuant to section 251, BellSouth is obligated to provide access to DS1, DS3 and dark fiber transport UNEs at TELRIC-compliant rates approved by the Commission. DS1, DS3 and dark fiber transport unbundled on other than a section 251 statutory basis should be made available at TELRIC-compliant rates approved by the Commission until such time as it is determined that another pricing standard applies and the Commission establishes rates pursuant to that standard. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES BELLSOUTH PROVIDE ANY JUSTIFICATION FOR WHY IT IS NOT OBLIGATED TO PROVIDE DS1, DS3 AND DARK FIBER TRANSPORT UNES AT TELRIC-COMPLAINT RATES?

A. No. Although BellSouth repeatedly attempts to intimidate the Commission by claiming that the Commission is ***prohibited*** from making any determinations for high capacity loops and transport, *see* Blake at 49:11-13, 19-21; 59:9-11; 61:22-62:1, it has provided no

justification why the Commission cannot apply federal law or state law (consistent with federal law) in this arbitration. It is the Petitioners' understanding that the Commission has already established TELRIC-complaint rates for high capacity and dark fiber transport. The Petitioners are not attempting to challenge these rates or attempt to turn this proceeding into a UNE cost proceeding. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE (BOTH PARTS) CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

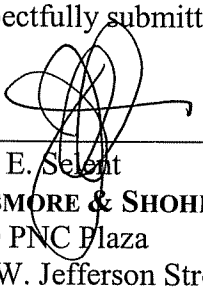
As stated in the Joint Petitioners direct testimony, and despite BellSouth's assertions to the contrary, *USTA II* did not eliminate BellSouth's section 251 statutory obligation to provide unbundled access to DS1, DS3 and dark fiber transport. Additionally, BellSouth is obligated to provide such unbundled access pursuant to section 271 of the Act as well as Kentucky state law. High-capacity and dark fiber transport should be provided at TELRIC-complaint rates until such time as it is determined that another standard applies. It is the Petitioners' understanding that TELRIC-complaint rates already exist for these UNEs and therefore, there is no reason why the Parties presently need to deviate from these rates. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 115, Issue No. S-8: ***This issue has been resolved.***

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, for now, it does. Thank you. *[Sponsored by: M. Johnson (KMC), J. Fury (NVX), H. Russell (NVX), J. Willis (NVX), J. Falvey (XSP)]*

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing was served by mailing a copy of the same by First Class United States Mail, to the following, this 17th day of December, 2004.

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