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December 15, 2005

RECEIVED
DEC 16 2005
PUBLIC SERVICE COMMISSION

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

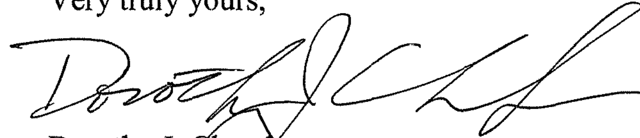
Re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of An Interconnection Agreement With BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, As Amended
PSC 2004-00044

Dear Ms. O'Donnell:

BellSouth encloses for this Commission's information the Recommendation of the Arbitration Panel to the Mississippi Public Service Commission filed December 13, 2005, in the Joint Petitioners' Arbitration case (Docket No. 2004-AD-094). The Arbitration Panel's well-reasoned analysis supported BellSouth's position on all issues.

Eleven paper copies of the Arbitration Award are provided for filing in the case. A copy of this filing is served on all parties of record.

Very truly yours,



Dorothy J. Chambers

Enclosures

cc: Parties of Record

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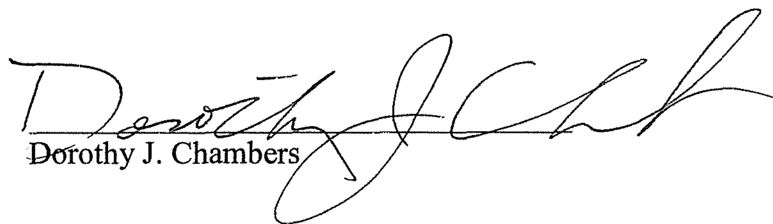
KPSC 2004-00044
CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the individuals on the attached service list by mailing a copy thereof, this 15th day of December 2005.



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BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION
ARBITRATION PANEL

In the Matter of:

Joint Petition for Arbitration by NewSouth Communications, Corp., KMC Telecom V, Inc., KNIC Telecom III LLC, and Xspedius Communications, LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jackson, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc.

Docket No. 2004-AD-094

FILED

DEC 13 2005

MISS. PUBLIC SERVICE
COMMISSION

RECOMMENDATION OF THE ARBITRATION PANEL TO THE MISSISSIPPI PUBLIC SERVICE COMMISSION

The following Arbitrators participated in the disposition of this matter:
Marc Brand, Chairman,
Keith Howle, Arbitrator
Samuel J. Nicholas, Jr., Arbitrator,

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CASE HISTORY

NewSouth Communications Corp. ("NewSouth"), which during the course of this arbitration merged with NuVox Communications, Inc. ("NuVox") with the surviving entity being NuVox, and Xspedius Communications, LLC ("Xspedius") (collectively referred to as "Joint Petitioners")[1] filed a Petition for Arbitration ("Petition") pursuant to the Telecommunications Act of 1996 (the "1996 Act") with the Mississippi Public Service Commission ("Commission") on February 11, 2004. On March 8, 2004, BellSouth Telecommunications, Inc. ("BellSouth") filed its Response to the Petition. Initially, the Joint Petitioners asked the Commission to resolve 107 issues, excluding subparts. As a result of continued negotiations by the Parties and decisions by this arbitration panel duly assigned by the Commission ("Panel"), only 13 issues remain for the Panel's consideration.[2]

On July 16, 2004, the Parties filed a Joint Motion for Abeyance with the Panel in which the Parties asked for a 90-day abatement of the arbitration proceeding so that they could include and address issues relating to the D. C. Circuit's decision in *United States Telecom Ass 'n v.* FCC, 359 F.3d *554* (D.C. Circuit 2004) *("USTA II")* in this proceeding. The Panel granted the abeyance on July 20, 2004. During this 90-day abatement period, the Federal Communications Commission ("FCC") issued its *Order and Notice of Proposed Rule Making* in WC Docket No. 04-313, CC Docket No. 01-338 *("Interim Rules Order").* At the end of the abeyance period, on November 19, 2004, the Parties filed a revised Joint Matrix, which included Items 108-114 ("Supplemental

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[1] Originally, KMC Telecom V, Inc. and KMC Telecom III LLC ("KMC") were also parties to this Arbitration along with the other Joint Petitioners. However, on May 27, 2005, KMC filed a Notice of Withdrawal With Prejudice with the Commission. Thus, KMC is no longer a Joint Petitioner.

[2] Pursuant to the Panel's June 14, 2005 Order, Issues 26, 36-38, and 51 have been moved to the Commission's Generic Proceeding (Docket No. 2005-AD-139) for consideration and resolution.

Issues"). These Items addressed *USTA II* and the *Interim Rules Order.*

On March 11, 2005, the FCC's Final Unbundling Rules in, FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) *("TRRO")* became effective. No issues in the arbitration substantively address the *TRRO* because that decision was not effective until March 2005 and thus after the time period for identifying issues to be arbitrated in this proceeding. Nevertheless, Issues 23, 108, 113 and 114 are similar if not identical to issues being addressed in the Commission's Generic Change of Law Proceeding (Docket No. 2005-AD-139) relating to changes of law resulting from the *TRO* and the *TRRO.* Consequently, the Parties jointly asked and the Panel agreed to move these issues to the Generic Change of Law Proceeding for consideration and resolution on June 8, 2005. Similarly, because the *TRRO* also rendered several arbitration issues relating to the *Interim Rules Order* moot, the Panel also found in its Order issued on June 8, 2005 that Issues 109, 110, 111, and 112 were moot and removed them from the arbitration. Finally, in its Order of June 14, 2005, the Panel moved Issues 26, 36-3 8, and 51 in the arbitration to the Commissions' Generic Change of Law Docket (Docket No. 2005-AD-139) for consideration and resolution because the Commission is considering similar, if not identical issues, in that proceeding.

The Evidentiary Hearing in this matter was held on June 15, 2005. At the hearing, BellSouth submitted the pre-filed testimony of Kathy Blake, Scot Ferguson, and Eric Fogle. The Joint Petitioners submitted the testimony of Hamilton Russell, James Falvey, Marva Johnson, John Fury, Robert Collins, and Jerry Willis.

As noted earlier, on May 27, 2005, KMC Telecom V, Inc. and KIVIC Telecom III, LLC ("KMC") filed a Notice of Withdrawal of Arbitration Petition with Prejudice. Thus, the KMC entities are no longer parties to this proceeding, their claims and arguments have been voluntarily dismissed with prejudice, and the Panel's rulings will not apply to the KMC entities.

LEGAL STANDARDS

Sections 251 and 252 of the 1996 Act encourage negotiations between Parties to reach local interconnection agreements. Section 252(a) of the 1996 Act requires incumbent local exchange carriers ("ILECs") to negotiate the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 25 1(c)(2)-(6). As part of the negotiation process, the 1996 Act allows a party to petition a state Commission for arbitration of unresolved issues.[3] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[4] The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the Parties with respect to those issues; and (3) any other issues discussed and resolved by the Parties."[5] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the Commission receives the petition.[6]

The 1996 Act limits a state commission's consideration of any petition (and any

[3] 47 U.S.C. § 252(b)(2)
[4] *See generally*, 47 U.S.C. §§ 252 (b)(2)(A) and 252 (b)(4)
[5] 47 U.S.C. § 252(b) (2)
[6] 47 U.S.C. § 252(b) (3)

response thereto) to the unresolved issues set forth in the petition and in the response.[7] Further, an ILEC can only be required to arbitrate and negotiate issues related to Section 251 of the 1996 Act, and the Commission can only arbitrate non-251 issues to the extent they are required for implementation of the interconnection agreement.[8] Issues or topics not specifically related to these areas are outside the scope of an arbitration proceeding. Importantly, Section 252 makes clear that the Arbitrators' role is to resolve the parties' open issue to "meet the ***requirements*** of Section 251, including the regulations prescribed by the [FCC]." 47 U.S.C. § 251(c)(1) (emphasis added).

[7] 47 U.S.C. § 252(b) (4)

[8] *Conserve Limited Liab. Corp. v. Southwestern Bell Tel.*, 350 F.3d 482,487 (5th Cir. 2003); *MCI Telecom., Corp. v. BellSouth Telecom., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

ISSUES

Issue 4: What should be the limitation on each Party's liability in circumstances other than gross negligence or willful misconduct?

Position of the Parties

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

BellSouth: The industry standard bill credits should apply, which limits the liability of the provisioning party to a credit for the actual cost of the services or functions not performed or improperly formed.

Analysis and Findings: The Joint Petitioners seek to have each Party's liability limited to 7.5 percent of amounts paid or payable at the time the claim arose, subject to several caveats and conditions. Conversely, BellSouth's proposed language memorializes the standard in the industry as it limits each Party's liability for negligent acts to bill credits. For the following reasons, we adopt BellSouth's position and proposed language.

The Joint Petitioners' language exceeds the Federal Communications Commission's ("FCC") Wireline Competition Bureau's standard as to the scope of an ILEC's liability to a competitive local exchange carrier ("CLEC"). The FCC determined that an ILEC should treat a CLEC in the same manner that it treats its retail customers: "Specifically, we find that, in determining the scope of Verizon's liability, it is appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers." *In the*

Matter of Petition of WorldCom, Inc. Pursuant to Section 252 (E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission, CC Docket No. 00-2 18, 17 FCC Rcd. 27,039 (Jul. 17, 2002) *("Virginia Arbitration Order")* at ¶ 709 *See also, Sprint Communications, LP,* Case No. 96-102l-TP-ARB (Ohio P.U.C. Dec. 27, 1996), 1996 WL 773809 at *32 ("The panel does not believe that GTE's proposal to limit its liability to Sprint to the same degree it limits its liability to its own retail customers is unreasonable... In accordance with the Commission's award in 96-832, it is appropriate for GTE to limit its liability in the same manner in which it limits its liability to its customers."); *In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.,* Docket No. 05-BTKT-365-ARB, Kansas Corporation Commission at 102 (Feb. 16, 2005) (refusing to adopt the Joint Petitioners' and CLEC proposal for limitation of liability language that exceeded bill credits).

BellSouth's proposed language complies with this standard as it limits each Party's liability for negligence to bill credits, which is exactly the standard applied to BellSouth's retail customers and the same standard that has governed the parties' relationship for the last eight years. (FL Tr. at 182; 943; Exhibit 14 at § A2.5.1). The Joint Petitioners do not contest this fact and concede that the provision of bill credits is "probably the current practice" in the industry. *(See* Russell Depo. at 82-83; *see also* FL Tr. at 182).[9]

[9] Reference to "Russell Depo" and similar references to the other Joint Petitioner depositions means the depositions taken by the parties as part of the North Carolina proceeding and which have been entered into the record here. When referring to depositions taken by the Florida Staff, which are part of this record, the citation will read "Russell FL Staff Depo."

By contrast, the 7.5 percent language proposed by the Joint Petitioners is not the standard in the industry. The Joint Petitioners are aware of no interconnection agreement that contains language that is identical or similar to what the Joint Petitioners propose here. *See* Joint Petitioners Supplemental Response to Request for Production No. 6; Russell Depo. at 43. Indeed, the Joint Petitioners' current interconnection agreements limit each Party's liability to bill credits. (MS Tr. at 40). Although the KMC entities are no longer parties to this arbitration, it is illuminating on this issue to note that KMC is arbitrating with Sprint and SBC in several other states and KMC did not propose similar limitation of liability language in any of those proceedings. *See* Johnson Depo. at 54. Likewise, none of the Joint Petitioners have similar limitation of liability language in their tariffs or standard contracts with Mississippi consumers. (MS Tr. at 43; 69; FL Tr. 182, 184; KMC MS Tariff at § 2.l.4(A)(H); NuVox MS Tariff at § 2.1 .4(B)(C); Xspedius MS Tariff at § 2.1 .4(A)(H)). Instead, like BellSouth, the Joint Petitioners limit their liability to bill credits. *Id.* And, KMC and NuVox impose limitation of liability language on their Mississippi customers that actually exceeds BellSouth's language as they limit their liability even for claims resulting from gross negligence or willful misconduct. *See* Johnson Depo. at 62; KMC MS Tariff at § 2.1.4(H), NuVox MS Tariff at § 2.1.4(B). Accordingly, the Joint Petitioners' proposed language violates the standard established by the FCC's Wireline Competition Bureau and other state commissions and cannot be adopted. The Joint Petitioners are not entitled to greater limitation of liability rights against BellSouth than what BellSouth provides for its own customers and what the Joint Petitioners are willing to provide to their customers.

The Panel rejects the Joint Petitioners' reliance on an alleged Xspedius template

contract (XSP 00004-5) to support their claim. The Xspedius contract actually supports BellSouth's proposed language as it limits Xspedius' liability to ***bill credits*** for tariffed services. In particular, it provides that (1) the terms and conditions contained in the contract "supplement" those set forth in Xspedius' tariffs (XSP 00004, Preamble); (2) "[i]n the event of any conflict among the Agreement and its Addenda, Attachments, Service Order Forms, or the terms or rates of Xspedius' tariffs, ***the terms and rates of the tariff shall control*** if the service itself is tariffed"; (XSP 00004, Preamble) (emphasis added); (3) Xspedius' liability for the interruption of tariffed service is limited to bill credits (XSP 00004, § 6); and (4) the "[c]ustomer's exclusive remedies under this Agreement shall be (i) the termination of rights in section 6, and (ii) any credits for outages specifically set forth in the Agreement." (XSP 00004 1; § 15).[10] Thus, Xspedius' liability for the provision of tariffed services in the contract is limited to bill credits, which is the same standard in Xspedius' tariff, the same standard employed by BellSouth with its retail end users, and the same standard offered by BellSouth to resolve this issue.

Although the Panel finds merit in both BellSouth's and the Joint Petitioners' arguments, the Panel agrees with the reasoning of the FCC Wireline Competition Bureau regarding an incumbent local exchange company's (ILEC) liability when contracting with a competitive local exchange (CLEC). The FCC Wireline Competition Bureau, acting through authority expressly delegated from the FCC to stand in the stead of the Virginia State Corporation Commission, found that,

[10] It should be noted that Section 6 of the Xspedius contract does not address termination rights. Rather, this section refers to credits for interruption of tariffed services.

> Verizon has no contractual relationship with WorldCom's customers, and therefore lacks the ability to limit its liability in such instances, as it may with its own customers. As the carrier with a contractual relationship with its own customers, WorldCom is in the best position to limit its own liability against its customers in a manner that conforms with this provision.

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

Conclusion: The Panel finds that a party's liability should be limited to the issuance of bill credits in all circumstances other than gross negligence or willful misconduct.

Issue 5: BellSouth Issue Statement: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks? Joint Petitioners' Issue Statement: Should each Party be required to include specific liability-eliminating terms in all of its tarrifs and End User contracts (past, present, and future), and to the extent that a Party does not or is unable to do so, should it be obligated to indemnify the other Party for liabilities not limited?

Position of the Parties

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

BellSouth: The purpose of this provision is to put BellSouth in the same position it would be in if a CLEC end user was a BellSouth end user. Accordingly, to the extent the Joint Petitioners decide not to limit their liability in accordance with industry standards to their end users, the Joint Petitioners should indemnify or reimburse BellSouth for any loss sustained by BellSouth.

Analysis and Findings: The exact language BellSouth proposes for this issue is in the Joint Petitioners' current agreement and has never been the subject of any dispute. (FL Tr. at 204-205). Further, the Joint Petitioners currently have limitation of liability language in their tariffs and contracts; they believe that their language is the maximum limit allowed by law; they have no plans to remove this language; their tariffs are in force and in effect today; and they intend to enforce tariff provisions limiting their liability. (FL

Tr. at 203; Russell Depo. at 87; Falvey Depo. at 61; Johnson Depo. at 8 1-82; NuVox MS Tariff at § 2.1.4; KMC MS Tariff at § 2.1.4; 2.1.6; Xspedius MS Tariff at § 2.1.4; 2.1.6). In fact, as conceded by NuVox witness Russell, having unlimited liability is not a prudent business move. (*See* Russell Depo. at 82).

Nevertheless, the Joint Petitioners object to BellSouth's language on the premise that the Parties cannot limit the right to third Parties via this contract. While the Panel agrees with this legal principle, it has no application here. BellSouth is not limiting the rights of any third party or dictating the terms by which the Joint Petitioners can offer service to their customers. Rather, BellSouth's language — language that has governed the Parties' relationship for the last several years — imposes obligations upon the Joint Petitioners in the event they make a business decision to not limit their liability within industry standards.

This problem is further compounded by the fact that the Joint Petitioners' end users are not purchasing services out of BellSouth's tariffs and are not under contract with BellSouth. (FL Tr. at 205). Accordingly, if the Joint Petitioners commit to providing a customer $1,000 if they fail to provision a loop within a specific time period and BellSouth misses the due date for the loop, the Joint Petitioners could seek to recover the $1,000 guaranteed to the customer from BellSouth through the indemnification language. (FL Tr. at 808). If, instead, that customer were a BellSouth customer, however, BellSouth's total exposure would be for bill credits. BellSouth should not be exposed to greater liability than otherwise contemplated simply because the end user is a CLEC end user rather than a BellSouth end user. The Minnesota Public Utilities

Commission addressed this exact scenario in rejecting similar indemnification language proposed by AT&T in arbitration with Qwest:

> Generally, the Commission regards indemnity clauses as means for allocating foreseen risks, not as means to induce Parties to insure one another against unanticipated and unbounded possibilities. Quest expressed concern that AT&T could advertise that it would not limit liability for consequential damage for service interruptions, knowing that Qwest would make AT&T whole if a claim ever arose. Whether or not this is a likely scenario, the indemnity language should not be drafted in a fashion to enable such a result.

In re: Petition ofAT&T Communications of the Midwest, Inc., Mm. P.U.C., Docket No. P-442, 421/IC-03-759, 2003 WL 2287903 at *18 (Nov. 18, 2003) ("*Minnesota Arbitration Order*"); *see also, In re: AT&T Communications of New York, Inc.*, N.Y. P.S.C., Case OI-C-0095, 2001 WL 1572958 at 12 (finding that AT&T should implement tariff and contract provisions to limit Verizon's potential liability to AT&T customers).

Each CLEC has the ability to limit its liability through its customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC should bear the resulting risk. The Panel notes that all parties to this proceeding currently limit their liability via their tariffs. The Panel finds that there is no compelling reason to deviate from such practice. The appropriate method of limiting liability is through the parties' tariffs. The Joint Petitioners and BellSouth currently have limitation of liability language in their tariffs and can enforce the tariff provisions limiting their liability. The Joint Petitioners concede that with regard to limiting liability, the provision of bill credits is probably the current practice in the industry. (Russell TR 182) The Panel does not believe deviating from the industry

standard is necessary or appropriate in this instance. However, even if this was not the case, the Panel notes that each of the parties to this proceeding has the ability to limit its liability to its customers through its own tariffs. If a party chooses not limit its liability through its own tariff, then the Panel believes it must assume the risk of liability.

Conclusion: The Panel finds that CLECs have the ability to limit their liability through their customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC should bear the resulting risk.

Issue 6: Bellsouth's Issue Statement: How should indirect, incidental or consequential damages be defined for purposes of the Agreement? Joint Petitioners' Issue Statement: Should limitation on liability for indirect, incidental, or consequential damages be construed to preclude liability for claims or suits for damages incurred by CLEC's (or BellSouth's) End Users to the extent such damages result directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance obligations set forth in the Agreement?

Position of the Parties

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

BellSouth: As conceded by the Joint Petitioners, the language proposed by the Joint Petitioners is of no force and effect as a matter of law and also is unnecessary. In addition, adoption of the Joint Petitioners' language emasculates the already agreed upon concept that the Parties would be subject to some form of limitation of liability.

Analysis and Findings: Upon review of the record and the parties' arguments, the Panel is of the opinion that there is no need to define these terms in an interconnection agreement. The issue of whether particular damages constitute indirect, incidental or consequential damages is best determined, consistent with applicable precedents, if and when a specific damage claim is presented to the Commission or to a court. The

Panel is of the opinion that third-party claims that solely involve damages would more than likely fall outside the Commission's jurisdiction.

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

Conclusion: The Panel finds that the Commission should not define indirect, incidental or consequential damages for purposes of the Agreement. The decision of whether a particular type of damage is indirect, incidental or consequential should be made, consistent with applicable law, if and when a specific damage claim is presented to the Commission or a court.

Issue 7: What should the indemnification obligations of the parties be under this Agreement?

Position of the Parties

Joint Petitioners: The Party receiving services should be indemnified, defended and held harmless by the Party providing services against any claims, loss or damage to the extent reasonably arising from or in connection with the providing Party's negligence (subject to limitation of liability for negligence), gross negligence or willful misconduct.

BellSouth: The party providing service should be indemnified by the receiving party when the end user of the receiving party sues the providing party. Adoption of the Joint Petitioners' language results in (1) BellSouth having virtually unlimited indemnification obligations to the Joint Petitioners while the Joint Petitioners will have essentially no indemnification obligations to BellSouth; and (2) BellSouth having no indemnification rights against the Joint Petitioners even when sued by a Joint Petitioner end user solely because of the faults of the Joint Petitioner.

Analysis and Findings: Although we find merit in each of the parties' positions, we find a Party should be indemnified, defended and held harmless against claims, loss or damage to the extent reasonably arising from or in connection with the other Party's gross negligence or willful misconduct. While both BellSouth's and the Joint Petitioners' arguments are very persuasive, the Panel does not find a compelling reason to deviate from the usual practice of limiting liability through the use of its tariffs. We believe that neither party should be required to indemnify the other party for claims of negligence.

The Panel believes this issue only applies to instances of gross negligence or willful misconduct by a party to the Agreement.

Further, neither party has contractual relationship with the other party's customers and therefore cannot limit its liability through an agreement with those customers. In this instance, the Panel believes it is appropriate for BellSouth to limit its liability in its tariffs because it lacks the ability to directly limit its liability to third-party users. The Panel is reluctant to agree with the Joint Petitioners because interconnection agreements should not be construed like typical commercial agreements as the Joint Petitioners suggest.[11] The carrier with a contractual relationship with its own customers is in the best position to limit its own liability against that customer in instances other than gross negligence and willful misconduct.

Conclusion: The Panel finds that a Party should be indemnified, defended and held harmless against any claims, loss or damage to the extent reasonably arising from or in connection with the other Party's gross negligence or willful misconduct.

[11] "...interconnection agreements are 'not . . . ordinary private contract[s],' and are 'not to be construed as . . . traditional contract[s] but as . . . instrument[s] arising within the context of ongoing federal and state regulation.' *E.spire Communications, Inc., v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004); *see also Verizon Md., Inc. v. Global Naps*, Inc., 377 F.3d 355, 364 (4th Cir. 2004) (interconnection agreements are a "creation of federal law" and are "the vehicles chosen by Congress to implement the duties imposed in § 251"). *BellSouth Telcomms., Inc. v. Miss. PSC*, 368 F. Supp. 2d 557 (D. Miss., 2005)

Issue 9: BellSouth's Issue Statement: Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the Interconnection Agreement? Joint Petitioners' Issue Statement: Should a court of law be included among the venues available at which a Party may seek dispute resolution under the Agreement?

Position of the Parties

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

BellSouth: As the expert agencies, the Commission or FCC should resolve disputes within their jurisdiction or expertise. If a dispute is outside the jurisdiction or expertise of the Commission or the FCC, the Parties should be able to bring disputes to a court.

Analysis and Findings: BellSouth takes the position that the Panel should order such a requirement but that, if the dispute is outside the jurisdiction or expertise of the Commission or FCC, the Parties can take the dispute to a court of law. (FL Tr. at 886; BellSouth Exhibit "A", GT&C at § 13.1). Conversely, the Joint Petitioners want to bring a dispute to any court of law.

We find that either party should be able to file a petition for resolution of a dispute in any available forum, but that the Commission should resolve matters that are within its expertise and jurisdiction. Interconnection agreements achieved through either

voluntary negotiations or through compulsory arbitration are established pursuant to Section 252 of the 1996 Act. Specifically, Section 252(e)(l) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the Commission for approval. As such, unlike a court, state commissions are in the best position to resolve disputes relating to the interpretation or enforcement of an agreement that it approves pursuant to the 1996 Act. (FL Tr. at 814; MS Blake Direct at 40).

The U.S. Court of Appeals for the Eleventh Circuit used this same rationale to find that state commissions have the authority under the 1996 Act to interpret interconnection agreements. *See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003). As stated by the court: "Moreover, the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance and to subject their determination to challenges in the federal courts." *Id.* (emphasis added). The FCC has also held that, "due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements." *Id.* (quoting *In re: Starpower*, 15 FCC Rcd at 11280(2000)).

The constitutional guaranty of due process demands that a party may petition a tribunal it deems to have jurisdiction over the claim. *See, Black's Law Dictionary, Fifth Edition,* p. 449, citing, *Di Aaio v. Reid*, 132 N.J.L. 17, 37 A.2d. 829, 830. It is our understanding that it would incumbent on that tribunal to either exercise its jurisdiction,

or to determine that it lacks jurisdiction. In light of this constitutional guarantee, the Panel finds that no tribunal should be foreclosed to the Parties, and either Party should be able to petition the Commission, the FCC or a court of competent jurisdiction.

However, we find that the Commission has primary jurisdiction over most disputes arising out of interconnection agreements, and is in the best position to resolve those disputes. For example, the Commission has previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to Section 364.162, Florida Statutes." *See*, PSC Order No. PSC-04-0972-TP, issued October 7, 2004. In the event the dispute falls outside the Commission's or FCC's jurisdiction, such as a claim for third-party damages, then the claimant could file in a court of competent jurisdiction.

The Panel finds no merit in Joint Petitioners' argument that litigating in State Commissions would force them into heavily discounted, non-litigated settlements with BellSouth. There is little, if any, efficiency gained in this position. The Joint Petitioners would still have to file a complaint in the state in which they sought relief. The Panel is of the opinion that the only difference would be that the litigation would be in the court system of a state, rather than in that state's Public Service Commission. Neither party should be foreclosed in a forum, thus the Agreement should not define a specific forum. However, this Panel strongly notes that the Commission has primary jurisdiction over most disputes arising from interconnection agreements.

Conclusion: In conclusion, we hold that either party should be able to file a petition for resolution of a dispute in any available forum. But, the Commission has primary jurisdiction over most disputes arising from interconnection agreements and that a petition filed in an improper forum would ultimately be subject to being dismissed or held in abeyance while the Commission addressed the matters within its jurisdiction.

Issue 12: Should the Agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?

Position of the Parties

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

BellSouth: The Parties agree that the interconnection agreement contains the Parties' interpretation of various FCC rules and decisions. The Parties also agree that the Parties should be confident as to the scope of their obligations and that the purpose in contracting is to be expressly clear. However, adoption of the Joint Petitioners' language results in the complete confusion of BellSouth's obligations and potential obligations. The Joint Petitioners' should not be allowed to use a new reading of "Applicable Law" to (1) take positions contrary to which they have already agreed or to create new obligations, not in existence in the agreement; or (2) impose state law obligations upon BellSouth that are not even referenced in the agreement and which could be preempted by federal law in this Section 252 interconnection agreement. Accordingly, when one party asserts that the other party has an obligation under substantive telecommunications law that is not addressed in the agreement and that obligation is disputed, the Commission should resolve the dispute and, if found applicable, the obligation should apply prospectively, only.

Analysis and Findings: BellSouth argues that this issue centers on how the Parties should handle disputes when one Party asserts that an obligation, right, or other requirement relating to telecommunications law is applicable even though such obligation, right, or requirements is not expressly memorialized in the interconnection agreement. The Joint Petitioners take the position that the law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise. (FL Tr. at 220; Russell Depo. at 142; 145).

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

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

Issue 65: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

Position of the Parties

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

BellSouth: BellSouth has no 251 obligation to provide the transit function under the 1996 Act. However, BellSouth has agreed to provide this function, just not at TELRIC. The FCC in the TRO, the Wireline Competition Bureau of the FCC in the Virginia Arbitration Order, and other state commissions have all reached the same conclusion. Accordingly, the Panel should reach the same conclusion here, and the Panel cannot order otherwise because it involves a request that is not encompassed within Section 251.

Analysis and Findings: The panel hereby adopts the language found within the proposed order submitted by BellSouth in this matter for this issue. We agree that BellSouth has no obligation to provide a transit function under the 1996 Act. The FCC confirmed this legal principal in the *TRO*: "To date, the Commission's rules have not required incumbent LECs to provide transiting." *TRO* at ¶ 534, n. 1640. However,

BellSouth has agreed to provide the transit function to the Joint Petitioners, just not at TELRIC rates. The Georgia Commission already has determined that BellSouth does not have to provide the transit function at TELRIC prices and has ordered that CLECs pay a non-TELRIC transit intermediary charge ("TIC") of $.0025 as an interim rate. *See BellSouth's Petition for a Declaratory Ruling Regarding Transit Traffic,* Docket No. 16772-U, *Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies*, G.P.S.C. (Mar. 24, 2005).[12] We reach the same conclusion here. Such a decision is consistent with the decisions of the FCC's Wireline Competition Bureau in the *Virginia Arbitration Order*[13], the decision of the FCC in the *TRO*[14]; and the decisions of state commissions[15], all of which support the conclusion that the TIC should not be TELRIC-based because BellSouth has no 251 obligation to provide the transit function to the Joint Petitioners. Specifically, in the *Virginia Arbitration Order*, the FCC's Wireline Competition Bureau held:

> We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 25 1(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such duty. In the absence of such a precedent or rule, we decline, on delegated

[12] The Joint Petitioners argue that BellSouth did not offer a composite TIC rate in this arbitration and thus the Panel should disregard the Georgia Commission's decision. We disagree. Regardless of whether the TIC rate is a composite rate or a stand-alone rate, BellSouth never has wavered from its position that TELRIC rates do not apply to the TIC. (GA Tr. at 1104-05).

[13] *Virginia Arbitration Order* at ¶ 117.

[14] *Triennial Review Order*, FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("*TRO*") at ¶ 534, n. 1640 ("To date, the Commission's rules have not required incumbent LECs to provide transiting.")

[15] *See In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB at 102 (Feb. 16, 2005).

> Commission, to determine for the first time that Verizon has a section 25 l(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under section 25l(A)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.

Virginia Arbitration Order at ¶ 117.

In addition to the fact that BellSouth does not have any obligation under Federal law to provide the transit service at TELRIC rates (as confirmed by the TRO), BellSouth incurs costs in providing the transit service that are not recovered by TELRIC rates. Specifically, as part of the transit function, BellSouth sends call records to the terminating carrier so that it can bill the originating carrier or the CLEC. (MS Tr. at 167). If the Joint Petitioners do not want these records, which are part of BellSouth's service, they can directly interconnect with other carriers. (MS Tr. at 168). And, indeed they do, as confirmed by KMC witness Mertz:

> Q. All right. Now, you would agree with me that KMC could avoid using BellSouth's service by directly interconnecting with NuVox, correct?
>
> A. Correct.
>
> Q. And KMC actually does interconnect with several different carriers, is that right?
>
> A. Yes.
>
> ***************************
>
> Q. When you directly interconnect with the terminating carrier, you avoid the BellSouth transiting function?
>
> A. Yes, we do.

(FLTr. at 41 1-12).

Finally, we find that we have no jurisdiction to force BellSouth to provide this function at a TELRIC price. BellSouth only has an obligation to negotiate and arbitrate those issues listed in Section 251(b) and (c) of the 1996 Act. *See Consev*, 350 F.3d at 487. In addition, the Panel only has the authority under the 1996 Act to arbitrate non-Section 251 issues if the issue was a condition required to implement the agreement. *MCI Tel. Corp. v. BellSouth Tel., Inc.*, 298 F.3d at 1274.

Conclusion: As established by the cases cited above, there is no support for the proposition that BellSouth must provide this transit function under Section 251. Accordingly, we adopt BellSouth's position and language for this issue.

Issue 88: What rate should apply for Service Date Advancement (a/k/a service expedites)?

Position of the Parties

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

BellSouth: BellSouth has no 251 obligation to provide expedited services. If the CLEC wants this service, it can purchase it at BellSouth's tariff rate. Further, this issue is not appropriate for arbitration because the issue does not involve a 251 obligation.

Analysis and Findings: The Panel finds the central, predominant question at issue here is that of parity. While other considerations have been raised, they are peripheral and fall subordinate to parity.

An absence of parity in provisioning of service expedites would open the door for a reasonable, valid TELRIC-rate argument by the Joint Petitioners. Substantiation of parity closes it, firmly.

According to 47 C.F.R. 51.307(a), there exists a requirement for an ILEC to provide a requesting carrier with nondiscriminatory access to UNEs at any technically feasible point. In the section of 47 C.F.R. 51.311(a), entitled "Nondiscriminatory access to unbundled network elements," it states that the quality of the UNE access that an incumbent provides shall be the same for all telecommunications carriers requesting

access to the network. 47 C.F.R. 51.311(b) further asserts that the quality of a UNE 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."

The Eighth Circuit opined that the phrase "at least equal in quality" leaves open the opportunity for parties to negotiate agreements for provision of access superior in quality to that which is normally provided, with the ILECs being compensated for the additional cost involved in providing superior quality. However, an ILEC is not mandated to provide such a standard.[16] With superior quality access as a standard rendered null and void, the Panel holds that parity is the preeminent qualification.

Accordingly, where technical feasibility is not at issue, incumbents are required to provide access to UNEs *at parity* (as a minimum) to that provided to their retail customers. It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer requesting similar services. So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites, and there is no conflict with Rule 51.311(b). We reiterate that current regulations do not compel an ILEC to provide CLECs with access superior in quality to that supplied to its own retail customers.

The Panel supports the idea that, by their nature, service expedites are extraordinary. Then, it follows that increased provider cost is a logical and reasonable

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

by-product, one traditionally associated with improved or increased services. The Panel agrees with the Florida record which indicates that both parties that the service expedite rate BellSouth currently charges CLECs is identical to the tariffed rate imposed on its retail customers. In other words, parity exists. Additionally, there exists no requirement that an incumbent provide supportive evidence for its tariffed rates; tariffs are presumptively valid. Services requested and provisioned to a superior standard (i.e. above parity) by the CLECs should be compensated accordingly. There was no conclusive evidence provided by the Joint Petitioners that BellSouth routinely foregoes charges for its retail customers. If there had been such evidence, indicating discriminatory treatment, a TELRIC standard might be applicable.

BellSouth is treating CLECs and its own retail customers in an identical manner with regard to the pricing of service expedites. Parity exists; TELRIC simply does not apply in the Panel's opinion.

Conclusion: BellSouth's tariffed rates for service expedites should apply unless the parties negotiate different rates.

Issue 97: When should payment of charges for service be due?

Position of the Parties

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

BellSouth: Payment should be due on or before the next bill date.

Analysis and Findings: This issue examines the time frame the Joint Petitioners have for analyzing bills they receive from BellSouth and remitting payment. At issue is whether the time period for review should be based upon the date bills are issued (by BellSouth), or whether it should be based on date bills are received.

The Joint Petitioners are requesting 30 days from receipt of a complete and readable bill to review and remit payments to BellSouth. The Panel believes the Joint Petitioners do not want BellSouth's "bill assembly" period of time to reduce the time they have to review and make payment for bills received from BellSouth. According to BellSouth witness Blake, "bill assembly" usually takes 3-4 days, and thereafter, electronic transmission can proceed on the release date. Additionally, the witness avers that this issue is really about "parity," and that BellSouth prepares bills for its wholesale customers in the same timeframe and manner as it does for its retail customers. Importantly, any conventional mailing timeframes or delays would begin after the 3-4 day timeframe for assembly. Also, the "bill date" will generally fall on the

same date each month – a time period of approximately 30 days. The Panel specifically agrees with witness Blake's assertion that this is a "parity" issue.

Joint Petitioners witness Russell states that other state commissions in the BellSouth region have ruled on this topic; he specifically references BellSouth's arbitrations with ITC^ DeltaCom in Georgia and Alabama. In each case, ITC^DeltaCom's general position was consistent with what the Joint Petitioners are seeking here - that BellSouth's bill date should not be considered the starting point for their review. However, the Panel believes the respective cases are only moderately germane to this case, since each decision was somewhat different from the specific position the Joint Petitioners assert in Florida.

The Panel is concerned about a phrase extracted from the Joint Petitioners' statement of position, the phrase "upon receipt of a complete and fully readable bill." Not only is "upon receipt" somewhat of a variable, we believe the text that follows it (i.e., "a complete and fully readable bill") could be subject to interpretation or dispute as well. Delays would result if an interpretation was necessary, and resources would have to be expended to address delays or disputes. As such, the Panel is uncertain how such issues would impact the entire bill issuance and remittance process.

Because the payment of charges is an important component of developing and maintaining strong business relationships, the Panel finds a degree of certainty should be established or maintained. In addition, we believe it is reasonable to expect the billed party to promptly remit payment to the billing party, or at a minimum, remit payment before a subsequent bill date in order to avoid late payment charges.

The Panel finds BellSouth's current bill rendering practices are reasonable. As noted, BellSouth's SQM performance results indicate that, on average, BellSouth is delivering bills to its wholesale customers at "parity" with its own retail customers. (Blake TR 1047, 1051; EXH 2, BST-1, pp. 35, 173; EXH 19, pp. 1-2; BellSouth BR at 64) BellSouth should not be ordered to make substantive changes to its billing systems on behalf of the Joint Petitioners, and at its own expense, in order to exceed "parity" performance. If individual instances of untimely wholesale performance occur, BellSouth has expressed a willingness to make accommodations upon request. If overall performance is substandard, BellSouth would be subject to SEEM[17] remedy payments.

Conclusion: We hold payment of charges for service should be payable on or before the next bill date.

[17] SEEM is an acronym for "Self -Effectuating Enforcement Mechanisms." SEEM remedy payments are an integral part of BellSouth's SQM plan.

Issue 100: Should CLEC be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

Position of the Parties

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

BellSouth: A CLEC should be required to pay all amounts that are past due as of the date of the pending suspension or termination action.

Analysis and Findings: This issue has been characterized by the Joint Petitioners as a "pull the plug" measure and by BellSouth as a measure for protection from financial risk. (Russell TR 174; Blake TR 739).

Joint Petitioners witness Russell believes that requiring CLECs to pay past due amounts in addition to the amount listed on the past due notice is "unfair and potentially abusive." (FL TR 151) He asserts that CLECs should only have to pay the amount posted on the notice. (FL TR 149, 265) The witness states that in order to avoid suspension or termination of service some "magic number" determined by BellSouth would have to be paid. (FL TR 151)

Witness Russell asserts that the Joint Petitioners are also concerned that problems could arise because of a "shell game," due to the erroneous posting by BellSouth of payments or disputes. The witness explains an error in posting could result in suspension or termination of CLEC service with possible harm to customers in Florida. (FL TR 70-73, 149-151, 174, 263-265) Witness Russell maintains that in the past BellSouth did not post payments or disputes in a timely manner. (FL TR 260, 280) The witness also states that NuVox has received notices in error from BellSouth. (FL TR 265).

BellSouth witness Blake[18] argues that treatment notices only apply when a CLEC fails to pay for the services it received. (FL TR 739) The witness does not believe the due date of the notice should be viewed as an extension of the payment due date on the original bill. (FL TR 905)

Witness Blake asserts that the Joint Petitioners, as with all CLECs, are currently required to pay all undisputed amounts that are past due as of the due date of the notice. The witness explains that an aging report containing all additional undisputed charges that will become past due during the 15 days between the notice date and suspension of service date is currently included with the suspension notice. In addition, BellSouth explains that it has modified its original language in Section 1.7.2 of Attachment 7 of the proposed Agreement to include information to requesting CLECs on the additional past due charges. Witness Blake notes that the recent change made in the collection process was "that the collection letter will no longer include any disputed

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[18] BellSouth witness Blake adopted witness Morillo's direct testimony.

amounts in the total amount due." (FL EXH 2, BST-3-Response to Staff's 4th Set of Interrogatories, No. 117; FL TR 1059-1060) Witness Blake contends that "concerns about guesswork to determine the amount to pay to avoid suspension or termination are eliminated" based on this change. (FL TR 923)

Witness Blake asserts that another aspect of the collection process is communication, written and oral, between the parties to eliminate guesswork on the amount of undisputed charges that are due to prevent suspension or termination of service. (TR 1056, 1060-1061; EXH 3, CONF -2- BST Response to Staff's 4th Set of Interrogatories, No. 117)

The Panel understands that the recent change in BellSouth's collection process which applies to all CLECs has not added new requirements for paying past due charges, but instead has eliminated any disputed charges from the amount past due in the collection letter, as is the case with the accompanying aging report. The Panel observes that the Joint Petitioners fail to show how they have been harmed by the current collection process of BellSouth. Even though Joint Petitioners witness Russell testifies that errors were made in posting of payments and in sending notices to his company, he never mentions any suspension of service. To the contrary, he acknowledges, "We have not had any collection or treatment process transactions." (FL TR 265).

Conclusion: The Panel holds that a CLEC should be required to pay past due undisputed amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination.

Issue 101: How many months of billing should be used to determine the maximum amount of the deposit?

Position of the Parties

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

BellSouth: The industry standard of two-months billing should be the maximum deposit amount that can be requested.

Analysis and Findings: It is undisputed that BellSouth has a right to a deposit (or to demand an additional deposit) if any Joint Petitioner fails to meet the specific and objective deposit criteria set forth in Attachment 7, Section 1.8.5.[19] Further, it cannot be disputed that a deposit reduces BellSouth's potential losses if a Joint Petitioner (or any CLEC that adopts a Joint Petitioner's interconnection agreement) ceases to pay its bills. Specifically, a two months' deposit is necessary because BellSouth must wait over two months (74 days) before disconnecting service for non-payment under the provisions of this agreement. (FL Tr. at 907-908; BellSouth Response to FL Staff Interrogatory No.

[19] The agreed-upon deposit criteria terms takes into account a CLEC's payment history, and other objective financial measurements, such as liquidity status (based upon a review of EBITDA) and bond rating (if any). As such, BellSouth is at a loss as to why Issue 101 remains unresolved. In any event, the payment history for some of the Joint Petitioners is poor. An established business relationship that includes a poor payment history does not warrant a reduced maximum security amount nor does it reduce BellSouth's risk in providing service to such Joint Petitioners (or high-credit risk CLECs that may adopt a Joint Petitioner's interconnection agreement).

118; Blake Rebuttal at 68). The need for a two months' deposit is especially appropriate in Mississippi in light of the Commission's recent adoption of rules that require BellSouth to continue to provide service to a CLEC even after the CLEC has failed to pay its bill to BellSouth in order to protect the CLEC's end-user customers from being left without service. *See* MPSC Amended Order Adopting Rules Governing Discontinuance of Service by Competitive Local Exchange Carriers, dated June 26, '2003. (BellSouth MS Hearing Exhibit 5). Reserving the right to require a deposit of up to two months' billing is necessary and demonstrates sound business judgment, as recognized by Joint Petitioners adopting this same standard for their Mississippi customers.

The Panel recognizes that the Joint Petitioners oppose BellSouth's proposal for this issue because it ties up capital; however, they do not explain how the proposal adversely affects their business operations. They also voice their objections to the deposit based on payment history, but staff concurs with BellSouth that payment record is only one of the agreed upon criteria of Section 1.8.5.

Even more persuasive to us is BellSouth witness Blake's statements regarding the 74-day period from commencement of service to physically disconnecting service. Given BellSouth's exposure over the period from service installation to potential termination if payment is not received, staff believes that BellSouth's proposal for a maximum two-months deposit is certainly justified.

Conclusion: The Panel holds that the maximum deposit should not exceed two months' estimated billing for new CLECs or two months' actual billing for existing CLECs based on average monthly billings for the most recent six-month period.

Issue 102: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC?

Position of the Parties

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

BellSouth: There should be no offset because a CLEC's remedy for slow payment by BellSouth is late payment charges or termination of service.

Analysis and Findings: The Panel agrees with BellSouth that as a general matter, a CLEC deposit should not be reduced by amounts owed by BellSouth to such CLEC. (FL Tr. at 913-914). The CLEC's remedy for addressing late payment by BellSouth should be suspension/termination of service and/or application of interest/late payment charges. Id. BellSouth is within its rights to protect itself against uncollectible debts on a non-discriminatory basis. Id. Deposits are needed to mitigate the risk that a CLEC may not be able to fulfill its financial obligations in the future. Id. BellSouth attempts to collect a deposit amount that is consistent with that risk. For BellSouth to do otherwise would not protect the interests of BellSouth's shareholders, employees, or other customers.

Additionally, the Panel finds that the Joint Petitioners' proposal on Item 102 is unreasonable and unacceptable as it fails to exclude amounts that are subject to a valid

billing dispute. (FL Tr. at 621). In support of their offset proposal, Joint Petitioners (i.e. Xspedius) rely on outdated and inaccurate information. Without providing any specifics, Joint Petitioners assert that the offset provision is necessary because, many years ago, BellSouth allegedly owed a now defunct CLEC (e.spire) millions for reciprocal compensation. (MS Tr. at 93-95). However, the specifics do not support the Joint Petitioners' position. Specifically, Mr. Falvey acknowledged that BellSouth is current in paying its reciprocal compensation bills (MS Tr. at 94-95; BellSouth MS Hearing Exhibit 2).

The Panel finds that reducing the deposit BellSouth requires from the Joint Petitioners by past due amounts owed by BellSouth is not appropriate. The parties would have a difficult time agreeing on the details of such an approach. The Joint Petitioners' proposal requires BellSouth to establish a good payment record as defined in the Agreement before the offset is paid, while BellSouth's proposal requires the CLEC to pay the offset within ten days of receiving the undisputed past due amount.

The offset proposal could increase disputes between the parties and be administratively burdensome to administer. In response to a staff interrogatory in the Florida proceeding, BellSouth stated:

> . . . Mr. Falvey's testimony suggesting that security deposits be adjusted for BellSouth bills "aged thirty (30) days or more" could most certainly cause conflicts and disputes over deposit amounts, not to mention the confusion surrounding the accounting and classification of this on-going exchange of funds.

(FL Tr. EXH 2, BST-1-Response to Staff's 2nd Set of Interrogatories, No. 50)

Finally, the Panel is of the opinion that requiring a deposit from the Joint Petitioners and the dispute of charges or late payments made by BellSouth are separate issues. A deposit required under the interconnection agreement is intended to protect the ILEC from the financial risk of non-payment for services provided to the CLEC. If BellSouth has a billing dispute or is late paying one of the Joint Petitioners, it should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount of services provided to the Joint Petitioners. Moreover, there are other remedies in place which address past due payments (disputed and undisputed) such as late payment charges, and suspension/ termination of service. As such, the amount of the deposit BellSouth requires from a Joint Petitioner should not be reduced by past due amounts owed by BellSouth to CLEC.

Conclusion: The amount of the deposit BellSouth requires from CLEC should not be reduced by past due amounts owed by BellSouth to CLEC.

Issue 103: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?

Position of the Parties

Joint Petitioners: BellSouth should be permitted to terminate services for failure to remit a requested deposit only if: (a) CLEC agrees that the deposit is required, or (b) the Commission has ordered payment the deposit. All deposit disputes must be resolved via the Agreement's Dispute Resolution provisions and not through "self-help." (emphasis in original)

BellSouth: Thirty calendar days is a reasonable time period within which the CLEC should have met its fiscal responsibilities as well as the already agreed-upon right for BellSouth to obtain a deposit.

Analysis and Findings: To protect its financial interests, BellSouth asserts that it should be able to terminate service if a Joint Petitioner fails to pay (or properly dispute) a deposit demand within thirty (30) calendar days. We agree. It is undisputed that BellSouth has a contractual right to a deposit. *See* Att. 7, § 1.8. It is undisputed that the parties have agreed to objective and specific criteria regarding deposits that govern BellSouth's right to demand a deposit. *See* Att. 7, § 1.8.5. Further, it is undisputed that if a Joint Petitioner satisfies the deposit criteria, then BellSouth will refund the deposit amount within 30 calendar days, plus accrued interest. *See* Aft. 7, § 1.8.10. Accordingly, it logically follows that if a Joint Petitioner fails to satisfy the objective and specific

deposit criteria, thereby triggering BellSouth's right to a deposit, then BellSouth should be permitted to terminate service if a Joint Petitioner refuses to respond to a deposit demand within thirty (30) calendar days. Termination for non-payment of a deposit is not a novel concept; it is expressly authorized by the Georgia and Florida Commissions (GA Tr. at 541; FL Tr. at *256-257);* the Mississippi Commission's own Rules governing discontinuance of service

Conclusion: The Panel holds and that BellSouth should be entitled to terminate service to the CLEC pursuant to the process for termination due to non-payment if the CLEC refuses to remit any deposit required by BellSouth and does not dispute the deposit request per Section 1.8.7 of the proposed Agreement, within 30 calendar days.

ABBREVIATIONS AND ACRONYMS

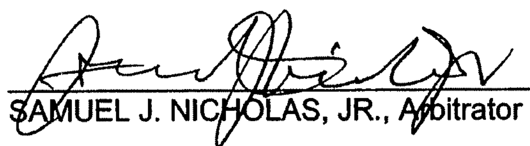
Act	Telecommunications Act of 1996
ASR	Access Service Request
BellSouth	BellSouth Telecommunications, Inc.
CABS	Carrier Access Billing System
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CO	Central Office
CPNI	Customer Proprietary Network Information
CSR	Customer Service Record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

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

THESE RECOMMENDATIONS are made to the Mississippi Public Service Commission on this the 12th day of December, 2005.

MARC E. BRAND, Commissioner

KEITH HOWLE, Arbitrator



SAMUEL J. NICHOLAS, JR., Arbitrator