would allow BellSouth's engineers to evaluate the specific costs associated with removing and replacing such an individual load coil.

The specific language proposed to be included in the Agreement in Attachment 2, Section 2.12.2 is as follows:

Joint Petitioners' Version –

No Section.

BellSouth's Version –

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

This issue is essentially a subpart of the issue previously addressed in the Evidence and Conclusions for Finding of Fact No. 10, concerning Matrix Item No. 36. Thus, consistent with their position regarding Matrix Item No. 36, the Joint Petitioners asserted that BellSouth should not be permitted to impose artificial restrictions on its obligation to provide line conditioning at Commission-approved TELRIC-compliant rates. The Joint Petitioners maintained that BellSouth should be required to remove load coils at TELRIC rates on loops of any length as required by the FCC's line conditioning rules. The Joint Petitioners argued that BellSouth's refusal to remove load coils on loops greater than 18,000 feet at TELRIC rates because BellSouth believes that such activity is not a routine network modification as defined by the FCC, is a flawed interpretation of the FCC's line conditioning rules. As discussed previously, in regard to Matrix Item No. 36, the Joint Petitioners again argued that BellSouth's line conditioning obligations are not constrained by the FCC's routine network modification rule.

Further, in their Brief, the Joint Petitioners observed that the Commission has already set TELRIC rates for load coil removal on loops of all lengths. In particular, the Joint Petitioners noted that, during the hearing, BellSouth witness Fogle was provided with the Joint Petitioners Cross-Examination Exhibit 4, which was an excerpt from BellSouth's current interconnection agreement with NewSouth, which included a detailed table of the rates applied to load coil removal; and the Joint Petitioners commented that witness Fogle agreed that these rates are TELRIC-compliant and had been set by the Commission. Consequently, the Joint Petitioners asserted that in seeking to impose unpredictable, individual case basis, FCC tariff Special Construction Rates for load coil removal on long loops, BellSouth is attempting to circumvent the rates set by prior order of this Commission. The Joint Petitioners maintained that they are not willing to waive the application of these rates; thus, they opposed the inclusion of BellSouth's proposed language for Section 2.12.2. Accordingly, the Joint Petitioners

recommended that the Commission should adopt the Joint Petitioners' position to ensure the applicability of its TELRIC rates for load coil removal on loops, including those that are greater than 18,000 feet in length, and to avoid the imposition of the artificial conditioning limitation that BellSouth seeks to impose contrary to the ILEC's conditioning obligations under existing FCC line conditioning rules and rulings.

In its Brief, BellSouth maintained that for the same reasons as discussed in its comments for Matrix Item No. 26, the Commission should move Matrix Item No. 37 to the change of law docket (Docket No. P-55, Sub 1549) for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum, BellSouth asserted that the Commission should defer resolution of this item until its decision in the change of law proceeding to avoid inconsistent rulings.

However, in the event the Commission chooses to address this issue now, BellSouth argued that the Joint Petitioners' position should be rejected because it conflicts with the *TRO* and BellSouth's nondiscriminatory obligations under the Act. Further, BellSouth commented that Matrix Item Nos. 36, 37, and 38 are all interrelated as they address BellSouth's line conditioning obligations in both a general and a specific fashion.

BellSouth asserted that it should have no obligation to remove load coils in excess of 18,000 feet at TELRIC rates for the Joint Petitioners because BellSouth does not remove load coils on long loops for its own customers. BellSouth noted that as it commented in regard to Matrix Item No. 36, this standard complies with Paragraph 643 of the *TRO*, as well as BellSouth's nondiscrimination obligations under the Act. Further, BellSouth explained that, if requested, it will remove load coils on such loops pursuant to its FCC tariff via the special construction process.

Additionally, BellSouth explained that pursuant to current network standards, BellSouth places load coils on loops greater than 18,000 feet to enhance voice service. As stated by witness Fogle, "[w]e start placing them at 18,000 feet, and it essentially takes static off the line so your voice service works better." BellSouth indicated that it placed load coils, generally in groups of 400 or more, after 18,000 feet when the network was originally built; and according to witness Fogle those load coils were designed to be in the network for long periods of time. Consequently, witness Fogle testified that load coils are generally found inside splice cases that are typically buried underground, and they could be under concrete or asphalt. As a result of the difficulties encountered in removing such load coils and because BellSouth believes it has no obligation to remove load coils on loops in excess of 18,000 feet since it does not remove load coils on long loops for its own customers, BellSouth asserted that it will remove such load coils upon request of a CLP, but only pursuant to special construction pricing, which allows BellSouth's engineers to evaluate the specific costs associated with removing and replacing an individual load coil.

The Public Staff agreed with the Joint Petitioners' position. The Public Staff maintained that since load coil removal on loops greater than 18,000 feet is in effect providing line conditioning on those loops, then for the same reasons supporting its

position on Matrix Item No. 36, the Agreement should not contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less. The Public Staff also noted that the FCC's *Line Sharing Order* makes the conditioning obligation cover loops of any length. Thus, the Public Staff asserted that adopting BellSouth's language would conflict with this requirement and would permit BellSouth to limit offerings by the Joint Petitioners. Consequently, the Public Staff agreed with the Joint Petitioner's position that the Agreement should not contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less in length.

The Commission, as previously concluded in regard to Matrix Item No. 36 (Issue No. 10), rejects BellSouth's assertion that its line conditioning obligations are now constrained by the FCC's *TRO*-implemented rule on routine network modifications, i.e., BellSouth asserted that its obligations to provide line conditioning at TELRIC rates should be limited to what BellSouth routinely provides for its own customers. The Commission agrees with the Joint Petitioners' and the Public Staff's position. Consistent with our findings and conclusions in regard to Matrix Item No. 36, we find that the Agreement should not contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less in length. In particular, as discussed in the Evidence and Conclusions for Finding of Fact No. 10 (Matrix Item No. 36), we found that (1) the ILECs' line conditioning obligations remained virtually the same as they did before the *TRO*, with the exception that the line conditioning obligations were expanded to include subloops; (2) the CLPs need to have access to line conditioning at TELRIC rates, so that they will be able to deploy advanced services on copper loops (including subloops), free of devices that diminish the capabilities of the loop; and (3) the ILEC's line conditioning obligations apply to loops of any length. Furthermore, we note that the Commission has previously concluded in its *Recommended Order Concerning all Phase I and Phase II Issues Excluding Geographic Deaveraging*, issued June 7, 2001, in Docket No. P-100, Sub 133d, that ILECs are obligated, pursuant to the FCC's *UNE Remand Order* and its line conditioning rules, to remove load coils from loops of any length at TELRIC rates.

CONCLUSIONS

The Commission concludes that the Agreement should not contain any specific contract language limiting the availability of line conditioning for load coil removal to only copper loops of 18,000 feet or less in length.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

ISSUE NO. 12 - MATRIX ITEM NO. 38: Under what rates, terms, and conditions should BellSouth be required to perform line conditioning to remove bridged taps?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners commented that any copper loop being ordered by a CLP with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. Line conditioning orders that require the removal of other bridged tap should be performed at the rates set forth in Exhibit A of Attachment 2 to the Agreement.

BELLSOUTH: BellSouth stated that any copper loop being ordered by a CLP that has over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, so that the loop will have a maximum of 6,000 feet of bridged tap. Such modification will be performed at no additional charge to the CLP. Line conditioning orders that require the removal of bridged tap which serves no network design purpose on a copper loop, that will result in a combined level of bridged tap between 2,500 feet and 6,000 feet will be performed at the rates set forth in Exhibit A of Attachment 2 to the Agreement. A CLP may request the removal of any unnecessary and non-excessive bridged tap (bridged tap between 0 and 2,500 feet which serves no network design purpose), at rates pursuant to BellSouth's special construction process. BellSouth is only required to perform line conditioning that it performs for its own xDSL customers.

PUBLIC STAFF: The Public Staff agreed with the Joint Petitioners' position.

DISCUSSION

According to the Joint Petitioners' Petition for Arbitration and the Joint Petitioners' Exhibit A, this issue relates to the matter of the appropriate contract language to be included in Section 2.12.3 and Section 2.12.4 of Attachment 2 (Network Elements and Other Services) to the Agreement.

BellSouth has agreed to remove bridged tap in excess of 6,000 feet from copper loops without charge. The Joint Petitioners and BellSouth have also agreed to TELRIC rates for the removal of bridged tap between 2,500 feet and 6,000 feet in length. The disputed issues between the parties are the cost for removal of bridged tap from copper loops between 0 and 2,500 feet in length and BellSouth's proposed limitation that only bridged tap between 0 and 6,000 feet which "serves no network design purpose" will be removed in accordance with BellSouth's rate proposals.

The Joint Petitioners asserted that Sections 2.12.3 and 2.12.4 of Attachment 2 of the Agreement should provide that BellSouth will remove bridged tap between 0 and 2,500 feet in length from any copper loop ordered by a CLP at TELRIC rates.

Whereas, BellSouth contended that, upon request by a CLP, it will remove bridged taps between 0 and 2,500 feet which serves no network design purpose pursuant to special construction pricing.

The specific language proposed to be included in the Agreement in Attachment 2, Section 2.12.3 and Section 2.12.4 is as follows, with the differences between the Joint Petitioners' proposal and BellSouth's proposal being denoted with underlined text:

Joint Petitioners' Version – Section 2.12.3

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

BellSouth's Version – Section 2.12.3

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

Joint Petitioners' Version – Section 2.12.4

> <u>No Section.</u>

BellSouth's Version – Section 2.12.4

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

This issue, like Matrix Item No. 37, is essentially a subpart of the issue addressed in the Evidence and Conclusions for Finding of Fact No. 10, concerning

Matrix Item No. 36. As with Matrix Item No. 37, the Joint Petitioners asserted that BellSouth is relying on its incorrect interpretation of the routine network modification rule for its refusal to remove bridged tap less than 2,500 feet in length from copper loops at TELRIC rates. Like Matrix Item No. 37, the Joint Petitioners observed that this issue would be resolved in the Joint Petitioners' favor with the proper resolution of the issue in Matrix Item No. 36.

As discussed previously in regard to Matrix Item No. 36, the Joint Petitioners again argued that BellSouth's line conditioning obligations are not constrained by the routine network modification rule. The Joint Petitioners disagreed with BellSouth's position which was that since BellSouth does not remove bridged tap less than 2,500 feet in length from copper loops serving its own retail customers, this activity is not a routine network modification. The Joint Petitioners further explained that since BellSouth incorrectly equates line conditioning with routine network modification, then BellSouth considers that this type of bridged tap removal does not constitute line conditioning and need not be done at TELRIC rates. However, consistent with their position on Matrix Item No. 36, the Joint Petitioners again argued that the FCC does not equate line conditioning and routine network modifications. The Joint Petitioners opined that they are separate and distinct rules. The Joint Petitioners contended that the ILEC's line conditioning obligations are not modified or limited by the routine network modification rules. The Joint Petitioners observed that there was no length limitation in the FCC line conditioning rules before the *TRO*, and there is none now. Consequently, the Joint Petitioners maintained that BellSouth remains obligated to remove bridged tap from loops of any length pursuant to Section 251(c)(3) of the Act and FCC Rule 51.319(a)(1)(iii)(A).

Next, the Joint Petitioners noted that BellSouth has proposed to limit bridged tap removal to that which "serves no network design purpose." In opposition, the Joint Petitioners asserted that there is no legal basis for that purported standard. The Joint Petitioners maintained that such a standard would provide BellSouth with the sole discretion to determine when bridged tap would be removed.

Further, in regard to BellSouth's argument that requiring it to remove bridged tap of this length would create a "superior network" for Joint Petitioners, the Joint Petitioners commented that the FCC has expressly stated that "[l]ine conditioning does not constitute the creation of a superior network, as some incumbent LECs argue."[14] Accordingly, the Joint Petitioners argued that the proposed implementation of FCC Rule 51.319 as to line conditioning does not violate any precept of parity, but rather comports exactly with the FCC's own interpretation of an ILEC's conditioning responsibilities.

Additionally, the Joint Petitioners observed that, as with load coils, the Commission has previously concluded in its *Recommended Order Concerning all Phase I and Phase II Issues Excluding Geographic Deaveraging*, issued June 7, 2001, in Docket No. P-100, Sub 133d, that ILECs were obligated, pursuant to the FCC's *UNE*

[14] *TRO*, at Paragraph 643.

Remand Order and its line conditioning rules, to remove bridge taps from loops of any length at TELRIC rates. Further, the Joint Petitioners noted that the Joint Petitioners Cross-Examination Exhibit 4 included rates for removing bridged taps for all loops, and that during cross-examination, in regard to said Exhibit 4, BellSouth witness Fogle testified that those rates were TELRIC rates set by this Commission. Consequently, the Joint Petitioners argued that BellSouth should not be permitted to impose other rates — particularly "Special Construction" rates — in contravention of the Commission's decision. Thus, the Joint Petitioners requested that the Commission adopt the Joint Petitioners' language for Sections 2.12.3 and 2.12.4.

In its Brief, BellSouth maintained that for the same reasons as discussed in its comments for Matrix Item No. 26, the Commission should move Matrix Item No. 38 to the change of law docket (Docket No. P-55, Sub 1549) for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum, BellSouth contended that the Commission should defer resolution of this item until its decision in the change of law proceeding to avoid inconsistent rulings.

However, in the event the Commission chooses to address this issue now, BellSouth argued that the Joint Petitioners' position should be rejected because it conflicts with the *TRO* and BellSouth's nondiscriminatory obligations under the Act. Further, BellSouth commented that Matrix Item Nos. 36, 37, and 38 are all interrelated as they address BellSouth's line conditioning obligations in both a general and a specific fashion.

BellSouth commented that the dispute concerning Matrix Item No. 38 centers on whether BellSouth should be required to remove bridge taps between 0 and 2,500 feet at TELRIC rates. BellSouth alleged that bridge taps are standard network enhancements that are used to allow BellSouth to reconfigure its network without reconfiguring the copper wire and that BellSouth deploys bridge taps in its network pursuant to industry standards. Further, in its Brief, BellSouth noted that even though BellSouth does not remove bridge taps at any length for its own customers, in conjunction with the CLP Shared Loop Collaborative, BellSouth has agreed to remove bridge taps for CLPs in the following scenarios: (1) over 6,000 feet for free; (2) between 2,500 feet and 6,000 feet at TELRIC; and (3) between 0 and 2,500 feet pursuant to special construction pricing. BellSouth has offered these same terms and conditions to the Joint Petitioners. Furthermore, BellSouth asserted that no carrier has ever asked BellSouth to remove bridge taps of this length; none of the services that the Joint Petitioners are providing would be impacted by bridge taps of this length; and the Joint Petitioners cannot present any evidence to rebut this fact because they do not even know the percentage of its loops that contain bridge taps of this length or whether they have ever asked BellSouth to remove bridge taps. BellSouth remarked that this lack of knowledge to support their claim is not surprising given that the Joint Petitioners did not participate in the CLP Shared Loop Collaborative. Accordingly, BellSouth recommended that the Commission reject the Joint Petitioners' language on this issue and adopt BellSouth's, as it provides the Joint Petitioners with exactly what the CLP Shared Loop Collaborative has already agreed to.

The Public Staff noted that the Joint Petitioners argued that BellSouth's proposed language would limit the removal of bridged tap between 2,500 feet and 6,000 feet that serves no network design purpose. The Public Staff asserted that this language leaves to BellSouth's discretion the determination of which bridged taps serve no network purpose and precludes the removal of bridged tap that is less than 2,500 feet that could possibly inhibit the provision of high-speed data transmission.

The Public Staff observed that, as with Matrix Item Nos. 36 and 37, BellSouth maintained that it has no obligation under Section 251 of the Act to perform bridged tap removal beyond what it performs for its own customers. Furthermore, the Public Staff pointed out that, nevertheless, BellSouth acknowledged that it currently offers bridged tap removal beyond what it contends are its obligations under Section 251, as a result of a process developed by the CLP Shared Loop Collaborative.

The Public Staff maintained that for the reasons supporting its position on Matrix Item No. 36, the Commission should find that BellSouth should perform line conditioning to remove bridged taps, without limitation as to the length of the bridged tap. The Public Staff argued that BellSouth has an obligation to condition loops regardless of the loop's length and may not limit the Joint Petitioners' offerings based on its own practices and procedures.

The Public Staff also observed that the parties concur that BellSouth has agreed through an industry collaborative to modify any copper loop ordered by a CLP at no additional charge to the CLP with over 6,000 feet of combined bridged tap, such that the loop will have a maximum of 6,000 feet of bridged tap. The Public Staff asserted that because loop conditioning is a Section 251 obligation, BellSouth must charge TELRIC-based rates for conditioning loops with combined bridged tap of 6,000 feet or less. Accordingly, the Public Staff recommended that the Commission find that any copper loop ordered by a CLP with over 6,000 feet of combined bridged tap would be modified, upon request from the CLP, at no additional charge to the CLP, so that the loop will have a maximum of 6,000 feet of bridged tap and that line conditioning orders that require the removal of other bridged tap should be performed at the BellSouth UNE rates previously adopted by the Commission.

The Commission, as previously concluded in regard to Matrix Item No. 36 (Issue No. 10), rejects BellSouth's assertion that its line conditioning obligations are now constrained by the FCC's *TRO*-implemented rule on routine network modifications, i.e., BellSouth asserted that its obligations to provide line conditioning at TELRIC rates should be limited to what BellSouth routinely provides for its own customers. In addition, the Commission rejects BellSouth's proposal to further limit the removal of bridged tap to that which "serves no network design purpose"; the FCC did not modify the line conditioning rules to allow such a limitation and the allowance of such a limitation would, inappropriately, provide BellSouth with the sole discretion to further determine when bridged tap would be removed. The Commission agrees with the Joint Petitioners' and the Public Staff's position. Consistent with our findings and conclusions in regard to Matrix Item No. 36, we conclude that BellSouth is required by the FCC's

rulings regarding line conditioning to condition copper loops to remove bridged tap between 0 to 6,000 feet at TELRIC rates. In particular, as discussed in the Evidence and Conclusions for Finding of Fact No. 10 (Matrix Item No. 36), we found that (1) the ILECs' line conditioning obligations remained virtually the same as they did before the *TRO*, with the exception that the line conditioning obligations were expanded to include subloops; (2) the CLPs need to have access to line conditioning at TELRIC rates, so that they will be able to deploy advanced services on copper loops (including subloops), free of devices that diminish the capabilities of the loop; and (3) the ILEC's line conditioning obligations apply to loops of any length.

CONCLUSIONS

The Commission accepts the parties' agreement that any copper loop ordered by a CLP with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. The Commission concludes that line conditioning orders that require the removal of other bridged tap (bridged tap between 0 and 6,000 feet) should be performed at the BellSouth UNE rates previously adopted by the Commission. Accordingly, the Commission adopts the Joint Petitioners' proposed language for inclusion in the Agreement in Attachment 2, Section 2.12.3 and Section 2.12.4.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

ISSUE NO. 13 - MATRIX ITEM 51:

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

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

POSITIONS OF PARTIES

JOINT PETITIONERS: With respect to (B) the Joint Petitioners position is that to invoke its limited right to audit CLP records in order to verify compliance with the high capacity EEL service eligibility criteria, BellSouth should send a Notice of Audit to the CLPs, identifying particular circuits for which BellSouth alleges noncompliance and demonstrating the cause upon which BellSouth rests its allegations. The Notice of Audit should also include all supporting documentation upon which BellSouth relies to form the basis of its allegations of noncompliance. Such Notice of Audit should be delivered to the CLPs with all supporting documentation no less than 30 days prior to the date upon which Bellsouth seeks to commence an audit.

With respect to (C) the Joint Petitioners argued that the audit should be conducted by a third-party independent auditor mutually agreed-upon by the Parties. The provisions regarding when a CLP must reimburse BellSouth and when BellSouth must reimburse a CLP should mirror those contained in the *TRO*.

BELLSOUTH: BellSouth argued that this matter should be moved to the change of law docket for consideration and resolution because similar if not identical issues are being raised in the change of law proceeding. At a minimum the Commission should defer resolution of this item until its decision in the change of law docket to avoid inconsistent rulings.

On the merits, BellSouth's view is that the Joint Petitioners are attempting to impose unnecessary conditions on BellSouth's EEL audit right in contravention of the *TRO* by seeking to limit its audit rights to those circuits identified in the Notice of Audit and for which sufficient documentation is produced to support the audit and by regulating BellSouth's choice of auditor.

PUBLIC STAFF: The Public Staff believes that the *TRO* sufficiently outlines the requirements for an audit. However, 30-45 days notice of the audit provides a CLP with adequate time to prepare. BellSouth should be able to select the independent auditor of its choice without prior approval from the CLPs or the Commission. Challenges to the independence of the auditor may be filed with the Commission only after the audit has been concluded. BellSouth should not be required to provide documentation to support its basis for audit or seek concurrence of the requesting carrier before selecting the audit's location.

DISCUSSION

(B) The first issue has to do with whether there is a notice requirement and, if so, what should the notice contain. The Joint Petitioners argued that BellSouth must send a Notice of Audit to a CLP when it chooses to invoke its limited right to audit the CLP's records to verify compliance with the high capacity EEL service eligibility criteria. They contended that the notice should include all supporting documentation forming the basis of the allegation of noncompliance and be delivered no less than 30 days prior to the audit's commencement. The Joint Petitioners maintain that a CLP is entitled to know the basis for the audit and needs sufficient time to evaluate the audit request and prepare for an audit. Conversely, BellSouth maintained that the *TRO* contains no requirement that it provide notice of an audit, identify the specific circuits to be audited, or provide supporting documentation justifying the audit 30 days prior to the its commencement.

Paragraph 622 of the *TRO* adopts certification and auditing procedures comparable to those previously established in the *Supplemental Order Clarification* (SOC). The FCC held in the *TRO* that an ILEC may conduct limited audits to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options. The FCC allowed audits to be conducted on an annual basis because this period appropriately balances the ILEC's need for usage information and a CLP's risk of costly and illegitimate audits. The Joint Petitioners admitted that the *TRO* does not include a specific notice requirement, but contended that this Commission may order such a requirement.

BellSouth is correct that the *TRO* does not require ILECs provide notice of an audit or supporting documentation. Paragraph 622, however, notes that CLPs should not be impeded from access to UNEs based upon self-certification, subject to later verification based upon cause. The FCC also recognized in Paragraph 625 that the "details surrounding the implementation of these audits may be specific to related provisions of the interconnection agreements or to the facts of a particular audit, and that the states are in a better position to address that implementation."

While the *TRO* does not require notice of the audit, advance notice of audit would afford a CLP the opportunity to compile the appropriate documentation to support its certifications. Additionally, 30 to 45 days notice of the audit represents an adequate amount of time to prepare for the audit.

As the *TRO* grants ILECs limited authority to audit compliance with the qualifying service criteria on no more than an annual basis, the Commission is satisfied that ILECs by virtue of this authority, need not supply requesting carriers with additional documentation to support their audit rights, *except that, as distinct from documentation, BellSouth should state its concern that the requesting carrier has not met the qualification criteria and should set forth a concise statement of the reasons therefor.* In any event, BellSouth has agreed to provide notice to a CLP stating the cause for the audit. The Commission finds this proposal to be reasonable.

(C) The second issue concerns who is to perform the audit and how the audit should be performed. The Joint Petitioners believe that BellSouth's proposed language is inadequate because it does not provide that (1) the independent auditor must be a third-party retained by BellSouth; (2) the parties must reach agreement on the independent auditor before an audit may commence; (3) the location of the audit will be mutually agreeable to the parties; (4) that the audit will commence no sooner than 30 calendar days after the parties agree on the auditor; and (5) the American Institute of Certified Public Accountants (AICPA) standards related to determining the independence of the auditor will apply. Further, the Joint Petitioners contended that BellSouth's refusal to accept these provisions is contrary to the FCC's EEL audit regulations.

BellSouth asserted that the requirements the Joint Petitioners are attempting to add do not appear in the *TRO*. Further the requirement for a "third-party, mutually agreed-upon, auditor" is only a delaying tactic. BellSouth cited the *TRO* to support its position that it may select and pay for an independent auditor to conduct the audit.

The Commission addressed the issue of auditor selection in Docket No. P-772, Sub 7, in its Order Granting Motion for Summary Disposition and Allowing Audit issued on August 24, 2004, and Order Denying Motion for Reconsideration issued on January 20, 2004. In these Orders, the Commission found that BellSouth must choose an independent auditor to conduct an audit of the CLP's EELs, but that BellSouth may select the auditor without the prior approval of the CLP or Commission. Further, the

Commission found it unnecessary to conduct a hearing to test the independence of BellSouth's selected auditor.

Paragraph 626 of the *TRO* concludes that an ILEC may obtain and pay for an independent auditor to audit compliance with the qualifying service eligibility criteria annually in accordance with the standards established by the AICPA. These standards require the auditor to perform an "examination engagement" and issue an opinion regarding the CLP's compliance with the qualifying service eligibility criteria. Paragraphs 627, 628, and 629 provide additional requirements for the auditor and the presentation of his findings. Paragraphs 627 and 628 specify that the ILEC must reimburse the audited carrier for its costs associated with the audit if the independent auditor concludes that the requesting carrier complied in all material respects with the eligibility criteria. Conversely, if the independent auditor concludes that the requesting carrier failed to comply in all material respects with the service eligibility criteria, the requesting carrier must reimburse the ILEC for the cost of the independent auditor. The FCC, however, does not specify the location of the audit or require that the parties agree to any particular location.

This Commission is not persuaded that the additional requirements suggested by the Joint Petitioners are necessary in light of the audit requirements in the *TRO*. The Commission agrees with BellSouth that the imposition of these superfluous requirements will serve only to delay the audit unnecessarily. The *TRO* clearly delineates the requirements for the audit and carefully assigns cost responsibilities based on the audit's findings.

CONCLUSIONS

The Commission concludes that the *TRO* sufficiently outlines the requirements for an audit. However, 30 - 45 days notice of the audit provides a CLP with adequate time to prepare. In its Notice of Audit, BellSouth should state its concern that the requesting CLP has not met the qualification criteria and a concise statement of its reasons therefor. The Commission further concludes that BellSouth may select the independent auditor without the prior approval of the CLP or this Commission. Challenges to the independence of the auditor may be filed with the Commission after the audit has concluded. Additionally, the Commission concludes that BellSouth is not required to provide documentation, as distinct from a statement of concern, to support its basis for audit or seek concurrence of the requesting carrier before selecting the audit's location.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14

ISSUE NO. 14 - MATRIX ITEM NO. 65: Should BellSouth be allowed to charge the CLP a TIC for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

POSITIONS OF PARTIES

JOINT PETITIONERS: No. BellSouth should not be permitted to impose upon CLPs a TIC for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic. The TIC is a non-TELRIC based additive charge that exploits BellSouth's market power and is discriminatory.

BELLSOUTH: Yes. BellSouth is not obligated to provide the transit function and the CLP has the right pursuant to the Act to request direct interconnection to other carriers. Additionally, BellSouth incurs costs beyond those for which the Commission ordered rates were designed to address, such as the costs of sending records to the CLPs identifying the originating carrier. BellSouth does not charge the CLP for these records and does not recover those costs in any other form. Moreover, this issue is not appropriate for arbitration in this proceeding because it involves a request by the CLPs that is not encompassed within BellSouth's obligations pursuant to Section 251 of the Act.

PUBLIC STAFF: The Public Staff recommended that the Commission conclude that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs.

DISCUSSION

The Joint Petitioners argued that the TIC is a non-TELRIC based additive charge enabling BellSouth to exploit its market power. The Joint Petitioners asserted that only BellSouth is in a position to provide transit service capable of connecting all carriers of all sizes, due to its past monopoly and continuing market dominance. The rate appears to be purely additive, simply enabling BellSouth to extract additional profits over and above the profit it already receives through the elemental UNE rates. In addition, the Joint Petitioners claimed that the TIC charge is discriminatory, since BellSouth does not impose this charge on all CLPs. Further, BellSouth threatened to double the rate if two of the Joint Petitioners did not agree to it during negotiations. The Joint Petitioners contended that BellSouth has not shown that its existing rates for the transiting function, tandem switching and common transport, do not adequately provide for recovery of its costs. The Joint Petitioners argued that BellSouth can seek to modify its TELRIC-based rates in the next generic pricing proceeding if its rates do not recover its costs. Despite BellSouth's contention that this issue should not be included in this arbitration, the Joint Petitioners argued that this issue is properly before the Commission because transiting is an interconnection issue and has been included in BellSouth's interconnection agreements for nearly eight years.

BellSouth initially contended that it was not required to provide a transit traffic function because it is not a Section 251 obligation under the Act. Therefore, BellSouth argued that if it provides the transit traffic function, the rates, terms, and conditions should be contained in a separately negotiated agreement. If BellSouth includes the transit traffic function in its Agreement, BellSouth believed that it should not be penalized by imposing rates for a service that, pursuant to a separate agreement, to which the Commission would not even be privy.

BellSouth maintained that it should be able charge a TIC for local transit and ISP-bound transit traffic because it is not obligated to provide the transit function to a CLP and the CLP has the ability to request direct interconnection to other carriers. BellSouth argued that the TIC is not "purely additive" because some costs are not recovered in tandem switching and common transport charges, such as the fee BellSouth pays to Telcordia for all messages sent and received through the Centralized Message Distribution System (CMDS). Moreover, BellSouth argued that because the TIC is not a Section 251 requirement, the rate should not be subject to the TELRIC cost standards set forth in Section 252.

In cross-examination, BellSouth witness Blake acknowledged that BellSouth has offered to provide a tandem transit function in these Agreements, but stated that the crux of the dispute in this case is the rate. Witness Blake also modified her position concerning BellSouth's Section 251 obligations by agreeing that BellSouth had an obligation to provide a tandem transit function based upon the FCC's Virginia arbitration orders and the Commission's September 22, 2003 Order in Docket No. P-19, Sub 454 that found ILECs have an obligation to provide transit service. Witness Blake testified that the TIC is designed to cover not only the cost of sending records identifying the originating carrier, but the "value-added" nature of the service as well. The transit function eliminates the need for originating carriers to directly connect with terminating carriers. The TELRIC tandem rate covers the transit part, while the TIC reflects the value of not having to directly interconnect with carriers.

The Public Staff stated in its Proposed Order that there appears to be no dispute that BellSouth is obligated to provide transit service. Witness Blake acknowledged that the Commission has previously found ILECs have an obligation to provide transit service and that the FCC has found the tandem transit function is a Section 251 obligation. Therefore, the Public Staff believed that the question before the Commission is whether BellSouth should be permitted to charge a TIC in addition to the TELRIC-based tandem switching rate. Although BellSouth has conceded that the tandem transit function is a Section 251 obligation, it is unclear why BellSouth still maintains that this function is not subject to the pricing requirements set forth in Section 252. The Public Staff noted that the FCC has implemented specific rules to which the Commission must adhere in determining the appropriate rates for providing a tandem transit function.

The Commission can find no basis for permitting BellSouth to impose a TIC for the tandem transit function. The tandem transit function is a Section 251 obligation, and

BellSouth must charge TELRIC rates for it. As pointed out by the Commission in its September 22, 2003 Order in Docket No. P-19, Sub 454, the tandem transit function may also involve a billing intermediary function. While this may not be necessary for the parties to this proceeding, the rates for providing a billing intermediary function are not required to be TELRIC-based. The Commission concurs that the tandem transit function provides some value to CLPs by permitting them to avoid directly interconnecting with all of the LECs subtending BellSouth's tandem. However, the fact that CLPs receive value for this service is not grounds for disregarding the FCC's pricing rules.

CONCLUSIONS

The Commission concludes that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15

ISSUE NO. 15 - MATRIX ITEM NO. 86(B): How should disputes over alleged unauthorized access to customer service record (CSR) information be handled under the Agreement?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners argued that if one party disputes the other party's assertion of noncompliance regarding access to CSR information, that party should notify the other party in writing of the basis for its assertion of compliance. The Joint Petitioners maintained that if the receiving party fails to provide the other party with notice that appropriate corrective measures have been taken within a reasonable time or fails to provide the other party with proof sufficient to persuade the other party that it erred in asserting the noncompliance, the requesting party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the parties should cooperatively seek expedited resolution of the dispute. The Joint Petitioners asserted that "self help", in the form of suspension of access to ordering systems and discontinuance of service, is inappropriate and coercive; moreover, it effectively denies one party the ability to avail itself to the Dispute Resolution process otherwise agreed to by the parties.

BELLSOUTH: BellSouth maintained that the Commission should adopt BellSouth's most recent proposed language for Matrix Item No. 86(b) (if the accused party fails to produce an appropriate letter of authorization (LOA) within the allotted time period, the requesting party will provide written notice via email to a person designated by the other party to receive such notice specifying the alleged noncompliance and advising that access to ordering systems may be suspended in five days if such noncompliance does not cease) as it addresses all of the Joint Petitioners' concerns as well as gives the parties sufficient recourse if a party refuses to comply with its legal and contractual obligations regarding the protection of CSRs.

PUBLIC STAFF: The Public Staff agreed with the Joint Petitioners' position.

DISCUSSION

The Parties disagree on the appropriate language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement, as follows:

Section 2.5.5.2 – Joint Petitioners

Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7^{th}) business day after such request has been made, the requesting Party will send written notice to the other Party specifying the alleged noncompliance. The Party receiving the notice agrees to acknowledge receipt of the notice as soon as practicable. If the Party receiving the notice does not dispute the other Party's assertion of non-compliance, the receiving Party agrees to provide the other Party with notice that appropriate corrective measures have been taken or will be taken as soon as practicable.

Section 2.5.5.2 – BellSouth

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

Section 2.5.5.3 – Joint Petitioners

Disputes over Alleged Noncompliance. If one Party disputes the other Party's assertion of non-compliance, that Party shall notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. In such instance, the Parties cooperatively shall seek expedited resolution of the dispute. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

Section 2.5.5.3 – BellSouth

Disputes over Alleged Noncompliance. In it's written notice to the other Party the alleging Party will state that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by

the fifth (5^{th}) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice by email to the person designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision of access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10^{th}) calendar day following the date of the initial notice. If the other Party disagrees with the alleging Party's allegations of unauthorized use, the alleging Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

Joint Petitioners witnesses Collins, Russell, and Falvey stated in prefiled testimony that the Joint Petitioners' position on this issue is that if one party disputes the other party's assertion of noncompliance, that party should notify the other party in writing of the basis for its assertion of compliance. Witnesses Collins, Russell, and Falvey continued that if the receiving party fails to provide the other party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other party with proof sufficient to persuade the other party that it erred in asserting the noncompliance, the requesting party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the parties should cooperatively seek expedited resolution of the dispute. Witnesses Collins, Russell, and Falvey maintained that "self help", in the form of suspension of access to ordering systems and discontinuation of service, is inappropriate and coercive; moreover, it effectively denies one party the ability to avail itself of the Dispute Resolution process otherwise agreed to by the parties.

Witnesses Collins, Russell, and Falvey asserted that self help is nearly always an inappropriate means of handling a contract dispute. They maintained that disputes should be handled in accordance with the Dispute Resolution provisions of the contract and not under the threat of suspension of access to operations support systems (OSS) or termination of all services.

Witnesses Collins, Russell, and Falvey stated that BellSouth's proposed language is inadequate because it provides little more than the threat of suspension of access to OSS and the termination of all services regardless of its potential impact on its competition or consumers who have been disloyal to BellSouth. They argued that while BellSouth offers as window dressing that if the CLP disagrees with BellSouth's allegations of unauthorized use, the CLP must proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. However, the witnesses asserted, it is not clear whether BellSouth gets to pull the plug while the dispute is pending or whether the coercive pressure created by BellSouth's ambiguous language is all that it is seeking. Witnesses Collins, Russell, and Falvey maintained that in the end, neither CLPs nor their customers should be forced into such a precarious provision.

Witness Collins agreed on cross-examination that CSR information contains customer proprietary network information (CPNI) and that BellSouth and the Joint Petitioners have an obligation to protect CPNI. Witness Collins further agreed that BellSouth and the Joint Petitioners have decided not to view, copy, or otherwise obtain access to CSR information without the customer's permission. He also agreed that the language proposed by both the Joint Petitioners and BellSouth states that if there is a question about whether either party has obtained a customer's permission, then either party can request the other party to provide an appropriate LOA within seven business days or at least nine calendar days. Witness Collins agreed that under BellSouth's proposed language, if no LOA is provided within seven business days, then the party that made the request will notify the other party that it has five more days to produce the LOA or orders may be suspended or refused. He stated that BellSouth's proposed language is not ambiguous. He agreed that in the Joint Petitioners' proposed language, the other party will provide notice that appropriate corrective measures have been taken or will be taken as soon as practicable. Further, he agreed that, in the Joint Petitioners' proposed language, if the accused party or the offending party simply fails to respond to an assertion that such party is accessing CSR information without permission, then the accusing party has got to look to the dispute resolution provision. Witness Collins also stated that to his knowledge there has not been any prior termination or suspension of service because of unauthorized access to CSR information between BellSouth and KMC. Witness Collins further stated that he could not give one reason why KMC would need more than 14 days to produce a LOA.

Witness Russell stated on cross-examination that BellSouth and NuVox have had only one LOA dispute back in 1998 or 1999 and that the dispute was resolved when NuVox produced a LOA.

Joint Petitioners witness Falvey also testified during the hearing that he was not aware of any dispute within recent years between Xspedius and BellSouth regarding unauthorized access of CSR information. Witness Falvey asserted that the proposed provision is reciprocal but that the reality is that a CLP does not have any services to pull the plug on for BellSouth. He maintained that there are other ways to handle CSR disputes other than a pull-the-plug type measure. Witness Falvey agreed that violation of CPNI rules is a violation of federal law. Witness Falvey stated on cross-examination that this self-help issue is a matter of fundamental fairness and that the parties should go through dispute resolution.

The Joint Petitioners asserted in their Proposed Order that this item is about whether disputes over unauthorized access to CSR information should be excepted from the Agreement's dispute resolution provisions. The Joint Petitioners maintained that both parties agree that CSR information contains CPNI which may not be accessed without a LOA from the customer. The Joint Petitioners argued that BellSouth has proposed a menu of debilitating sanctions it would impose for any allegation by BellSouth of unauthorized access by the Joint Petitioners. The Joint Petitioners argued that under BellSouth's proposal, BellSouth could refuse to accept new orders, suspend

any pending orders, and suspend access to ordering and provisioning systems, thus, closing off the Joint Petitioners' ability to serve the needs of existing customers, as well as potential new ones. Ultimately, the Joint Petitioners stated, BellSouth could terminate all services provided to the Joint Petitioners, no matter how unrelated to the unproven allegations of unauthorized access to CSRs. The Joint Petitioners noted that BellSouth witness Morillo conceded on cross-examination that the suspension of access to BellSouth's OSS ordering systems could result in the loss of customers to the Joint Petitioners. The Joint Petitioners argued that the disruption of their business operations from such a sanction is obvious. The Joint Petitioners stated that they have proposed that the offended party first notify the other party of the alleged unauthorized access and that the parties attempt to resolve the matter themselves. If unsuccessful, the Joint Petitioners proposed, they ask that the Agreement's standard dispute resolution provisions apply.

The Joint Petitioners maintained that BellSouth has not met its burden of proof on this item. The Joint Petitioners argued that they can find no evidence to support the inclusion of the self-help remedy BellSouth has proposed and that they find no basis to deviate from the Agreement's standard dispute resolution provision here.

The Joint Petitioners recommended that the Commission conclude that disputes over unauthorized access to CSR information should be resolved by resorting to the standard dispute resolution provisions in the General Terms and Conditions section of the Agreement and that the language offered by BellSouth for this section of the Agreement should not be included.

BellSouth witness Ferguson stated in direct testimony that BellSouth's position is that the party providing notice of the impropriety concerning CSRs should notify the offending party that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth calendar day following the date of the notice. In addition, witness Ferguson noted, the alleging party may, at the same time, provide written notice to the person(s) designated by the other party to receive notice of noncompliance that the alleging party may terminate the provision of access to ordering systems to the other party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth calendar day following the date of the initial notice. Witness Ferguson maintained that if the other party disagrees with the alleging party's charges of unauthorized use, the other party should proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions of the Agreement.

Witness Ferguson argued that CLPs are well aware that BellSouth does not suspend or terminate access to OSS interfaces on a whim. Witness Ferguson asserted that BellSouth does not suspend or terminate access if there is a good faith dispute between the parties; however, he stated, if circumstances indicate a systemic problem with unauthorized CSR access, then the Joint Petitioners want BellSouth to file a complaint with the Commission, which could take a year or more to resolve. Witness

Ferguson maintained that BellSouth's proposed language, on the other hand, balances the Joint Petitioners' right not to be suspended except for good cause versus BellSouth's right not to have to endure protracted proceedings in order to correct the situation of unauthorized access.

Witness Ferguson stated in his summary that if BellSouth has a reason to believe that a CLP is engaged in abusive access to CPNI or is using methods that degrade the network access to that information, and the CLP refuses to acknowledge or cure the abuse, BellSouth must have the leeway to resolve such a situation in as timely a manner as necessary to protect BellSouth's customers, other CLPs, and the other CLPs' customers. He maintained that unless a CLP is engaged in, or is planning to engage in, such fraudulent activity, BellSouth's proposed language should not be a concern. Witness Ferguson noted that there is no evidence to suggest that the Joint Petitioners are predisposed to such activity, and BellSouth is not singling them out with the proposed language. However, witness Ferguson noted, the interconnection agreement signed by the Joint Petitioners and BellSouth could be adopted by other CLPs who are not as concerned with protection of CPNI. He noted that BellSouth has been forced to terminate access for CSR abuse only once to his knowledge in a case of both CPNI violation and access degradation.

Witness Ferguson agreed during cross-examination that BellSouth has proposed a series of sanctions for unauthorized access to CSRs: (1) refusals to accept new orders; (2) suspension of pending orders; and (3) denial of access to the system (i.e., no additional access to the CSR database would be possible). He asserted that it is a BellSouth capability and decision to impose these sanctions. He maintained that this issue is a business-impacting issue for the Joint Petitioners and BellSouth.

BellSouth stated in its Post-Hearing Brief that the crux of this issue is simple: how long does a party need to produce documentation establishing that it has complied with the law by obtaining a customer's authorization to review the customer's records prior to receiving such records? BellSouth commented that as conceded by the Joint Petitioners, two weeks is more than a sufficient amount of time for the parties to demonstrate compliance with their legal and contractual obligations.

BellSouth maintained that the Joint Petitioners conceded that CSR information contains CPNI and that BellSouth and the Joint Petitioners have an obligation under federal law to protect the unauthorized disclosure of CPNI. BellSouth argued that given such obligations, it is no surprise that the parties have agreed to refrain from accessing CSR information without an appropriate LOA from a customer and to access CSR information only in strict compliance with applicable laws. BellSouth stated that regarding LOAs, the parties have agreed that upon request, a party shall use best efforts to provide an appropriate LOA within seven business days.

BellSouth asserted that under its most recent proposed language, if the accused party fails to produce an appropriate LOA within the allotted time period, the requesting party will provide written notice via email to a person designated by the other party to

receive such notice specifying the alleged noncompliance and advising that access to ordering systems may be suspended in five days if such noncompliance does not cease. BellSouth further noted that if the accused party disputes the allegations of noncompliance, then the requesting party, prior to suspending or terminating service, would seek an expedited resolution of the CSR dispute from the appropriate regulatory body pursuant to the dispute resolution procedures. BellSouth noted that it offered this revised language during the Georgia hearing in an effort to compromise and address the Joint Petitioners' concerns about buried notices or pull-the-plug provisions. BellSouth stated that despite offering this language almost two months ago, the Joint Petitioners have failed to respond to BellSouth's modified language for Matrix Item No. 86(b).

BellSouth asserted that under its proposal, prior to any action being taken by the requesting party, the accused party has at least two full weeks to exercise best efforts to produce the LOA. BellSouth argued that two weeks is more than sufficient time to produce evidence that the Joint Petitioners are legally and contractually obligated to keep. BellSouth maintained that at the evidentiary hearing, the Joint Petitioners could not articulate one reason why any additional time beyond the two weeks would be needed to produce an appropriate LOA.

Additionally, BellSouth noted, it is unclear why the Joint Petitioners are so adamantly opposed to BellSouth's proposed language given the fact that with one exception, the Joint Petitioners cannot identify any prior disputes regarding unauthorized access to CSR information. BellSouth commented that it recalled one dispute which was immediately resolved when NuVox produced an appropriate LOA.

BellSouth recommended that the Commission adopt BellSouth's most recent proposed language for Matrix Item No. 86(b) as it addresses all of the Joint Petitioners' concerns as well as gives the parties sufficient recourse if a party refuses to comply with its legal and contractual obligations regarding the protection of CSRs.

The Public Staff stated in its Proposed Order that BellSouth's proposed language puts the burden of proof on the CLP. The Public Staff noted that despite BellSouth's assurances that it will not suspend access to ordering and provisioning functions on a whim, its proposed language gives it the discretion to do so. The Public Staff believes that suspension, prior to any dispute resolution process, would place undue pressure on a CLP to acquiesce in order to maintain access to critical ordering and provisioning functions.

The Public Staff agreed with the Joint Petitioners that BellSouth should not be able to unilaterally determine if an alleged case of noncompliance is sufficient to terminate access to its OSS and thereby severely hinder a CLP's ability to serve its customers. The Public Staff maintained that if the parties cannot informally resolve a dispute over noncompliance, the dispute resolution process is the appropriate recourse. Therefore, the Public Staff recommended that the language proposed by the Joint Petitioners for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement should be

adopted since it is fair and equitable to both parties and provides a viable option for settling disputes.

The Commission notes that all of the Parties agree that this issue is a business-impacting issue. Further, all of the Parties agree that violations of CPNI are not allowed based on federal law and that CSR information contains CPNI which may not be accessed without a LOA from the customer.

The substantive difference between the Parties on this issue concerns Section 2.5.5.3 – Disputes Over Noncompliance. Under both the Joint Petitioners' and BellSouth's proposed language in Section 2.5.5.2, a party asserting noncompliance (the alleging party) will notify the other party (the accused party) in writing.

Under the Joint Petitioners' language, if an accused party agrees with the alleged noncompliance, that party should provide notice that corrective measures have been taken as soon as practicable. If the accused party disputes the alleging party's assertion of noncompliance, the accused party would provide proof sufficient to persuade the alleging party that the alleging party erred in asserting noncompliance. If the accused party does not provide either a notice or proof as outlined above, then the alleging party should proceed pursuant to the dispute resolution provisions in the Agreement.

Under BellSouth's language, BellSouth may provide in its notice that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth calendar day following the date of the notice. In addition, at the same time, BellSouth may provide written notice by email to the person designated by the accused party to receive notices of noncompliance that the alleging party may terminate the provision of access to ordering systems to the accused party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth calendar day following the date of the initial notice. If an accused party disagrees with the alleged noncompliance, then the alleging party should proceed pursuant to the dispute resolution provisions in the Agreement.

The Commission agrees with the Joint Petitioners that it is unclear from BellSouth's proposed language whether BellSouth gets to pull the plug while a dispute concerning noncompliance is pending. Further, the Commission believes that suspension of access to OSS and the termination of all services is a severe consequence and agrees with the Joint Petitioners and the Public Staff that BellSouth should not be able to unilaterally determine if an alleged case of noncompliance is sufficient to terminate access to OSS. Therefore, the Commission finds it reasonable and appropriate to adopt the Joint Petitioners' proposed language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement.

CONCLUSIONS

The Commission concludes that the Joint Petitioners' proposed language concerning how disputes over alleged unauthorized access to CSR information should be handled under the Agreement is reasonable and appropriate. Accordingly, the Commission adopts the Joint Petitioners' proposed language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 16

ISSUE NO. 16 - MATRIX ITEM NO. 88: What rate should apply for Service Date Advancement (a/k/a service expedites)?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners argued that the rates for Service Date Advancement (a/k/a service expedites) related to UNEs, interconnection, or collocation should be set consistent with TELRIC pricing principles.

BELLSOUTH: BellSouth maintained that this issue is not appropriate for arbitration under Section 252 of the Act because BellSouth has no Section 251 obligation to expedite service orders.

PUBLIC STAFF: The Public Staff recommended that the Commission conclude that BellSouth must provide service expedites to CLPs at TELRIC rates. The Public Staff further recommended that if, after further negotiation, the parties cannot agree on an appropriate rate, BellSouth should submit a TELRIC cost study for Commission review and approval.

DISCUSSION

This issue concerns Section 2.6.5 of Attachment 6 of the Agreement. The Parties do not disagree on the appropriate language for Section 2.6.5, however they disagree on the appropriate rate.

Joint Petitioners witnesses Collins, Willis, and Falvey asserted in direct testimony that rates for service expedites related to UNEs, interconnection, or collocation should be set consistent with TELRIC pricing principles. They argued that where CLPs require access to UNEs on an expedited basis, which is often necessary in order to meet a customer's needs, CLPs should not be subject to inflated, excessive fees that were not set by the Commission and that do not comport with the TELRIC pricing standard.

Witnesses Collins, Willis, and Falvey maintained that BellSouth's position is that it is not required to provide expedited service pursuant to TA96. Therefore, they stated, BellSouth's proposed language states that BellSouth's tariffed rates for service date

advancements will apply; the tariffed rate is $200.00 per element, per day. They argued that this fee is unreasonable, excessive, and harmful to competition and consumers.

Witnesses Collins, Willis, and Falvey argued that this issue which concerns the manner in which BellSouth provisions UNEs is within the parameters of Section 251. They maintained that setting prices and arbitrating the terms and provisions associated with Section 251 unbundling are squarely within the Commission's jurisdiction and are appropriately resolved in this arbitration proceeding.

In rebuttal testimony, witnesses Collins, Willis, and Falvey maintained that BellSouth witness Morillo did not dispute that UNEs must be provisioned at TELRIC-compliant rates. They argued that an expedite order for a UNE should not be treated any differently. In addressing witness Morillo's claims that BellSouth's expedite charges are set forth in its FCC-approved FCC No. 1 Tariff, which are the same charges that BellSouth charges its retail customers, witnesses Collins, Willis, and Falvey asserted that the Joint Petitioners are not BellSouth retail customers. They stated that the Joint Petitioners purchase UNEs at TELRIC rates, whereas BellSouth retail customers do not. Consequently, they maintained, the corresponding charge to expedite an order for a UNE should also be a TELRIC rate set by the Commission, not the retail rate from BellSouth's FCC tariff.

Witnesses Collins, Willis, and Falvey noted that the dispute is not whether BellSouth will offer expedites in the Agreement since BellSouth has already agreed to do so; they maintained the dispute is over the appropriate rate. Witnesses Collins, Willis, and Falvey stated they are not convinced by witness Morillo's statement that if there were no charge or a minimal charge for expedites, it is likely that most CLP orders would be expedited, causing BellSouth to miss its standard intervals and its obligations to provide nondiscriminatory access. They argued that BellSouth should not be able to set an artificially high service expedite charge in order to keep its expedite ordering volumes at an artificially low level.

Witnesses Collins, Willis, and Falvey maintained that the Joint Petitioners remain optimistic that BellSouth will take them up on their offer to negotiate a reasonable rate for service expedites.

Witness Collins agreed on cross-examination that BellSouth is not obligated to provide service expedites. Witness Collins agreed that a service expedite request is not something unique to the telecom industry. He agreed that if someone wanted to mail a letter via first-class mail, it will cost 37 cents and that if someone wanted to send that same letter via overnight mail, it would cost substantially more than 37 cents. Witness Collins also stated that he could not cite any specific Commission or FCC order that says an expedite should be priced at TELRIC; he asserted that Section 251 of TA96 would require such a result.

Witness Collins also agreed on cross-examination that BellSouth's Service Quality Measurement (SQM)/Self-Effectuating Enforcement Mechanism (SEEM) plan is

designed to ensure that BellSouth continues to meet its Section 251 obligations, including its provisioning obligations and that the SQM/SEEM plan contains no provision measurements regarding BellSouth's ability to meet the service expedite request. He asserted that expedites, by nature, do not have a standard interval.

Witness Collins admitted on cross-examination that during his deposition, he stated that he was not aware of any state commission order, federal order, or any other authority for the position that a service expedite charge must be TELRIC based. He further stated that he had learned something since the time of his deposition: that Section 251 requires nondiscrimination. He stated that under Section 251 and nondiscrimination there is a right to a service expedite. When asked whether KMC charges its customers $250.00 for a service expedite, witness Collins stated that he would not be aware of the pricing.

The Joint Petitioners stated in their Proposed Order that TA96 requires that all UNEs be provisioned at rates that comply with TELRIC principles. The Joint Petitioners argued that the Commission is required to ensure that all Section 251 interconnection agreements comply with this standard. The Joint Petitioners maintained that because this issue regards the rates that apply to UNE provisioning, the Commission should find that it has jurisdiction to review it.

The Joint Petitioners stated that the sole dispute with respect to Section 2.6.5 of Attachment 6 of the Agreement is the price that should apply when BellSouth performs Service Date Advancements. The Joint Petitioners maintained that TELRIC principles should apply because Advancements involve UNE provisioning and, thus, are governed by the cost-based pricing of Section 252. Moreover, the Joint Petitioners argued, the work performed is no different than the work required to provision a UNE under a standard interval.

The Joint Petitioners also asserted that the general nondiscrimination requirements of TA96 require BellSouth to perform Service Date Advancements in the same manner as BellSouth performs them for itself. The Joint Petitioners argued that the record demonstrates that BellSouth performs Service Date Advancements for its own retail unit, which then provides the service to its retail customers.

The Joint Petitioners noted that BellSouth's proposed rate for Service Date Advancements is $200.00 per facility, per each day advanced. The Joint Petitioners stated that it is not clear that the wholesale provisioning arm of BellSouth imposes that same requirement on the BellSouth retail division. Thus, the Joint Petitioners stated, although the BellSouth end user customer may pay an expedite fee, the retail entity of BellSouth may not. The Joint Petitioners asserted that this Service Date Advancement fee thus appears to be a cost of doing business for the Joint Petitioners, but not for BellSouth itself.

The Joint Petitioners argued that all UNEs must be priced at cost. The Joint Petitioners noted that the FCC has implemented this mandate with the creation of the

TELRIC methodology. In addition, the Joint Petitioners stated, the FCC requires in Rule 51.501 that the methods of obtaining access to unbundled elements must be priced at TELRIC. The Joint Petitioners asserted that a Service Date Advancement is a means of obtaining a UNE and is part and parcel of provisioning a UNE, thus it is included in Congress' cost-based pricing mandate, and thus, TELRIC applies.

The Joint Petitioners maintained that the concepts of nondiscrimination and parity require that BellSouth treat the Joint Petitioners in the same manner as it treats its retail entity. Specifically, the Joint Petitioners commented, BellSouth must provide the same network access to the Joint Petitioners as its retail entity is provided. The Joint Petitioners argued that in this instance, it appears that BellSouth will perform Service Date Advancements for its retail entity without charge, but seeks to impose a $200.00 per facility, per day fee on the Joint Petitioners. The Joint Petitioners asserted that such a provision would violate the nondiscrimination and parity principles of Section 251.

The Joint Petitioners also argued that this regime would give BellSouth an unfair competitive advantage over the Joint Petitioners. The Joint Petitioners maintained that BellSouth's retail entity would be entitled to request Service Date Advancements at any time, without having to absorb any additional costs. The Joint Petitioners asserted that this result would not serve the public interest, as it would impede the Joint Petitioners' ability to compete in the North Carolina market and meet the needs of the customers it seeks to serve.

The Joint Petitioners noted that although BellSouth has not to date presented any cost justification for the Service Date Advancement fee, it is possible that in the future it may. For example, the Joint Petitioners stated, there may be costs associated with OSS maintenance and order management that are not incorporated in existing UNE provisioning rates. The Joint Petitioners recommended that the Commission review such costs if they are presented to the Commission and order the Joint Petitioners to adopt into the Agreement any TELRIC-compliant rates that the Commission establishes based on the costs.

In conclusion, the Joint Petitioners recommended that the Commission find that the charge for a Service Date Advancement must comport with the general pricing principles set forth in FCC Rule 51.503 and Section 252(d)(1) of TA96. Therefore, the Joint Petitioners recommended that the Commission find that BellSouth may charge only a TELRIC-based Service Date Advancement fee and reject BellSouth's proposed fee. The Joint Petitioners proposed that, in the event that BellSouth presents costing data to demonstrate the additional costs associated with Service Date Advancements, the Commission review them and set rates in accordance with TELRIC methodology that will apply to the Agreement on a going-forward basis after amendment.

BellSouth witness Morillo stated in direct testimony that BellSouth's obligations under Section 251 of TA96 are to provide service in standard intervals at cost-based prices. He maintained that there is no Section 251 requirement that BellSouth provide

service in less than the standard interval. Witness Morillo argued that because BellSouth is not required to provide expedited service pursuant to TA96, the Joint Petitioners' request on this issue is not appropriate for a Section 251 arbitration, and it should not, therefore, be included in the Interconnection Agreement. Witness Morillo asserted that if BellSouth elects to offer this service in the Agreement, it should not be penalized for doing so by having TELRIC rates apply to a function that is not even contemplated by the Act.

Witness Morillo noted that BellSouth's expedite charges are set forth in BellSouth's FCC No. 1 Tariff, Section 5. He stated that these are the same charges BellSouth's retail customers are charged when a retail customer requests service in less than the standard interval. Witness Morillo opined that to the extent that a CLP wants expedited service, the CLP should pay the same rates as BellSouth's retail customers. Witness Morillo stated that since BellSouth has no obligation under Section 251 to provide CLPs with expedited service, the cost-based pricing standards of Section 252(d) do not apply. Witness Morillo asserted that BellSouth's position on this issue is reasonable and provides parity of service between how BellSouth treats CLPs and how it treats its own retail customers.

Witness Morillo stated on cross-examination that BellSouth does not have an obligation under TA96 to provide service on an expedited basis. However, he also stated that he was not an attorney so this was not a legal opinion.

Witness Morillo observed that negotiations between the Joint Petitioners and BellSouth on the appropriate charge have not gone "anywhere". He also asserted that pricing expedites at TELRIC would be a penalty since it would force BellSouth to provide service at a price that BellSouth does not think is justifiable and commercially reliable. He stated that he was not aware of any cost studies that BellSouth had done with respect to its actual costs for service expedites.

BellSouth maintained in its Brief that compulsory arbitration under Section 252 of the Act should be properly limited to those issues necessary to implement a Section 251 interconnection agreement. BellSouth argued that expedite charges are not necessary to implement the agreement, especially since BellSouth meets its Section 251 obligations by providing service pursuant to standard provisioning intervals already established by the Commission. Accordingly, BellSouth maintained, the Commission should refrain from arbitrating this issue.

Indeed, BellSouth argued, it has a Section 251 obligation to provision interconnection services and UNEs within standard provisioning intervals. BellSouth asserted that the Commission recognized this obligation in establishing a performance measurement plan (the SQM/SEEM plan) for BellSouth in North Carolina in Docket No. P-100, Sub 133k. BellSouth maintained that the SQM/SEEM plan is designed to ensure that BellSouth continues to meet its Section 251 obligations and requires BellSouth to pay SEEM penalties if BellSouth fails to provision services within such standard intervals. BellSouth further noted that the SQM plan contains 17 provisioning

measures which are disaggregated into over 1,200 provisioning sub-measures. BellSouth further noted that, at the evidentiary hearing, the Joint Petitioners conceded that the SQM/SEEM plan contains no expedited provisioning measures. BellSouth asserted that this fact provides conclusive evidence that the expedited provisioning of a service order is a matter that is completely outside the scope of Section 251.

BellSouth commented that further buttressing this conclusion is the fact that the Joint Petitioners concede that BellSouth has no obligation to expedite service orders. Additionally, BellSouth maintained, the Joint Petitioners admit that if a service expedite request cannot be met by BellSouth, the Joint Petitioners can look to alternative measures to satisfy their customers' service request. BellSouth asserted that, clearly, if a service expedite was a Section 251 obligation, the Joint Petitioners would not concede that BellSouth has no obligation to provide it.

BellSouth maintained that with the exception of citing Section 251(c)(3) of the Act, the Joint Petitioners cannot cite any authority that supports their contention that a service expedite request should be priced at TELRIC. BellSouth commented that the words expedite or advancement do not appear in the text of Section 251(c)(3), and instead, BellSouth has, among other things, a nondiscriminatory obligation under Section 251(c)(3). BellSouth asserted that from a provisioning perspective, BellSouth satisfies such obligation by provisioning services within standard intervals and by charging CLPs the same service expedite rate that it charges its retail customers for purchasing services out of BellSouth's access tariff. BellSouth argued that the Joint Petitioners' assertion that they are not retail customers and, thus, should not be charged retail tariff rates misses the mark. BellSouth noted that at the hearing the Joint Petitioners acknowledged that CLPs buy services out of BellSouth's access tariff, such as special access, and when they do, they are charged the rates in the access tariff.

BellSouth stated that, as a practical matter, if there were a TELRIC-based service expedite charge, it is likely that many, if not most, CLP orders would be expedited, thus causing BellSouth to miss its standard intervals and its obligation to provide nondiscriminatory access. BellSouth also maintained that from a policy perspective, any requirement that forces BellSouth to price voluntarily-offered services at TELRIC prices will chill BellSouth's willingness to voluntarily offer services to CLPs.

BellSouth also argued that the special expedite rate reflects the value of the special expedite service being provided, and is no different from choosing to pay in excess of $10.00 to send a letter via overnight rather than paying 37 cents to send the same letter via first class mail. BellSouth asserted that at the evidentiary hearing the Joint Petitioners admitted that special pricing should govern special provisioning requests.

BellSouth concluded that the Commission should refrain from setting rates for voluntarily-offered services and should adopt BellSouth's position on Matrix Item No. 88, as it is reasonable and nondiscriminatory.

The Public Staff noted in its Proposed Order that FCC Rule 51.311(b) provides that if technically feasible an ILEC should provide a CLP with access to UNEs at least equal in quality to that which the ILEC provides to itself. The Public Staff stated that it believes that expediting service to customers is simply one method in which BellSouth can provide access to unbundled network elements. The Public Staff maintained that since BellSouth offers service expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section 251 and Rule 51.311(b).

The Public Staff argued that the rate BellSouth proposes is the rate it charges its large retail customers, but there is no cost support for this rate. Thus, the Public Staff maintained, it is unable to determine whether the rate is TELRIC compliant. The Public Staff stated that it believes that service expedites have costs not reflected in the normal nonrecurring charges for UNE installations, so a TELRIC cost study would likely show higher rates for service expedites than normal service installations. The Public Staff recommended that if the parties cannot come to agreement on a rate for service expedites, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

Overall, the Public Staff recommended that the Commission conclude that BellSouth must provide service expedites to CLPs at TELRIC rates. Further, the Public Staff recommended, if the parties cannot agree on an appropriate rate, BellSouth should submit a TELRIC cost study for Commission review and approval.

The Commission notes that Section 251(c)((3) of the Act states that telecommunications carriers must provide ". . . 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 terms and conditions of the agreement and the requirements of this section and section 252."

The Commission also notes that FCC Rule 51.311(b) states:

> 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 an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element, or to provide access to the requested unbundled network element, at a level of quality that is equal to that which the incumbent LEC provides to itself.

Although Joint Petitioners witness Collins agreed on cross-examination that BellSouth is not required to provide service expedites, the Commission agrees with the Public Staff that since BellSouth offers service expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section 251 and Rule 51.311(b)

to the Joint Petitioners. This outcome is necessary in order to assure that BellSouth provides nondiscriminatory access to UNEs and does so at least equal in quality to that which BellSouth provides itself.

Further, the Commission notes that Joint Petitioners witnesses Collins, Willis, and Falvey maintained that they remained optimistic that BellSouth would take them up on their offer to negotiate a reasonable rate for expedites. The Commission finds it appropriate to require the Joint Petitioners and BellSouth to make a good faith effort to negotiate an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

CONCLUSIONS

The Commission concludes that BellSouth must provide service expedites at TELRIC-compliant rates. BellSouth and the Joint Petitioners are instructed to negotiate in good faith an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

ISSUE NO. 17 - MATRIX ITEM NO. 97: When should payment of charges for service be due?

POSITIONS OF PARTIES

JOINT PETITIONERS: The Joint Petitioners recommended that the Commission conclude that payment of charges for services rendered should be due thirty (30) calendar days from receipt or website posting of a complete and fully readable bill or within thirty (30) calendar days from receipt or website posting of a corrected or retransmitted bill in those cases where correction or retransmission is necessary for processing.

BELLSOUTH: BellSouth maintained that payment for services should be made on or before the payment due date (i.e., the next bill date) in immediately available funds.

PUBLIC STAFF: The Public Staff recommended that the Commission conclude that the payment due date should be 26 days from the date of receipt of the bill.

DISCUSSION

The Parties disagree on the appropriate language for Section 1.4 of Attachment 7 of the Agreement, as follows:

Section 1.4 – Joint Petitioners

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

Section 1.4 – BellSouth

Payment Due. Payment for services will be due on or before the next bill date (Payment Due Date) and is payable in immediately available funds. Payment is considered to have been made when received by the billing Party.

Joint Petitioners witnesses Johnson, Russell, and Falvey stated in direct testimony that payment for charges for services rendered should be due 30 calendar days from receipt or website posting of a complete and fully readable bill or within 30 calendar days from receipt or website posting of a corrected or retransmitted bill in those cases where correction or retransmission is necessary for processing. They argued that the Joint Petitioners need at least 30 days to review and pay invoices. Witnesses Johnson, Russell, and Falvey maintained that in other commercial settings in which parties have established business relationships, the payor may be afforded 45 days or more to pay an invoice. Furthermore, they asserted, it is not uncommon for parties to a contract to develop a course of dealings in which a party is not strictly held to a certain payment date. Nevertheless, witnesses Johnson, Russell, and Falvey stated, in order to try to settle as many billing issues as possible, the Joint Petitioners have agreed to BellSouth's proposal for a 30-day payment deadline (one billing cycle).

Witnesses Johnson, Russell, and Falvey maintained that it is the Joint Petitioners' experience that BellSouth is consistently untimely in posting or delivering its bills and those bills are often incomplete and sometimes incomprehensible. Therefore, the witnesses asserted, in effect BellSouth is actually giving the Joint Petitioners far fewer than 30 days to pay invoices, which is neither typical nor acceptable in a commercial setting, especially in this case, where the bills are numerous, voluminous, and complex.

Witness Russell stated that NuVox has tracked how long it takes BellSouth to post or deliver its bills. He asserted that on average it takes seven days after the issue date for NuVox to receive a bill from BellSouth. Witness Russell also noted that NuVox conducted a study of how long it takes NuVox to receive an electronic invoice from BellSouth using July 2002 through July 2003 data. He stated that although the times

recorded by NuVox varied from three days to over 30 days, the average time it takes BellSouth to deliver its electronic bills to NuVox is seven days.

Witness Falvey stated that he has tracked the difference between the date BellSouth posts on the bill and the date the bill is received by Xspedius. He noted that Xspedius began tracking this data in December 2003 and that their results demonstrate that it takes on average 6.45 days for Xspedius to receive a bill from BellSouth. He stated that although the average time is 6.45 days, they have traced bills that Xspedius has received from BellSouth in as little as two days and as long as 22 days.

Witness Russell stated that NewSouth's experience has been that, by the time it receives its bills from BellSouth, it has anywhere from 19 to 22 days to process bills for payment. He asserted that this amount of time is inadequate as it does not allow NewSouth to effectively and completely review and audit the bills it receives from BellSouth.

Witnesses Johnson, Russell, and Falvey stated that BellSouth's proposed language is inadequate since it provides that payment of charges for services rendered must be made on or before the next bill date. They argued that this language does not account for the fact that there is typically a long gap between the time a bill is issued and the date upon which it is made available to or delivered to a Joint Petitioner. Witnesses Johnson, Russell, and Falvey asserted that BellSouth's language also makes no attempt to mitigate the problems caused in circumstances when BellSouth's invoices are incomplete and/or incomprehensible.

Witnesses Johnson, Russell, and Falvey maintained that BellSouth is, in essence, using its monopoly legacy and bargaining position to force CLPs to either remit payment faster than almost any other business or in the alternative face substantial late payment penalties and increased security deposits.

Witnesses Johnson, Russell, and Falvey stated in rebuttal testimony that the Joint Petitioners should not be subject to unfair payment terms based on BellSouth's alleged systems limitations. They asserted that BellSouth makes two blanket statements with no justification: (1) due date requirements listed in its access tariff and contracts cannot be differentiated; and (2) all customer due dates and treatments are the same for all customers and cannot be differentiated. Witnesses Johnson, Russell, and Falvey maintained that neither assertion seems to be a valid reason for not providing the Joint Petitioners with reasonable payment terms.

Witnesses Johnson, Russell, and Falvey argued that the Joint Petitioners should not have to endure inconsistent and unfair payment terms because BellSouth would have to undertake modifications to make system changes to fix its systems to allow CLPs adequate time to pay invoices. They maintained that it is unreasonable for BellSouth to assert that its systems cannot be modified and improved or that it won't modify or improve them. Witnesses Johnson, Russell, and Falvey asserted that their request is reasonable, and BellSouth should not be able to hide behind its convenient