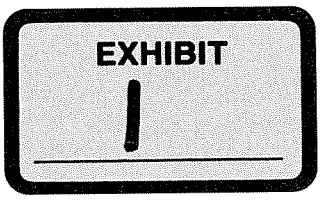

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint petition by NewSouth Communications Corp., NuVox Communications, Inc., and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecommunications, Inc.	DOCKET NO. 040130-TP ORDER NO. PSC-05-0975-FOF-TP ISSUED: October 11, 2005

The following Commissioners participated in the disposition of this matter:

RUDOLPH "RUDY" BRADLEY
LISA POLAK EDGAR

FINAL ORDER REGARDING PETITION FOR ARBITRATION

BY THE COMMISSION:

APPEARANCES:

NORMAN H. HORTON, Jr., Esquire, Messer, Caparello & Self, P.A., Post Office Box 1876, Tallahassee, Florida 32302-1876; and
JOHN J. HEITMANN, Esquire, STEPHANIE JOYCE, Esquire, and GARRET R. HARGRAVE, Esquire, Kelley Drye & Warren LLP, 1200 19th Street, NW, Suite 500, Washington, DC 20036
On behalf 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 Jacksonville, LLC. ("JOINT PETITITONERS").

NANCY B. WHITE, Esquire, c/o Nancy H. Sims, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301; and
R. DOUGLAS LACKEY, Esquire, JAMES MEZA III, Esquire, and ROBERT CULPEPPER, Esquire, Suite 4300, BellSouth Center, 675 W. Peachtree Street, NE, Atlanta, Georgia 30375
On behalf of BellSouth Telecommunications, Inc. ("BST").

JEREMY L. SUSAC, Esquire; and KIRA SCOTT, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission ("STAFF").

Abbreviations and Acronyms

Act	Telecommunications Act of 1996
ASR	Access Service Request
BellSouth	BellSouth Telecommunications, Inc.
CABS	Carrier Access Billing System
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CO	Central Office
CPNI	Customer Proprietary Network Information
CSR	Customer Service Record
DA	Directory Assistance
DS0	Digital Signal, level Zero. DS0 is 64,000 bits per second.
DS1	Digital Signal, level One. A 1.544 million bits per second digital signal carried on a T-1 transmission facility.
DSL	Digital Subscriber Line
FCC	Federal Communications Commission
FPSC	Florida Public Service Commission
GTC	General Terms and Conditions
ICA	Interconnection Agreement
ILEC	Incumbent Local Exchange Carrier
ISP	Internet Service Provider
IXC	Interexchange Carrier
Joint Petitioners	Joint Petitioners
KMC	KMC Telecom V, Inc., KMC Telecom III, LLC
LEC	Local Exchange Carrier
LENS	Local Exchange Navigation System
LSR	Local Service Request
NewSouth	NewSouth Communications Corporation
NRC	Non-Recurring Charge
NuVox	NuVox Communications, Inc.
NXX	Central Office Code/Prefix
OSS	Operational Support Systems
TELRIC	Total Element Long-Run Incremental Cost
TRO	Triennial Review Order, FCC 03-36
TRRO	Triennial Review Remand Order, FCC 04-290

UNE	Unbundled Network Element
UNE-L	Unbundled Network Element-Loop
UNE-P	Unbundled Network Element-Platform
USOC	Universal Service Order Code
USTA II	DC Circuit Court of Appeals' TRO remand; *United States Telecom Ass'n. v. FCC,* 359 F.3d 554 (D.C. Cir. 2004)
xDSL	"x" distinguishes various types of DSL
Xspedius	Xspedius Management Co. Switched Services LLC and Xspedius Management Co. of Jacksonville LLC

I. CASE BACKGROUND

On February 11, 2004, the Joint Petitioners[1] filed their Joint Petition for Arbitration with BellSouth Telecommunications, Inc. (BellSouth) pursuant to the Telecommunications Act of 1996. On March 8, 2004, BellSouth filed its Answer to the Joint Petitioners' Petition. On July 20, 2004, both parties filed a Joint Motion to Hold Proceeding in Abeyance for 90 days. As a result, Order No. PSC-04-0807-PCO-TP, issued on August 19, 2004, revised the procedural schedule as set forth in Order No. PSC-04-0488-PCO-TP and required the parties to file an updated issues matrix on October 15, 2004.

An issue identification was held on November 15, 2004, at which time the parties agreed to the inclusion of all supplemental issues, with the exception of issues 113(b) and 114(b). Parties filed briefs in support of their positions regarding these two issues, and on January 4, 2005, Order No. PSC-05-0018-PCO-TP was issued granting the Joint Petitioners' request for inclusion of issues 113(b) and 114(b).

On March 25, 2005, BellSouth filed a Motion to Move Issues to BellSouth's Generic Docket (Motion). On April 1, 2005, the Joint Petitioners filed their Response in Partial Support of and Partial Opposition to BellSouth's Motion. On April 15, 2005, our staff held an informal conference call with the parties to discuss the motion and response.

By Order No. PSC-05-0443-PCO-TP, issued April 26, 2005, BellSouth's Motion was granted in part and denied in part. Pursuant to that Order issues 23, 108, 113 and 114 were moved from this docket to Docket No. 041269-TP, Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, by BellSouth Telecommunications, Inc. Upon resolution of these issues in Docket No. 041269-TP, the decisions are to be applied to Docket No. 040130-TP as if arbitrated. It was further ordered that issues 26, 36, 37, 38 and 51 would be addressed in this proceeding, while issues 109, 110, 111 and 112 were found moot.

Numerous issues were resolved by the parties during the pendency of this case. Pursuant to Order Nos. PSC-04-0488-PCO-TP, PSC-05-0065-PCO-TP, and PSC-05-0330-PCO-TP, an administrative hearing was held on April 26 through 28, 2005, to address the remaining issues.

On May 27, 2005, KMC filed its notice of withdrawal from the case. On July 12, 2005, Order No. PSC-05-0742-PCO-TP acknowledged KMC's notice, stating that the withdrawal pertains to KMC only and does not apply to the remaining petitioners. Pursuant to Order No. PSC-04-0488-PCO-TO, issued May 12, 2004, CLEC witnesses selected one main witness to testify to each issue or position where the CLECs have a joint position. As a result KMC's

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[1] NewSouth Communications Corp. (NewSouth); NuVox Communications, Inc. (NuVox); KMC Telecom V, Inc. (KMC V) and KMC Telecom III LLC (KMC III)(collectively "KMC"); and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC (Xspedius Switched) and Xspedius Management Co. of Jacksonville, LLC (Xspedius Management) (collectively "Xspedius");(collectively the "Joint Petitioners" or "CLECs")

testimony represents the Joint Petitioners, not KMC specifically. Thus, it remains a part of the record in the case.

On July 6, 2005, BellSouth filed a letter stating that the parties have settled issues 2 and 104. Thus, these issues have been removed from this proceeding.

II. LIMITATION OF EACH PARTIES' LIABILITY

A. PARTIES' ARGUMENTS

The Joint Petitioners propose that the appropriate limitation on each party's liability should be an amount equal to 7.5% of the aggregate fees, charges or other amounts billed for any and all services provided or to be provided pursuant to the Agreement as of the day the claim arose. They propose that the negligent party would thus pay the damages proved before a competent tribunal. Joint Petitioners claim that they are not currently afforded this minimal relief in their interconnection agreements with BellSouth. They support their argument stating in their brief that, "an injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance." In addition, Joint Petitioners argue that "money paid by a party to a vendor for services rendered is subject to restitution if the party were injured by the vendor's conduct or performance." The Joint Petitioners claim that they are not even granted this minimal relief in their interconnection agreements when they suffer harm through BellSouth's negligence. They claim that this inequity does not exist in other commercial contracts and does not reflect the settled law of contracts.

The Joint Petitioners also argue in their brief that, historically, BellSouth has always been able to impose harsh liability terms. The Joint Petitioners claim in their briefs that BellSouth's negligence is the Joint Petitioners' burden. In their briefs, Joint Petitioners disagree with BellSouth's bill credits proposal, because it does not stand for the notion that liability caused by the negligent party should be eliminated. The Joint Petitioners also argue that issuing bill credits is not the industry standard, but is BellSouth's standard. The Joint Petitioners support this argument by referencing a NuVox-ALLTEL interconnection agreement in Hearing Exhibit 27 that diverges from BellSouth's standard. This agreement provides liability up to $250,000 for harm caused by negligence and does not limit recovery to bill credits. In sum, Joint Petitioners implicitly argue in their briefs that bill credits are not the industry standard and not a replacement for monetary damages resulting from negligence.

BellSouth claims that the Joint Petitioners' proposal is an attempt to deviate from standard industry practice regarding limitation of liability. BellSouth's central argument rests on a decision from the FCC Wireline Competition Bureau (Bureau).[2] BellSouth asserts that the Bureau has already determined that an incumbent local exchange carrier's (ILEC) liability is

[2] See, In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission, CC Docket No. 00-218, 17 FCC Rcd. 27,039. (Jul. 17, 2002).

parity when contracting with a competitive local exchange carrier (CLEC). BellSouth claims that the Bureau specifically stated in an Order resulting from a Virginia Arbitration that, "in determining Verizon's liability, it is appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers."[3] BellSouth also argues that pursuant to this rationale, BellSouth should treat the Joint Petitioners in the same manner as it treats its retail customers, which would result in BellSouth issuing the Joint Petitioners bill credits. BellSouth claims that this is exactly the standard that has governed the parties' relationship for the last eight years. BellSouth argues that even the Joint Petitioners concede that provision of bill credits is probably the current practice in the industry. In contrast, BellSouth argues that the 7.5% language proposed by the Joint Petitioners is not the industry standard. BellSouth points to Hearing Exhibit 15 and concludes that the Joint Petitioners want greater limitations of liability rights against BellSouth than what BellSouth provides for its own customers, and what the Joint Petitioners are willing to provide to their customers.

BellSouth also takes issue with Hearing Exhibit 27. First, BellSouth argues that the NuVox-ALLTEL Interconnection Agreement was not produced in discovery and, therefore, should not be given much credence. Moreover, BellSouth argues that this Commission should further discount Exhibit 27, because ALLTEL is a rural ILEC that does not have a Section 251(c) obligation to provide UNEs at cost-based rates.

BellSouth argues that interconnection agreements are not typical commercial agreements and therefore should not be treated as commercial contracts. BellSouth argues that even the Joint Petitioners' witness Russell concedes that the Mississippi Federal District Court held that interconnection agreements are not ordinary contracts and are not to be construed as traditional contracts. BellSouth argues that this Commission should reject the Joint Petitioners' proposal because it imposes costs on BellSouth that were not taken into consideration when establishing BellSouth's UNE costs. Rather, BellSouth argues that its UNE costs were determined using a limitation of liability to bill credits. Last, BellSouth argues that the Joint Petitioners' language regarding limitation of liability is unworkable and that each of the Joint Petitioners originally had different understanding of the language.

B. ANALYSIS

Although we find merit in both BellSouth's and the Petitioners' arguments, we agree with the reasoning of the FCC Wireline Competition Bureau regarding an incumbent local exchange company's liability when contracting with a competitive local exchange. The FCC Wireline Competition Bureau, acting through authority expressly delegated from the FCC to stand in the stead of the Virginia State Corporation Commission, found that:

> Verizon has no contractual relationship with WorldCom's customers, and therefore lacks the ability to limit its liability in such instances, as it may with its own customers. As the carrier

[3] Id.

> with a contractual relationship with its own customers, WorldCom is in the best position to limit its own liability against its customers in a manner that conforms with this provision.

See, 17 FCC Rcd 27039, 27382 (FCC 2002). We find that in this instance, BellSouth and the Joint Petitioners are in the best position to limit their liability with their customers.

Further, we find that BellSouth shall treat the Joint Petitioners in the same manner BellSouth treats its own retail customers. It is undisputed that BellSouth's liability to its own retail customers is limited to the issuance of bill credits; therefore, it is appropriate for BellSouth's liability to Joint Petitioners to be similarly limited. Further, even the Joint Petitioners concede that the provision of bill credits is probably the current practice in the industry. The Joint Petitioners will not be prejudiced by our approach because they admittedly limit their liability to their own customers to the issuance of bill credits. Id. However, even if this was not the case, we note that each of the parties to this proceeding has the ability to limit its liability to its customers through its own tariffs. If a party (e.g., a Joint Petitioner) chooses not to limit its liability through its own tariff, then that party shall assume the heightened risk itself, and not shift the risk to the other party to the interconnection agreement (e.g., BellSouth).

Under the Joint Petitioners' proposal, negligence would be limited to an amount equal to 7.5% of the aggregate fees, charges or other amounts billed for any and all services provided or to be provided pursuant to the Agreement as of the day the claim arose. We find that this record does not support a proposal limiting liability to 7.5% of the aggregate billings, and that bill credits are the appropriate limitation regarding each party's liability. The Petitioners argue that service contracts generally include such liability terms, and they cite to an agreement with a software company to support their argument. They also cite to their prefiled testimony where the Petitioners discuss contracts that cap liability at 15% to 30% of total revenues. Last, the Joint Petitioners cite to the NuVox-ALLTEL interconnection agreement that provides liability up to $250,000 for harm caused by negligence. In this instance, we do not deem it appropriate to compare an ILEC with Section 251(c) wholesale obligations with a rural ILEC that does not have Section 251(c) wholesale obligations. Theoretically, rural ILECs, such as ALLTEL, may charge higher prices for UNEs to take into account the possibility of additional liability, while BellSouth cannot.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that a party's liability should be limited to the issuance of bill credits in all circumstances other than gross negligence or willful misconduct.

III. ALLOCATION OF RISK

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their briefs that BellSouth seeks to have the Joint Petitioners pay any and all claims attributable to BellSouth's negligence, simply because BellSouth limits its liability completely in its tariffs. The Joint Petitioners presently have commercially reasonable limitation of liability terms in their tariffs and customer agreements, and do not plan to remove them. The Joint Petitioners assert in their briefs that they need to respond to the demands of a competitive market place wherein customers are insisting on less stringent limitations. Joint Petitioners argue in their briefs and Joint Petitioners' witness Russell testified at hearing, that BellSouth remains protected by existing provisions of the Agreement and applicable commercial law stipulating that a Party is precluded from recovering damages to the extent it has failed to act with due care and commercial reasonableness. Further, the Joint Petitioners argue that they are "often times competing to win [BellSouth] customers," as the Telecom Act of 1996 expressly permits, and if the Joint Petitioners are contractually obligated and confined by the terms of these interconnection agreements not to have different terms than those in the BellSouth tariff, then the Joint Petitioners are not on a level playing field.

BellSouth responds by stating the purpose of this issue is to put BellSouth in the same position that it would be in if the CLEC end user was a BellSouth end user. BellSouth claims it should not suffer any financial hardship as a result of Joint Petitioners' business decisions. (BellSouth BR at 18) The exact language BellSouth proposes is in its current interconnection agreement with the Joint Petitioners and has never been the subject of any dispute. BellSouth supports its point with Hearing Exhibit 6 and by stating that the Joint Petitioners currently have limitation of liability language in their tariffs and will enforce the tariff provisions limiting their liability. BellSouth also directs our attention to Joint Petitioners' Hearing Exhibit 4 which is witness Russell's deposition wherein he stated that unlimited liability is not a prudent business-move. BellSouth concludes that it is not limiting any third-party's rights, but rather is imposing obligations upon the Joint Petitioners in the event they make a business decision that would not limit their liability in accordance with industry standards. In addition, BellSouth argues that it needs this level of protection in light of the Joint Petitioners' position regarding indemnification. BellSouth concludes that the issue is further compounded by the fact that the Joint Petitioners' end users are not purchasing services out of BellSouth's tariffs and have no contractual relationship to BellSouth.

B. ANALYSIS

Each CLEC has the ability to limit its liability through its customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC shall bear the resulting risk. We note that all parties to this proceeding currently limit their liability via their tariffs. We find that there is no compelling reason to deviate from such practice. The appropriate method of limiting liability is through the parties' tariffs. The Joint Petitioners and BellSouth currently have limitation of liability language in their tariffs and can enforce the tariff provisions limiting their liability. Further, the Joint Petitioners concede that

with regard to limiting liability, the provision of bill credits is probably the current practice in the industry. In light of these facts, we do not find that deviating from the industry standard is necessary or appropriate in this instance. However, even if this was not the case, we note that each of the parties to this proceeding has the ability to limit its liability to its customers through its own tariffs. If a party chooses not limit its liability through its own tariff, then it must assume the risk of liability.

C. DECISION

Upon consideration and review, we find that CLECs have the ability to limit their liability through their customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC shall bear the resulting risk.

IV. DEFINITION OF DAMAGES CATEGORIES

A. PARTIES' ARGUMENTS

The Joint Petitioners seek to define the terms indirect, incidental and consequential damages in a manner that does not unfairly deprive any party of damages that are reasonably foreseeable. Specifically, the Joint Petitioners argue in their briefs and witness Russell testifies that damages to end users that are direct, proximate and reasonably foreseeable from BellSouth's performance of obligations set forth in the Agreement should be considered direct damages and not indirect or incidental. The Joint Petitioners argue that reasonably foreseeable damages are those for which contracting parties are responsible when they act negligently, recklessly or in a manner that violates the law. Joint Petitioners define consequential damages as "any loss resulting from general or particular requirements under the contract, of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise."

Joint Petitioners state that they rely on BellSouth's facilities. Any acts or omissions by BellSouth that are reasonably foreseeable directly impact the Joint Petitioners' ability to operate. For example, if an outage was caused by BellSouth's negligence, recklessness or willful misconduct, BellSouth should compensate Joint Petitioners for the losses incurred therefrom.

BellSouth argues in its brief that each party to the proceeding "agrees" that they should not be liable to each other for indirect, consequential or incidental damages. BellSouth, however, takes issue with the Joint Petitioners' language because BellSouth believes it is an attempt to preserve certain damage claims the Joint Petitioners' end users may have against BellSouth. BellSouth asserts in its brief that Joint Petitioners' witness Russell conceded at hearing that as a matter of law a company cannot impact the rights of third parties via a contract. BellSouth concludes in its brief that if it cannot legally limit the rights of a third-party end user through this interconnection agreement, then the Joint Petitioners' language is of no force and effect.

B. ANALYSIS

Upon review of the record and the parties' arguments, we find that there is no need to define these terms in an interconnection agreement. The issue of whether particular damages constitute indirect, incidental or consequential damages is best determined, consistent with applicable precedents, if and when a specific damage claim is presented to us or to a court. We note that third-party claims that solely involve damages would more than likely fall outside our jurisdiction.

For example, in Southern Bell Tel. & Tel. Co. v. Mobile America Corp, the court held, "Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, § 5(b), Fla.Const." 291 So.2d 199, 202 (Fla. 1974) In light of this decision, we will not define the aforementioned damages. We have previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to Section 364.162, Florida Statutes." See, PSC Order No. PSC-04-0972-TP, issued October 7, 2004. However, in the event a dispute falls outside our jurisdiction or the FCC's jurisdiction, then the claimant may seek relief in a court of competent jurisdiction. In that situation, it would then fall under the review of that court to define the terms based upon the applicable case law.

C. DECISION

Upon review and consideration of the record and the parties' briefs, we shall not define indirect, incidental or consequential damages for purposes of the Agreement. The decision of whether a particular type of damage is indirect, incidental or consequential shall be made, consistent with applicable law, if and when a specific damage claim is presented to this Commission, the FCC or a court of law.

V. INDEMNIFICATION

A. PARTIES' ARGUMENTS

The Joint Petitioners argue that parties must be responsible for damages caused by their own acts or omissions. The Joint Petitioners argue that their proposal provides that the party providing service must indemnify the other party for damages caused as a result of providing those services. They also argue in their brief that their proposal comports with industry practice as reflected in the Joint Petitioners' tariffs and contracts. Joint Petitioner witness Russell testified that, "A party that is negligent should bear the cost of its own mistakes." Joint Petitioner witness Russell also testifies that " . . .in virtually all other commercial-services contexts, the service provider, not the receiving party, bears the more extensive burden on indemnities." Joint Petitioners also argue in their brief that BellSouth witness Blake agrees that the party receiving service should indemnify the party providing service for damages caused by the receiving party's own unlawful conduct. The Joint Petitioners argue in their brief that the

parties' differences are with respect to the instances where the providing party is negligent. Further, the Petitioners claim that BellSouth incorrectly insists the receiving party should indemnify the providing party. Petitioners assert in their briefs that this is backwards, contrary to law and common sense. For example, the Joint Petitioners, cite to Xspedius' tariffs stating that the company does not indemnify customers for damages caused by "the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees." The Joint Petitioners conclude that an injured party is entitled to relief from the causing party, and anything else would run contrary to longstanding legal principles.

BellSouth claims in its brief that the Joint Petitioners' position is asymmetrical and only benefits the Joint Petitioners (which is contrary to industry standards). BellSouth argues that "indemnity clauses [are] means for allocating foreseen risks, not as means to induce Parties to insure another against unanticipated and unbounded possibilities." BellSouth responds by arguing that the Joint Petitioners are attempting to change industry standard by requiring the party providing service to indemnify the receiving party for: (1) failure to abide by applicable law or (2) for injuries arising out of or in connection with the Agreement to the extent caused by the providing party's negligence. However, BellSouth argues that under the Joint Petitioners' proposal, the receiving party would only indemnify the providing party "against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications." BellSouth reasons that under this proposal, BellSouth will have virtually unlimited obligations to the Joint Petitioners, and the Joint Petitioners will have essentially no indemnification obligations to BellSouth. BellSouth fears that if it were sued by a third-party solely resulting from the Joint Petitioners' negligence, then it would have no indemnification rights against the Joint Petitioners. BellSouth also notes that the Joint Petitioners have already insulated their liability through the Joint Petitioners' tariffs. BellSouth also argues that pursuant to the FCC Wireline Bureau decision, it should not have to indemnify the Joint Petitioners.[4] BellSouth cites a Minnesota Arbitration Order[5] supporting the notion that the Petitioners' proposed language would make parties potentially liable for another party's conduct far removed from the ICA. BellSouth also claims that interconnection agreements are not typical commercial agreements and should not be construed as such. Further, BellSouth argues that its UNE rates were not established under the premise that it would have almost unlimited exposure via indemnification language in an interconnection agreement. Therefore, BellSouth reasons that the Joint Petitioners' proposal should be rejected because it does not comply with industry standards.

[4] 17 FCC Rcd 27039, 27382 (FCC 2002)

[5] 2003 WL 22870903 at 17.

B. ANALYSIS

Although we find merit in each of the parties' positions, we hold that a party shall be indemnified, defended and held harmless against claims, loss or damage to the extent reasonably arising from or in connection with the other party's gross negligence or willful misconduct. While both BellSouth's and the Joint Petitioners' arguments are very persuasive, we do not find a compelling reason to deviate from the usual practice of limiting liability through the use of its tariffs. Neither party shall be required to indemnify the other party for claims of negligence. This issue only applies to instances of gross negligence or willful misconduct by a party to the Agreement. We find that the carrier with a contractual relationship with its own customers is in the best position to limit its own liability against that customer in instances other than gross negligence and willful misconduct.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that a Party shall be indemnified, defended and held harmless against any claims, loss or damage to the extent reasonably arising from or in connection with the other Party's gross negligence or willful misconduct.

VI. FORUM FOR DISPUTE RESOLUTION

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their brief that they have a right to resolve disputes in a court of law, and they are not willing to give up that right. The Joint Petitioners also argue in their brief that BellSouth is seeking to limit Petitioners' right to seek relief in court to the extent that the jurisdiction or expertise of the dispute is not in the possession of this Commission or the FCC. Joint Petitioners also argue in their brief that BellSouth witness Blake testified that courts should not hear matters that fall within the jurisdiction of this Commission or FCC. The Joint Petitioners are concerned with BellSouth's witness' generalization contained in Hearing Exhibit 6 that, "there could be some facets that aren't relative to the interpretation or implementation [of an interconnection agreement]" that fall outside agency jurisdiction but "can't think of any specific examples." Thus, the Joint Petitioners argue in their brief that BellSouth's language would in effect deprive the Petitioners of their right to seek adjudication by a court of competent jurisdiction. In addition, the Joint Petitioners argue that the jurisdiction of the courts in Florida is set by Section 1 of the Florida Constitution which holds that "[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts." Florida Constitution § 1.

Further, Joint Petitioners argue that adjudication in a court of law may be more efficient. The Joint Petitioners are also concerned that BellSouth's position would have the parties litigating before nine different state commissions and the FCC. Joint Petitioners' witness Falvey

testified that this "often is able to force carriers into heavily discounted, non-litigated settlements."

BellSouth argues in its brief that if the dispute is outside the jurisdiction of this Commission or the FCC, then the parties can take the dispute to a court of competent jurisdiction. BellSouth argues in its brief that there can be no question we should resolve matters that are within its expertise and jurisdiction. Specifically, Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the Commission for approval. As such, BellSouth's position is that state commissions are in the best position to resolve disputes relating to the interpretation and enforcement of the agreement.

In addition, BellSouth points to the Eleventh Circuit decision[6] in its brief as support for its position. BellSouth argues in its brief that this decision used this rationale to find that state commissions have the authority under the Act to interpret interconnection agreements. The language of § 252 persuaded the 11th Circuit that in "granting the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce **in the first instance** and to subject their determination to challenges in the federal courts." Id. (emphasis added) BellSouth also argues in its brief that the Joint Petitioners' language would have us standing by or seeking intervention in a state court proceeding regarding interpretation and enforcement of interconnection agreements that we approved. Further, BellSouth asserts that the Joint Petitioners witness Falvey recognized our authority at the hearing, and conceded that state commissions are experts with respect to a number of issues in the agreement.

Last, BellSouth argues in its brief that the Joint Petitioners' position would not reduce litigation. BellSouth also argues in its brief that its position allows for the possibility of dispute resolution to a single forum, the FCC, to resolve a dispute(s).

B. ANALYSIS

The constitutional guaranty of due process demands that a party may petition a tribunal it deems to have jurisdiction over the claim. See, Black's Law Dictionary, Fifth Edition, p. 449, citing, Di Aaio v. Reid, 132 N.J.L. 17, 37 A.2d. 829, 830. It is our understanding that it would be incumbent on that tribunal to either exercise its jurisdiction, or to determine that it lacks jurisdiction. In light of this constitutional guarantee, we find that no tribunal shall be foreclosed to the Parties, and either Party shall be able to petition this Commission, the FCC or a court of competent jurisdiction.

However, we note that this Commission has primary jurisdiction over most disputes arising out of interconnection agreements, and is in the best position to resolve those disputes. For example, we have previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to

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[6] See, BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services Inc., 317 F.3d 1270, 1277 (11th Cir. 2003).

Section 364.162, Florida Statutes." See, PSC Order No. PSC-04-0972-TP, issued October 7, 2004. In the event the dispute falls outside this Commission's or the FCC's jurisdiction, such as a claim for third-party damages, then the claimant could file in a court of competent jurisdiction.

We do not find merit in Joint Petitioners' argument that litigating before state commissions would force them into heavily discounted, non-litigated settlements with BellSouth. We find little, if any, efficiency gained in their position. For example, the Joint Petitioners would still have to file a complaint in the state in which they sought relief. We determine the only difference would be that the litigation take place in the court system of a state, rather than in that state's public service commission. Neither party shall be foreclosed in a forum, thus the Agreement will not define a specific forum. However, we strongly note that this Commission has primary jurisdiction over most disputes arising from interconnection agreements.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that either party shall be able to file a petition for resolution of a dispute in any available forum. However, we note that this Commission has primary jurisdiction over most disputes arising from interconnection agreements and that a petition filed in an improper forum would ultimately be subject to being dismissed or held in abeyance while we addressed the matters within our jurisdiction.

VII. APPLICABLE LAW

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their brief that it is undisputed that Georgia law will govern the agreement. Joint Petitioners argue that under Georgia contract law, all laws of general applicability that exist at the time of contracting will apply to the contract unless expressly repudiated via an explicit exception or displaced by conflicting requirements. Id. The Supreme Court of Georgia has held that "[l]aws that exist at the time and place of the making of a contract, enter into and form a part of it . . . and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter."[7] This comports with the United States Supreme Court holding that "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if fully they have been incorporated in its terms . . . "[8] The Joint Petitioners argue that due to this presumption, contracts are deemed to include any tenet of applicable law unless expressly excluded. In short, a "contract may not be construed to contravene a rule of law."[9] The Joint

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[7] Magnetic Resonance Plus, In., v. Imaging Systems, Int'l, 273 Ga. 525, 543 S.E.2d 32, 34-35 (2001).

[8] Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.Su 117, 130 (1991).

[9] Van Dyck v. Van Dyck, 263 Ga. 161, 429 S.E.2d 914, 916 (1993).

Petitioners claim in their brief that parties could not be expected to expressly include all elements of generally applicable law into one contract. If this were expected, then contracts would result in tens of thousands of pages to the agreement. In conclusion, the Joint Petitioners argue that if BellSouth intends to comply with the law, then incorporating the law of the land should not be a problem.

BellSouth argues that this issue is about providing the parties with certainty in the interconnection agreement as to their respective telecommunications obligations. Specifically, BellSouth's concern is that, without relying on specific provisions, the Joint Petitioners will review a telecommunications rule or order, interpret it in a manner that BellSouth could not have anticipated and claim that such forms the basis of a contractual obligation. As indicated by Hearing Exhibit 7, BellSouth' proposal to address this is to include language in the agreement that,

> to the extent that either Party asserts that an obligation, right or other requirement, **not expressly memorialized herein,** is applicable under this Agreement by virtue of a reference to an FCC or Commission rule or order, or **with respect to substantive telecommunications law only** . . .

In addition, BellSouth argues that the Joint Petitioners concede that the interconnection agreement contains the Parties' interpretation of various FCC rules and decisions. Further, BellSouth argues that the Joint Petitioners agree that Parties should not be able to use the Applicable Law provision to circumvent what the Parties memorialize in this Agreement. Id.

BellSouth also argues that the Joint Petitioners' position - that the law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise – should be rejected. Taken to its logical extreme, the parties would only need a one-page interconnection agreement stating that parties agree to comply with Applicable Law, rather than the 500 page agreement currently in existence. BellSouth cites to the North Carolina Utility Commission's decision which expressly rejected this argument in the context of conducting an EEL audit. See, In re: BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp., Docket No. P-772, Sub 7, *Order Granting Motion for Summary Disposition and Allowing Audit* (Aug. 24, 2004).

B. ANALYSIS

The purpose of an agreement is to create specific obligations to do or not to do a particular thing. We find it is essential to have a document that contains specific terms and conditions. That being said, a provision in the Agreement stating when explicit language would apply, and when it would not, could cause more confusion. While the parties raise arguments over applicable law, we find these arguments are premature. These arguments are more appropriately addressed on a case-by-case basis as disputes arise.

C. DECISION

Upon consideration of the parties' briefs and the record, we find that the Agreement will not explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties. A provision including such a statement could be subject to various interpretations in the context of a dispute. Instead, the contract shall be interpreted according to its explicit terms if those terms are clear and unambiguous. If the contract language at issue in a dispute is deemed ambiguous, the terms shall be interpreted in accordance with applicable law governing contract interpretation.

VIII. COMMINGLING

The FCC has reversed its previous prohibition of commingling and defines, within the TRO, the meaning of the term and applicable conditions. The issue here is that BellSouth commits to commingling certain section 271 elements that are required to be provided under section 251(c)(3). However, BellSouth will not commit to commingling section 271 elements that are not required to be unbundled pursuant to section 251(c)(3). In that situation BellSouth will do so only under a commercial agreement; therefore, it asserts this aspect should not be included in a § 252 arbitration proceeding.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Mertz[10] employs the FCC's definition and explanation of commingling to form the basis of his argument. Specifically, commingling means "the connecting, attaching, or otherwise linking of a UNE or a UNE [c]ombination to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services." Witness Mertz expresses that "clearly" the elements BellSouth provides under § 271 are obtained by a method other than unbundling under § 251(c)(3) and thus the Joint Petitioners should be allowed to commingle them. He argues that nothing regarding commingling in the TRO or the errata to the TRO supports BellSouth's position that it is not obligated to commingle § 271 elements with § 251 UNEs. Joint Petitioners witness Mertz also argues that the FCC concluded that § 271 requires Regional Bell Operating Companies, such as BellSouth, "to provide network elements, services, and other offerings, and those obligations operate completely separate and apart from section 251." Witness Mertz continues that BellSouth is incorrect in its interpretation of the commingling rule to the extent that its proposed language "turns the rule on its head."

Joint Petitioners witness Mertz argues that when the FCC issued an errata to paragraph 584 of the TRO, the elimination of the phrase "any network elements unbundled pursuant to section 271" was to "clean up stray language" dealing with the commingling of section 251

[10] Mr. James Mertz adopted all testimony, discovery responses, etc., of Joint Petitioner's witness Ms. Marva Brown Johnson.

UNEs with services provided for resale under section 251(c)(4). The inclusion of the phrase was inconsistent with the rest of the paragraph and the errata corrected the deficiency, he asserts. Witness Mertz states "BellSouth's attempt to create by implication an affirmative adoption of commingling restrictions with respect to section 271 elements cannot withstand scrutiny." In addition, he argues that the D.C. Circuit's *USTA II* holding does not prohibit commingling of UNEs and UNE combinations with § 271 offerings, because the D. C. Circuit's discussions concerning § 271 were directed at combining, not commingling. He concludes that elements utilized under § 271 fall within the "any other method" definition and are not obtained pursuant to § 251(c)(3) unbundling.

Witness Blake argues that BellSouth's position is "consistent" with the FCC's errata to paragraph 584 of the TRO, stating that there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available pursuant to § 271 of the Act. She explains that the TRO errata is significant in that the FCC took action to delete a sentence that specifically made reference to "any network elements unbundled pursuant to section 271." Witness Blake argues that the FCC, in striking the sentence, meant to exclude certain § 271 elements from commingling under § 251, and she states that BellSouth will only commingle § 271 elements under separate commercial agreements.

The BellSouth witness points to the D.C. Circuit's *USTA II* decision issued on March 2, 2004, as additional support for BellSouth's position. In the discussion concerning "Section 271 Pricing and Combination Rules" of the checklist items (loops, transport, switching, and call-related databases), the FCC and the D.C. Circuit agreed that there was no duty to combine network elements by the incumbent LEC. Witness Blake continues stating that "it is clear that both the FCC and D.C. Circuit have determined there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the 1996 Act."

Witness Blake asserts that "BellSouth's interpretation of its commingling requirement is based solely on the obligations stated in the TRO by the FCC." Citing paragraph 579 of the TRO, BellSouth's witness Blake argues that the Joint Petitioners are not prevented from commingling wholesale services purchased from its special access tariff with UNEs and UNE combinations obtained via § 251. However, when the Joint Petitioners are asking to commingle UNEs with "non-tariffed services provided only pursuant to BellSouth's Section 271 obligations, commingling is not required by Section 251 or 252 . . . ." Witness Blake contends that such commingling is outside the scope of an interconnection agreement and should be detailed in a separate agreement negotiated by the parties. Last, in its brief, BellSouth argues that under the Joint Petitioners' interpretation of BellSouth's commingling obligations, BellSouth could be required to combine § 271 switching with a UNE loop, thereby resurrecting UNE-P, which BellSouth contends it has no § 251 obligation to provide.[11] \

[11] We acknowledge that the 271 switching and 251 loop elements are priced differently..

B. ANALYSIS

The FCC devoted paragraphs 579 through 584, including numerous footnotes and several examples, to support its decision to address restrictions to commingling. We note that the Joint Petitioners and BellSouth provided the FCC's definition of commingling located in paragraph 579 of the TRO:

> The connecting, attaching, or otherwise linking of a UNE, or UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services.

BellSouth's arguments above contain the details of the errata to the TRO concerning paragraph 584. In paragraph 584 of the TRO, the FCC said "as a final matter we require the incumbent LECs to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act."[12] The FCC's errata to the TRO struck the portion of paragraph 584 referring to ". . . any network elements unbundled pursuant to section 271. . . ." The removal of this language illustrates that the FCC did not intend commingling to apply to section 271 elements that are no longer also required to be unbundled under section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to section 271. Further, we find that connecting a section 271 switching element to a section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential re-creation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition.

C. DECISION

Upon review and consideration, we find that BellSouth is required, upon a CLEC's request, to commingle or to allow commingling of UNEs or UNE combinations with any service, network element or other offering it is obligated to make available. However, this does not include offerings made available only under Section 271. We find that striking the reference to section 271 means BellSouth's commingling obligation does not extend to elements obtained pursuant to section 271.

[12] See TRO ¶ 584 before the TRO errata.

IX. LINE CONDITIONING - DEFINITION

In the UNE Remand Order,[13] the FCC concluded ILECs must provide access on an unbundled basis, to xDSL-capable stand-alone copper loops because CLECs are impaired without such loops. Such access may require ILECs to condition the local loop. Line conditioning involves removing any device, such as bridged taps and load coils, that could diminish the capability of the loop or subloop to deliver xDSL services. (47 C.F.R. § 51.319(a)(1)(iii)(A)) However, on copper loops over 18,000 feet, load coils are necessary to provide analog voice capability; thus, a dispute on whether such loops should be conditioned can arise. The parties do not appear to dispute that line conditioning involves removing devices from the loop, but appear to disagree on the rates, terms and conditions under which the ILEC must provide line conditioning.

A. PARTIES' ARGUMENTS

The Joint Petitioners witness Russell asserts that line conditioning should be defined in the Agreement pursuant to 47 C.F.R. § 51.319(a)(1)(iii)(A), which states:

> Line conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include but are not limited to, bridged taps, load coils, low pass filters, and range extenders.

He asserts that "this language does not provide Petitioners with anything more than what the FCC rules prescribe." (TR 51)

The Joint Petitioners point out in their brief that BellSouth has "signed interconnection agreements containing rates, terms and conditions for conditioning **all** copper loops. These agreements provided for conditioning copper loops of any length and removing bridged tap, without length restrictions, at TELRIC rates **already set by this Commission.**"[14] Further, the Joint Petitioners note that BellSouth has sought to limit the line conditioning obligations only after the TRO was issued. They believe that nothing in the text of the TRO suggests that ILEC line conditioning obligations were limited by that order.

BellSouth counters in its brief that the definition proposed by the Joint Petitioners excludes terminology that addresses its obligation to provide line conditioning at parity to that provided to its own customers or other telecommunications carriers, which was clarified within the TRO. BellSouth emphasizes that the Joint Petitioners' definition is unlimited in scope and would lead to BellSouth being required to provide superior access to the network than it affords its own customers or to other telecommunications carriers and finds such a position in violation

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[13] Order No. FCC 99-238 issued November 5, 1999, CC Docket No. 96-98 Third Report and Order and Fourth Further Notice of Proposed Rulemaking. (UNE Remand Order).

[14] See Exhibit 24 of Joint Petitioners Brief (BellSouth/New South Agreement excerpt).

of BellSouth's nondiscrimination obligations under the Act. BellSouth points out that, although the Joint Petitioners have current agreements containing TELRIC rates for line conditioning, it is of no consequence because their current agreements are not TRO-compliant.

BellSouth witness Fogle proposes a definition using language from the TRO, defining line conditioning as "a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." He points to the FCC's discussion of line conditioning in TRO ¶ 643, which states:

> Line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers. As noted above, incumbent LECs must make the routine adjustments to unbundle loops to deliver services with parity with how incumbent LECs provision such facilities for themselves.

BellSouth's position is that "the FCC expressly equated its routine modification rules to its line conditioning rules in the TRO," pointing to ¶ 635, where the FCC stated, "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LEC currently undertake under our line conditioning rules." It noted that those sentiments were echoed in ¶ 250, which states, "As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service." BellSouth further explains that the mathematical definition for the term "properly," as used in ¶ 643 cited above, is distinctly a subset. BellSouth witness Fogle clarified that a subset means that it is wholly contained within the set; therefore, line conditioning is wholly contained within routine network modifications, or that line conditioning is a subset of routine modifications.

Joint Petitioners witness Falvey argues that this language from the TRO is contrary to the intent of the definition in the rule. He contends that no weight should be given to the language in the order. Joint Petitioners believe that neither the line conditioning rule, 47 C.F.R. § 51.319(a)(1)(iii), nor the routine modification rule, 47 C.F.R. § 51.319(a)(8), expresses any modification or limitation on line conditioning obligations, stating that "the two rules are distinct and do not cross reference each other." Witness Falvey admitted that the adoption of the Joint Petitioners' proposed language would require BellSouth to perform line conditioning at TELRIC prices in instances where it does not perform line conditioning for its own customers. In addition, Joint Petitioners witness Russell asserts that BellSouth's assessment that line conditioning is only for xDSL services contravenes 47 C.F.R. § 51.319(a)(1)(iii), which he claims "is neutral as to the services that can be provided over conditioned loops."

B. ANALYSIS

We find that neither definition provided by the parties is appropriate because both parties selected specific, but incomplete, text from the FCC rules and the TRO that they thought were supportive of their respective positions. BellSouth selected text from the TRO, while the Joint Petitioners selected text from the rules. We do not agree with this approach, but instead find that a definition must encompass all of the defining elements expressed throughout the rules, in order

to maintain the integrity and full meaning expressed in the rule. Neither text offered by the parties can be read in isolation.

We note that neither party disputes that line conditioning involves the removal of disruptive devices;[15] therefore, the removal of devices can certainly be included in the definition. They disagree on whether the TRO imposes limiting standards on line conditioning, such as parity or conditioning to enable xDSL services. We also note that the definition of line conditioning has evolved with the issuance of each FCC order and the definition expressed in the proposed agreement should comply with current law.

We find Hearing Exhibit 4 convincing and agree with Joint Petitioners witness Falvey that one would expect to find similarity between the FCC's discussion of line conditioning in the TRO and how it was incorporated into the rule. As reflected in Hearing Exhibit 4, he states that if the FCC meant for a limiting factor to be imposed on line conditioning, "It would appear in paragraph 1, front and center." We, therefore, refer to the first paragraph under 47 C.F.R. § 51.319(a)(1)(iii), which contains the text which the Joint Petitioners have submitted as their definition for line conditioning. The following is an excerpt from 47 C.F.R. § 51.31:

> **§ 51.319 Specific unbundling requirements.**
>
> (a) *Local loops.* An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the local loop on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section.
>
> . . .
>
> (1) *Copper loops.* An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the copper loop on an unbundled basis.
>
> . . .
>
> (iii) *Line conditioning.* The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop *under paragraph (a)(1) of this section*, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is *suitable for providing digital subscriber line services*, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop.

[15] Such devices include, but are not limited to, bridged taps, load coils, low pass filters, and range extenders. (47 C.F.R. § 51.319(a)(1)(iii)(A)).

. . .

> (A) Line conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridged taps, load coils, low pass filters, and range extenders. (emphasis added)[16]

This Commission notes that the first paragraph under 47 C.F.R. § 51.319(a)(1)(iii) refers to conditions "under paragraph (a)(1) of this section," that further clarifies the conditions under which the ILEC must condition a line. Paragraph (a)(1) begins, "An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the copper loop on an unbundled basis." (emphasis added) Additionally, we observe that the encompassing paragraph (a), states, "An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the local loop on an unbundled basis." (emphasis added) We also note that each inclusive paragraph to the one selected by the Joint Petitioners as a defining paragraph for line conditioning includes a nondiscriminatory access restriction or obligation.

Witness Willis testifies that the FCC established the line conditioning rule under its section 251 authority provided by the Act. Section 251(c)(2)(C) requires incumbent LECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself. . ." (47 U.S.C. § 251(c)(2)) Section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers with "*nondiscriminatory access* to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252." (47 U.S.C. § 251(c)(3); emphasis added) Nondiscriminatory access has been the standard for accessing the loop since the issuance of Section 251(c)(3). As stated in paragraph 203 of the TRO, "In the UNE Remand Order, the Commission broadened the definition of the loop to include all features, functions, and capabilities of these transmission facilities," including line conditioning. As expressed in the line conditioning rules, the same nondiscriminatory access standard that applies to the loop also applies to line conditioning, which is an element of the loop.

However, as a result of the issuance of the Local Competition Order[17] and carried forward to the UNE Remand Order prior to the issuance of the TRO, the definition of nondiscriminatory access provided:

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[16] "the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section" refers to line sharing. The term "advanced services" is defined as "high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high quality voice, data. Graphics or video telecommunications using any technology." Line Sharing Order, 14 FCC Rcd at 20915, para. 4.

[17] Order No. FCC 96-325 issued August 8, 1996, CC Docket Nos. 96-98, 95-185, First Report and Order. (Local Competition Order).

> to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that the incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be *superior in quality* to that which the incumbent LEC provides to itself." (47 C.F.R. § 51.311 (c))[18] (emphasis added)

Such language was found by the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) to violate the plain terms of the Act,[19] so with the issuance of the TRO, this definition was revised, eliminating a "superior in quality" access standard. Nondiscriminatory access is now defined as:

> (a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the *same* for all telecommunications carriers requesting access to that network.
>
> (b) To the extent technically feasible, the quality of an unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be *at least equal in quality* to that which the incumbent *provides to itself.* (47 C.F.R. § 51.311)(emphasis added)

The Eighth Circuit concluded that the phrase "at least equal in quality" leaves open the possibility for the parties to negotiate agreements to provide a superior quality access, with the ILECs being *compensated* for the additional cost involved in providing superior quality; however, the ILECs are *not mandated* to meet such a standard.[20] With the "superior in quality" access standard now null and void, we find *parity alone reigns as the qualifying standard,* thereby becoming a limiting factor for line conditioning.

With the FCC redefining nondiscriminatory access as parity, we find that the ILEC is now obligated to provide access to the loop and its elements, which include line conditioning, "at least equal in quality to that which the incumbent provides to itself." (47 C.F.R. § 51.311) By the Joint Petitioners limiting their focus to the language contained in 47 C.F.R. § 51.319(a)(1)(iii)(A) and disregarding any encompassing paragraphs, their proposed definition omits the parity standard, leaving us to conclude that the definition is insufficient.

BellSouth's definition includes the parity standard, but it does so by equating line conditioning with routine modifications. Consequently, the parties engage in substantial argument over whether line conditioning is or is not a routine modification, which we find was to belabor the point of whether or not line conditioning is governed by a parity standard.

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[18] 47 C.F.R. § 51.311 (c) (10-1-00 Edition).

[19] Iowa Utilities Bd. v. FCC, (Remand Decision) Nos. 96-3321(and consolidated cases) issued July 18, 2000, p. 22. before the United States Court of Appeals for the Eighth Circuit.

[20] See, Iowa Utils. Bd., 120 F.3d at 812-13.

Therefore, we find that discussion is irrelevant, in that the parity standard is now required. (47 C.F.R. § 51.311)

Joint Petitioners object to BellSouth's inclusion of the term xDSL in the definition, stating that 47 C.F.R. § 51.319(a)(1)(iii)(A) includes other high-speed switched wireline telecommunications services, including digital subscriber line service, and is not limited to any service or to xDSL capability. We note that higher-speed services could require more line conditioning than xDSL services. Lower speeds can tolerate more interference. However, we disagree with the Joint Petitioners' interpretation. When read in context, the phrase "high-speed switched wireline telecommunications capability, including digital subscriber line service," refers to the removal of devices. (47 C.F.R. § 51.319(a)(1)(iii)(A)) Those same devices are known to diminish high-speed switched wireline telecommunications capability in general. They are also known to diminish xDSL capability. The rule went on to state that "[s]uch devices include, but are not limited to, bridged taps, load coils, low pass filters, and range extenders," giving further evidence that the context of the previous statement was referring to devices. (47 C.F.R. § 51.319(a)(1)(iii)(A)) However, the encompassing paragraph, (a)(1)(iii), specifically addresses services, stating, "[t]he incumbent LEC *shall condition* a copper loop at the request of the carrier seeking access to a copper loop . . . to ensure that the copper loop or copper subloop is suitable *for provisioning digital subscriber line services.*" (47 C.F.R. § 51.319(a)(1)(iii), emphasis added)

We understand the rule and paragraph 642 of the TRO to require line conditioning in order to provide an xDSL-capable stand-alone copper loop. The FCC states throughout the TRO that line conditioning is for provisioning xDSL services.[21] We also believe that it was clearly the intent of the rule and footnote 624 of the TRO to focus on provisioning digital subscriber line services, services which are typically associated with the mass market, a market in which the FCC found impairment. We find that the FCC has established limits to line conditioning based on xDSL service suitability.

BellSouth's definition includes a standard of delivery for xDSL. However, this definition was taken from the order, leading the parties' arguments to center around whether the rules take precedence over the order or vice versa. We find this discussion is unnecessary to draw a conclusion on this issue. Seeing no conflict between the rule and the order, we prefer a definition derived from the rules. The parties are free to negotiate a definition provided it includes the limiting factors of nondiscriminatory access and xDSL capability expressed in the rules as a whole, as discussed in our analysis.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that the definition for line conditioning shall be taken from the FCC rules and contain the limiting conditions of nondiscriminatory access and suitability for xDSL delivery which appear

[21] TRO ¶ 7, ¶ 23, ¶ 26, Note 465, Note 624, ¶ 211, ¶ 215, Note 661, ¶ 249, ¶ 250, Note 746, Note 747, ¶ 255, ¶ 344, ¶ 347, ¶ 350, ¶ 642, ¶ 643, ¶ 644.

in the rules leading to the definition found in 47 C.F.R. § 51.319(a)(1)(iii)(A). If the parties through negotiation cannot agree on a definition that includes the stated conditions, then the following language shall serve as a default:

> Line Conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver xDSL capability,[22] to ensure that the copper loop or copper subloop is suitable for providing xDSL services[23] and provided the same for all telecommunications carriers requesting access to that network[24] and at least in quality to that which the incumbent provides to itself.[25]

X. LINE CONDITIONING - OBLIGATION

The parties appear to dispute whether BellSouth's obligations to provide line conditioning have been limited in any way due to the issuance of the TRO. Such limits, if any, would affect the rates, terms and conditions by which line conditioning would be provided.

A. PARTIES' ARGUMENTS

Joint Petitioners believe that line conditioning is a section 251(c)(3) obligation that has remained unchanged since prior to the issuance of the TRO. Joint Petitioners note that BellSouth signed current agreements which included TELRIC-compliant rates approved by the FPSC for removing load coils on loops in excess of 18,000 feet and removing bridged taps without respect to the length of the bridged tap. They believe that BellSouth must continue to perform line conditioning at those rates. Joint Petitioners further argue that "[n]othing in any FCC order allows BellSouth to treat [l]ine [c]onditioning in different manners depending on the length of the loop . . . [and] BellSouth's imposition of 'special construction' rates for [l]ine [c]onditioning is inappropriate . . . , [since] the work performed in connection with providing UNEs must be priced at TELRIC-compliant rates."

BellSouth witness Fogle counters by arguing that, while the law does not change line conditioning obligations based on loop length, its availability is governed by a parity standard; therefore, if loop lengths are a factor in providing parity, then loop lengths become a factor in line conditioning obligations. Witness Fogle testified that for its customers, "BellSouth adds or does not add load coils depending on the length of the copper loop . . . and has offered this same procedure to the Joint Petitioners." BellSouth understands parity to mean that it is obligated to

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[22] See 47 C.F.R. § 51.319(a)(1)(iii)(A).

[23] See 47 C.F.R. § 51.319(a)(1)(iii).

[24] See 47 C.F.R. § 51.311(a).

[25] See 47 C.F.R. § 51.311(b).

provide the line conditioning it routinely performs for itself and believes that the Joint Petitioners seek "to obtain rights that exceed what BellSouth offers its own customers." Although the Joint Petitioners have current agreements containing TELRIC rates for line conditioning, BellSouth points out that it is of no consequence because their current agreements are not TRO-compliant.

Joint Petitioners object to line conditioning being limited to what BellSouth routinely conditions for itself. Joint Petitioners present that if BellSouth were permitted to condition loops based on what it does for its own customers, BellSouth would be able to "**eliminate all line conditioning completely**." They claim that if BellSouth determined that something was not *routinely* done for itself, then it would not do what was required by the rule.

BellSouth witness Fogle asserts that section 251(c)(3) of the Act and the TRO obligates BellSouth to provide nondiscriminatory access by "perform[ing] line conditioning functions . . . to the extent the function is a routine modification that BellSouth regularly undertakes to provide xDSL to its own customers," and the Joint Petitioners have not been denied this right. Witness Fogle notes that BellSouth "adheres to current industry technical standards that require the placement of load coils on copper loops greater than 18,000 feet in length to support high quality voice service. . . [and] does not remove load coils for BellSouth's retail end users served by copper loops of over 18,000 feet in length." He states that BellSouth also does not remove bridged tap at less than 2,500 feet for its own customers. Witness Fogle testifies that the Joint Petitioners' fears of all line conditioning being eliminated are "purely hypothetical." He expressed that although BellSouth is not obligated, by the parity standard expressed in TRO ¶ 643, to provide to the Joint Petitioners line conditioning beyond that provided to its own customers, BellSouth does offer to do so "via BellSouth's Special Construction tariffs on a time and materials basis." He notes that BellSouth's proposed language is found in other agreements with other carriers, such as with those CLECs who are members of the Shared Loop Collaborative.[26] Witness Fogle believes that BellSouth's proposed language for the interconnection agreement with the Joint Petitioners provides nondiscriminatory access as required by the law.

As to BellSouth's agreement with the Shared Loop Collaborative, the Joint Petitioners state that they are not bound by any agreements made by BellSouth and any other CLECs.

B. ANALYSIS

Joint Petitioners witness Falvey states that the ILEC is obligated to provide the CLEC with line conditioning wherever requested. It is our understanding that this position is derived from a standard that came into being after the issuance of the UNE Remand Order.[27] The rule that evolved from the UNE Remand Order held that the incumbent LEC was obligated to

[26] The following carriers were identified as some members of the Shared Loop Collaborative: Northpoint, Rhythms, Covad, AT&T, and MCI (Fogle TR 713-715, 718).

[27] Order No. FCC 99-238 issued November 5, 1999, CC Docket No. 96-98 Third Report and Order and Fourth Further Notice of Proposed Rulemaking. (UNE Remand Order).

provide line conditioning "wherever a competitor requests." (47 C.F.R. § 51.319 (a)(3))[28] However, that phrase has now been stricken from the rule and replaced with

> . . . at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop . . . . (47 C.F.R. § 51.319(a)(1)(iii))

The Joint Petitioners consider the revision noted above as an expansion of "wherever a competitor requests." However, this paragraph is subsumed within paragraphs referring to an obligation to provision line conditioning on a nondiscriminatory basis. Nondiscriminatory access is now defined as:

> (a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be *the same* for all telecommunications carriers requesting access to that network.
>
> (b) To the extent technically feasible, the quality of an unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be *at least equal in quality* to that which the incumbent *provides to itself.* (47 C.F.R. § 51.311)(emphasis added)

However, parties are free to negotiate agreements to provide superior quality access, with the ILECs *being compensated* for the additional cost involved in providing superior quality; however, the ILECs are *not mandated* to provide service at such a standard.[29] With the FCC redefining nondiscriminatory access as parity, we find that the ILEC is now obligated to provide a quality of access to the loop and its elements, which includes line conditioning, "at least equal in quality to that which the incumbent provides to itself." (47 C.F.R. § 51.311)

Joint Petitioners object to BellSouth refusing to condition lines to enable xDSL on loops in excess of 18,000 feet, when it routinely conditions DS1 loops longer than 18,000 feet. BellSouth notes that Joint Petitioners witness Willis did acknowledge that NuVox was not ordering services that would require load coil removal on loops over 18,000 feet and were using DS1s to provide broadband services to customers regardless of loop length. Witness Willis also noted that the provisioning of DS1s or the line conditioning for such loops is not at issue in this dispute.

We note that in addition to parity, the rule also limits line conditioning to a standard of providing "suitability for digital subscriber line services." (47 C.F.R. § 51.319(a)(1)(iii)) This is

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[28] 47 C.F.R. § 51.319 (a)(3)(10-1-00 Edition).

[29] See Iowa Utils. Bd., 120 F.3d at 812-13.

clarified in paragraph 643 of the TRO, which states, "[l]ine conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." The FCC restates throughout the TRO that line conditioning is for provisioning xDSL services.[30] Further, in footnote 624 of the TRO, it states that DS0 loops are typically used to deploy xDSL services to customers associated with the mass market. As stated in paragraph 209 of the TRO, the enterprise market typically purchases high-capacity loops such as DS1. The FCC noted in paragraph 210 of the TRO that the economic considerations in provisioning DS1 loops vary from provisioning DS0 loops, and adopted loop unbundling rules specific to each loop type. The Joint Petitioners note one DS1 could provide the capacity of 24 DS0 loops. We find that in evaluating whether BellSouth is meeting its nondiscriminatory obligation to provide line conditioning suitable for xDSL services, we must focus on the conditions under which BellSouth's own customers obtain line conditioning for xDSL services. Therefore, we conclude that any line conditioning afforded to DS1 customers is irrelevant.

In paragraph 2 of the TRRO, the FCC "recognized the marketplace realities of robust broadband competition and increasing competition from intermodal sources, and thus eliminated most unbundling requirements for broadband architectures serving the mass market." The FCC used its section 251 unbundling authority in a more targeted manner, and in paragraph 2 of the TRRO, the FCC noted that it "impose[d] unbundling obligations only in those situations where [it found] that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition." In response to the USTA II court's directive, the FCC modified its "approach regarding carriers' unbundled access to incumbent LECs' network elements for provision of certain services," which it expressed in paragraph 22 of the TRRO. We find that as more and more elements become "de-listed" as network elements requiring unbundling, the obligation to provide line conditioning wanes accordingly. This limiting focus is reflected in the FCC's revision of the line conditioning rules to providing "suitability for digital subscriber line services." (47 C.F.R. § 51.319(a)(1)(iii))

We conclude that the rules obligate BellSouth to provide parity in the quality of access to the unbundled network element -- in this case, line conditioning. Further, we note that nondiscriminatory access has now been defined in paragraph 643 of the TRO as "at least equal in quality to that which the incumbent provides to itself," and understand the term parity to hold the same meaning. (47 C.F.R. § 51.311) This Commission finds that BellSouth has met the requirement of the law and that the request of the Joint Petitioners goes beyond what BellSouth provides for itself or to other carriers. Moreover, we find that to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders.

C. DECISION

[30] TRO ¶ 7, ¶ 23, ¶ 26, Note 465, Note 624, ¶ 211, ¶ 215, Note 661, ¶ 249, ¶ 250, Note 746, Note 747, ¶ 255, ¶ 344, ¶ 347, ¶ 350, ¶ 642, ¶ 643, ¶ 644.

Upon consideration and review of the record and arguments in the parties' briefs, we find that BellSouth's obligations with respect to line conditioning are to provide nondiscriminatory access and ensure digital subscriber line capability.

XI. LOAD COIL REMOVAL ON COPPER LOOPS OF 18,000 FEET OR MORE

Joint Petitioners witness Willis notes that BellSouth proposes to unload loops of less than 18,000 feet at TELRIC rates. There is no disagreement over this proposal. Witness Fogle points out in Hearing Exhibit 2 that load coils on loops less than 18,000 feet are not necessary to sustain the underlying voice service, and are removed by BellSouth to provide its own xDSL service. Pursuant to current network design standards, no load coils are anticipated on loops extending to 18,000 feet. However, load coils are required on loops with lengths exceeding 18,000 feet to support voice service. Once a loop extends beyond 18,000 feet, pursuant to current network design standards, it would require a minimum of three load coils with the first placed at 3,000 feet from the central office and subsequent load coils placed at 6,000 foot intervals thereafter. The Joint Petitioners do not dispute these facts. Where the parties differ is that BellSouth proposes to unload loops longer than 18,000 feet using its special construction process.[31]

A. PARTIES' ARGUMENTS

Joint Petitioners witness Willis proposes that rates for unloading loops longer than 18,000 feet should be at TELRIC, stating primarily that "[n]othing in any FCC order allows BellSouth to treat Line Conditioning in different manners depending on the length of the loop." Witness Willis further points out that the FCC's Line Sharing Order[32] held that ILECs are required to condition loops, regardless of the loop length, and the FCC reiterated this obligation in footnote 1947 of the TRO. Joint Petitioners note that the FPSC has already approved TELRIC rates for load coil removal on loops longer than 18,000 feet.[33] Joint Petitioners state in their brief that those rates are in their existing agreements with BellSouth and should remain applicable. Witness Willis believes that BellSouth is obligated by the FCC's line conditioning rules and the FPSC's order[34] to unload all loops at TELRIC-compliant rates, even those longer than 18,000 feet.

BellSouth witness Fogle states that the TRO provides for nondiscriminatory access, which is parity. Witness Fogle testifies that for its customers, "BellSouth adds or does not add

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[31] Special construction provision is contained in a FCC tariff. Actual costs are calculated on an individual case basis.

[32] Order No. FCC 99-355 issued December 9, 1999, CC Docket Nos. 96-98, 98-147, Third Report and Order in CC Docket No. 98-147; Fourth Report and Order in CC Docket No. 96-98. (Line Sharing Order).

[33] See Order No. PSC-01-2051-FOF-TP (Appendix A, Element A.17), issued October 18, 2001.

[34] See PSC-01-1181-FOF-TP.

load coils depending on the length of the copper loop." He purports that BellSouth does not unload its facilities to provide digital subscriber line service capability for its own customers on loops longer than 18,000 feet and states that under its nondiscriminatory obligations under the Act, BellSouth should not be obligated to do so at TELRIC for the Joint Petitioners. However, BellSouth will remove load coils on loops extending beyond 18,000 feet upon request pursuant to its special construction process. Witness Fogle testifies that using this methodology, BellSouth is able to calculate the specific costs associated with removing and replacing an individual load coil. Witness Fogle notes that in some cases, the resulting cost could be "less than the TELRIC rate for removing load coils, if the load coil is on aerial cable and can easily be removed."

BellSouth witness Fogle argues that the Joint Petitioners have current agreements containing TELRIC rates for line conditioning, which are of no consequence because their current agreements are not TRO-compliant. Where the ILEC is not obligated to perform line conditioning, BellSouth notes that such line conditioning is not bound to TELRIC pricing. BellSouth confirmed, "state law . . . can provide no 'back door' for reimposition of TELRIC rates for network elements that the FCC has determined BOCs should not be required to make available at forward-looking prices."

Joint Petitioners reiterate that BellSouth acknowledges the definition of line conditioning in rule 47 C.F.R. § 51.319 (a)(1)(iii)(A) has not materially changed. They further propose that the text of the TRO does not express any limitations. Joint Petitioners believe that the parity standard, which BellSouth purports is applicable to line conditioning, is only relevant for routine network modifications. They express that the rules governing line conditioning and routine modifications "are distinct and do not reference each other." Furthermore, the Joint Petitioners point out, by using the special construction tariff, each request would have both a cost and interval for delivery calculated on an individual case basis, which they find unacceptable.

Joint Petitioners witness Willis contends that access to unloaded loops in excess of 18,000 feet is important for the deployment of Etherloop[35] and G.SHDSL,[36] which could provide broadband capabilities on such loops. He claims that without line conditioning on loops longer than 18,000 feet, these services will not work. Witness Willis states that the Petitioners have a "right to provide the service of their choice and to obtain loops that can carry those services."

BellSouth states in its brief that the Joint Petitioners' claims that Etherloop and G.SHDSL will not work on loop lengths in excess of 18,000 feet without line conditioning is pure speculation, pointing out that the job duties of the Joint Petitioners' sole witness, Jerry Willis, do not include the development of new technologies. BellSouth asserts that the Joint Petitioners' concerns regarding Etherloop and G.SHDSL are inaccurate, with witness Fogle testifying that

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[35] "Etherloop . . . is a blending of DSL and Ethernet, combining the high data rates of DSL and the half-duplex communications model of Ethernet [providing] "burst" packet delivery capabilities." See, Hearing Exhibit 2

[36] G.SHDSL is a new standards-based single pair implementation of DS-1, offering symmetric bandwidths of between 192 Kbps to 2.3 Mbps, with a 30 percent longer loop reach than SDSL and is spectrally compatible with other DSL variants within the network, as set forth in Hearing Exhibit 2.

new technologies being developed to provide broadband services on copper loops in excess of 18,000 feet take into consideration the network limitations of the embedded loop in their development. BellSouth's brief notes that Joint Petitioners witness Willis did acknowledge that his firm, NuVox, was not ordering services that would require load coil removal on DS0 loops longer than 18,000 feet and were using DS1s to provide broadband services to customers regardless of loop length, also noting that the provisioning of DS1s or the line conditioning for such loops is not at issue in this dispute.

Joint Petitioners indicate that BellSouth removes load coils on DS1 loops exceeding 18,000 feet in length. They further conclude that BellSouth should be required to remove load coils on all loops. BellSouth witness Fogle objects, stating that BellSouth must apply the same criteria to the Joint Petitioners that are applied to its own retail customers and if BellSouth does not condition loops longer than 18,000 feet to enable xDSL delivery for itself, then by its parity obligation BellSouth should not be required to do so for the Joint Petitioners at TELRIC.

BellSouth reveals that receiving requests to condition loops of any length is rare, stating that BellSouth received only 14 requests from all CLECs throughout its entire nine-state region to remove load coils in 2004, with only two of those being for loops in excess of 18,000 feet; the Joint Petitioners, in particular, "did not request a single order to perform any form of line conditioning in 2004." BellSouth concludes that the Joint Petitioners' claims that BellSouth's proposed language will prevent them from deploying broadband services is not credible because the Joint Petitioners have not used nor have they presented any plans for using a technology that requires line conditioning. Further, the Joint Petitioners are currently providing broadband access to their customers at all lengths via alternative approaches that do not require line conditioning.

B. ANALYSIS

We agree with Joint Petitioners witness Willis that the FCC does not treat line conditioning in different manners depending on the length of the loop. In ¶ 86 of the Line Sharing Order, the FCC states in particular, incumbent LECs are required to condition any loop requested by a competitor, regardless of length, unless such conditioning would significantly degrade the customer's analog voice service provided by the incumbent. Further, the FCC states that "an incumbent LEC will rarely, if ever, be able to demonstrate a valid basis for refusing to condition a loop under 18,000 feet."[37] The FCC specifically addressed conditioning loops over 18,000 feet in its Line Sharing Reconsideration Order (LSRO).[38] The FCC in ¶ 34 of that Order considered comments that loading loops which exceed lengths of 18,000 feet was a "well-established engineering principle" and removing such devices would degrade voice service, since

[37] Line Sharing Order, 14 FCC Rcd at 20954, para 86.

[38] Order No. FCC 01-26 issued January 19, 2001, CC Docket No. 98-147, CC Docket No. 96-98, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98. (Line Sharing Recon Order).

loading was required to obtain minimally acceptable levels of voice quality. However, the FCC in ¶¶ 35-36 of the LSRO refused to make a "categorical finding" that loaded loops over 18,000 feet were ineligible for line sharing because conditioning would degrade the voice service:

> We reject . . . mak[ing] a categorical finding that loops over 18,000 feet . . . are ineligible for line sharing because conditioning them will significantly degrade the voice service. . . . [I]n some cases, unloaded loops longer than 18,000 feet may be able to support quality voice service. We also agree . . . that the simple loop length standard . . . is inappropriate because it does not focus on the quality of the voice service that can be provisioned over the line. AT&T suggests that the loss characteristics of a loop are a more relevant determination when considering voice degradation, with loss being a function *both* of the loop's length and the gauge of the loop wire. . . . [I]n fact, the differing positions on this point further support our finding in the Line Sharing Order that it is appropriate for state commissions to consider such various loop conditioning scenarios on a case-by-case basis. . . .
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> . . . Our intent in requiring loops in excess of 18,000 feet to be conditioned, unless the incumbent LEC demonstrates that conditioning will significantly degrade voice service, was to prevent the incumbent LECs from refusing to condition the loop merely because the loop is over 18,000 feet.

We find that the FCC's refusal to make a "categorical" finding, leaves the FPSC the option to make such a finding.

We agree with Joint Petitioners witness Falvey that the FPSC previously set rates for line conditioning loops longer than 18,000 feet[39] after the issuance of the UNE Remand Order.[40] We also recognize that the FCC made no material changes to 47 C.F.R. § 51.319 (a)(1)(iii)(A), where line conditioning is described as the removal of devices from the copper loop. However, both parties fail to note that the FCC changed the definition of nondiscriminatory access in 47 C.F.R. § 51.311, which is a pivotal term used in the line conditioning rules.

As discussed in Section VIII herein, the "superior in quality" standard that became law after the issuance of the Local Competition Order[41] and that was carried forward to the UNE Remand Order, and was the basis for the line conditioning obligations prior to the issuance of the TRO. With the issuance of the TRO, this definition was revised, eliminating a "superior in quality" access standard. The FCC's rule 47 C.F.R. § 51.319 (a) states that nondiscriminatory access shall be provided to line conditioning as an element of the local loop. Nondiscriminatory

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[39] See PSC-01-2051-FOF-TP.

[40] Order No. FCC 99-238 issued November 5, 1999, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking. (UNE Remand Order).

[41] Order No. FCC 96-325 issued August 8, 1996, CC Docket Nos. 96-98, 95-185, First Report and Order. (Local Competition Order).

access is *now* defined as "at least *equal* in quality to that which the incumbent provides to itself." (47 C.F.R. § 51.311, emphasis added) Nondiscriminatory access at this point carries the same definition as parity. Parity is currently the standard established by the FCC for access to the unbundled network. As stated in ¶643 of the TRO section discussing line conditioning, the FCC stated that the "incumbent LECs must make the routine adjustments to unbundled loops to deliver services *at parity* with how incumbent LECs provision such facilities for themselves." (emphasis added) Furthermore, the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) in its Remand Decision,[42] has found that the phrase "at least equal in quality" leaves open the possibility for the parties to negotiate agreements to provide a superior quality access, with the ILECs being compensated for the additional cost involved in providing superior quality, but ruled that the ILECs are not mandated to provide such a standard.[43] By changing what constitutes nondiscriminatory access, we find that the FCC now permits line conditioning to be treated in different manners depending on how the incumbent provides service to its retail customers, with access that exceeds parity provided at non-TELRIC rates.

In analyzing whether the Joint Petitioners are impaired[44] without access to unloaded loops longer than 18,000 feet, we consider

- The manner in which BellSouth provides advanced services[45] to its own customers on loops longer than 18,000 feet (parity),
- Whether the limitation on unloading loops longer than 18,000 feet poses any practical barriers to providing advanced services to customers, and
- Whether unloading loops longer than 18,000 feet poses serious interference with the incumbent's network operations.

Access to elements described in 47 C.F.R. § 51.319 is to be provided

> at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires the incumbent LEC to . . . [provide] the *same technical criteria and service standards* that are used within the incumbent LEC's network. (47 C.F.R. § 51.305(a)(3), emphasis added)

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[42] Iowa Utilities Bd. v. FCC, (Remand Decision) Nos. 96-3321(and consolidated cases) issued July 18, 2000, p. 22. before the United States Court of Appeals for the Eighth Circuit.

[43] See, Iowa Utils. Bd., 120 F.3d at 812-13.

[44] When analyzing impairment, the cost of unbundling must be adequately weighed. (TRRO ¶ 8).

[45] The term "advanced services" is defined as "high speed, *switched*, broadband, wireline telecommunications capability that enables users to originate and receive high quality voice, data, graphics or video telecommunications using any technology." (Line Sharing Order, 14 FCC Rcd at 20915, ¶ 4. (emphasis added).

We find that in evaluating whether BellSouth is meeting its nondiscriminatory obligation to provide line conditioning, we must focus on all of the criteria under which BellSouth's own customers are bound in obtaining line conditioning. According to BellSouth witness Fogle, BellSouth does not remove load coils for its own xDSL customers on loops with lengths exceeding 18,000 feet, but offers to do so for other parties at non-TELRIC rates. In accord with what it has offered other carriers, BellSouth makes the same offer to the Joint Petitioners.

In footnote 16 of the TRRO, the FCC states that in evaluating impairment other alternatives may not be ignored. Additionally, in footnote 20 of the TRO, the FCC adds that consideration must be given whether practical barriers to competitive entry have been removed must be considered along with whether serious interference with the incumbent's network operations can be avoided. BellSouth witness Fogle states that BellSouth serves customers on loops over 18,000 feet with multiple other options for broadband services, including but not limited to the use of remote terminals, Digital Subscriber Line Access Multiplexers (DSLAM), fiber technology or the use of DS1s. It is our understanding that multiple options are available to the CLECs as well. We note that advanced services can and are being served with DS1 loops by the Joint Petitioners. Joint Petitioners witness Willis did acknowledge that NuVox was using DS1s to provide broadband services to customers regardless of loop length. BellSouth notes that Joint Petitioners were not ordering services that would require load coil removal on loops longer than 18,000 feet. Joint Petitioners suggested that BellSouth routinely conditions DS1 loops longer than 18,000 feet. Witness Willis also noted that the provisioning of DS1s or the line conditioning for such loops is not at issue in this dispute.

As read in footnote 624 of the TRO, DS0 loops are typically used to deploy xDSL services to customers associated with the mass market. DS0 loops exceeding lengths of 18,000 feet require load coils to provide voice service to those customers. In Hearing Exhibit 2, BellSouth presents that the loop tapers, becoming smaller and smaller, at longer lengths. Therefore, at greater distances, spare capacity and flexibility become more critical. As also indicated by Hearing Exhibit 2, the costs of unloading at those distances is far greater than at distances less than 18,000 feet, since cables less than 18,000 feet may be unloaded, whereas, those loops exceeding 18,000 feet have at minimum three load points and more as the loop lengthens. To reuse loops for voice service that are previously unloaded to enable advanced services would require reloading, which would require loading at three or more locations.[46] The costs of reloading these facilities is not included in TELRIC pricing.

The Joint Petitioners witness Willis further notes that one DS1 provides the capacity of 24 DS0 loops. Furthermore, in Hearing Exhibit 2, the Joint Petitioners provided evidence, as reflected by Hearing Exhibit 2, that one DS1 could be provided using one or two pairs; therefore,

[46] "Many bridged taps and load coils are permanently attached, often buried, connect hundreds of loops at a single junction, and not designed for easy access. To remove a load coil or bridged tap often involves digging up the splice case, locating and identifying the correct loop, performing the steps associated with . . . removing the bridged tap or load coil, and reclosing the cable/splice case, re-burying and possible re-landscaping the affected location, including replacing asphalt or concrete when necessary. . . All of this is possibly repeated when . . . the loop is abandoned by the current customer or CLEC, and BellSouth desires to return the loop to industry standard specifications." (Hearing Exhibit 2, Item No. 121(d))