BELLSOUTH

BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Room 407
Louisville, KY 40203

Dorothy.Chambers@BellSouth.com

Dorothy J. Chambers
General Counsel/Kentucky

502 582 8219
Fax 502 582 1573

RECEIVED

APR 1 5 2004

PUBLIC SERVICE COMMISSION

April 15, 2004

Mr. Thomas M. Dorman
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 Mr. Dorman:

Enclosed for filing in the above-captioned case is BellSouth's Response in Opposition to Petitioners' Motion for Procedural Schedule. The original and ten (10) copies of the Response and Exhibit 2 are provided to the Commission. Exhibit 1 to the Response consists of 248 pages. Two paper copies of Exhibit 1 are provided to the Commission. Exhibit 1 is being provided to parties on a CD.

Very truly yours,

Dorothy J. Chambers

Dorothy J. Chambers

Enclosures

cc: Parties of Record

535362

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

NEWSOUTH COMMUNICATIONS CORP.,	)	
NUVOX COMMUNICATIONS, INC.,	)	
KMC TELECOM V, INC.,	)	
KMC TELECOM III LLC, and	)	**Case No.**
XSPEDIUS COMMUNICATIONS, LLC	)	**2004-00044**
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 1923, as Amended	)	

BELLSOUTH'S RESPONSE IN OPPOSITION TO PETITIONERS' MOTION FOR PROCEDURAL SCHEDULE

BellSouth Telecommunications, Inc. ("BellSouth") hereby files its Response In Opposition to the Motion For Procedural Schedule filed by the Petitioners (or "CLECs"), and states the following:

On April 7, 2004, the Petitioners filed their proposed Procedural Schedule with the Commission. The Petitioners did not discuss any aspect of this proposal to BellSouth prior to filing.[1] BellSouth objects to two aspects of the procedural schedule. (1) Petitioners' proposal as to the filing of testimony is contrary to the procedure that typically pertains before this Commission. Further, the petitioners' proposal, if adopted, would be prejudicial to BellSouth.

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1 BellSouth mentions this because counsel for BellSouth has a conflict on the hearing days suggested. The more serious problems with the CLECs' proposal are as described below.

(2) BellSouth opposes the CLECs proposed setting of a <u>single</u> three-day hearing in this proceeding. BellSouth has filed a Motion to Sever, which this Commission should grant for the reasons set forth in the Motion. If BellSouth's Motion is granted, four separate hearings should be set, rather than the single hearing proposed by the CLECs. On the other hand, if the Commission denies BellSouth's Motion, and allows the Petitioners to file testimony, assuming Petitioners file testimony in the manner they apparently intend to, and have already filed in Alabama, then the hearing of this matter will likely take a minimum of nine to ten days. Thus, a three day setting would be inadequate to try the case.

As to the first aspect of Petitioners' proposed schedule, the Petitioners have proposed that they file direct testimony, then BellSouth file direct testimony, then the CLECs file rebuttal testimony. The CLEC's proposed schedule makes no provision for BellSouth to file rebuttal testimony. Thus, the CLECs propose that they would have two opportunities to file testimony, as compared to one opportunity for BellSouth, and the CLECs would have the last word, as it were.

The typical procedure before this Commission in proceedings of all types, including arbitrations, is for all parties to simultaneously file direct testimony, and for all parties to later simultaneously file rebuttal testimony. The Petitioners have identified no reason why this Commission should deviate from its typical procedural process. Further, if the Commission were to adopt the Petitioners' proposal, then this would work to the obvious disadvantage of BellSouth in that, as set forth above, the Petitioners would be able to file more testimony than BellSouth, and would be the only party entitled to file rebuttal testimony.

Therefore, BellSouth submits that the Commission should reject the Petitioners' proposal, and should, instead, order the approach more typically followed by this Commission, i.e., to order the simultaneous filing of direct testimony by all parties on one date and rebuttal testimony simultaneously filed by all parties on a subsequent date.

The Petitioners also propose that the Commission set this matter for a three-day hearing, September 8-10, 2004. The first problem with this proposal is that it presupposes that the Commission will deny BellSouth's Motion to Sever, and that there will only be a single hearing. BellSouth submits that its Motion to Sever should be granted for the reasons set forth in the Motion and in BellSouth's subsequent Reply. If this is done, then it will, of course, be necessary to set four individual hearings. Further, even if the Commission were to deny BellSouth's request for severance, this hearing could only be completed in three days if the Commission adopts BellSouth's proposed procedural restrictions. Unless the CLECs are conceding that BellSouth's proposed restrictions should be adopted, they have proposed far too little time for the hearing.

Much of the Petitioners' response to BellSouth's Motion has been premised upon their representation as to what their testimony will say when it is filed. For example, the Petitioners responded to BellSouth's suggestion that they should not file the multiple testimony of witnesses on common issues by stating that "each CLEC is an independent company with different circumstances and experiences to draw upon in support of the common positions adopted by the joint petitioners". (CLEC Response, page 8). Of course, at the time the Petitioners filed their response, they had not filed testimony in any state. On April 6, 2004, however, they filed their direct testimony in Alabama (a copy of which is attached hereto as Exhibit A). A review of that testimony is instructive in several regards.

First, the Commission will note that the testimony is 242 pages long. The Commission will also note that it is not the testimony of a single witness, but rather the testimony of five different witnesses representing three different CLECs. The testimony, which reads in many regards more like a legal brief than actual testimony, includes a number of broad questions, and equally broad answers, for each of the approximately 90 issues that remain in the case. Specifically, one answer is used to provide the joint CLEC position, another provides the rationale for that position, and another addresses the basis of the CLECs' opposition to BellSouth's position. There are fewer than 10 instances in the entire testimony filed in Alabama in which a particular witness for a CLEC provides an answer that appears to be based on some knowledge of facts specific to that witness or the CLEC that employs the witness.[2] Instead, utilizing the format described above, there are approximately 325 answers to which three CLEC witnesses append their names on behalf of their respective employers. Some of these answers are as short as a few lines and some run to multiple pages.

In other words, this is a classic example of cumulative testimony. If the CLECs had filed the testimony in the way that testimony should be filed, that is, with each witness filing only his or her testimony, then there would have been three almost completely sets of testimony filed by the three CLECs in Alabama. In Kentucky, since there are four CLECs, there would have presumably been four sets of largely identical testimony. It is unlikely that the Commission would have allowed this type of cumulative testimony. What the CLECs have done in Alabama, however, and what they likely may attempt to do in Kentucky, if permitted, is just as bad. The multiple CLECs have simply filed one set of testimony and appended the names of multiple witnesses to almost every answer. Thus, they have achieved the exact same effect as if they had filed cumulative testimony in the more typical form.

Given the way that the CLECs filed their testimony in Alabama, and presumably will try to do here, there are only two possibilities: One, the CLECs have appended the names of

2 See e.g., Ex. A, pages 20, 84 and 100.

witnesses to particular answers even though the particular witness has no knowledge of the answer, and could not answer further questions about the CLEC position on cross-examination. If this is the case, then the CLECs' intention would be to put witnesses on the stand to testify about matters about which they have no actual knowledge. This approach would, of course, be improper, and should not be allowed. If this approach is allowed, then BellSouth will have to cross examine each of the CLEC witnesses on every one of the more than 300 questions that they have answered jointly to determine which witnesses have actual knowledge of the matters discussed in the joint testimony.

The second possibility is that each of the witnesses on behalf of the CLECs really do have actual knowledge that relates to each of the more than 300 answers to which their names are appended. If this is the case, it still will be necessary for BellSouth to cross-examine each CLEC witness on every one of the more than 300 questions to which they purport to provide an answer. Thus, in Kentucky BellSouth will have to examine four different witnesses on 90 issues each, and on the approximately 325 answers that they have "sponsored" in support of these issues.

Anything short of conducting cross in this manner will not allow BellSouth to determine which witness has actual knowledge about each answer, or, if all do, to determine what the particular witness knows about the answer. While this fact is regrettable, it is the unavoidable result of the particular approach to filing testimony that the CLECs took in Alabama, and intend to take here. If this Commission allows this approach, then the cross-examination of each CLEC witness will likely take one to two days. Thus, a realistic assessment of the time for hearing would be approximately 10 hearing days. There is absolutely no way the hearing can be conducted in three days, if the Commission allows the CLECs to proceed as they have requested.

If the Commission determines that these cases should not be severed, then BellSouth submits, once again, that, generally, the appropriate course would be for only one CLEC witness to testify on each common issue. BellSouth has no objection to the CLECs filing differing testimony in the handful of instances in which a witness actually has some personal knowledge that relates to the issue. However, there is absolutely no point to allowing the CLECs to file testimony in which more than 300 answers are provided jointly by four different witnesses. Allowing multiple witnesses for such "joint" testimony will create a situation in which BellSouth must conduct extensive cross-examination to find the witness that is truly knowledgeable about the issue. The more reasonable approach is to adopt the procedure BellSouth has proposed, that is, to have the CLECs file separate testimony for each witness and in this testimony for each witness to address only the matters about which he or she is knowledgeable. If the Commission adopts the approach proposed by BellSouth, then a three-day hearing should be adequate. If the Commission adopts the CLEC approach, then the necessary time to conduct the hearing will likely be tripled.

Finally, BellSouth would note that the Louisiana Commission has accepted the above-described approach proposed by BellSouth. (See Staff Recommendation and Proposed Order, Exhibit 2). On April 13, 2004 a status conference was held in the arbitration case in Louisiana. BellSouth's Motion was presented at this conference to the Administrative Judge. This represents the first time a Commission has considered the issue of severance/restrictions after actually seeing the testimony that the Petitioners plan to file. At the conclusion of the hearing the parties were presented with the attached Recommendation and Order. Although the Recommendation and Order are unsigned, the parties were told at the conference that the Order would be entered in that proceeding.

WHEREFORE, BellSouth requests that the Commission reject the CLECs' proposal for filing testimony, and instead order the parties to file simultaneous direct testimony on a date certain, to be followed by the simultaneous filing of rebuttal testimony 30 days later. BellSouth also requests that the Commission either sever the proceeding into four separate arbitrations, and set each hearing separately, or impose the procedural restrictions requested by BellSouth. If the Commission denies both of these requests, then BellSouth would request that the Commission reserve ten days for the hearing, since this amount of time will likely be necessary to cross-examine the CLECs if they are allowed to file testimony as they did in Alabama, and appear to plan to do here.

Respectfully submitted,

Dorothy J. Chambers

Dorothy J. Chambers
601 W. Chestnut Street, Room 407
P. O. Box 32410
Louisville, KY 40232
Tel. (502) 582-8219
Fax (502) 582-1573

R. Douglas Lackey
J. Phillip Carver
Suite 4300, BellSouth Center
675 West Peachtree Street, NE
Atlanta, GA 30375
Tel. (404) 335-0710

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

#534808

BSB

BALCH & BINGHAM LLP

Alabama • Mississippi • Washington, DC

Robin G. Laurie
(334) 269-3146

Exhibit 1

Attorneys and Counselors
The Winter Building
2 Dexter Avenue
P.O. Box 78 (36101-0078)
Montgomery, Alabama 36104-3515
(334) 834-6500
(334) 269-3115 Fax
www.balch.com
(866) 736-3859 (direct fax)
rlaurie@balch.com

April 6, 2004

BY HAND DELIVERY

Mr. Walter Thomas
Secretary
Alabama Public Service Commission
RSA Union Building
8th Floor
100 N. Union Street
Montgomery, Alabama 36104

RECEIVED
APR 7 2004
AL LEGAL DEPT.

Re: Joint Petition for Arbitration of NewSouth Communications Corp., 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 Birmingham, LLC, Xspedius Management Co. of Mobile, LLC and Xspedius Management Co. of Montgomery, LLC; Docket No. 29242

Dear Mr. Thomas:

Enclosed for filing are the original and ten copies of the Testimony of Joint Petitioners with attachment, Joint Petitioners' First Set of Requests for Production Directed to BellSouth Telecommunications, Inc., and Joint Petitioners' First Set of Interrogatories Directed to BellSouth Telecommunications, Inc., in the above-referenced matter.

Very truly yours,

Robin G. Laurie

RGL:dpe
Enclosures

cc: Counsel of Record
Terry L. Butts, Esquire

BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION

RECEIVED
APR 1 5 2004
PUBLIC SERVICE
COMMISSION

In the Matter of **Joint Petition for Arbitration of** **NEWSOUTH COMMUNICATIONS CORP., KMC TELECOM V, INC., KMC TELECOM III LLC, and XSPEDIUS COMMUNICATIONS, LLC on Behalf of it Operating Subsidiaries, XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF BIRMINGHAM, LLC, XSPEDIUS MANAGEMENT CO. OF MOBILE, LLC, and XSPEDIUS MANAGEMENT CO. OF MONTGOMERY, LLC** **Of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended**	)	**Docket No. 29242**

TESTIMONY OF JOINT PETITIONERS

Raymond Chad Pifer on behalf of KMC Telecom V, Inc. & KMC Telecom III LLC
Marva Brown Johnson on behalf of KMC Telecom V, Inc. & KMC Telecom III LLC
Brian C. Murdoch on behalf of KMC Telecom V, Inc. & KMC Telecom III LLC
John Fury on behalf of NewSouth Communications Corp.
James Falvey on behalf of Xspedius Companies

PRELIMINARY STATEMENTS

WITNESS INTRODUCTION AND BACKGROUND

KMC: Raymond Chad Pifer

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

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

Q. PLEASE DESCRIBE YOUR POSITION AT KMC.

A. I assist in managing the company's federal regulatory and legislative matters, state regulatory proceedings and complaints, and interconnection issues. I am familiar with the operations and facilities of KMC.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A. I hold a Bachelors of Arts in History (BA) from Hendrix College, and a Juris Doctor from or the University of Arkansas at Little Rock. I am admitted to practice law in the State of Georgia, as well as in the State of Arkansas.

I have been employed with KMC since October 2003. Prior to joining KMC as Regulatory Counsel, I had over seven years of telecommunications-related experience in various areas including carrier access billing, collections, industry relations, regulatory affairs, and interconnection services. From November 2000 to October 2003, I was Corporate Counsel — Regulatory Affairs for Xspedius Communications, LLC, where I handled the company's legal and regulatory matters in thirty-five (35) states, including compliance issues, rulemaking proceedings, and interconnection negotiations. Prior to that, I was Southeast Regulatory Counsel to FairPoint Communications, Inc. from January to November 2000, and handled the regulatory and legal matters for the company's Southeast region as well as the company's own compliance matters. From 1996 to 2000, I served in a variety of positions with ALLTEL Communications, Inc., including the management of carrier access billing and collections, industry relations and interconnection services.

Q. PLEASE IDENTIFY ALL STATE COMMISSIONS TO WHICH YOU HAVE SUBMITTED TESTIMONY.

A. I have submitted testimony to the following commissions: the Public Service Commission of Wisconsin; the Louisiana Public Service Commission; the Michigan Public Service Commission; and the Alabama Public Service Commission.

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

A. I am sponsoring testimony on the following issues:[1]

General Terms and Conditions	G-1 through G-16
Attachment 2: Unbundled Network Elements	2-5, 2-7, 2-8, 2-9, 2-10, 2-12, 2-13, 2-15, 2-17, 2-18, 2-27, 2-28, 2-31, 2-32, 2-33, 2-34, 2-38, 2-40, 2-41
Attachment 3: Interconnection	3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8
Attachment 4: Collocation	4-2, 4-3
Attachment 6: Ordering	6-10
Attachment 7: Billing	7-1 through 7-12

1 The following issues have been settled: G-10, G-11, 2-1, 2-2, 2-3, 2-6, 2-11, 2-14, 2-16, 2-26, 2-29, 2-30, 2-35, 2-36.

Attachment 11: BFR/NBR	11-1

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position and associated contract language on the issues indicated in the chart above.

KMC: Marva Brown Johnson

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

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

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

Q. PLEASE DESCRIBE YOUR POSITION AT KMC.

A. I manage the organization that is responsible for federal regulatory and legislative matters, state regulatory proceedings and complaints, and local rights-of-way issues. I am also an officer of the company and I currently serve in the capacity of Assistant Secretary.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A. I hold a Bachelors of Science in Business Administration (BSBA), with a concentration in Accounting, from Georgetown University; a Masters in Business Administration from Emory University's Goizuetta School of Business; and a Juris Doctor from Georgia State University. I am admitted to practice law in the State of Georgia.

I have been employed by KMC since September 2000. I joined KMC as the Director of ILEC Compliance; I was later promoted to Senior Regulatory Counsel and this is the position that I hold today.

Prior to joining KMC as the Director of ILEC Compliance, I had over eight years of telecommunications-related experience in various areas including consulting, accounting, and marketing. From 1990 through 1993, I worked as an auditor for Arthur Andersen & Company. My assignments at Arthur Andersen spanned a wide range of industries, including telecommunications. In 1994 through 1995, I was an internal auditor for BellSouth. In that capacity, I conducted both financial and operations audits. The purpose of those audits was to ensure compliance with regulatory laws as well as internal business objectives and policies. From 1995 through September 2000, I served in various capacities in MCI Communications' product development and marketing organizations, including as Product Development – Project Manager, Manager - Local Services Product Development, and Acting Executive Manager for Product Integration. At MCI, I assisted in establishing the company's local product offering for business customers, oversaw the development and implementation of billing software initiatives, and helped integrate various regulatory requirements into MCI's products, business processes, and systems.

Q. PLEASE IDENTIFY ALL STATE COMMISSIONS TO WHICH YOU HAVE SUBMITTED TESTIMONY.

A. I have submitted testimony in proceedings before the following commissions: the North Carolina Utilities Commission; the Florida Public Service Commission; and the Tennessee Regulatory Authority.

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

A. I am prepared to sponsor and adopt all testimony sponsored by my colleague Mr. Pifer. Mr. Pifer and I will be sharing the duty of serving as KMC's regulatory policy witness in all nine of the BellSouth arbitrations. Depending on the hearing schedule adopted by the Commission, I may appear at the hearing as a substitute for Mr. Pifer.[2]

General Terms and Conditions	G-1 through G-16
Attachment 2: Unbundled Network Elements	2-5, 2-7, 2-8, 2-9, 2-10, 2-12, 2-13, 2-15, 2-17, 2-18, 2-27, 2-28, 2-31, 2-32, 2-33, 2-34, 2-38, 2-40, 2-41
Attachment 3: Interconnection	3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-7, 3-8
Attachment 4: Collocation	4-2, 4-3
Attachment 6: Ordering	6-10
Attachment 7: Billing	7-1 through 7-12
Attachment 11: BFR/NBR	11-1

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position and associated contract language on the issues indicated in the chart above.

2 The following issues have been settled: G-10, G-11, 2-1, 2-2, 2-3, 2-6, 2-11, 2-14, 2-16, 2-26, 2-29, 2-30, 2-35, 2-36.

KMC: Brian C. Murdoch

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

A. My name Brian Christopher Murdoch. I am the Director — Carrier Management of KMC Telecom Holdings, Inc., the parent company of KMC Telecom V, Inc. and KMC Telecom III, LLC. My business address is 1755 North Brown Road, Lawrenceville, Georgia 30043.

Q. PLEASE DESCRIBE YOUR POSITION AT KMC.

A. I assist in managing the company's federal regulatory and legislative matters, state regulatory proceedings and complaints, and interconnection issues. I am familiar with the operations and facilities of KMC.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A. I hold a Bachelor of Science in Industrial Management (BS) from The Georgia Institute of Technology. I have been employed by KMC since July 2000. I joined KMC as Director of Carrier Management. I assist in managing the company's interconnection issues with incumbent telephone companies. As such, I am familiar with the operations and facilities of KMC in all states.

Prior to joining KMC, I had over seven years of telecommunications-related experience in various areas including government affairs, network operations, financial operations, and sales. From 1997 through 2000, I served as Manager of Carrier Markets for MCI Worldcom. While at MCI, I assisted in the creation and implementation of an interactive navigational tool for its 20 local interconnection agreements. I also drove carrier compliance with contract terms and conditions relating to operational trials related to Pre-ordering and ordering processes for Resale and UNEs. From 1996 to 1997, I served as Manager of ISDN Operations for Ameritech. While at Ameritech, I managed employees handling preordering, ordering, provisioning, installation, and maintenance of ISDN related services. From 1995 to 1996, I served as Operations Analyst for Sprint Corporation. While at Sprint, I conducted analysis on key performance indicators of Sprint's technical operations, including development and application of performance measures and statistical trending analysis.

Q. PLEASE IDENTIFY ALL STATE COMMISSIONS TO WHICH YOU HAVE SUBMITTED TESTIMONY.

A. This is the first set of testimony that I have sponsored before a state commission.

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

A. I am sponsoring testimony on the following issues:[3]

General Terms and Conditions	None
Attachment 2: Unbundled Network Elements	2-4, 2-19, 2-20, 2-21, 2-22, 2-23(C)-(E), 2-24, 2-25, 2-37, 2-39
Attachment 3: Interconnection	None
Attachment 4: Collocation	4-1, 4-4, 4-5, 4-6, 4-7, 4-8, 4-9, 4-10
Attachment 6: Ordering	6-1, 6-2, 6-3, 6-4, 6-5, 6-6, 6-7, 6-8, 6-9, 6-11
Attachment 7: Billing	None

[3] The following issues have been settled: G-10, G-11, 2-1, 2-2, 2-3, 2-6, 2-11, 2-14, 2-16, 2-26, 2-29, 2-30, 2-35, 2-36.

Attachment 11: BFR/NBR	None

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position and associated contract language on the issues indicated in the chart above.

NewSouth: John Fury

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

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

Q. PLEASE DESCRIBE YOUR POSITION AT NEWSOUTH.

A. I am responsible for overseeing NewSouth's business relationships with other telecommunications carriers particularly those incumbent local exchange companies with whom we interconnect to provide services.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A. I graduated from Louisiana State University in 1991 with a Bachelor of Science degree in Political Science, and I have been employed in the telecommunications industry since then. I have been employed in various capacities for Worldcom, Brooks Fiber, Broadwing and U.S. One. Since April 1998, I have been employed by NewSouth Communications of Greenville, South Carolina. I have worked in network audit, planning and provisioning, capacity management, traffic management, outside plant design and engineering as well as network design. More specifically, since April 1998, I have worked for NewSouth in network planning and capacity planning, and since January of 2001 I have held my current position as carrier relations manager.

Q. PLEASE IDENTIFY ALL STATE COMMISSIONS TO WHICH YOU HAVE SUBMITTED TESTIMONY.

A. I have submitted testimony to the following commissions: the Florida Public Service Commission; the Georgia Public Service Commission; the Louisiana Public Service

Commission; the Public Service Commission of South Carolina; and the Tennessee Regulatory Authority.

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

A. I am sponsoring testimony on the following issues:[4]

General Terms and Conditions	G-1 through G-16
Attachment 2: Unbundled Network Elements	2-1 through 2-41
Attachment 3: Interconnection	3-1 through 3-6
Attachment 4: Collocation	4-1 through 4-10
Attachment 6: Ordering	6-1 through 6-11
Attachment 7: Billing	7-1 through 7-12
Attachment 11: BFR/NBR	11-1

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position and associated contract language on the issues indicated in the chart above.

[4] The following issues have been settled: G-10, G-11, 2-1, 2-2, 2-3, 2-6, 2-11, 2-14, 2-16, 2-26, 2-29, 2-30, 2-35, 2-36.

Xspedius: James Falvey

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

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

Q. PLEASE DESCRIBE YOUR POSITION AT XSPEDIUS.

A. I manage all matters that affect Xspedius before federal, state, and local regulatory agencies. I am responsible for federal regulatory and legislative matters, state regulatory proceedings and complaints, and local rights-of-way issues.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A. I am a cum laude graduate of Cornell University, and received my law degree from the University of Virginia School of Law. I am admitted to practice law in the District of Columbia and Virginia.

After graduating from law school, I worked as a legislative assistant for Senator Harry M. Reid of Nevada, and then practiced antitrust litigation in the Washington D.C. office of Johnson & Gibbs. Thereafter, I practiced law with the Washington, D.C. law firm of Swidler & Berlin, where I represented competitive local exchange providers and other competitive providers in state and federal proceedings. In May 1996, I joined e.spire Communications, Inc. as Vice President of Regulatory Affairs, where I was promoted to Senior Vice President of Regulatory Affairs in March 2000.

Q. PLEASE IDENTIFY ALL STATE COMMISSIONS TO WHICH YOU HAVE SUBMITTED TESTIMONY.

A. In total, I have testified before 13 public service commissions, including those of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, New Mexico, Texas, Pennsylvania, Arkansas, and Kansas.

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

A. I am sponsoring testimony on the following issues:[5]

General Terms and Conditions	G-1 through G-16
Attachment 2: Unbundled Network Elements	2-1 through 2-41
Attachment 3: Interconnection	3-1, 3-2, 3-3, 3-4, 3-7, 3-8, 3-9, 3-10, 3-11, 3-12, 3-13, 3-14
Attachment 4: Collocation	4-1 through 4-10
Attachment 6: Ordering	6-1 through 6-11
Attachment 7: Billing	7-1 through 7-12
Attachment 11: BFR/NBR	11-1

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position and associated contract language on the issues indicated in the chart above.

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5 The following issues have been settled: G-10, G-11, 2-1, 2-2, 2-3, 2-6, 2-11, 2-14, 2-16, 2-26, 2-29, 2-30, 2-35, 2-36.

GENERAL TERMS AND CONDITIONS

Issue No. G-1 [Section 1.6]: What should be the effective date of future rate impacting amendments?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE G-1.

A. Future amendments incorporating Commission-approved rates should be effective as of the effective date of the Commission order, if an amendment is requested within 30 calendar days of that date. Otherwise, such amendments should be effective 10 calendar days after request. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Rate amendments should essentially be self-executing and carriers are entitled to avail themselves of the rates approved by the Commission once the Commission approves them. The Petitioners have proposed language which is designed to reasonably address concerns regarding instability that could result from true up periods that cover a long period of time. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is designed to provide it with the opportunity to, in effect, hold newly adopted rate amendments hostage, and allow BellSouth to delay the implementation of an approved rate to the extent that the Commission's decision is unfavorable to it. BellSouth's language provides it with the opportunity to perform or possibly, delay performance of the last act necessary to effectuate a rate amendment. Countenancing the BellSouth proposal would allow BellSouth inordinate power to promulgate rate amendments that contain language that has little or nothing to do with effectuating the Commission's rate decisions. Petitioners submit that rate amendments that result from Commission rate orders should be simple and straight-forward. There is no reason that a Party should be permitted to lard a rate amendment with extraneous terms wholly unrelated to the implementation of the new rates. But BellSouth's proposed language, which provides no ceiling on the maximum amount of time following adoption of a new rate by the Commission for BellSouth to review and sign an amendment, injects a huge amount of uncertainty into a process that should be simple and straightforward. The Commission should reject BellSouth's proposal to ensure that future Commission approved rates are made effective in an efficient and expeditious manner. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

A. The term "End User" should be defined as "the customer of a Party". *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The definition proposed by the Petitioners is simple and avoids controversy. In addition, it is the most natural and intuitive definition. Petitioners have a variety of telecommunications services customers – whether or not they qualify as the "ultimate user" of such telecommunications services (whatever that means) is simply not relevant to whether they are or aren't End Users of the telecommunications services provided by Petitioners. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed definition unnecessarily invites ambiguity and the potential for future controversy, by turning on the notion that in order to be an End User, the customer must be the "ultimate user of the Telecommunications Service". Obviously, this is a restrictive definition designed to serve some undefined and heretofore undisclosed BellSouth motive. Given that the concept of "ultimate user" is undefined and there is no precise way of knowing which Telecommunications Service is "<u>the</u> Telecommunications Service" BellSouth refers to, BellSouth's proposal seems well suited to serve its apparent effort to have the term End User narrowly defined. However, there is no apparent policy or legal basis to support BellSouth's apparent attempt to limit who can or cannot be Petitioners' customers. Provided that Petitioners comply with the contractual provisions regarding resale, UNEs and Other Services (defined in Attachment 2), the contract should in no way attempt to limit who can or cannot be considered an End User of a party's services. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. ARE THERE OTHER REASONS WHY THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. Yes. The curiously restrictive definition proposed by BellSouth is inconsistent with the manner in which the term "End User" has been used elsewhere in the Agreement. For example, under BellSouth's proposed definition of "End User," it is arguable that certain types of CLEC customers, such as Internet Service Providers ("ISPs"), might not be considered to be "End Users". However, in Attachment 3 of the Agreement BellSouth has agreed to language regarding "ISP-bound traffic" that does treat ISPs as End Users, even under BellSouth's proposed definition. This language already has been agreed to. Yet it is clear that, while ISPs use Telecommunications Services provided by Petitioners, it is not readily apparent that they qualify as "the ultimate user of the Telecommunications Service" (although they apparently do qualify, lest BellSouth would not have agreed to use the term End User in Section 10.6.1 (KMC), 10.4.1 (NSC), 10.9.1 (XSP) of Attachment 3 – the problem is that only BellSouth knows why they do qualify). There simply is no need for the tension that exists between this provision and the improperly restrictive and ambiguous definition of End User proposed by BellSouth in the General Terms. The bottom line is that the language proposed by the Petitioners is simple, straight-forward, and is the best way to avoid unnecessary ambiguity and future controversy. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. ARE THERE OTHER APPARENT COMPLICATIONS RAISED BY BELLSOUTH'S PROPOSED DEFINITION?

A. Yes. In connection with Attachment 2, Section 5.2.5.2.1, which addresses EEL eligibility criteria, BellSouth, is attempting to replace the word used in the FCC's rules: "customer" with "End User," a word which BellSouth seeks to limit to a vague subset of customers. If BellSouth wants to do that, its definition of End User should simply be that it means "customer". Petitioners will not agree to a definition that will serve to limit their rights and BellSouth's obligations to provide access to EELs, UNEs or any other services or facilities. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. DO YOU AGREE WITH BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE G-2?

A. No. Petitioners disagree with BellSouth's proposed restatement of this issue. The CLECs seek to arbitrate the definition of End User where it has been defined and that is in the General Terms and Conditions. The definition of End User is at issue in the General Terms and Conditions of this Agreement, so that it apply to all attachments of the Agreement. If the Petitioners sought to limit the effect of the definition of End User to Attachment 2, they would have proposed a definition for use in Attachment 2. They didn't and neither did BellSouth. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS ISSUE G-2 APPROPRIATE FOR ARBITRATION?

A. BellSouth's Issues Matrix states that Issue G-2 "is not appropriate for arbitration" because "the issue as stated by the CLECs and raised in the General Terms and Conditions of the Agreement has never been discussed by the Parties". BellSouth's Position statement appears to have been drafted by somebody that had not taken part in the negotiations. In any event, it is wrong. The Parties discussed the definition of End User in a number of contexts of the Agreement, including the Triennial Review Order ("TRO")-related provisions of Attachment 2. When Petitioners learned that BellSouth was going to attempt to use the definition of End User to limit its obligation to provide and CLECs' access to UNEs and Combinations, they refused to agree to the definition of End User proposed by BellSouth in the General Terms and Conditions. The fact that the issue is teed up in the conflicting versions of the definition contained in the General Terms and Conditions document (a document controlled by BellSouth) belies BellSouth's false claim that the issue had never been discussed by the Parties. Petitioners have sought to clarify, via arbitration, the correct definition of End User so that it may be used consistently throughout the Agreement. For these reasons, Issue G-2 is properly before this Commission. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. CAN YOU CONCEIVE OF CIRCUMSTANCES THAT MIGHT NOT BE COVERED BY THE SPECIFIC PROVISIONS OF ATTACHMENTS 3 AND 7?

A. Yes. Certain traffic passed to NewSouth by BellSouth over our Supergroups with a "0 CIC" would likely result in unbillable and uncollectible revenues. *[Sponsored by 1 **CLEC:** J. Fury (NSC)]*

> *Issue No. G-3 [Section 10.2]: Should the Agreement contain a general provision providing that BellSouth shall take financial responsibility for its own actions in causing, or contributing to unbillable or uncollectible CLEC revenue in addition to specific provisions set forth in Attachments 3 and 7?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE G-3.

A. The answer to the question posed in the issue statement is "YES". BellSouth should be financially liable for causing, failing to prevent, or contributing to unbillable or uncollectible CLEC revenue. A general provision complements the specific provisions contained in Attachments 3 and 7. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The provision the Petitioners propose is standard language that has regularly been included in BellSouth's interconnection agreements, and in fact is contained in each of the Petitioners existing agreements with BellSouth (See NewSouth agreement Section 8.1; the KMC and Xspedius agreements with BellSouth each contain the provision in Section 9.1) Accordingly, it is surprising for BellSouth to now be heard to complain that this provision is somehow unnecessary. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. Even though Attachments 3 and 7 address areas of responsibility for various billing record exchange deficiencies, the provision proposed by the Petitioners is necessary to address instances not contemplated by the specific circumstances addressed in Attachments 3 and 7. The general provision proposed by the Petitioners should be, as it has always been, included as a "catch all" to address those instances not specifically contemplated elsewhere in the Agreement. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. G-4 [Section 10.4.1]: What should be the limitation on each Party's liability in circumstances other than gross negligence or willful misconduct?

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

A. In cases other than gross negligence and willful misconduct by the other party, or other specified exemptions as set forth in CLECs' proposed language, liability should be limited to an aggregate amount over the entire term equal to 7.5% of the aggregate fees, charges or other amounts paid or payable for any and all services provided or to be provided pursuant to the Agreement as of the day immediately preceding the date of assertion or filing of the applicable claim or suit. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Petitioners and BellSouth should be able to establish and fix a reasonable limitation on their respective risk exposure, in cases other than gross negligence or willful misconduct. As this Agreement is an arm's-length contract between commercially-sophisticated Parties, providing for reciprocal performance obligations and the pecuniary benefits as to each such Party, the Parties should, in accordance with established commercial practices, contractually agree upon and fix a reasonable and appropriate, relative to the particular substantive scope of the contractual arrangements at issue here, maximum liability exposure to which each Party would potentially be subject in its performance under the Agreement. The Petitioners, as operating businesses party to a substantial negotiated contractual undertaking, should not be forced to accept and adhere to BellSouth's "standard" limitation of liability provisions, simply because BellSouth has traditionally been successful to date in leveraging its monopoly legacy to dictate terms and impose such provisions on its diffuse customer base of millions of end users requiring BellSouth service Petitioners' proposal represents a compromise position between limitation of liability provisions typically found in the absence of overwhelming market dominance by one party, in commercial contracts between sophisticated parties and the effective elimination of liability provision proposed by BellSouth. As any commercial undertaking carries some degree of a risk of liability or exposure for the performing party, such risks (along with the contractual, financial and/or insurance protections and other risk-management strategies routinely found in business deals to manage these issues) are a natural and legitimate cost of doing business, regardless of the nature of the services performed or the prices charged for them. As Petitioners are merely requesting that BellSouth accept some measure, albeit a modest one relative to universally-regarded commercial practices, of accountability and contractual responsibility for performance and do not seek to expose BellSouth to any particular risks or excess levels of risk that would not otherwise fall within the general commercial-liability coverage afforded by any typical insurance policy, the incremental cost or exposure for these ordinary-course, insurable risks is nonexistent or minimal to BellSouth beyond possible costs incurred for the insurance premiums, financial reserves and/or other risk-management measures already maintained by BellSouth in the usual conduct of its business, costs that would in any event likely constitute joint and common cost and already factored into BellSouth's UNE rates.

Petitioners' proposal is structured on a "rolling" basis, such that no Party will incur liabilities that in aggregate amount exceed a contractually-fixed percentage of the actual revenue amounts that such Party will have collected under the Agreement up to the date of the particular claim or suit. Thus, for example, an event that occurs in Month 12 of the term of the Agreement would, in the worst case, result in a maximum liability equal to 7.5% of the revenue collected by the liable Party during those first 12 months of the term. This amount is fair and reasonable, and in fact, is far less onerous than the standard liability-cap formulations – starting from a minimum (in some of the more conservative commercial contexts such as government procurements, construction and similar matters) of15% to 30% of the total revenues actually collected or otherwise provided for over the entire term of the relevant contract— more universally appearing in commercial contracts. The Petitioners' proposed risk-vs.-revenue trade-off has long been a staple of commercial transactions across all business sectors, including regulated industries such as electric power, natural resources and public procurements and is reasonable in telecommunications service contracts as well. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth maintains that an industry standard limitation of liability 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 not properly performed. This position is flawed because it grants Petitioners no more than what long-established principles of general contract law and equitable doctrines already command.: the right to a refund or recovery of, and/or the discharge of any further obligations with respect to, amounts paid or payable for services not properly performed. Such a provision would not begin to make Petitioners whole for losses they incur from a failure of BellSouth systems or personnel to perform as required to meet the obligations set forth in the Agreement in accordance with the terms and subject to the limitations and conditions as agreed therein. In my experience, it is a common-sense and universally-acknowledged principle of contract law that a party is not required to pay for nonperformance or improper performance by the other party. Therefore, BellSouth's proposal offers nothing beyond rights the injured Party would otherwise already have as a fundamental matter of contract law, thereby resulting in an illusory recovery right that, in real terms, is nothing more than an elimination of, and a full and absolute exculpation from, any and all liability to the injured Party for any form of direct damages resulting from contractual nonperformance or misperformance. Additionally, it is not commercially reasonable in the telecommunications industry, in which a breach in the performance of services results in losses that are greater than their wholesale cost — these losses will ordinarily cost a carrier far more in terms of direct liabilities vis-à-vis those of their customers who are relying on properly-performed services under this Agreement, not to mention the broader economic losses to these carriers' customer relationships as a likely consequence of any such breach. Petitioner's proposal for a 7.5% rolling liability cap is therefore more appropriate as a reasonable and commercially-viable compromise and should be adopted. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

> *Issue No. G-5 [Section 10.4.2]: **Should each Party be required to include specific liability-eliminating terms in all of its tariffs 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 eliminated?***

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

A. The answer to the question posed in the issue statement is "NO". BellSouth should not be able to dictate the terms of service between Petitioners and their customers by, among other things, holding Petitioners liable for failing to mirror BellSouth's limitation of liability and indemnification provisions in CLEC's End User tariffs and/or contracts. To the extent that a Party does not, or is unable to, include specific elimination-of-liability terms in all of its tariffs and End User contracts (past, present and future), and provided that the non-inclusion of such terms is commercially reasonable, in the particular circumstances, that Party should not be required to indemnify and reimburse the other

Party for that portion of the loss that would have been limited had the first Party included in its tariffs and contracts the elimination-of-liability terms that such other Party was successful in including in its tariffs at the time of such loss. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. It is not reasonable to impose on Petitioners the burden of guaranteeing that their customers will accede to liability language identical to what BellSouth generally obtains. Petitioners do not have the market dominance or negotiating power of BellSouth, and thus do not have nearly the same leverage as BellSouth to dictate terms vis-à-vis their End Users and other contract counterparties. As such, holding Petitioners to a standard that, in actual effect, assumes comparable negotiating positions for Petitioners and BellSouth in their respective markets is inappropriate, since it is clearly in each Party's own business interest, first and foremost, to at all times seek and secure in each particular aspect of its business operations the most favorable limitations on liability that it possibly can obtain. For these reasons, Petitioners propose that they be required to negotiate liability language that actually reflects the terms that they could reasonably be expected to secure in their exercise of diligence and commercially reasonable efforts to maintain effective contractual protections for their own direct liability interests that are most critical to their respective businesses. As such, Petitioners request that the Agreement allow them to offer a measure of commercially reasonable terms on liability that they may need in the exercise of their reasonable business judgment to make available to End Users and contract counterparties in order to conduct their businesses. Accordingly, these terms may at some point need to make allowances, although Petitioners would naturally prefer not to do so if they were in a position to deny such terms, for some level of recovery for service failures. While each Party under the Agreement surely has a significant liability interest in ensuring that the other Party maintains an aggressive approach to tariff-based limitation of liability, such concerns are already adequately and more appropriately addressed by existing provisions of the Agreement and applicable commercial law stipulating that a Party is precluded from recovering damages to the extent it has failed to act with due care and commercial reasonableness in mitigation of losses and otherwise in its performance under the Agreement. In other words, any failure by Petitioners to adhere to these existing standards of due care, commercial reasonableness and mitigation in their tariffing and contracting efforts would, in itself, bar recovery for any otherwise-avoidable losses. In order to allay any concern BellSouth may continue to have notwithstanding the above, Petitioners would agree to include terms that more expressly require each Party to mitigate any damages vis-à-vis third parties, for example a promise to operate prudently and perform routine system maintenance. These terms should make abundantly clear that, even without a rigid tariff-based standard, adequate protection will exist for BellSouth with respect to claims by a third-party customer of a Petitioner *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has proposed language that would require Petitioners to ensure that their tariffs and contracts include the same limitation of liability terms that BellSouth achieves in its own agreements. As mentioned previously, Petitioners should not be required to offer the same tariff liability terms and conditions as BellSouth. Moreover, it is likely that CLECs in certain instances would not even be able to obtain the same liability provisions from a customer due to the fact that a CLEC generally has to concede, where it can do so prudently in weighing its business-generation needs against the corresponding liability concerns, on certain terms to attract customers in markets dominated by incumbent providers. Given the vast disparity between BellSouth and the Petitioners in overall bargaining power and their relative leverage in the communications market it is patently unfair for BellSouth to attempt to dictate tariff terms that would limit the Petitioners' recourse and subject it to indemnity obligations by holding it to tariff terms that, in certain instances, may be uniquely obtainable by BellSouth. Such a provision is clearly a one-sided provision for the benefit of BellSouth and should not be adopted. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE G-5?

A. BellSouth's proposed restatement of the issue focuses on the CLEC's "election" not to include "standard industry limitations of liability" in their tariffs, and "who should bear the risks" in that event. Although BellSouth attempts to skew the issue with the false implication that CLECs have the same ability to impose the same liability provisions that BellSouth does, the core issue remains the same. Indeed, BellSouth's statement illustrates Petitioners' overall concern regarding this issue. BellSouth unreasonably believes that a CLEC's inability to secure the same liability language as BellSouth reflects their affirmative and commercially *unreasonable* choice not to do so. As explained above, it is not a clear choice, but rather is more likely to be a result of a competitive marketplace for CLEC-provided services and, given the CLECs' generally inferior negotiating leverage, a product of the trade-off between remaining competitive in the market and trying to secure otherwise ideal levels of contractual liability protection, that could result in language more favorable to their customers than that which BellSouth has grown accustomed to extracting from its own customers in a monopoly environment. BellSouth's characterization of the limitation-of-liability language it demands is "industry standard" is thus misleading. Such language may still be standard for BellSouth, but it is already becoming or is likely to become less standard for non-incumbent providers in a competitive marketplace. Petitioners have stated, however, that the liability language they include in their End User contracts will be commercially reasonable, as it is in the Petitioners' natural best interests to secure the best terms on liability issues they possibly can in the circumstances.

Regarding BellSouth's question "who will bear the risks?", Petitioners have already made clear that they will indemnify BellSouth against any loss resulting from their own failure to obtain liability language that does not accord with the commercial reasonableness and duties of mitigation otherwise required of them under the Agreement. Under this language, Petitioners plainly bear the risk just as they would under BellSouth's proposed language. However, the difference is that CLECs find themselves in a position of no longer being able to expect – in all cases and for the next three-and-one-half years – BellSouth's standard will be the commercially reasonable benchmark for use in the contexts of Petitioners' businesses. Indeed, with heightened competition, it would stand to reason that consumers may begin to chip away at a standard developed in the days when BellSouth was a legal monopoly. While BellSouth may be well positioned to hold to its standard, it is entirely inappropriate to prejudge that competitors, such as CLECs, will find it commercially reasonable, if possible at all, to insist that their customers bear the brunt of that same standard. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. G-6 [Section 10.4.4]: 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?

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

A. The answer to the question posed in the issue statement is "NO". The limitation of liability terms in the Agreement should not preclude damages that CLECs' End Users incur as a foreseeable result BellSouth's performance of its obligations, including its provisioning of UNEs and other services. Damages to End Users that result directly, proximately, and in a reasonably foreseeable manner from BellSouth's (or a CLEC's) performance of obligations set forth in the Agreement that were not otherwise caused by, or are the result of, a CLEC's (or BellSouth's) failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage should be considered direct and compensable under the Agreement for simple negligence or nonperformance purposes. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. In any contract, including the Agreement, each Party should be liable for damages that are the direct and foreseeable result of its actions. Where the injured person is a customer of one Party, providing relief is no less proper where, as in the case of the Agreement, a contract expressly contemplates that services provided are being directed to end users or consumers identified therein. Such liability is an appropriate risk to be borne by any service provider in a contract that clearly envisions that the effect of performance or nonperformance of such services will be passed through to ascertainable third parties related to the other Party to the contract. In this Agreement, being a contract for wholesale services, liability to injured End Users must be contemplated and covered by express language, subject, in any event, to the forseeability and legal and proximate cause limitation as Petitioners have proposed for express inclusion in the Agreement in this particular instance as well as in addition to those found in the Agreement's general liability provisions. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's position on liability vis-à-vis End Users is somewhat ambiguous insofar as its language merely states that "[e]xcept in cases of gross negligence or willful or intentional misconduct, under no circumstances shall a Party be responsible or liable for indirect, incidental, or consequential damages" while, in other provisions of the Agreement there are disclaimers of liability to End Users that are predicated on specified circumstances (for example, non-negligent damage to End User premises, among others). It is BellSouth's stated position that "[w]hat damages constitute indirect, incidental or consequential damages is a matter of state law at the time of the claim and should not be dictated by a party to an agreement." BellSouth is mistaken. At the onset, liability, limitation of liability, indemnification and damages are all matters of state law, nonetheless BellSouth includes provisions for all of these matters in its template agreement (the basis for this Agreement and other BellSouth interconnection agreements). Therefore, BellSouth contradicts itself in claiming the terms of the Agreement cannot address the substance of the Parties' negotiated agreement as to what will constitute, as between such Parties only, indirect, incidental, and/or consequential damages for purposes of their respective liabilities. This is simply a matter of risk allocation among the Parties expressly bound by the terms of this Agreement and, as such, there is no issue of "dictating" the Parties' agreed understanding on these damages to any third parties as to whom they may arise. Petitioners merely seek a reasonable contractual standard for purposes of allocating these third-party risks as between BellSouth and Petitioners exclusively. If any claim or loss would fail to meet the standards Petitioners propose for inclusion in the Agreement, the Party seeking compensation would simply be forced to bear these risks with respect to its own third parties, regardless of what state law had to say on the particular issue. As such, Petitioners believe that BellSouth miscasts these issues in terms of ambiguous state-law concerns, whereas all that Petitioners are proposing here is a contractual allocation, binding on the Agreement Parties only, of the third-party risks already provided for throughout the Agreement by inserting a fair and reasonable standard that will offer a uniform and definitive statement as to each Party's potential exposure to these third-party risks. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE G-6?

A. Petitioners disagree with BellSouth's proposed restatement of the issue. BellSouth's statement of the issue misses the Parties' core dispute. Petitioners are not disputing the definition of indirect, incidental or consequential damages, but rather seek to establish with certainty that 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 are not included in that definition. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

A. The Party providing service under the Agreement should be indemnified, defended and held harmless by the Party receiving services against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications. Additionally, customary provisions should be included to specify that the Party receiving services under the Agreement should be indemnified, defended and held harmless by the Party providing services against any claims, loss or damage to the extent reasonably arising from: (1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent cased by the providing Party's negligence, gross negligence or willful misconduct. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Party receiving services under this Agreement is, at a minimum, equally entitled to indemnification as the party providing services. As is more universally the case in virtually all other commercial-services contexts, the service provider, not the receiving party, bears the more extensive burden on indemnities given the relative disparity among the risk levels posed by the performance of each. In other words, the higher level of risks inherent in service-related activities as compared to the mere payment and similar obligations of the receiving party typically results in a far heavier indemnity undertaking on the provider side. As such, the Party receiving services under this Agreement should, at a minimum, be indemnified for reasonable and proximate losses to the extent it becomes liable due to the other Party's negligence, gross negligence and/or willful misconduct, or failure to abide by Applicable Law. With regard to Applicable Law, the Parties agree in Section 32.1 of the General Terms and Conditions that "[e]ach Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, injunctions, judgments and binding decisions, awards and decrees that relate to its obligations under this Agreement ('Applicable Law')." With this provision expressly set forth in the General Terms and Conditions, it is logical that, a Party should be indemnified to a third-party due to the other Party's failure to comply with Applicable law, regardless of whether that Party is the providing or receiving Party. The Parties are in an equal contractual position under the Agreement to ensure compliance with Applicable Law as well as the terms and conditions of the Agreement and are, in any event, entitled to the benefit of Agreement provisions limiting any resulting liability or indemnity obligation to a reasonable and foreseeable scope; it is entirely equitable and appropriate for the noncomplying Party to indemnify the other for losses resulting from any such breach of Applicable Law. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposal provides that only the Party providing services is indemnified under this Agreement. Not to mention the extent of its deviation from generally-accepted contract norms providing precisely to the contrary, BellSouth's proposal is completely one-sided in that BellSouth, as the predominate provider of services under this Agreement, will be the only Party indemnified and the CLECs as the Parties predominately taking services under the Agreement will be the ones indemnifying BellSouth. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

A. Given the complexity of and variability in intellectual property law, this nine-state Agreement should simply state that no patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by the Agreement and that a Party's use of the other Party's name, service mark and trademark should be in accordance with Applicable Law. The Commission should not attempt to prejudge intellectual property law issues, which at BellSouth's insistence, the Parties have agreed are best left to adjudication by courts of law (see GTC, Sec. 11.5). *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale for Petitioners' position is that intellectual property law is a highly specialized area of the law where the bounds of what is and is not lawful are hashed out in case law that can vary among jurisdictions. Petitioners are fully prepared to ensure that their marketing efforts comport with those varying standards and will consult with experts in the field of intellectual property law when appropriate. Petitioners are not however willing to hamstring their marketing departments so that they are at a disadvantage and cannot do what other CLEC marketing departments can do when engaging in comparative advertising and other sales and marketing initiatives. Since Petitioners believe that the services they provide often compare favorably with those provided by BellSouth, we intend to preserve our right to engage in comparative advertising to the fullest extent permitted under the law. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. The language proposed by BellSouth is inadequate because it proposes to significantly restrict Petitioners' rights to engage in comparative advertising or use BellSouth's name, marks, logo and trademarks in ways that are permitted by Applicable Law. Joint Petitioners are not prepared to give up those rights and we do not believe that it would be appropriate for the Commission to order us to do so by adopting BellSouth's proposed language. If BellSouth wants Petitioners to sacrifice rights, particularly those which could put Petitioners at a disadvantage relative to other competitors, it should be prepared to on offsetting concession. It hasn't – and Joint Petitioners refuse to bow to BellSouth's demand to give up something for nothing. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. G-9 [Section 13.1]: Should a court of law be included among the venues at which a Party may seek dispute resolution under the Agreement?

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

A. The answer to the question posed in the issue statement is "YES". Either Party should be able to petition the Commission, the FCC or a court of law for resolution of a dispute. Given the difficulties experienced in achieving efficient regional dispute resolution, and the ongoing debate as to whether state commissions have jurisdiction to enforce agreements (CLECs do not dispute that authority) and as to whether the FCC will engage in such enforcement (or not), no legitimate dispute resolution venue should be foreclosed. There is no question that courts of law have jurisdiction to entertain such disputes (see GTC, Sec. 11.5); indeed, in certain instances, they may be better equipped to adjudicate a dispute and may provide a more efficient alternative to litigating in up to 9 different jurisdictions or to waiting for the FCC to decide whether it will or won't accept an enforcement role given the particular facts. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Petitioners submit that it is unreasonable to exclude courts of law from the available list of venues available to address disputes under this Agreement. There is no question that courts of law have proper jurisdiction over disputes arising out of this Agreement, and in fact, BellSouth and the Petitioners have agreed to language providing as much elsewhere in the Agreement, including in Sec. 11.5 of the General Terms and Conditions (and in prior agreements (see, e.g., Xspedius agreement at Section 15)) Therefore, at a minimum, internal consistency militates in favor of including courts of law as available venues. Furthermore, in a number of instances, such as the resolution of intellectual property issues, tax issues, the determination of negligence, willful misconduct or gross negligence issues, petitions for injunctive relief and claims for damages, courts of law may be far better equipped to adjudicate such disputes. The Commission and the FCC are obviously the expert agencies with respect to a number of the issues that might arise in connection with this Agreement (and a court can if appropriate defer to the expertise of the state or federal commission under the doctrine of primary jurisdiction, if these types of complaints are brought directly to courts), however the foregoing types of disputes would tax heavily the Commission's expertise and resources.

In addition, administrative efficiency favors inclusion of the courts as venues for dispute resolution. Given that this Agreement, or an Agreement very similar to it, will likely be adopted across BellSouth's nine-state region, the courts may for certain disputes and in certain contexts provide a more efficient alternative to litigating in up to 9 different jurisdictions or to waiting for the FCC, to decide whether or not it will accept an enforcement role given the particular facts.

Petitioners' experience has been that achieving efficient regional dispute resolution is already too difficult and it need not be made more difficult be the elimination of the courts as a possible venue for dispute resolution. As a result of the difficulties inherent in enforcing a multi-state agreement (technically, separate agreements for each state), BellSouth often is able to force carriers into heavily discounted, non-litigated settlements. Such settlements often are, heavily discounted to reflect the exorbitant costs associated with litigating an issue that exists region-wide, but that gives rise to a disputed amount that may be too low for a single carrier to justify litigating in each state jurisdiction separately. Foreclosing the courts as a venue for dispute resolution may prevent CLECs from litigating legitimate disputes that cannot efficiently be litigated across 9 different states or at the FCC, where dispute resolution is expensive and uncertain.

At bottom, elimination of the court of law as a venue option for dispute resolution unnecessarily forecloses a viable means for efficient dispute resolution. The parties must decide on a case-by-case basis the appropriate venue for a particular dispute, and a court of law with competent jurisdiction should not be excluded from those choices.

*[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has proposed language that would require parties to resolve disputes regarding the interpretation or implementation of the Agreement only before the Commission or the FCC. BellSouth's position serves only to foreclose a necessary and appropriate venue for dispute resolution and to make dispute resolution under the agreement more burdensome than it need be. Indeed, BellSouth rejected other CLEC proposals designed to create efficient opportunities for regional dispute resolution. Moreover, BellSouth's proposal also fails to address problems created when a state commission does not have the ability to grant relief requested – whether it be injunctive or compensatory. Accordingly, BellSouth's language should be rejected.

Elimination of a court of law as a possible venue for dispute resolution only benefits BellSouth. It needlessly forecloses a legitimate venue for resolving contract claims and disputes and it has the potential of unfairly forcing CLECs to re-litigate the same issue in 9 different states, or, if claimed damages spread across all the states are too small, not to pursue their rights to enforce compliance with the Agreement at all. While the FCC theoretically may be available as an enforcement venue for disputes arising out of the Agreement, the FCC is often slow to decide as a threshold matter, whether in fact, it will even accept an enforcement role under particular facts. Assuming that the FCC is willing to exercise its jurisdiction (if it decides it has jurisdiction), the FCC often takes many months and in some cases years to render decisions, which, in the context of business contracts that have daily and on-going impact, is unacceptable. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE G-9?

A. The CLECs disagree with BellSouth's proposed restatement of the issue, as it attempts to improperly skew the issue by incorporating the false implication that there are exclusive, efficient and adequate administrative remedies available to address all claims and disputes that may arise under the Agreement and that there is an applicable mandate that such remedies be exhausted before parties may resort to a court. BellSouth's own insistence that intellectual property related claims and disputes must go directly to a court of law (a provision to which the Petitioners agreed) underscores that BellSouth's premise and position are false. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

Issue No. G-12 [Section 32.2]: Should the Agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?

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

A. The answer to the question posed in the issue statement is "YES". Nothing in the Agreement should be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, as defined in the Agreement, except in such cases where the Parties have explicitly agreed to a limitation or exemption. Moreover, silence with respect to any issue, no matter how discrete, should not construed to be such a limitation or exception. This is a basic legal tenet and is consistent with both federal and Georgia law (agreed to by the parties), and it should be explicitly stated in the Agreement in order to avoid unnecessary disputes and litigation that has plagued the Parties in the past. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners' position is essentially a restatement of Georgia law, which the Parties have agreed is the body of contract law applicable to the Agreement. Because several of the Petitioners have been confronted with BellSouth-initiated litigation in which BellSouth seeks to upend this principle of Georgia law, all Petitioners believe it is important that the

Agreement be explicit on this point. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it purports to adopt principles that differ from Georgia contract law (already agreed to by the Parties as being the governing contract law) – and, for that matter, black-letter contract law. Although the specifics of this argument might best be left to briefing by counsel, it is important to note that BellSouth's proposal attempts to turn universally accepted principles of contracting on their head. The case of interconnection agreements presents no exception to the rule. Parties to a contract may agree to rights and obligations different than those imposed by Applicable Law. When they do so, however, they need to do it explicitly. It is far easier to set forth negotiated exceptions to rules than it is to set forth all the rules for which no exceptions were negotiated. Moreover, Petitioners must stress that in the context of their negotiations with BellSouth, they have refused to negotiate away rights for nothing in return. The Act and the FCC and Commission rules and orders do not exist for the purpose of seeing how CLECs and the Commission can detect and overcome attempts by BellSouth to evade obligations that are contained therein with contract language that skirts certain obligations. If BellSouth wants to free itself from an obligation under Section 251, or any other provision of Applicable Law (including FCC and Commission rules and orders) it needs to identify that obligation and offer a concession acceptable to Petitioners in exchange – otherwise, consistent with Georgia Law, all obligations under

Applicable Law are incorporated into this Agreement. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. G-13 [Section 32.3]: How should the Parties deal with non-negotiated deviations from the state Commission-approved rates in the rate sheets attached to the Agreement?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE G-13.

A. Any non-negotiated deviations from ordered rates should be corrected by retroactive true-up to the effective date of the Agreement within 30 calendar days of the date the error was identified by either Party. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners have entered into this Agreement with the expectation that the rates, incorporated in the Agreement, are accurate. Such intent is reflected in the undisputed language of this provision, which states, "[w]here a Commission has adopted rates for network elements or services provided under this Agreement, as of the effective date, it is the intent of the Parties that the rate exhibits incorporated into this Agreement will be those rates." Petitioners proposed language regarding true-up is intended to cover those situations in which BellSouth made an error inputting a rate into the rate sheets so that the rate for a particular UNE, interconnection, collocation or related service is not the rate approved by the Commission. In such an event, the incorrect rate should be corrected and retroactively applied to the effective date of the Agreement, to reflect the Parties' intent when executing the Agreement. The Commission should adopt the CLEC proposed language to avoid any inequitable result whereby Petitioners would be billed incorrect rates by BellSouth due to a BellSouth inputting error in the rate sheets of the Agreement. Petitioners recognize that a rate error could mean that the Petitioners are charged a higher or lower rate than the Commission-approved rate for the particular UNE or related service. Regardless, the Petitioners seek the Commission-approved rates and business certainty under this Agreement. Therefore, Petitioners propose that any rate error be corrected and applied retroactively to the effective date of the Agreement, whether the incorrect rate is higher or lower than the Commission-approved rate. Furthermore, Petitioners propose that thirty (30) days, a full billing cycle, is sufficient time for BellSouth to correct a rate error in the Agreement and true-up any resulting incorrect billing to the effective date of the Agreement. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language provides that upon request by either Party, errors in rate sheets will be corrected prospectively by amendment to the Agreement. It is BellSouth's position that any corrections to the rate sheets should be applied prospectively, regardless of whether the rate increases or decreases as a result of such amendment. During negotiations, BellSouth has argued that it is the Petitioners' as well as BellSouth's responsibility to ensure the accuracy of the rates in the Agreement. Accordingly, if either Party identifies an error in the rate sheets, the error is the fault of both Parties and therefore, the corrected rate will apply prospectively. BellSouth is incorrect in asserting that the CLECs are responsible for the accuracy of the rates in the Agreement. It is BellSouth that creates the rate sheets and is responsible to charge the rates ordered by the

Commission, not the CLECs. Furthermore, it is BellSouth that has employee(s) designated to input Commission-approved rates in the rate sheets – not the CLECs - and the CLECs should not have to expend time and resources to check BellSouth's work (that should be BellSouth's job).

BellSouth has complete ownership over its template agreement (the base agreement for any interconnection negotiation) and makes all changes to the template as a result of negotiations. It is my experience, during the negotiations process, that BellSouth keeps its template agreement locked and will not give out the password to the negotiating party. Thus, only BellSouth can make changes to the Agreement, including the rate sheets. BellSouth has argued that it must maintain strict control over the template agreement so a carrier cannot make any changes to the document without BellSouth's knowledge. In light of BellSouth's clear ownership over the documents, BellSouth cannot genuinely argue now that the CLECs have equal responsibility as BellSouth to ensure the accuracy of the rates included in the rate sheets of the Agreement. Accordingly, if CLEC or BellSouth identifies an error in the rate sheet, it is BellSouth's error and the error should be expeditiously corrected and the corrected rate applied retroactively to the effective date of the Agreement. Such a result will ensure consistency and business certainty between the Parties. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. G-14 [Section 34.2]: Can either Party require, as a prerequisite to performance of its obligations under the Agreement, that the other Party adhere to any requirement other than those expressly stipulated in the Agreement or mandated by Applicable Law?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE G-14.

A. The Parties should not be permitted to hold performance hostage to terms not included in the Agreement and not mandated by Applicable Law. More specifically, neither Party should, as a condition or prerequisite to such Party's performance of its obligations under the Agreement, impose or insist upon the other Party's (or any of its End Users') adherence to any requirement or obligation other than as expressly stipulated in this Agreement or as otherwise mandated by Applicable Law. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. If a contract is to have any meaning and value – and it should have both, performance under a contract cannot be subjugated to conditions not incorporated therein or otherwise not required by Applicable Law. Petitioners are prepared to fulfill every provision of their proposed Agreement, and expect BellSouth to adhere to the same standard. It is not reasonable for BellSouth to cling to the notion that it may condition its performance on a condition precedent that is not incorporated in the Agreement and is not otherwise required by Applicable Law. For this reason, Petitioners have proposed language stating that "Neither Party shall … impose or insist upon the other Party's (or any of its End Users') adherence to any requirement or obligation other than as expressly stipulated in this Agreement or as otherwise mandated by Applicable Law." *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has not proposed any alternative language for Section 34.2. Instead, BellSouth maintains that the Parties are free to negotiate with each other as they may with third parties, and that neither Party should use this Agreement to interfere with a third party's contractual rights and obligations. That, however, is not the issue. BellSouth is free to contract with third parties – but it should not be free to alter or condition its obligations under this Agreement based on its contractual arrangements with third parties. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. G-15 [Section 45.2]: If BellSouth changes a provision of one or more of its Guides that would cause CLEC to incur a material cost or expense to implement the change, should the CLEC notify BellSouth, in writing, if it does not agree to the change?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE G-15.

A. The answer to the question posed in the issue statement is "NO". If the contemplated change to one or more of BellSouth's Guides would cause CLEC to incur a material cost or expense to implement the change, BellSouth and CLEC should negotiate an amendment to the Agreement to incorporate such change. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Nearly all of the CLECs involved in this arbitration have had one bad experience or another with BellSouth using one of its Guides as controlling authority for an issue between the Parties instead of the Agreement. Despite these bad experiences, the CLECs recognize that BellSouth's Guides have a role in the implementation of this Agreement and others, and therefore, have worked with BellSouth to draft a provision that will allow for certain changes to BellSouth Guides to become effective without an amendment to the Agreement. Nevertheless, it is the CLECs' position that any proposed change to a BellSouth Guide that would cause the CLECs to incur a material cost must be accomplished by an amendment to this Agreement. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. The undisputed portion of this provision provides that BellSouth will not make a change to one of its Guides that: (1) alters, amends or conflicts with any term of this Agreement; (2) changes any charge or rate, or the application of any charge or rate, specified in this Agreement; (3) adds a new rate or rate element not previously specified in the Agreement; or (4) increases an interval set forth in this agreement, without signing an amendment to this Agreement reflecting the change. It is the position of the CLECs that a proposed change that will cause the CLECs to incur a material cost to implement is tantamount to any of the changes listed above that require an amendment. BellSouth's proposed language provides that a change in a Guide that will result in a material cost to the CLECs to implement will become effective if a CLEC fails to inform BellSouth in writing that it does not agree to such change or alteration within thirty (30) calendar days of notice of such change. It is BellSouth's position that such a change should be become effective without an amendment to the Agreement and, moreover, it should be the CLECs' responsibility to notify BellSouth if they do not agree with the change. CLECs cannot accept BellSouth's negative, opt-out approach whereby the change will go into effect unless the CLECs notify BellSouth of their disagreement. Such a burden is too onerous and the ramifications too severe to be acceptable to the CLECs. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS IT TOO BURDENSOME TO CLECS TO NOTIFY BELLSOUTH IF IT DOES NOT AGREE WITH A CHANGE INVOLVING A MATERIAL COST TO IMPLEMENT?

A. As can be easily imagined, with the number of BellSouth Guides that are referenced throughout the Agreement, including Guides for pre-ordering, ordering, collocation, E-911, jurisdictional factors, issue resolution, rights-of-way, programming, products and services, technical references, disputes, LNP, operational understanding, etc., CLECs cannot possibly keep up with every single change to these Guides. Nevertheless, BellSouth proposes that CLECs keep track of every change, assess whether such a change would cause a material cost to implement, and provide notice to BellSouth of disagreement with such change, all within thirty (30) calendar days of the date BellSouth claims notice of such changes were made. Moreover, such notice may not be received on the date BellSouth marks as its issue date and it may not contain enough information about the change for a CLEC to determine whether it might cause it to incur material expenses. BellSouth's proposal places too much of a burden on the CLECs and the more equitable way to deal with such change is through the amendment process to the Agreement. While I believe that the CLECs, as well as BellSouth, have worked very hard to develop a workable solution for incorporating BellSouth's Guides, and subsequent changes to those Guides, into the Agreement, the CLECs cannot agree to BellSouth's proposal with regard to changes that will cause the CLECs to incur a material cost to implement. Given the proliferation of Guide references, accepting BellSouth's language would severely undermine the integrity of the Agreement and, indeed the entire Section 251/252 negotiation and arbitration process. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. G-16 [Section 45.3]: Should the obligations set forth in the Agreement be impacted by unreasonable and/or discriminatory revisions to BellSouth tariffs?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE G-16.

A. The answer to the question posed in the issue statement is "NO". Unreasonable and/or discriminatory revisions to BellSouth's tariffs should not affect the obligations set forth in the Agreement. Specifically, to the extent that tariff changes are inconsistent with the provisions of the Agreement, or are unreasonable or discriminatory, they should not supersede or become incorporated into the Agreement. Such changes may only become part of the Agreement by written amendment negotiated and/or arbitrated by the Parties. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As with the BellSouth Guides discussed above, the Agreement contains many references to BellSouth's various intrastate and interstate tariffs. In order to balance the fact that the CLECs must keep up with BellSouth's tariff revisions to its interstate FCC Tariff No. 1, as well as its state General Subscriber Services Tariff, Private Line Tariff and Intrastate Access Services Tariffs, the CLECs should be able to require an amendment for any tariff changes that it alleges are unreasonably and/or discriminatory. Petitioners' language strikes the right balance between protecting CLECs from the impact of subsequent unreasonable or discriminatory changes to BellSouth tariff provisions incorporated by reference into the Agreement and allowing BellSouth to make subsequent reasonable and nondiscriminatory revisions to such tariff provisions. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate in that it makes no provision for instances in which a Party objects to the incorporation of tariff changes into the Agreement that a Party believes to be unreasonable and/or discriminatory. Furthermore, the Parties do not agree on the framing of the issue of BellSouth tariff revisions. Whereas, the CLECs take issue with tariff changes that may be unreasonable and/or discriminatory. BellSouth simply frames the issues as what effect should subsequent changes to the BellSouth tariffs have on the Agreement. The issue is however limited to those changes which are unreasonable or discriminatory and whether such changes will operate to incorporate unreasonable and discriminatory terms into the agreement absent an amendment.

BellSouth fails to acknowledge the narrow circumstances in which the CLECs seek to negotiate an amendment: in those instances when the CLECs feel a tariff revision is unreasonable and/or discriminatory and will have such effect on the terms of the Agreement. Moreover, BellSouth's assertion that the Commission has a process for disputing proposed tariff provisions does not address the fact that the services ordered under the Agreement are governed by the Agreement, regardless of whether various tariff provisions are referenced to fill out its terms. (BellSouth also ignores the fact that the Petitioners simply do not have the resources to monitor each and every tariff change BellSouth proposes to make to its nine sets of state tariffs and to its federal tariffs.)

Petitioners have negotiated with BellSouth and instituted this Arbitration so that their rights will be governed by the terms and conditions of this Agreement. Nevertheless, the CLECs have agreed to numerous tariff references throughout the Agreement, largely for the convenience of BellSouth. The CLECs have further agreed that BellSouth's tariff will govern over the Agreement in limited circumstances (if a tariff is referenced for the purposes of a service that is provisioned pursuant to such tariff, and there is a conflict between such reference tariff provision and the Agreement the terms of the tariff will control). Therefore, where BellSouth makes unreasonable and discriminatory changes to such tariffs, those changes should not become part of the Agreement, by virtue of the fact that the Parties had agreed to refer to different tariff terms. Moreover, the Commission should understand that the CLEC proposed language is reciprocal and BellSouth may avail itself of this option as well. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

RESALE (ATTACHMENT 1)

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

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

NETWORK ELEMENTS (ATTACHMENT 2)

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

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

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

Issue No. 2-4 [Section 1.4.3]: (A) Should CLEC be required to submit a BFR/NBR to convert a UNE or Combination (or part thereof) to Other Services or tariffed BellSouth access services? (B) In the event of such conversion, what rates should apply?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-4(A).

A. The answer to the question posed in the issue statement is "No". Petitioners should not be required to submit a BFR/NBR to convert a UNE or Combination (or part thereof) to Other Services or tariffed BellSouth access services. Rather, the CLECs should be allowed to submit an LSR or ASR, as appropriate. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The BFR/NBR process is inappropriate for this type of conversion. The BFR process, as defined in the Agreement, is utilized when BellSouth is requested to provide a new or modified network element, interconnection option or other service option pursuant to the Act, and the NBR process is utilized when a CLEC requests a new service, or element that is not required by the Act. If a CLEC seeks to convert a UNE or Combination (or part thereof) to Other Services or tariffed BellSouth access services, the CLEC is not requesting a new network element or service. Rather, the CLEC simply seeks to convert from a UNE or Combination to another existing BellSouth service provided in Attachment 2 or pursuant to BellSouth's tariff. Accordingly, the CLECs should submit an LSR, or appropriate spreadsheet, to convert a UNE or Combination (or part thereof) to a service pursuant to Attachment 2 of the Agreement, or an ASR to convert to a BellSouth's tariffed access services.

It is my understanding that the FCC concluded, in the TRO, that carriers may convert from UNEs and UNE Combinations to wholesale services and vice versa. It is also my understanding that the FCC concluded such conversions should be seamless and not affect any end-user customer's service. As discussed in more detail in the testimony regarding Attachment 11, the BFR/NBR process is lengthy and expensive and would not result in the seamless process the FCC had directed in the TRO. On the other hand, the LSR/ASR are existing processes with established intervals that should ensure the conversion is completed in a reasonable timeframe. Therefore, the LSR/ASR should be utilized for conversions of UNEs and wholesale services. *[Sponsored by **3 CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth language is inadequate because it proposes that if a CLEC is required to convert a UNE or Combination (or part thereof) to Other Services or tariffed BellSouth access service, the CLEC must submit a BFR or NBR. As mentioned previously, the CLECs should not be subject to the BFR/NBR process, but instead should be able to request such conversions via an LSR or ASR. BellSouth's language seeks to make CLECs endure significant time and costs associated with developing a new process via the BFR/NBR, which should not be necessary to convert from one BellSouth service to another. *[Sponsored by **3 CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. DOES THE POSITION STATEMENT PROPOSED BY BELLSOUTH FOLLOW ITS LANGUAGE PROPOSAL?

A. No. BellSouth's position statement makes no reference of the BFR or NBR process, and instead explains that CLECs can submit spreadsheets for such conversions. Since we have agreed to use spreadsheets in the past, this is a promising development. However, much remains unclear, including how much BellSouth will seek to charge for use of such spreadsheet and just what a "commingled ordered document" is. In the meantime, BellSouth's position is too vague and should not replace language proposed by CLECs. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-4(B).

A. For a conversion of a UNE or Combination (or part thereof) to Other Services or tariffed BellSouth access services, the non-recurring charges should be as set forth in Exhibit A of Attachment 2 or the relevant tariff, as appropriate. In addition, such charges should be commensurate with the work required to effectuate the conversion (cross connect only, billing change/records update only, etc.). *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. To the extent that a CLEC request a conversion of a UNE (or part thereof) to Other Services or tariffed services pursuant to Attachment 2, such charge should logically be included in the rates set forth in Exhibit A of Attachment 2. Exhibit A of Attachment 2 includes rates for various types of conversions, including CLEC-to-CLEC conversions, service order conversions, and loop/transport combination conversions. Accordingly, there is no reason why rates for conversions of UNEs or Combinations (or parts thereof) to Other Services or tariffed services cannot similarly be included in Exhibit A of Attachment 2. Moreover, any conversion rates included in the Agreement should be commensurate with the work required to effectuate the conversion (cross connect only, billing change/records update only, etc.) and should not be considered an opportunity to price gouge CLECs by charging full NRCs, as though the circuit were being established as a new circuit or disconnected. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it proposes that the CLECs be charged rates associated with the BFR/NBR for these conversions. There are no established rates for the BFR/NBR process, rather rates are developed as BellSouth develops processes and operations to implement the BFR/NBR. However, converting a UNE or Combination (or part thereof) to Other Services or tariffed BellSouth access services should not require substantial development and related costs. Rather, the conversion charges, commensurate with the work required to effectuate the conversion, should be set forth in Exhibit A to Attachment 2. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. DOES THE POSITION STATEMENT PROPOSED BY BELLSOUTH TRACK ITS LANGUAGE PROPOSAL?

A. No, it does not. BellSouth's position statement says that there should be no charge for the conversion itself. Obviously, if we can get language that reflects that position, we will have no problem. However, the position statement also includes the murky and vague a statement that "other applicable charges will apply". Without knowing what BellSouth considers applicable and whether such charges will be reasonable, , we certainly could not agree to such language and the Commission should reject it. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

> *Issue No. 2-5 [Section 1.5]: (A) In the event UNEs or Combinations are no longer offered pursuant to, or are not in compliance with, the terms set forth in this Agreement, which Party should bear the obligation of identifying those service arrangements? (B) What recourse may BellSouth take if CLEC does not submit a rearrange or disconnect order within 30 days? (C) What rates, terms and conditions should apply in the event of a termination, re-termination, or physical rearrangements of circuits?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-5(A).

A. In the event UNEs or Combinations are no longer offered pursuant to, or are no longer in compliance with, the terms set forth in the Agreement, it should be BellSouth's obligation to identify the specific service arrangements that it insists be transitioned to Other Services pursuant to Attachment 2. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. BellSouth should be responsible for identifying any CLEC service arrangements that it seeks to transition from UNEs or Combinations to Other Services pursuant to Attachment 2. It is logical that the Party seeking a change under the Agreement should be responsible for identifying such change to the other Party. Any other result would place the burden on the Party that does not necessarily think that a service change is desirable or necessary. Consequently, if BellSouth insists that a UNE or Combination be transitioned to Other Services pursuant to Attachment 2 or tariffed services, it should, at least, be responsible for identifying such service arrangement to the CLECs. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it proposes that the CLEC will be responsible for identifying those service arrangements that BellSouth believes should no longer be offered pursuant to the Agreement. If it is BellSouth that wants the CLEC to transition a UNE or Combination to Other Services, BellSouth should notify the CLEC of its request. It is possible that BellSouth and the CLEC will have differing views as to which UNEs and Combinations should and should not be offered pursuant to the Agreement. Therefore, BellSouth should not rely on the CLECs to read its mind and identify service arrangements for transition. If BellSouth believes that a CLEC should be transitioning its service, it should notify the CLEC of its request. The CLECs, in turn, and in good faith, will respond to the BellSouth notice and, if required, begin the transition process in compliance with the terms and conditions of this Agreement. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-5(B).

A. If CLEC does not submit a rearrange or disconnect order within thirty (30) days, BellSouth may disconnect such arrangements or services without further notice, provided that the CLEC has not notified BellSouth of a dispute regarding the identification of specific service arrangements as being no longer offered pursuant to, or are not in compliance with, the terms set forth in the Agreement. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. BellSouth should not be able to disconnect any CLEC service arrangement if there is a dispute as to whether such a service arrangement should no longer be offered pursuant to, or is no longer is in compliance with, the terms of the Agreement. BellSouth should not be able to engage in self-help whereby it disconnects a CLEC service in light of a dispute. The Commission must compel BellSouth to adhere to the Dispute Resolution provisions of the Agreement. Otherwise, BellSouth's self-help actions will result in harm to the CLECs' business as well as harm Alabama consumers. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would allow it unilaterally to disconnect the CLECs' service arrangements if the CLECs do not submit orders to rearrange or disconnect those arrangements that BellSouth believes should not be provided pursuant to, or are no longer in compliance with, the terms of the Agreement by the thirty-first (31st) calendar day after the effective date of this Agreement. BellSouth's proposed language is inadequate in that it does not address how the Parties will proceed if there is a dispute as to whether a service arrangement should or should not be provided pursuant to the Agreement. Rather, BellSouth seeks to unilaterally disconnect CLEC service, despite a dispute. As stated above, such result will not only irreparably harm the CLECs' business in Alabama, it will also harm Alabama consumers, as their service will be impaired, if not terminated. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-5(C).

A. For arrangements that require a re-termination or other physical rearrangement of circuits to comply with the terms of the Agreement, non-recurring charges for the applicable UNE or cross connect from Exhibit A of Attachment 2 should apply. Disconnect charges should not apply to services that are being physically rearranged or re-terminated. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Agreement should set forth the non-recurring rate for such re-termination, which is likely to be nothing more than a cross-connect. All relevant rates for UNEs, Combinations, and related services should be included in the Agreement, including re-termination. That way, the Parties will be clear as to the charges involved and will be less likely to engage in billing disputes. Furthermore, there should be no disconnection charges associated for the physical rearrangement or re-termination of services that are no longer offered pursuant to the Agreement. The CLECs are not disconnecting a service, but rather are rearranging a service that cannot be maintained as currently offered under the Agreement. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate in that it simply states that "applicable disconnect charges will apply to a UNE/Combination that is rearranged or disconnected." Already it is clear that the Parties have a dispute over what is "applicable". BellSouth should not be able to assess disconnection charges when services are being rearranged or re-terminated, – the services are not being disconnected. BellSouth provided no persuasive reasons during negotiations as to why disconnect charges should apply if a UNE or Combination is converted to Other Services or BellSouth tariffed services. Under such a scenario, the CLECs are not requesting that its service be disconnected, but rather service is being converted to another type service because the existing service will no longer be offered once CLECs begin operations under the terms of the new Agreement. At bottom, since the CLECs are not requesting a disconnection, they should not be required to bear the disconnection charges. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

Issue No. 2-7 [Section 1.6.1]: ***What rates, terms and conditions should apply for Routine Network Modifications pursuant to 47 C.F.R. § 51.319(a)(8) and (e)(5)?***

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-7.

A. If BellSouth has anticipated such Routine Network Modifications and performs them during normal operations, then BellSouth should perform such Routine Network Modifications at no additional charge and within its standard provisioning intervals. If BellSouth has not anticipated a requested or necessary network modification as being a Routine Network Modification and, as such, has not recovered the costs of such Routine Network Modifications in the rates set forth in Exhibit A of Attachment 2, then BellSouth should notify the CLEC of the required Routine Network Modification and should request that CLEC submit a Service Inquiry to have the work performed. Each unique request should be handled as a project on an individual case basis. BellSouth should provide a TELRIC-compliant price quote for the request, and upon receipt of a firm order from CLEC, BellSouth should perform the Routine Network Modification within a reasonable and nondiscriminatory interval. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Routine Network Modifications generally should already be factored into BellSouth's rates and intervals. The FCC's rules require that costs associated with Routine Network Modifications can and should be recovered by BellSouth as part of the expense associated with network investment, and therefore they should already have been factored into BellSouth's TELRIC cost studies. Indeed, the FCC's rules are very clear that there may not be any double recovery by BellSouth of Routine Network Modification costs by virtue of BellSouth recovering both the cost of the UNE and a new charge for Routine Network Modifications that already have been factored into the UNE rate. The FCC's rules are also very clear that the onus is on BellSouth affirmatively to demonstrate that a requested modification was not contemplated by BellSouth as a "Routine Network Modification", and that the costs associated with the requested modification were not factored into BellSouth's TELRIC cost studies in any way whatsoever.

Petitioners' proposed language properly requires BellSouth to demonstrate that a requested modification is not Routine, and ensures that the Petitioners will be able to provision service to new customers as quickly as possible without being delayed by disputes with BellSouth about whether a particular modification is, in fact, a "Routine Network Modification". To the extent that the requested modification is a "Routine Network Modification" that has not been factored into BellSouth's UNE rates, the language proposed by the Petitioners suggests that each such unique request be handled as a project on an individual case basis. Once a type of request has been handled in this way, it will no longer be considered unique and, subsequent requests for the same type of modification should be processed expeditiously based on prior experience. Petitioners' proposed language also ensures that the rate BellSouth charges for the modification is a TELRIC-compliant rate and allows the requesting carrier to dispute the rate proposed by BellSouth without a delay in provisioning service to the requesting carrier's new customer. Accordingly, under the Petitioners' language, BellSouth will be precluded from delaying the provisioning of service to end users pending the outcome of any debate regarding the appropriate characterization of a requested modification, or the appropriate charges. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is problematic for a number of reasons. First, it includes the phrase "Except to the extent expressly provided otherwise in this Attachment". We're not aware of where we agreed to do otherwise and BellSouth has never been able to show us. It is not our intent to deviate from the requirements of Applicable Law, unless we get something from BellSouth to compensate us for that deviation. Here, no deviation was requested or made. Accordingly, BellSouth's superfluous (and thereby needlessly ambiguous) language should be rejected.

Second, BellSouth appears to be attempting to inappropriately re-open some of the UNE pricing decisions made by this Commission by inserting uncertainty with respect to Routine Network Modifications that it does as a matter of course. Specifically, BellSouth seems to be trying to carve out the ability to charge for such modifications, if it does not believe that the Commission-approved rates allow it to recover its costs. Either the costs were factored in and considered in BellSouth's costs studies and the Commission's setting of TELRIC rates or not. Whether BellSouth thinks it has recovered its costs should not factor into the equation.

Third, BellSouth's language includes an inappropriate "pay first" provision. Petitioners are willing to pay BellSouth a TELRIC compliant rate for any Routine Network Modification not previously considered in BellSouth's current UNE rates. However, Petitioners will not agree to pay whatever rate BellSouth demands (as would be required under BellSouth's language). So that the customer does not experience delay in getting service, BellSouth should provision upon receipt of a firm order. Any dispute about the appropriate rate can be handled through the normal bill dispute process and in a manner that does not impact the customer or Petitioner's ability to serve the customer. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-8 [Section 1.7]: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

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

A. The answer to the question posed in the issue statement is "Yes". BellSouth should be required to "commingle" UNEs or Combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to Section 271 of the Act. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Petitioners' proposed language seeks to ensure that BellSouth will provide UNEs and UNE Combinations commingled with services, network elements and any other offering it is required to provide pursuant to Section 271, consistent with the FCC's rules, which do not allow BellSouth to impose commingling restrictions on stand-alone loops and EELs.

The FCC has defined "commingling" as the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services. In the TRO, the FCC specifically eliminated the temporary commingling restrictions that it had adopted on stand-alone loops and EELs and affirmatively clarified that CLECs are free to commingle UNEs and combinations of UNEs with services (*i.e.*, non-UNE offerings), and further clarified that BellSouth is required to perform the necessary functions to effectuate such commingling. The FCC has also concluded that Section 271 places requirements on BellSouth to provide network elements, services and other offerings, and those obligations operate completely separate and apart from Section 251. Clearly, elements provided under Section 271 are provided pursuant to a method other than unbundling under section 251(c)(3). Therefore, the FCC's rules unmistakably require BellSouth to allow the Petitioners to commingle a UNE or a UNE combination with any facilities or services that they may obtain at wholesale from BellSouth, pursuant to Section 271. In short, BellSouth's efforts to isolate – and thereby make useless Section 271 elements – should be flatly rejected. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth interprets the FCC's rules as providing no obligation for it to commingle UNEs and Combinations with elements, services, or other offerings that it its required to provide to CLECs under Section 271. BellSouth's language turns the FCC's commingling rules on their head, and nothing in the FCC's rules or the TRO supports its interpretation. In fact, the FCC specifically rejected BellSouth's creative but erroneous interpretation of the TRO (including paragraph 35 of the errata to the TRO) when it concluded that CLECs may commingle UNEs or UNE combinations with facilities or services that a it has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act. Services obtained from BellSouth pursuant to Section 271 obligations are obviously obtained from BellSouth pursuant to a method other than Section 251(c)(3) unbundling, and therefore are not subject to any restrictions on commingling whatsoever. The Commission should therefore reject BellSouth's proposal as anticompetitive and unlawful. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

A. When multiplexing equipment is attached to a commingled circuit, the multiplexing equipment should be billed from the same jurisdictional authorization (Agreement or tariff) as the lower bandwidth service. If the commingled circuit involves multiple segments at the same bandwidth, the multiplexing should be billed from the jurisdiction of the loop. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. If a CLEC requests a commingled circuit in which multiplexing equipment is attached, then the multiplexing equipment should be billed at the lower bandwidth of service – *i.e.*, per the jurisdiction of the loop if a loop is attached or per the lower bandwidth transport, if the circuit involves commingled transport links. It is my understanding that the FCC held, in the TRO, that the definition of local loop includes multiplexing equipment. Therefore, the multiplexing should be at UNE rates when a UNE loop is part of the circuit. At the very least, the CLECs – as the Party ordering and paying for the service – should be able to choose whether it wants to purchase multiplexing out of the Agreement (connected to a UNE) or out of a BellSouth tariff. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language provides that when multiplexing equipment is attached to a commingled circuit, the multiplexing equipment will be billed from the same jurisdictional authorization (agreement or tariff) as the higher bandwidth service. The problem with this language is that, in a commingled circuit incorporating a DS1 UNE loop and DS3 special access transport (the most common kind of commingled circuit we expect to see), the multiplexing element would get billed at special access rates even though it is by definition part of the loop UNE. On a commingled circuit involving a DS1 UNE loop and DS1 special access transport, it is not clear what jurisdiction the multiplexing would be billed from. Such a lack of clarity can only lead to unnecessary disputes. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-10 [Section 1.9.4]: Should the recurring charges for UNEs, Combinations and Other Services be prorated based upon the number of days that the UNEs are in service?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-10.

A. The answer to the question posed in the issue statement is "YES." The recurring charges for UNEs, Combinations, and Other Services should be prorated based upon the number of days that the UNEs, Combinations, and Other Services are in service. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. It is axiomatic that a customer should pay only for what he receives, else the seller receives an unwarranted windfall. New entrants cannot afford to subsidize BellSouth by paying for elements and services that they do not use. Petitioners have therefore offered language stating that "fractionalized billing shall apply," such that recurring charges are prorated according to the number of days in the month that they were used. This is the way it has worked since we started buying UNEs from BellSouth and there is no rational reason to change this now. These terms proposed by Petitioners are commercially reasonable, as well as fair. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language seeks to impose upon Petitioners — for the very first time — a "minimum billing period." There is no valid or reasonable justification for this vague and undefined proposal. If a CLEC orders a UNE and its customer elects to switch to another carrier and the UNE loop is disconnected after say 10 days, there is no compelling reason why any of the Petitioners should have to pay for that UNE loop after it is disconnected. A minimum billing period of 30 days, 2 months, etc. (it is not clear from the language how BellSouth proposes to pick) would carry with it exclusive use right thereby inhibiting a customer's ability to switch carriers as he or she wishes. Moreover, to my knowledge, no minimum billing periods were built into the TELRIC-based prices the Commission approved for UNEs. BellSouth's proposed minimum billing periods are both anti-competition and anti-consumer and should be flatly rejected. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-11 [Section 2.1.1]: ***This issue has been resolved.***

Issue No. 2-12 [Section 2.1.1.1]: Should the Agreement include a provision declaring that facilities that terminate to another carrier's switch or premises, a cell cite, Mobile Switching Center or base station do not constitute loops?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-12.

A. The answer to the question posed in the issue statement is "NO." The Agreement should not include a provision declaring that facilities terminating to another carrier's switch or premises, a cell site, Mobile Switching Center, or base station do not constitute loops.

Such a provision would be inconsistent with the FCC's Triennial TRO. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. There is no basis to add BellSouth's expansive gloss to the what the FCC has had to say with respect to what is and is not a loop. The FCC has never limited the availability of loops according to the type or location of the customer that uses it. Thus, BellSouth may not unilaterally restrict facilities based on the type of customer served or the location of that customer. Thus, if a Petitioner requests a UNE Loop for the purpose of serving another carrier, including a cellular provider, and that facility is what the FCC considers to be a UNE Loop and will be used in accordance with FCC rules, BellSouth should be required to provide it on an unbundled basis. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is clearly over-expansive and proposes to pre-decide issues currently before the FCC in at least one reconsideration petition. BellSouth cannot lawfully impose such restrictions on our access to UNE Loops. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-13 [Section 2.1.1.2]: Should the Agreement require CLEC to purchase the entire bandwidth of a Loop, even in cases where such purchase is not required by Applicable Law?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-13.

A. The answer to the question posed in the issue statement is "NO." Petitioners should not be required to purchase the entire bandwidth of a Loop, in cases where Applicable Law permits line sharing, line splitting, or the ability of a customer to retain BellSouth xDSL-based services while purchasing voice serves from a CLEC using a UNE loop. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners' proposed language in Section 2.1.1.2 merely seeks to retain whatever rights CLECs presently enjoy with respect to loop access, including the right to obtain a portion of loop bandwidth so that voice-grade services may be provided by one carrier and other services, such as xDSL-based transport services may be provided by another. Thus, to the extent that Applicable Law (including state law) permits CLECs to continue to order line sharing, engage in line splitting or other arrangements whereby a customer may choose to retain BellSouth-provided xDSL-based transport services, Petitioners wish to preserve these rights in the Agreement. In sum, Petitioners' proposed language does nothing more than ensure that the Agreement explicitly affords them the loop unbundling rights already granted to them by regulatory authorities and non-discriminatory treatment vis-à-vis other carriers. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's has proposed language that will provide Petitioners with a portion of a loop's bandwidth only upon the agreement of the parties. BellSouth refuses to incorporate language requiring it to comply with Applicable Law. This position is unreasonable, as it would force Petitioners to secure BellSouth's agreement in order to obtain the shared UNE loop options already guaranteed them by Applicable Law. Moreover, BellSouth's proposed language simply introduces unnecessary ambiguity into the Agreement, because it would be not explicit as to the loop unbundling parameters with which BellSouth must comply. It is not commercially reasonable to use ambiguous terms in any contract where more specific language is available. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 2-13?

A. BellSouth has restated Issue 2-13 to focus only on whether it must unbundle the low-frequency portion of loop. This restatement improperly recharacterizes the issue which is about compliance with Applicable Law and securing non-discriminatory treatment. Moreover, BellSouth's restatement does not match its proposed Agreement language, which does not distinguish between the high-frequency and low-frequency portions of the loop. It therefore does not properly present the Parties' dispute to the Commission. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS ISSUE 2-13 APPROPRIATE FOR ARBITRATION?

A. BellSouth's position statement states that Issue 2-13 should not even be included in this Arbitration because "it involves a request by the CLECs that is not encompassed" in Section 251 of the 1996 Act. This statement is incorrect. Regardless of whether the shared use of a UNE loop is mandated under Section 251 or state law, this issue plainly involves a dispute over and related to loop unbundling which is clearly encompassed by Section 251. Moreover, this issue goes directly to ensuring that BellSouth's practices are just and reasonable, which are always within the jurisdiction of this Commission. Finally, loop unbundling is a separate checklist item under Section 271, and thus this Commission retains the authority to set rules and policy for its provisioning. In fact, it was on this ground that the North Carolina Commission arbitration panel recently recommended rejection of BellSouth's similar argument with respect to unbundled switching. For these reasons, Issue 2-13 is properly before this Commission. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-14 [Sections 2.1.2, 2.1.2.1, 2.1.2.2]: ***This issue has been resolved.***

Issue No. 2-15 [Section 2.2.3]: ***Is unbundling relief provided under FCC Rule 319(a)(3) applicable to Fiber-to-the-Home Loops deployed prior to October 2, 2003?***

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-15.

A. The answer to the question posed in the issue statement is "NO." The unbundling relief provided under FCC Rule 51.319(a)(3) is only applicable to Fiber-to-the-Home Loops deployed on or after October 2, 2003 (the effective date of the FCC's TRO). *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners have proposed language that first cites to FCC Rule 51.310(a)(3), setting forth BellSouth's obligation to unbundle Fiber-to-the-Home ("FTTH") loops, and then states that any unbundling relief adopted by the FCC for FTTH loops is applicable only to loops deployed after the effective date of the FCC's TRO. This language comports exactly with the FCC's express distinction between existing FTTH loops and newly-deployed FTTH, or so-called "greenfield," FTTH loops. Moreover, there is nothing in the TRO that supports retroactive application of the relief granted or some other cut-off date for "new" network deployment. Accordingly, Petitioners' language simply preserves access to the FTTH loops to which federal law entitles them. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has offered language that references FCC Rule 51.319(a)(3) without elaboration or explanation. It refuses to accept Petitioners' language regarding the effective date of the TRO. This position is inappropriate because it does not make clear that FTTH unbundling relief will not apply to loops already deployed, which is the result that the FCC demonstrably intended by culling out "greenfield" loops for unbundling relief. BellSouth's proposed language is thus incomplete, rendering the Agreement vague and ambiguous.

In its position statement, BellSouth asserts that the FCC's finding on FTTH loops was not "contingent upon a deployment date", and thus presumably affects all FTTH loops immediately, without limitation. That position is unfounded. FCC orders are presumed to become law, and affect substantive rights, on their effective date. That legal truism does not have to be expressly stated in every FCC rule. Accordingly, the FTTH rules can apply only to facilities installed after the order's effective date. In addition, and more importantly, both the FCC Rules and the TRO expressly parse out "new builds", or "greenfield" fiber loops and state that they are subject to unbundling relief must not be unbundled. As a matter of logic, then, FTTH loops that are not new must continue to be unbundled. BellSouth's reliance on the lack of a "deployment date contingency" in the

FCC's decision is therefore misplaced. Petitioners' more comprehensive language should therefore be adopted. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

> *Issue No. 2-16 [Section 2.3.3]:* ***This issue has been resolved.***

> *Issue No. 2-17 [Sections 2.4.3, 2.4.4]: (A) What rates should apply to testing and dispatch performed by BellSouth in response to a CLEC trouble report when no trouble is found to exist?*
> *(B) What rate should apply when BellSouth is required to dispatch to an end user location more than once due to incorrect or incomplete information?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-17(A).

A. TELRIC-compliant rates to be approved by the Commission and incorporated in Exhibit A of Attachment 2 should apply to testing and dispatch performed by BellSouth in response to a CLEC trouble report and in order to confirm the working status of a UNE Loop. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. FCC rules require that unbundled network elements be provisioned at forward-looking, cost-based rates (*i.e.*, TELRIC). Accordingly, all facilities and work involved in provisioning, maintaining and repairing UNEs, including loops, must be priced at TELRIC-compliant rates. When testing and dispatch is requested in order to ensure that the loop that a Petitioner pays for actually works, such services should be performed at TELRIC-compliant rates.

The result is no different when the issue is framed "when no trouble is ultimately found to exist." Line testing, especially in response to a customer complaint, is a necessary function of provisioning a network. If no trouble is actually found, that outcome does not then render the testing irrelevant or unnecessary. As such, it should be priced no differently than testing that revealed a problem, which must, we all seem to agree, be priced at TELRIC compliant rates. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language states that the rates applicable to testing and dispatching service for local loops will come from its various tariffs. The first tariff is the BellSouth FCC Tariff Number 1. The rates contained in that tariff, however, were not set by a state commission under TELRIC principles. BellSouth's language also refers to its GSST tariffs in Alabama, Kentucky, Louisiana, Mississippi, Tennessee, Florida and North Carolina. Finally, BellSouth states that testing and dispatch rates in Georgia and South Carolina will be in the Non-Regulated Services Pricing tariffs for those states. These state tariffs are also an inappropriate source, as they were not derived for use in connection with UNE provisioning. In fact, these tariffs set prices for BellSouth residential retail services. It is not appropriate for an incumbent to charge retail rates for the wholesale provisioning of network elements.

The following examples illustrate why BellSouth's proposed rate language is improper. In North Carolina, BellSouth's state GSST tariff charges $31.25 for the first half-hour of dispatch time on the customer's premises, and $15.75 for every additional half-hour (or portion thereof). Under these prices, a 45-minute dispatch costs $47.00 — more than half of BellSouth's own retail rates for Expanded Basic Local Saver Service ($72.00) and costs four times more than BellSouth's monthly rate of $10.96 — $12.26 for basic local service, or "Community Caller Plus," within Exchange Groups 1 to 5. In South Carolina, BellSouth would charge $110.00 for a 45-minute premises visit, compared with retail rates of $12.70 — $14.05 per month for flat-rated basic service and $32.00 per month for the Complete Choice® plan that includes 6 features. In Alabama, BellSouth charges $20.00 for the first 15 minute increment for a premise work charge and $10.50 for each 15 minute increment thereafter. The work premise charges are more expensive than BellSouth's retail residential area calling service, which is $10.00 a month per access line. On their face, these dispatch charges significantly undercut Petitioners' ability to compete effectively. Accordingly, BellSouth's proposed pricing language for loop service dispatch should be rejected in favor of terms that explicitly provide for TELRIC-compliant prices. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-17(B).

A. TELRIC-compliant rates to be approved by the Commission and incorporated in Exhibit A of Attachment 2 should apply to testing and dispatch performed by BellSouth in response to a CLEC trouble report and in order to confirm the working status of a UNE Loop. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As explained above with respect to Issue 2-17(A), all rates that apply to the ordering, provisioning, maintenance and testing of UNEs must be priced at TELRIC. There is no reasonable basis to alter this rule in the event that a particular loop requires a dispatch more than once. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is inadequate because instead of referencing TELRIC-compliant rates it again references its FCC Tariff No. 1 and various state tariffs for the dispatch rates that apply in the event multiple dispatches are needed due to "incorrect or incomplete information." As demonstrated in the examples cited above, these tariffed rates are not lawful in the context of UNEs and are anticompetitive in the wholesale context. Further, in the context of this sub-issue, they appear to be blatantly punitive. BellSouth has not explained what "incorrect or incomplete information" means, or how it is to be determined in practice. For example, what type of error would rise to the level of "incomplete"? Who would decide? BellSouth's position on this issue is ambiguous. It could be that BellSouth would deem every multiple-test situation as "due to incorrect information" that is subject to expensive tariffed rates as opposed to TELRIC rates. This result would of course contravene settled unbundling law and policy, as it would impose improper costs on UNE access. For these reasons, the Agreement should state that TELRIC compliant rates for testing UNE Loops will apply across the board. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-18 [Section 2.12.1]: (A) How should line Conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to Line Conditioning?

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

A. Line Conditioning should be defined in the Agreement as set forth in FCC Rule 47 CFR 51.319 (a)(1)(iii)(A). *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners' language incorporates by reference FCC Rules 51.319(a)(1)(iii) — the Line Conditioning rule — and 51.319(a)(1)(iii)(A) — the definition of Line Conditioning — to describe BellSouth's obligations. This language sets forth, in a simple yet precise way, what BellSouth should be able and willing to provide to Petitioners within the Agreement. This language does not provide Petitioners with anything more than what the FCC rules prescribe. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it provides an extensive definition of Line Conditioning that refuses to reference or incorporate the applicable FCC Rule 51.319(a)(1)(iii). Petitioners are not interested in BellSouth's rewriting of the rule which conflates BellSouth's Line Conditioning obligations with its Routine Network Modification obligations. The FCC has rules that govern each. Line Conditioning is not limited to those functions that qualify as Routine Network Modifications.

BellSouth's position statement demonstrates the analytical errors in its contract language, as we have explained. It states that Line Conditioning should be defined as "routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers". This position does not comport with FCC Rule 319. "Routine network modification" is not the same operation as "Line Conditioning" nor is xDSL service identified by the FCC as the only service deserving of properly engineered loops. Neither BellSouth's position nor its contract language complies with the law. The FCC created and kept two separate rules to govern these distinct forms of line modification, and the Agreement must reflect this FCC decision. BellSouth's proposal would effectively nullify one of those rules. Petitioners' language should therefore be adopted. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

A. BellSouth should perform Line Conditioning in accordance with FCC Rule 47 CFR 51.319 (a)(1)(iii). *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners' request only that the Agreement and BellSouth's obligations thereunder comport with federal law. Petitioners are unwilling to accept BellSouth's attempt at diluting its obligations by effectively eliminating Line Conditioning obligations that the FCC left in place. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate for the same reasons discussed previously with respect to issue 2-18(A). BellSouth's proposed language inappropriately attempts to limit its Line Conditioning obligations. For its position statement, BellSouth essentially re-states the same position it provided for Issue 2-18(A). That is, BellSouth will only perform Line Conditioning as a "routine network modification", in accordance with Rule 51.319(a)(1)(iii), to the extent that BellSouth would do so for its own xDSL customers. For the reasons I have explained, this position is meritless. First, to discuss "routine network modification" as occurring under Rule 51.319(a)(1)(iii) is simply wrong: that term does not appear anywhere in Rule 51.319(a)(1)(iii). Second, it is not permissible under the rules for BellSouth to perform Line Conditioning only when it would do so for itself. The FCC has not placed such a limitation on Line Conditioning. Third, BellSouth's repeated insistence that Line Conditioning is only for xDSL services contravenes Rule 51.319(a)(1)(iii), which is absolutely neutral as to the services that can be provided over conditioned loops. The Agreement should accurately reflect BellSouth's obligations as to Line Conditioning, and therefore should include Petitioners' language on that matter, which references the FCC's governing rule. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-19 [Section 2.12.2]: Should the Agreement contain specific provisions limiting the availability of Line Conditioning to copper loops of 18,000 feet or less?

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

A. The answer to the question posed in the issue statement is "NO." The agreement should not contain specific provisions limiting the availability of Line Conditioning to copper loops of 18,000 feet or less in length. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners will not agree to language that provides them no right to order Line Conditioning on loops that are longer than 18,000 feet. Nothing in Applicable Law would support such a limitation. Petitioners are entitled to obtain loops that are engineered to support whatever service we choose to provide. In refusing to condition loops over 18,000 feet in length, BellSouth may preclude Petitioners from providing innovative services to a great proportion of customers. In unreasonably attempting to restrict their Line Conditioning obligations, BellSouth is attempting to dictate the service that Petitioners may provide by limiting those services to those that *BellSouth* chooses to provide. This result is contrary to the 1996 Act, is anticompetitive, and may deprive Alabama consumers of innovative services that CLECs may choose to provide and that BellSouth would prefer not to. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has proposed language stating that it "will remove load coils only on copper loops and sub loops that are less than 18,000 feet in length" as a matter of course, but that it will remove load coils on longer loops only at the CLEC's request and at the rates in "BellSouth's Special Construction Process contained in BellSouth's FCC No. 2." This language is unacceptable. <u>First</u>, it has no basis in Applicable Law. Nothing in any FCC order provides BellSouth with a basis to treat Line Conditioning in different manners depending on the length of the loop. <u>Second</u>, BellSouth's imposition of "special construction" rates for Line Conditioning is inappropriate. As we have explained with respect to several issues in this arbitration, the work performed in connection with provisioning UNEs must be priced at TELRIC-compliant rates. BellSouth's special construction rates are not TELRIC compliant. Indeed, BellSouth's Tariff FCC No. 2 does not include rates for Line Conditioning, but rather lists the charges imposed on specific carriers for hanging or burying cable, adding UDLC facilities, and the like. Petitioners therefore do not know what rates they would pay for Line Conditioning under this section. Such ambiguity is unacceptable. Accordingly, the Agreement should state that TELRIC-compliant rates shall apply to Line Conditioning for loops over 18,000 feet in length. For all these reasons, BellSouth's language should be rejected. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR VIEW ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 2-19?

A. BellSouth has restated this issue to cover only "load coil removal", rather than Line Conditioning. Petitioners do not agree that this restatement is appropriate. Line Conditioning encompasses far more than the removal of load coils. In fact, the definition that BellSouth has already provided does not state that Line Conditioning speaks only to load coils (Issue 2-18). Its position here is thus inconsistent with other BellSouth policies. In addition, BellSouth's limiting of Line Conditioning to include only load coil removal does not comport with Rule 51.319(a)(1)(iii), which states that the devices to be removed to condition a loop include, but are not limited to, bridge taps, load coils, low pass filters, and range extenders. This rule language conclusively demonstrates that discussing Line Conditioning only in terms of load coils is incorrect. Because the Line Conditioning requirement is not limited to removing load coils, BellSouth's characterization of this issue is inappropriate. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. ARE YOU CURRENTLY CONTEMPLATING THE DEPLOYMENT OF TECHNOLOGIES THAT MIGHT REQUIRE THE TYPE OF LINE CONDITIONING THAT BELLSOUTH SEEKS TO EXCLUDE FROM THE AGREEMENT?

A. Yes. We are currently exploring at least two technologies designed to derive additional bandwidth from "long" loops. One is called "Etherloop" which should work on loops up to 21,000 feet in length and another is called "G.HDSL Long" which should work on loops up to 26,000 feet in length. *[Sponsored by 1 CLEC: J. Fury (NSC)]*

Issue No. 2-20 [Sections 2.12.3, 2.12.4]: Under what rates, terms and conditions should BellSouth be required to perform Line Conditioning to remove bridged taps?

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

A. Any copper loop being ordered by CLEC which has over 6,000 feet of combined bridged tap will be modified, upon request from CLEC, so that the loop will have a maximum of 6,000 feet of bridged tap. This modification will be performed at no additional charge to CLEC. Line Conditioning orders that require the removal of other bridged tap should be performed at the rates set forth in Exhibit A of Attachment 2. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners seek to ensure that BellSouth will, at their request, remove bridged tap from loops as necessary to enable the loop to carry Petitioners' choice of service. Federal law provides, without limitation, that CLECs may request this type of Line Conditioning, insofar as they pay for the work required based on TERLIC-compliant rates. Petitioners' language comports exactly with these parameters, stating simply that they may request removal of bridged tap at the rates already provided in the Agreement, excepting bridged tap of more than 6,000 feet, which the parties agree should be removed without charge. Petitioners have the right to provide the service of their choice, and to obtain loops that can carry those services. The Agreement should reject BellSouth's attempt to limit CLEC service offerings to those BellSouth also chooses to provide. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would require it to remove only bridged tap "that serves no network design purpose" and is between "2500 and 6000 feet". This language substantially restricts Petitioners' ability to obtain loops that are free of bridged tap, in two ways. First, it leaves entirely to BellSouth's discretion which bridged tap "serves no network design purpose", which is an arbitrary and unworkable standard. Moreover, it is not for BellSouth to unilaterally roll-back its federal regulatory obligations. Second, BellSouth's language precludes the removal of bridged tap that is less than 2500 feet in length, which may significantly impair the provision of high-speed data transmission. Nothing in federal law supports a refusal to remove bridged tap, regardless of the length of or their location on the loop. BellSouth's language would have the effect of depriving consumers of competitive choice of service, and would improperly gate Petitioners' entry into the broadband market. This proposal is unlawful, anticompetitive, and should be rejected.

BellSouth makes two points in its position statement that require comment. First, BellSouth claims that removing bridged tap that either "serves no network purpose" or is "between 0 and 2500" feet constitutes "creation of a superior network". This position is flatly incorrect, as the FCC has expressly held that Line Conditioning does not result in a "superior network". Rather, it is the work necessary to ensure that existing loops can support the services that a CLEC chooses to provide. BellSouth is not building a "superior network" in this instance, it is merely cleaning up its existing network. Moreover, removing bridged tap pursuant to the CLEC's request is absolutely required by Rule 51.319(a)(1)(iii) (Line Conditioning). Second, BellSouth states that this issue is "not appropriate for arbitration" because it somehow involves "a request by the CLECs that is not encompassed within ... Section 251." Yet, the FCC established the Line Conditioning rule under its Section 251 authority. Accordingly, this issue is squarely within this Commission's arbitration jurisdiction. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

*Issue No. 2-21 [Section 2.12.6]: **(A) Should the Agreement contain a provision barring Line Conditioning that would result in the modification of a Loop in such a way that it no longer meets technical parameters of the original Loop? (B) If not, should the resulting modified Loop be maintained as a non-service -specific Unbundled Copper Loop?***

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-21(A).

A. The answer to the question posed in the issue statement is "NO". Petitioners should not be barred from requesting Line Conditioning that would result in the modification of a Loop in such a way that it no longer meets the technical parameters of the original Loop. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Much like Issue 2-20, this issue concerns Petitioners' ability to obtain a loop that is capable of transmitting whatever service Petitioners wish to provide. Petitioners are entitled to order Line Conditioning of whatever kind and to whatever degree is necessary to condition the loop in a manner necessary for them to provide the service they seek to provide. The FCC has not required that CLECs be trapped in a "box" created by BellSouth. Accordingly, Petitioners' wish to include language in this section stating that even if a conditioned loop no longer meets the technical parameters of the original Loop type (e.g., voice grade, ISDN, ADSL, etc.), the resulting modified Loop will be maintained as a generic, non-service specific UCL (unbundled copper loop). *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth proposes to drastically alter the purpose of this provision to state that it simply "will not modify a Loop in such a way that it no longer meets the technical parameters of the original Loop type." This language, which seeks to eliminate BellSouth's Line Conditioning obligations in most circumstances, is unacceptable. BellSouth is required to condition loops as a matter of law, and cannot avoid that obligation by unilaterally imposing this sort of limitation. As Petitioners have explained, they seek to, and are entitled to, ensure that their chosen service will run on the loop they receive; federal law grants them that right. BellSouth's proposed language would improperly limit or nullify this right, which would injure both Petitioners and consumers, and should be rejected.

In its position statement, BellSouth argues that what Petitioners request as to Line Conditioning is "against industry technical standards", and that BellSouth would not perform such work for itself, which purportedly renders the request out of keeping with the TRO. Again, as we have explained with respect to Issues 2-18 to 2-20, BellSouth is misstating what its Line Conditioning obligations are. Rule 51.319(a)(1)(iii) does not state that ILECs must only condition loops if it would do so for themselves. As to "industry standards," BellSouth has not identified which standards it is referencing, making it difficult to assess whether there are applicable industry standards that should be considered. BellSouth's position is therefore untenable, and does not justify its refusal to condition loops in accordance with FCC rules. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 2-21(A)?

A. BellSouth's proposed restatement of this issue does not represent a significant change, yet it seems as though it is intended to mask the fact that the Parties' dispute is over BellSouth's Line Conditioning obligations and whether this Agreement will require something less than full compliance with the FCC rule. Obviously, it should not. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-21(B).

A. The answer to the question posed in the issue statement is "YES". The resulting modified Loop should be maintained as a non-service-specific Unbundled Copper Loop. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. All loop facilities that Petitioners use should, as we have explained, be conditioned at our request to carry our choice of service. If a loop is modified, it should be treated as a generic and non-service specific Unbundled Copper Loop under the Agreement. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has not proposed language to define the nature of a conditioned loop, as it has already offered language that would in large part prohibit Line Conditioning altogether. Yet as Petitioners have made plain, BellSouth cannot evade its Line Conditioning responsibilities. Petitioners' proposed language should therefore be adopted. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 2-21(B)?

A. As with Issue 2-21(A), BellSouth's restatement does not change the central inquiry at all. It simply (and needlessly) changes the tone of the question from the negative to the affirmative. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS ISSUE 2-21(B) APPROPRIATE FOR ARBITRATION?

A. In its position statement, BellSouth asserts that Issue 2-21(B) should not be included in this Arbitration because "it involves a request by the CLECs that is not encompassed" in Section 251. This statement is flatly incorrect. The manner in which UNE loops are provisioned, and whether they are usable for CLEC service, is squarely within the parameters of Section 251. In addition, this issue goes directly to ensuring that BellSouth's provisioning practices are just and reasonable, which are always within the jurisdiction of this Commission. Finally, loop unbundling is a separate checklist item under Section 271, and thus this Commission retains the authority to set rules and policy for its provisioning. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-22 [Section 2.14.3.1.1]: Should BellSouth be required to allow CLEC to connect its Loops directly to BellSouth's multi-line residential NID enclosures that have inactive loops attached?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-22.

A. The answer to the question posed in this issue is "YES." The Commission should order BellSouth to allow CLEC to connect its Loops directly to BellSouth's multi-line residential NID terminations that currently have loops attached to them but that are not currently used by BellSouth or any other telecommunications carrier to provide service to the premises. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners should be able to use any NID termination not presently in use by BellSouth or another carrier. This right attaches regardless of whether the unused termination has a loop connected to it. If an idle loop is connected, CLECs should have the right to remove it and connect their own loop. Four state commissions — Alabama, Georgia, Kentucky and Tennessee — have already made this ruling. The basis for this request is clear: BellSouth should not be permitted to "warehouse" NID terminations, as such warehousing could needlessly result in the denial of CLEC access to UNE NIDs. Nor should a CLEC be forced to build a new NID simply because BellSouth will not give up unused terminations — the FCC has already found, on a nationwide basis, that CLECs should not be made to build new NIDs. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would give Petitioners the ability to use unused terminations in multi-line residential NIDs only "in those states where the Commission has so ordered." This proposal is not acceptable. Access to NIDs is required by the FCC without limitation, and includes NIDs that serve multi-dwelling units. Not only is BellSouth's position incorrect as a matter of law, but it also would deprive a substantial number of customers of a competitive choice of service. If BellSouth successfully blocked Petitioners' access to multi-line NIDs, which are present at both multi-unit and single family dwellings, Petitioners would either have to build new NIDs or forego the customer. There is no basis for BellSouth to assert that it can "warehouse" unused NID terminations by keeping loops connected to them. This conduct is unreasonable, yet BellSouth will not stop it unless the Commission tells BellSouth that it must. Accordingly, the Commission should reject BellSouth's unreasonable position and adopt the language proposed by Petitioners. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-23 [Sections 2.16.2.2, 2.16.2.3.1-5, 2.16.2.3.7-12]: (A) ***This issue has been resolved.*** *(B)* ***This issue has been resolved.*** *(C) Should the obligation to provide access to UNTW be limited to existing UNTW? (2.16.2.3.2)* *(D) Should CLECs have to agree to language that requires them to "ensure" that a customer that has asked to switch service to CLEC is already no longer using another carrier's service on that pair – or – will language obligating CLEC to use commercially reasonable efforts to access only an "available pair" suffice? (2.16.2.3.3)* *(E) Should a time limit be placed on a CLEC's commitment reimburse costs associated with removing access terminals and restoring the property to its original state (per request of property owner)? (2.16.2.3.5)*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-23(C).

A. The answer to the question posed in the issue statement is "NO". To the extent BellSouth would install new or additional UNTW beyond existing UNTW upon request from one of its own End Users, or is otherwise required to do so in order to comply with FCC or Commission rules and orders, BellSouth should be obligated to provide access to such new or additional UNTW beyond existing UNTW. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. UNTW is part of the Loop UNE. Accordingly, the FCC's routine network modification rules require, in addition to those that require BellSouth to extend UNTW to single points of interconnection, BellSouth to modify and extend UNTW to the extent it would do so for its own customers and to the extent otherwise required by FCC rules . BellSouth cannot unilaterally eliminate these requirements with respect to UNTW. In this provision, Petitioners seek nothing more than nondiscriminatory access to UNE Loop facilities — something that BellSouth is required to provide. Therefore Petitioners' language should be adopted. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language flatly states that "BellSouth shall not be required to install new or additional NTW beyond existing NTW". The problem with this language is that it omits reference to BellSouth's requirement to provide UNTW to the full extent of the law and it is on its face contrary to law.

BellSouth's position baldly states that it "is not obligated to build a network for CLECs." Again, this argument misses the point of this section of the Agreement. Petitioners have not asked for a new network. We have asked BellSouth to perform routine network modifications and to extend UNTW to the extent necessary to comply with the FCC's rules. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 2-23(C)?

A. BellSouth has restated Issue 2-23(C) in a way that seems designed to skew the issue in its favor by framing it as a network construction issue. It asks "[s]hould BellSouth be required to install new network terminating wire for the use of the CLEC?" With this wording, BellSouth seeks to overlook the FCC's inside wire and routine network modification rules. Petitioners request only that BellSouth act in a nondiscriminatory manner, and that it comply with applicable FCC requirements. BellSouth's restatement of this issue thus fails to frame the dispute properly. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-23(D).

A. The answer to the question posed in the issue statement is "NO". Petitioners should not be required to "ensure" that a customer that has asked to switch service from another carrier is no longer using that carrier's service on a particular pair. Rather, a provision obligating Petitioners to use commercially reasonable efforts to access only an "available pair" should be sufficient. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. It is not reasonable for CLECs to be required to ensure that an End User is not being served on a particular pair on an Access Terminal. CLECs do not own and control BellSouth's OSS systems, nor do they control the Access Terminal. For these reasons, Petitioners have been willing to include language requiring them to take "commercially reasonable efforts" to access only an available pair. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language places an impossible burden on Petitioners: prior to connecting our new End User via an inside wire loop, we must ensure that "the End User is no longer using [BellSouth's] service or another CLEC's service on that pair." How are we supposed to know with the certainty that BellSouth seems to demand? Unless BellSouth commits to label all pairs as "available" or not, the imposition of such a standard is inappropriate. Moreover, there may be circumstances in which a pair may not be technically available, but a customer's request to switch service providers may nevertheless require that a pair used by the carrier it seeks to replace be flipped to the new carrier. Accordingly, BellSouth's language is therefore unreasonable on its face and should be rejected. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 2-23(D)?

A. BellSouth's restatement of Issue 2-23(D) does not change the inquiry in any material way. It simply omits Petitioners' offer to include "commercially reasonable" language in this provision of the Agreement. The question remains whether CLECs must "ensure" that an End User is not "obtaining BellSouth's service, or another carrier's service on that pair." For the reasons we have explained, the answer to this issue must be that it is unreasonable to place this burden on CLECs. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-23(E).

A. The answer to the question posed in the issue statement is "YES". There should be a time limit on reimbursement obligations. Specifically, Petitioners should be responsible for costs associated with removing access terminals and restoring the property to its original state only when the property owner objects to and demands removal of access terminal installations that are in progress or within thirty (30) calendar days of completion. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners cannot agree to be forever on the hook, if a property owner at some point requests that BellSouth remove an access terminal. If the property owner approved the construction, that should be the end of it. The thirty (30) day time limit on a CLEC's reimbursement obligation is more than reasonable. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. The language BellSouth proposes is inadequate because it foists upon CLECs a never-ending reimbursement obligation that BellSouth could invoke long after a CLEC has ceased using the UNE. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 2-23(E)?

A. BellSouth's restatement of Issue 2-23(E) does not change the inquiry in any meaningful way. It makes two small changes: (1) BellSouth asks whether "the CLEC's obligation" to pay costs should have a time limit, whereas Petitioners refer to "a CLEC's commitment", as CLECs do not have the open-ended "obligation" BellSouth seeks to impose; (2) Instead of including Petitioners' qualifying statement "(per request of property owner)," BellSouth's issue states "(upon request of property owner)." It is unclear why BellSouth finds these changes necessary. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-24 [Section 2.17.3.5]: Should BellSouth be required to provide access to Dark Fiber Loops for test access and testing at any technically feasible point?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-24.

A. The answer to the question posed in the issue statement is "YES." BellSouth should be required to provide access to Dark Fiber Loops for test access and testing at any technically feasible point, the termination point within a serving wire center, and CLEC's End User's premises. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners require testing access for Dark Fiber Loops at any technically feasible point in order to ensure a high quality of service for their customers. Test access at the distribution frame and at the end user's premises is helpful, but there may be points along the loop route that require diagnostic testing as well. Loops can be several thousands of feet long, and a faulty splice or other technical impediment may occur at any place on a loop. Customer service is best ensured when a carrier can detect and pinpoint a problem at the exact point on the loop. Moreover, federal law imposes no limitations on a CLEC's right to test loops — both lit and dark fiber loops — at any technically feasible point. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth proposes to give testing access only at "the termination point within [Petitioners'] Serving Wire Centers and at [Petitioners'] End User's premises." This language improperly restricts Petitioners' access, which both endangers customers' quality of service and contravenes federal law. Petitioners will be paying BellSouth for these loops, and should be permitted to do whatever testing is necessary to ensure that they work. In addition, it is instructive that BellSouth has not placed any restriction on the testing of lit loops, which indicates that the limitations that BellSouth has placed on Dark Fiber loop testing are not necessary as a technical matter. Finally, the FCC treats lit loops and dark fiber loops in the same manner; it grants expansive access to loops for testing purposes. For these reasons, BellSouth's proposed language should be rejected. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-25 [Section 2.18.1.4]: Under what circumstances should BellSouth provide CLEC Loop Makeup information?

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

A. BellSouth should provide CLEC Loop Makeup information on a particular loop upon request by a Petitioner. Such access should not be contingent upon receipt of an LOA from a third party carrier. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners are entitled to obtain information about the physical make-up of loops upon request. BellSouth, as the sole controller of the legacy systems that hold this information, must provide it to the fullest extent required by law. The law does not require an LOA from a third party carriers. If BellSouth withholds loop make-up information on that basis, it will delay, or even preclude, Petitioners' ability to discern which services it can offer to a customer, thus limiting the customer's competitive choice. It will also inhibit Petitioners' ability compete, as it effectively institutes a policy of one competitor having to ask another for permission to compete for their customers. The Agreement should therefore ensure that Petitioners can obtain Loop Makeup information upon request. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would deny Petitioners Loop Makeup if a carrier other than BellSouth "controls" the loop. More specifically, BellSouth's language would require Petitioners to provide "a Letter of Authorization (LOA) from the voice CLEC (owner) or its authorized agent" prior to receiving any loop information. This proposal is pure mischief. BellSouth does not need an LOA from one competitor in order to provide loop make-up information to another. As I've indicated, this would in effect require CLECs to ask each other for permission to attempt to win-over their customers. Such a regime would obviously be anti-competitive and would likely thwart most attempts to get information needed to make informed service offers to customers.

If customer privacy is BellSouth's true concern, that issue is not addressed in its proposed language. For BellSouth to require an LOA from a CLEC as a means of securing privacy would therefore be misplaced. Because it serves no lawful basis, yet would impose significant competitive harm, BellSouth's proposed language should be rejected. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 2-25?

A. BellSouth's restatement of Issue 2-25 focuses the issue on when it should give Petitioners Loop Makeup information "on a facility used or controlled by another CLEC." Yet, BellSouth's obligation to provide such information does not exclude those instances where such facilities are being used as UNEs or by carriers reselling Bellsouth services. Accordingly, BellSouth's attempt to craft an issue in terms of an exception that does not exist is inappropriate. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

Issue No. 2-27 [Section 3.10.3]: What should be CLEC's indemnification obligations under a line splitting arrangement?

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

A. If a Petitioner is purchasing line splitting, and it is not the data provider, the Petitioner is willing to indemnify, defend and hold harmless BellSouth from and against any claims, losses, actions, causes of action, suits, demands, damages, injury, and costs (including reasonable attorney fees) reasonably arising or resulting from the actions taken by the data provider in connection with the line splitting arrangement, except to the extent caused by BellSouth's negligence, gross negligence or willful misconduct. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners are willing to indemnify BellSouth for damages reasonably arising or resulting from the actions taken by the data provider with whom they split a line. Petitioners are not willing, however, to indemnify BellSouth for its own actions. BellSouth has no right to be protected against damages that are caused by BellSouth. Petitioners have therefore excepted damages "caused by BellSouth's negligence, gross negligence or willful misconduct" from this indemnification provision. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth refuses to accept Petitioners' language, and instead seeks indemnification for any problem "which arise out of actions related to the data provider." BellSouth's language is too vague, and its refusal to agree to the clarifying language proposed by Petitioners is unreasonable. BellSouth's refusal to include language that makes clear that the indemnification would not extend to damages caused by BellSouth also is patently unreasonable. It simply is not reasonable to ask Petitioners to serve as an insurance company for BellSouth. Petitioners' ability to engage in line splitting would be seriously and artificially constrained by inclusion of the unusual and unreasonable indemnification language proposed by BellSouth. BellSouth's provision for line splitting indemnification should therefore be rejected. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-28 [Section 3.10.4]: (A) In cases where CLEC purchases UNEs from BellSouth, should BellSouth be required not to refuse to provide DSL transport or DSL services (of any kind) to CLEC and its End Users, unless BellSouth has been expressly permitted to do so by the Commission?

(B) Where BellSouth provides such transport or services to CLEC and its End Users, should BellSouth be required to do so without charge until such time as it produces an amendment proposal and the Parties amend this Agreement to incorporate terms that are no less favorable, in any respect, than the rates, terms and conditions pursuant to which BellSouth provides such transport and services to any other entity?

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

A. The answer to the question posed in the issue statement is "YES." In cases where a Petitioner purchases UNEs from BellSouth, BellSouth should not be permitted to refuse to provide DSL transport or DSL services (of any kind) to the Petitioner and its End Users, unless BellSouth has been expressly permitted to do so by the Commission. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. BellSouth should not be permitted to refuse xDSL transport services to a CLEC or its customers. It is anticompetitive and anti-consumer to block CLEC customers from receiving such DSL services. By doing so, BellSouth is discriminating against Petitioners and artificially preserving its local service base with the threat of denying attractive DSL services to those customers who wish to switch to a CLEC for other services. In addition, denying DSL to CLEC customers is contrary to the public interest, as such conduct in effect "punishes" customers for exercising their right to choose a local service provider. Four state commissions, Georgia, Florida, Kentucky and Louisiana, and

Georgia have agreed. Petitioners are not asking the Commission to decide whether BellSouth should be able to tie DSL services to its voice offerings and punish consumers who would like to use other voice providers in this proceeding. Instead, Petitioners are simply asking the Commission to prohibit BellSouth from doing so, until the Commission expressly determines that it is lawful and in the public interest to allow BellSouth to leverage its control over its rate-payer financed network in such a manner. For these reasons, Petitioners have proposed language stating that "BellSouth shall not refuse to provide DSL transport or DSL services (of any kind) to [a Petitioner]and its End Users unless BellSouth has been expressly permitted to do so by the Commission." *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has not provided any alternative language for this provision. Its position has been, however, that only upon an express order by a state commission will it sell DSL service to a CLEC local customer. This position is unreasonable. An entity should not refrain from acting anticompetitively only at the behest of an official. That obligation remains constant. Nor should BellSouth have the power to punish CLEC customers absent a specific Commission order to the contrary, as denying customers the services that they request, if they are technically feasible to provide, is patently unreasonable and contrary to the public interest. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 2-28(A)?

A. BellSouth's restatement of Issue 2-28(A) omits Petitioners' reference to orders of the Commission (if any – please keep in mind that the Agreement is written to cover 9 states) that require BellSouth to sell DSL service to CLEC customers. It simply asks whether BellSouth must provide "DSL transport or DSL services (of any kind) to CLEC and its End Users." Yet in framing the issue in this way, BellSouth mischaracterizes the issue. The issue here is not one that seeks the Commission to rule one way or another with respect to whether BellSouth must provide DSL-based services to CLEC customers served via UNEs – it is my understanding that that issue has been teed-up in other contexts. Instead, the issue here is simply whether BellSouth may refuse to provide DSL-based services absent a Commission order establishing a right for it to do so Without such an order, BellSouth would simply be punishing consumers for picking competitive service providers. This Commission should neither condone nor turn a blind eye toward such punishment. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

A. The answer to the question posed in the issue statement is "YES". Where BellSouth provides such transport or services to a Petitioner and its End Users, BellSouth should be required to do so without charge until such time as it produces an amendment proposal and the Parties amend this Agreement to incorporate terms that are no less favorable, in any respect, than the rates, terms and conditions pursuant to which BellSouth provides such transport and services to any other entity. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. This position comes out of frustration with BellSouth's failure to provide a proposal with respect to CLEC's request to have contract language that provides them with the same rights any other entity has with respect to such transport and services. This is simply an anti-discrimination provision. Petitioners have therefore proposed that BellSouth must provide DSL service to their customers free of charge, until such time as the Agreement includes terms and conditions for provisioning that are at least as advantageous as those to which BellSouth has already agreed or that are currently in effect. Because BellSouth refuses to negotiate these terms, they must be imposed upon BellSouth. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has refused to provide language and merely suggests that it will some day provide Petitioners with another non-Section 252 agreement to consider. This is unacceptable. Petitioners are not willing to wait until someday and they are not willing to accede to BellSouth's request to address the issue outside the scope of the Commission's jurisdiction. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 2-2-28(B)?

A. BellSouth's restates this issue as simply "what rates, terms and conditions should apply" where it provides DSL to a CLEC customer. This restatement does not change the inquiry. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S ADDITION OF ISSUE 2-28(C)?

A. BellSouth's new Issue 2-28(C) asks whether BellSouth's obligation not to deny DSL service should "be in included in this agreement." Petitioners' response to that question is "YES." We want those provisions in this Agreement subject to the General Terms and Conditions provisions we have negotiated (and arbitrated). *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS ISSUE 2-28 AN APPROPRIATE ISSUE FOR ARBITRATION?

A. BellSouth's assertion that "[t]his issue (including all subparts) is not appropriate in this proceeding" is incorrect. This issue came up repeatedly during negotiations and because it involves the shared use of UNE facilities, it is squarely within the Commission's jurisdiction to arbitrate. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-29 [Section 4.2.2]: (A) ***This issue has been resolved; (B) This issue has been resolved.***

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

Issue No. 2-31 [Section 5.2.4]: Under what conditions, if any, may BellSouth deny or delay a CLEC request to convert a circuit to a high capacity EEL?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-31.

A. BellSouth may not deny or delay a Petitioner's request for a high-capacity EEL based upon its own assessment of the Petitioner's compliance with EEL eligibility criteria. However, BellSouth may notify a Petitioner when it detects an order that it does not believe complies with the eligibility criteria. Upon notification by BellSouth of a potential compliance problem, the Petitioner will then have the option of proceeding with, modifying or canceling such order *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Petitioners seek to ensure that BellSouth provisions EEL conversion requests in a manner consistent with the FCC's rules, which specifically prohibit BellSouth from conducting pre-audits of a CLEC's compliance with the EEL availability rules before converting circuits to high capacity EELs.

The FCC has concluded that such pre-audits constitute an unjust, unreasonable and discriminatory term and condition for obtaining access to UNE combinations and are prohibited. The Petitioner's proposal strikes a balance between the concerns of BellSouth and the Petitioners, by allowing an appropriate opportunity for BellSouth to flag any potential issues with an EEL conversion order without delaying the provisioning process or upsetting End User expectations. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is inadequate because it seeks to contractualize a policy that violates the letter and the spirit of the FCC's prohibition on EEL conversion pre-audits. Under the BellSouth proposal, BellSouth would be permitted to conduct pre-audits of EEL conversion orders and cancel the order if BellSouth unilaterally determines that the order does not meet the FCC's EEL conversion criteria. That is not at all how the FCC said it should work. BellSouth's open-ended language flatly violates the FCC's "provision-first/dispute later" policy. Moreover, Petitioners believe that BellSouth EEL conversion pre-audits have contributed to unwarranted and unlawful delays in converting special access circuits to EELs. Petitioner, NewSouth has a complaint pending at the FCC against BellSouth regarding such delays. The Commission should therefore reject BellSouth's proposal. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. HAVE SUCH DELAYS PROVEN COSTLY?

A. Yes. NewSouth calculates that unreasonable and unlawful delays associated with BellSouth's conversions of special access circuits to EELs have resulted in damages of approximately $1.6 million. NewSouth has a formal complaint on file at the FCC in this regard. *[Sponsored by **1 CLEC:** J. Fury (NSC)]*

Issue No. 2-32 [Sections 5.2.5.2.1-7]: Should the high capacity EEL eligibility criteria use the term "customer", as used in the FCC's rules, or "End User"?

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

A. The high capacity EEL eligibility criteria should be consistent with those set forth in the FCC's rules and should use the term "customer", as used in the FCC's rules. Use of the term "End User" may result in a deviation from the FCC rules to which CLECs are unwilling to agree. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale for this position is simple: we want what the rule says, not anything else. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed replacement of "customer" with "End User" – a term upon which the parties cannot agree on a definition (Issue G-2) improperly seeks to reduce the availability of EELs in a manner not intended by the FCC. In the absence of mutual agreement otherwise, the Commission must find that the express terms of the FCC rule govern. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-33 [Sections 5.2.6, 5.2.6.1, 5.2.6.2, 5.2.6.2.1, 5.2.6.2.3]: (A) How often, and under what circumstances, should BellSouth be able to audit CLEC's records to verify compliance with the high capacity EEL service eligibility criteria? *(B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?* *(C) Who should conduct the audit and how should the audit be performed?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-33(A).

A. BellSouth may, no more frequently than on an annual basis, and only based upon cause, conduct a limited audit of CLEC's records in order to verify compliance with the high capacity EEL service eligibility criteria. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. In order to ensure BellSouth conducts EEL audits in a reasonable and nondiscriminatory manner that is in all respects in accordance with the TRO, the Agreement must be clear that BellSouth may conduct a limited audit of CLEC's records no more frequently than once a year and only based upon cause. The Petitioners' proposed for-cause standard (in addition to the annual standard) are taken right from the TRO and will help ensure that BellSouth does not seek an illegitimate audit that unduly imposes costs on qualifying carriers. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language provides that BellSouth may conduct an EEL audit on an annual basis, but does not state that such audit may only be conducted based upon cause. BellSouth's proposed language is inadequate as the FCC adopted a higher standard than "on an annual basis" for BellSouth to request an EEL audit. Consistent with FCC orders, BellSouth's ability to request audit must be narrowly construed.

It is my understanding that the FCC held, in the TRO, that ILECs have a "limited" right to audit a CLEC's compliance with the EEL service eligibility criteria. Furthermore, the FCC recognized that the details regarding the implementation of audits should be included in the interconnection agreement and are better addressed by the state commission than the FCC. Therefore, this Commission may, and should, determine that BellSouth's ability to request an EEL audit from CLECs should be limited to once annually and only for cause. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. HOW WILL BELLSOUTH MEET THE FOR-CAUSE STANDARD FOR EEL AUDITS?

A. In order for BellSouth to meet the for-cause standard, BellSouth must identify the particular circuits for which BellSouth alleges non-compliance with the service eligibility criteria and the cause upon which BellSouth rests its allegations. Additionally, BellSouth will provide supporting documentation to the CLECs upon which BellSouth establishes the cause that forms the basis of BellSouth's allegations of noncompliance. Accumulating this type-of information and providing it to the CLECs does not place a significant burden on BellSouth, as all the data necessary to do is available to BellSouth. In fact, BellSouth should already be doing this type of data collection and analysis before making any type of EEL audit request. The CLECs are simply seeking to making this requirement explicit in the Agreement. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

A. The answer to the question posed in the issue statement is "YES". It is the CLECs' position that to invoke its limited right to audit CLEC's records in order to verify compliance with the high capacity EEL service eligibility criteria, BellSouth should send a Notice of Audit to the CLECs, identifying the particular circuits for which BellSouth alleges non-compliance and demonstrating the cause upon which BellSouth rests its allegations. The Notice of Audit should also include all supporting documentation upon which BellSouth establishes the cause that forms the basis of BellSouth's allegations of noncompliance. Such Notice of Audit should be delivered to the CLECs with all supporting documentation no less than thirty (30) days prior to the date upon which BellSouth seeks to commence an audit. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. In order for the CLECs to be adequately prepared to respond to a BellSouth EEL audit request, BellSouth should provide the CLECs with proper notification. CLECs are entitled to know the basis for the audit and need sufficient time, i.e., thirty (30) days, to evaluate BellSouth's audit request and to prepare to for an audit. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth does not provide any language on this issue. It is BellSouth's position that the TRO does not require any notice for an EEL audit. Although the TRO does not include a specific notice requirement, this Commission may order a such a requirement. The TRO only includes "basic principles for EEL audits" and should not be construed as a comprehensive overview of all EEL audit requirements. In fact, the FCC specifically stated, "…we set forth basic principles regarding carriers' rights to undertake and defend against audits. However, we recognize that the details surrounding the implementation of these audits may be specific to related provisions of interconnection agreements or to the facts of a particular audit, and the states are in a better position to address that implementation."

If the CLECs are going to have to endure the time and expense necessary to comply with a BellSouth audit request, at the very least, BellSouth can provide adequate notice to CLECs setting forth the cause of the audit request and supporting documentation. As I discussed earlier in my testimony, such a requirement should place no additional burden on BellSouth, as BellSouth would have to (at least one would hope) accumulate such information before requesting an EEL audit from a CLEC. Moreover, as clearly stated in the FCC's TRO, this Commission is well within its prerogative to order such a notice requirement be included in the Parties' Agreement. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

A. The audit should be conducted by a third party independent auditor mutually agreed-upon by the Parties and retained and paid for by BellSouth. The audit should commence at a mutually agreeable location (or locations) no sooner than thirty (30) days after the Parties have reached agreement on the auditor. In addition, the audit should be performed in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA) which will require the auditor to perform an "examination engagement" and issue an opinion regarding CLEC's compliance with the high capacity EEL eligibility criteria. AICPA standards and other requirements related to determining the independence of an auditor will govern the audit of requesting carrier compliance. The concept of materiality should govern the audit; the independent auditor's report should conclude whether or the extent to which CLEC complied in all material respects with the applicable service eligibility criteria. Consistent with standard auditing practices, such audits should require compliance testing designed by the independent auditor, which typically includes an examination of a sample selected in accordance with the independent auditor's judgment. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Agreement should precisely state who is eligible to conduct an EEL audit and how the audit will be performed. In particular, with regard to the logistics of the audit, the CLECs want to make clear that the audit should commence at a mutually agreeable location (or locations) no sooner than thirty (30) days after the Parties have reached agreement on an auditor. This ensures the CLECs will not be bound by BellSouth's choice of an auditor if the CLECs question the independence of BellSouth's selection. In addition, the CLECs will not be required to endure unreasonable expense to travel and transport the records to a location selected by BellSouth. With regard to the standards for the audit, the Petitioners seek to guarantee that not only will the audit be performed in accordance with the accounting standards established by the American Institute for Certified Public Accountants (AICPA), but other AICPA requirements related to determining the independence of an auditor. Moreover, the concept of materiality should govern BellSouth's audit, so that any potential remedy for noncompliance will not outweigh the infraction. Petitioners' proposed language regarding the requirements for independence of the auditor and the concept of materiality come directly from the FCC's TRO.

Given the history of controversy that has surrounded BellSouth's EEL audits, the Petitioners understandably have genuine concerns about the legitimacy of BellSouth's EEL audits. The language proposed by the CLECs, which is consistent with the language of the TRO, should help the CLECs achieve some level of comfort with the BellSouth EEL audit process, eliminate future EEL audit abuses, and thus, reduce the potential for EEL audit disputes between the Parties. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is inadequate in that it does not provide that: (1) the independent auditor must be a third-party and that it must be 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 thirty (30) calendar days after the Parties agreed on the auditor; and (5) AICPA standards related to determining the independence of an auditor will be applied. BellSouth has provided no persuasive reasons why it cannot agree on the above-mentioned terms.

BellSouth's refusal to accept these provisions is contrary to the FCC's EEL audit regulations. This Commission must establish EEL audit criteria that incorporate the FCC's criteria and ensure reasonable and nondiscriminatory EEL audits. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-34 [Section 5.2.6.2.3] – When should CLEC be required to reimburse BellSouth for the cost of the independent auditor?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-34.

A. As expressly set forth in the FCC's TRO, in the event the auditor's report concludes that CLEC did not comply in all material respects with the service eligibility criteria, CLEC shall reimburse BellSouth for the cost of the independent auditor. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Our position and proposed language come directly from the TRO. In the TRO, the FCC set-up a symmetrical all-or-nothing cost shifting scheme designed to address flagrant abuses by either side. Indeed, it is clear that the FCC did not envision money changing hands other than in the most egregious cases of abuse by either an ILEC or a CLEC. Specifically, the FCC states "to the extent the independent auditor's report concluded that the competitive LEC failed to comply in **all** material respects with the service eligibility criteria, the competitive LEC must reimburse the Incumbent LEC for the cost of the independent auditor." I emphasize the word "all" because it is clear that the FCC did not choose the word "any". The flip-side of that provision is the FCC's determination that "to the extent the independent auditor's report concludes that the requesting carrier complied in **all** material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit." Here, too, I have emphasized the use of the word "all" because it matches the previous provision. [TRO, 628] Thus, in cases of "no compliance", the CLEC is penalized by having to reimburse BellSouth; in cases of "full compliance", BellSouth is penalized by having to reimburse the CLEC. This approach is consistent with the FCC's stated views that EEL audits should not be routine and should occur only in the limited circumstances. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is inadequate because, while it accepts the stringent "all" standard with respect to those instances where it will be required to reimburse CLECs for their costs associated with an EEL audit, it refuses to accept the flip-side, mirroring language prescribed by the FCC regarding those instances in which BellSouth will have to reimburse the audited CLEC for its costs associated with the EEL audit. When it comes to the standard for when a CLEC must reimburse BellSouth, BellSouth writes-out the word "all", and it clearly expects reimbursement in cases other than those in which a CLEC fails to comply "in all material respects". That change is neither fair nor consistent with what the FCC prescribed. Given BellSouth's history of mischief in this area, Petitioners will not voluntarily agree to BellSouth's lopsided any-fault reimbursement standard. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

Issue No. 2-37 [Section 6.4.2]: What terms should govern CLEC access to test and splice Dark Fiber Transport?

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

A. CLEC should be able to splice and test Dark Fiber Transport obtained from BellSouth at any technically feasible point, using CLEC or CLEC-designated personnel. BellSouth must provide appropriate interfaces to allow splicing and testing of Dark Fiber. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Petitioners seek to ensure that BellSouth provides access to test and splice dark fiber in a manner consistent with the FCC's rules. In addition to requiring that BellSouth provide CLECs with technical information necessary to achieve access to UNEs, the

FCC's rules require that BellSouth provide nondiscriminatory access to the dark fiber transport UNE at any technically feasible point, including access for purposes of conducting splicing and testing activities. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language impermissibly limits CLEC access to the dark fiber transport UNE to only those interfaces that BellSouth, in its sole discretion, deems appropriate. Such a limitation on access is flatly inconsistent with the FCC's rules, which require non-discriminatory access to UNEs at any technically feasible point. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-38 [Sections 7.2, 7.3]: Should BellSouth's obligation to provide signaling link transport and SS7 interconnection at TELRIC-based rates be limited to circumstances in which BellSouth is required to provide and is providing to CLEC unbundled access to Local Circuit Switching?

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

A. The answer to the question posed in the issue statement is "NO". BellSouth's Section 251(c)(2) obligation to provide signaling link transport and SS7 interconnection at TELRIC-based rates should not be limited to circumstances in which BellSouth is required to provide, and is providing to CLECs, unbundled access to Local Circuit Switching. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The language of the Petitioners acknowledges that in the TRO the FCC relieved BellSouth of its obligation to provide unbundled access to SS7 signaling on an unbundled basis pursuant to Section 251(c)(3). However, the FCC's rules maintain the requirement that BellSouth provide SS7 interconnection to the Petitioners at TELRIC based rates. Under Section 251 (c)(2) BellSouth still have an obligation to interconnection and to provide such interconnection at cost-based rates, regardless of the elimination of the obligation to unbundle signaling itself. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth misreads the FCC's rules as they relate to its obligation to provide cost-based interconnection to the SS7 network. Under BellSouth's interpretation of the rules, the limitation on BellSouth's obligation to provide SS7 signaling as a UNE also obviated the requirement that BellSouth provide TELRIC based interconnection to the SS7 network. This interpretation is incorrect. The FCC's rules preserved BellSouth's obligation to provide TELRIC compliant rates for interconnection under Sections 251(a) and 251(c)(2) of the Act. In light of the fact that SS7 interconnection is a component of Section 251(c)(2) interconnection, the obligation to apply cost-based rates continues to apply to BellSouth. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-39 [Sections 7.4]: Should the Parties be obligated to perform CNAM queries and pass such information on all calls exchanged between them, regardless of whether that would require BellSouth to query a third party database provider?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-39.

A. The answer to the question posed in the issue statement is "YES". The Parties should be obligated to perform CNAM queries and pass such information on all calls exchanged between them, regardless of whether that would require BellSouth to query a third party database provider. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale for this position is one of competitive necessity. If BellSouth refuses to perform CNAM queries and to pass such information on CLEC originated traffic to be terminated to its own customers, then CLECs will be placed at an unfair competitive advantage because its customers will not have his/her/its caller ID appear when a BellSouth customer subscribes to that service. When caller ID does not appear, the party receiving the call is much less likely to answer the call. This may scare customers away from CLECs and back to BellSouth. Because BellSouth would be able to do this only as a result of its monopoly legacy and overwhelming market dominance, the Commission should find that requiring BellSouth to query and pass CNAM information – even if that requires BellSouth to query a competitive database provider is in the public interest. Without such a ruling CLECs would be faced with a Hobson's choice of having to choose between competitive CNAM providers that the largest LEC (BellSouth) refuses to dip or the (non-UNE) CNAM service provided by BellSouth. BellSouth should not be permitted to free itself of the CNAM unbundling obligation based on the presence of competitive alternatives only to then engage in behavior that makes those alternatives false choices and forces CLECs back to BellSouth for non-UNE CNAM. Accordingly, the Commission should adopt CLECs' proposed language. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it does not oblige BellSouth to query another CNAM database provider and thus threatens to put CLECs at a significant competitive disadvantage. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS ISSUE 2-39 APPROPRIATE FOR ARBITRATION?

A. In its position statement, BellSouth asserts that this issue, and its subparts, are "appropriate for this proceeding" because they "involve[] a request ... that is not encompassed within BellSouth's obligations pursuant to Section 251." This position is incorrect. As explained above, the exchange of such information is essential to fair competition. By virtue of even the language BellSouth has offered, it is clear that CNAM queries and delivery are essential to the exchange of local traffic between interconnecting LECs required under Section 251. Moreover, unless Petitioners' proposed language is adopted, they will once again be impaired without unbundled access to BellSouth's CNAM database. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-40 [Sections 9.3.5]: Should LIDB charges be subject to application of jurisdictional factors?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-40.

A. The answer to the question posed in the issue statement is "NO". LIDB charges should not be subject to application of jurisdictional factors. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. LIDB should be billed at TELRIC-compliant rates. We have never had a factors provision such as this in our agreement and do not believe that one should be employed for the purpose of billing higher tariffed rates for a certain percentage of traffic. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it is unnecessary. All LIDB usage should be billed at what BellSouth calls the "local rates". *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 2-41 [Sections 14.1]: What terms should govern BellSouth's obligation to provide access to OSS?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 2-41.

A. BellSouth must provide CLEC with nondiscriminatory access to operations support systems on an unbundled basis, in accordance with 47 C.F.R. § 51.319(g) and as set forth in Attachment 6. Operations support system ("OSS") functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by BellSouth's databases and information. BellSouth, as part of its duty to provide access to the pre-ordering function, must provide CLEC with nondiscriminatory access to the same detailed information about the loop that is available to BellSouth. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Attachment 2 of the Agreement must be clear that BellSouth will provide the CLECs nondiscriminatory access to operations support systems on an unbundled basis, in accordance with 47 C.F.R § 51.319(g). Although the CLECs recognize that the details of how access to pre-ordering, ordering, maintenance and repair interfaces and systems is covered in Attachment 6 of the Agreement, BellSouth's obligation must be clear in Attachment 2 as well, since that is the UNE attachment and OSS is a UNE. With their language, CLECs seek to ensure that that the Agreement provides for nothing less than full access to BellSouth's OSS UNE, consistent with FCC rules and orders, as well as those of the this Commission. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth refuses include a reference to the FCC's rule as the basis of it obligation to provide access to the OSS UNE. Rather, BellSouth's language provides only that BellSouth shall provide with nondiscriminatory access to operations support systems on an unbundled basis, in accordance with Attachment 6. Petitioners find this unacceptable because we believe that we have negotiated no exceptions to the FCC's OSS unbundling requirements. We do not want to be faced with an argument from BellSouth months or years down the road that they crafted an exception to the rules that we were not aware of.

The rule reference ensures that BellSouth couldn't do that. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

<u>INTERCONNECTION (ATTACHMENT 3)</u>

Issue No. 3-1 [Section 3.3.4 (KMC, NSC), 3.3.3 XSP)]: Should CLEC be permitted to connect to BellSouth's switch via a Cross Connect or any other technically feasible means of interconnection?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-1.

A. The answer to the question posed in the issue statement is "YES." In the event that a Party's Point of Presence is located within any serving wire center (i.e., switch location), such Party may interconnect to the other Party's switch via a Cross Connect or any other technically feasible means of interconnection. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale for this position is quite simply that CLECs do not want to be mischarged for a Local Channel when an intra-office cabling scheme is used to connect their point-of-presence to the BellSouth switch. The definitions of "Point of Presence" and "Local Channel" already agreed to in Attachment 3 make clear that such a facility is not a Local Channel. Petitioners, however, did not feel comfortable leaving this critical point addressed only in the definitions (and by deductive reasoning). Thus, they proposed simple and straightforward language to memorialize their understanding with BellSouth and BellSouth balked without explanation. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHEN YOU SAY "BALKED" DO YOU MEAN BELLSOUTH DISAGREED?

A. In terms of disagreeing for purposes of generating another arbitration issue, yes. In terms of disagreeing in concept, I think it is clear that we agreed to definitions that, when put together, demonstrate that we don't disagree. BellSouth insisted that the definitions were all we needed and we responded that we'd feel more comfortable with the principle being memorialized in "operative" text – rather than in definitions only. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. HAVE YOU EVER BEEN BILLED FOR LOCAL CHANNELS WHERE A CROSS CONNECT SHOULD HAVE BEEN BILLED?

A. Yes, we have. We disputed the charges and have since received an appropriate credit from BellSouth, as BellSouth agreed that the billing of a Local Channel in such instances is improper. *[Sponsored by 1 CLEC: J. Fury (NSC)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is inadequate because it skirts the issue we have spent many hours addressing with BellSouth. Frankly, after working for so long on the issue with BellSouth, it is disappointing that they never have explained why they cannot agree to our language. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHEN BELLSOUTH FINALLY DISCLOSED ITS PROPOSED RESTATEMENT OF THE ISSUE AND ITS POSITION STATEMENT, DID THE BASIS FOR BELLSOUTH'S DISAGREEMENT WITH YOUR PROPOSED LANGUAGE BECOME CLEAR THEN?

A. No, not at all. First, BellSouth's proposed restatement of the issue deliberately skirts the issue – that being one of Cross Connects – that the parties were discussing during their negotiations. Second, BellSouth's position statement follows Petitioners' language and not BellSouth's language. At least BellSouth talks about a Cross Connect there. However, BellSouth's position statement seems designed to distract or confuse. BellSouth ignores that Petitioners' language speaks only to interconnection between a POP and a switch located in the same wire center (and not between wire centers separated by many miles, as BellSouth suggests). We had reached conceptual agreement on this issue – we cannot explain or figure out what BellSouth is up to here. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF THE ISSUE 3-1?

A. The CLECs disagree with BellSouth's proposed restatement of the issue. BellSouth's proposed restatement obscures the fact that the Parties have a dispute largely over language proposed relating to Cross Connects. oversimplifies the issue as to how should the CLECs be permitted to connect to BellSouth's switch. The CLECs do not generally disagree with BellSouth over how CLECs should be permitted to connect to BellSouth's switch, but rather have raised this issue to ensure the CLECs are not mischarged for a Local Channel when an intra-office cabling scheme is used to connect their point-of-presence to the BellSouth switch. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 3-2 [Section 9.6 and 9.7]: (A) (A) What is the definition of a global outage? (B)Should BellSouth be required to provide upon request, for any trunk group outage that has occurred 3 or more times in a 60 day period, a written root cause analysis report? (C)(1) What target interval should apply for the delivery of such reports, as well as for those for global outages? (C)(2) What target interval should apply for reports related to global outages?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-2(A).

A. Global outages should include outages that impact an entire market or all traffic between two carriers or an entire trunk group. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The definition of global outages must be comprehensive enough to encompass those outages that significantly affect a CLEC's business. Any outage that impacts an entire market, all traffic between two carriers or an entire trunk group is drastic enough to significantly harm a CLEC's business on a large scale. By including these types of outages as global outages, we expect to be able to obtain root cause analyses for these types of outages. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's definition that a global outage is inadequate in that the definition is limited to an entire trunk group outage. There are, however, other types of outages that we would categorize as global outages. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-2(B).

A. The answer to the question posed in the issue statement is "YES." Upon request, BellSouth should provide a written root cause analysis report for all global outages, and for any trunk group outage that has occurred three (3) or more times in a 60-day period. *[Sponsored by 3* ***CLECs****: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale for our position is that we want to know what went wrong, how it was fixed and what steps BellSouth plans to take to ensure that service affecting issues are not repeated. Such information will help us understand and respond more efficiently to future outages. It also may help our own efforts to convey information to our customers who have a right to know that we are working cooperatively with our vendors to ensure that the get reliable service. Neither we nor they like to be left in the dark. So that we are not left t in the dark, we have requested root cause analyses for what we consider to be serious outages – global outages and for any trunk group outage that has occurred 3 or more times in a 60-day period. Notably, the parties agreed that such reports should be provided for "global outages" – although it is now clear that we don't agree with respect to what constitutes a global outage. *[Sponsored by 3* ***CLECs****: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. HAVE YOU EVER EXPERIENCED A "GLOBAL OUTAGE" INVOLVING AN ENTIRE TRUNK GROUP?

A. Yes. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. HAVE YOU EVER EXPERIENCED A "GLOBAL OUTAGE" INVOLVING AN ENTIRE MARKET?

A. Yes. Typically these result from switch translation and/or NPAC errors. In our experience the exposure is greatest during NPA splits/overlays. *[Sponsored by **2 CLECs:** C. Pifer (KMC), J. Fury (NSC)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate b ecause it only commits BellSouth to prepare a written root cause analysis report for global outages. It is BellSouth's position that ***no reports*** should be required other than for global outages. It is simply not clear why BellSouth refuses to meet Petitioners' request for a root cause analysis on any trunk group outage that has occurred 3 or more times in a 60-day period. BellSouth's refusal to prepare such reports for trunk group outages is unjustified. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUES 3-2(C)(1) and (C)(2).

A. BellSouth should use best efforts to provide global outage and trunk group outage root cause analysis reports within five (5) business days of request. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. It is important to learn as much as possible about outages as quickly as possible, so that recurrences can be avoided or at least detected and repaired as quickly as possible. All this is essential to providing good customer service and is necessary so that carriers can have the best information upon which they can advise customers as to problems, the steps taken to repair them and avoid their recurrence in the future. Petitioners believe it is reasonable for BellSouth to use its best efforts to provide such report within five (5) business days of the CLECs' request. The CLECs recognize that there may be various reasons for a service outage and that in some instances it will be more difficult for BellSouth to determine the root cause than others. Therefore, the CLECs propose a "best effort" standard which will provide BellSouth longer than five (5) business days in those cases where the root cause analysis report is more difficult to prepare. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is inadequate in that it provides a target interval that is simply too long. If we want to be responsive to customer demands regarding such service-impacting outages, we need to get a root cause analysis report reasonably quickly. That is why we have proposed a target interval of five (5) business days. This interval, which is not a "hard interval", should allow us to get back to customers with a timely explanation. If BellSouth's proposed 30-day interval is adopted (its language says 30 days; its position says 10-30 days, both making 30 days acceptable) it will put us in the position of appearing non-responsive and will allow us little more than an opportunity to remind customers of the service outage at a point where we would hope to have moved well beyond it. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 3-3 [Section 10.7.4, 10.9.5, and 10.12.4]: What provisions should apply regarding records exchange necessary for the billing and collection of access revenues?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-3.

A. In the event that either Party fails to provide accurate and detailed switched access usage data to the other Party within 90 days after the recording date and the receiving Party is unable to bill and/or collect access revenues due to the sending Party's failure to provide such data within said time period, then the Party failing to send the specified data should be liable to the other Party in an amount equal to the unbillable or uncollectible revenues. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Parties must have accurate switched detail usage data within a reasonable timeframe in order to bill their respective customers. Without such data, the Parties will either be unable to bill their customers or will bill inaccurately, and likely not collect all the revenue from their customers. Therefore, the CLECs propose that if a Party does not provide the accurate switched access data within 90 days after the recording date, and this causes the receiving Party to be unable to bill or collect from its customers, the Party failing to send the data should be liable for any unbillable or uncollectible revenue. Ninety days from the recording date is more than ample time for the Party to provide accurate switched detail usage data. Moreover, the CLECs' proposal is consistent with their 90-day backbilling proposal addressed in Issue No. 7-1, Section 1.1.3 of Attachment 7 (Billing). As discussed in more detail in Issue No. 7-1, the CLECs cannot reasonably backbill their customers more than 90 days and, therefore, to the extent BellSouth does not provide the CLECs accurate switched access usage data within 90-days, BellSouth should be liable to the CLECs for the unbilled and/or uncollected revenue. Furthermore, the Commission should be reminded that this provision is reciprocal and the CLECs are willing to adhere to the same standard if they are unable to provide such data to BellSouth within 90 days as well. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is too non-committal. It does not provide any benchmark by which a Party will be liable for not providing timely switched usage data and causing unbillables for the other Party. Specifically, BellSouth's language provides an unspecified "reasonable time period" to provide switched detail usage data to the billing Party. BellSouth's proposed language does not provide any real standard under which a Party will be liable for failing to provide accurate switched access usage data and causing the other party to suffer unbillables and/or uncollectibles. On the other hand, the CLECs' proposed 90-day timeframe is a reasonable benchmark that the Parties can use to ensure the transfer of record data in a timely manner. There are no valid reasons why BellSouth should not agree to the standard proposed by the CLECs, especially in light of the fact that Petitioners' current Agreements include the 90-day standard (See NSC Sec.5.8.3; KMC Sec. 6.8.3, XSP provides 60 days, Sec. 9.8.5) *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

A. In the event that a terminating third party carrier imposes on BellSouth any charges or costs for the delivery of Transit Traffic originated by CLEC, CLEC should reimburse BellSouth for all charges paid by BellSouth, which BellSouth is contractually obligated to pay. BellSouth should diligently review, dispute and pay such third party invoices (or equivalent) in a manner that is at parity with its own practices for reviewing, disputing and paying such invoices (or equivalent) when no similar reimbursement provision applies. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners have agreed to reimburse BellSouth for termination charges that BellSouth must pay third party carriers that terminate CLEC-originated traffic transited by BellSouth. The Agreement, however, must be clear that such reimbursement is limited to those charges BellSouth is contractually-obligated to pay to third party carriers. Without such a limitation, there is the potential that BellSouth will pay third parties without carefully scrutinizing their bills and the legal bases therefore, and expect reimbursement from CLECs, for unjustified termination charges. In order to further ensure that BellSouth does not overpay and CLECs are not over-reimbursing for third-party termination of CLEC-originated/BellSouth transited traffic, BellSouth should be required to diligently review, dispute and pay such third party invoices (or equivalent) in a manner that is at <u>parity</u> with its own practices. We feel that such language is needed because, without it, there is the incentive for BellSouth to become lax, as it can relay on the reimbursement provision. Accordingly, we simply ask BellSouth to treat bills for termination of Transit Traffic no differently from other bills the company gets from independent telcos and the like. The CLECs' proposal will eliminate any potential discrimination and promote business certainty with regard to BellSouth's transiting function. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate in that it does not limit the reimbursement obligation to those charges BellSouth is contractually obligated to pay third parties terminating CLEC-originated/BellSouth-transited traffic. Instead, it gives BellSouth the latitude to choose to pay such third parties even when it has no contractual or other legal obligation to do so. The result would leave CLECs vulnerable to whatever political or business arrangements BellSouth struck with such third parties regardless of whether the rate imposed is unjust and unreasonable. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR VIEW ON BELLSOUTH'S PROPOSED RESTATEMENT OF THE ISSUE?

A. My view is that it is unacceptable in that it appears that BellSouth is trying to disguise the fact that this is an issue that relates to BellSouth's Transit Traffic service. It is not simply an issue about CLEC-originated traffic. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 3-5 [Section 10.5.5.2, 10.5.6.2 and 10.7.4.2]: While a dispute over jurisdictional factors is pending, should factors reported by the originating party remain in place, unless the parties mutually agree otherwise?[6]

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-5.

[6] Xspedius is not arbitrating this issue.

A. As posed, the direct answer to the issue statement question is "YES". The answer to your question is that in the event that negotiations and audits fail to resolve disputes between the Parties, either Party may seek Dispute Resolution as set forth in the General Terms and Conditions. While such a dispute is pending, factors reported by the originating Party should remain in place, unless the Parties mutually agree otherwise. *[Sponsored by 2 CLECs: C. Pifer (KMC), J. Fury (NSC)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale here is that a change is not proper until the preferred method agreed upon by the Parties is proven broken. The Parties have agreed that billing will be based on factors reported by the originating party. Thus, it is logical that while a dispute is pending as to the jurisdictional factors, the factors reported by the originating Party should remain in effect. Those factors are presumptively valid until replaced by the reporting party, by agreement of the parties, by way of an audit, or through dispute resolution. In the case of disputes, the audit provision provides for the replacement of an erroneously reported factor for the prior quarter. Until such an audit proves an erroneous report, the reported factor should remain in place. *[Sponsored by 2 CLECs: C. Pifer (KMC), J. Fury (NSC)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth language would give it the right to replace CLEC-reported factors any time it saw fit. There is a methodology to which the Parties have agreed that applies to the calculation of factors by the originating Party; by contrast, while it is unclear what constraints, if any, would apply to the terminating Party's efforts to replace those factors.

Because factors reporting involves temporal measurements, it is more than likely that replacement factors created by BellSouth will not lend themselves to an apples-to-apples comparison. Thus, it is far more logical to leave the originating Party's factors in place, if a dispute arises. The audit provisions provide a sound process for addressing such disputes and make clear the point at which factor replacement should take effect in the event that a reporting error is proven. *[Sponsored by 2 **CLECs**: C. Pifer (KMC), J. Fury (NSC)]*

Issue No. 3-6 [Section 10.8.1, 10.10. 1]: Should BellSouth be able to impose upon CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?[7]

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

A. As posed, the direct answer to the issue statement question is "NO". The answer to your question is that BellSouth should not be permitted to impose upon CLECs a Tandem Intermediary Charge ("TIC") for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic. The TIC is a non-TELRIC based additive charge which exploits BellSouth's market power and is discriminatory. *[Sponsored by **2 CLECs**: C. Pifer (KMC), J. Fury (NSC)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. KMC and NewSouth's reasoning for refusing to agree to BellSouth's proposed TIC is threefold. First, BellSouth has developed the TIC predominantly to exploit its monopoly legacy and overwhelming market power. Only BellSouth is in the position of providing transit service capable of connecting all carriers big and small. BellSouth is in this

[7] Xspedius is not arbitrating this issue.

position because of its monopoly legacy and continuing market dominance. To ensure connectivity necessary to allow Alabama consumers to choose among carriers big or small, it is essential that this means of interconnection among parties be preserved and not jeopardized by the imposition of non-cost-based rates.

Second, the rate BellSouth seeks to impose – appropriately called the TIC (like its insect namesake, this charge is parasitic and debilitating) – appears to be purely "additive". BellSouth already collects elemental rates for tandem switching and common transport to recover its costs associated with providing the transiting functionality. These elemental rates are TELRIC-compliant which, by definition, means that they not only provide BellSouth with cost recovery but they also provide BellSouth with a reasonable profit. BellSouth has recently developed the TIC simply to extract additional profits over-and-above profit already received through the elemental rates.

Third, BellSouth's attempted imposition of the TIC charge on the CLECs is discriminatory. BellSouth does not charge TIC on all CLECs and it appears that, even when it does, it can set the rate at whatever level it desires. Although, the TIC proposed by BellSouth in the filed rate sheet exhibits to Attachment 3 is $0.0015, BellSouth had threatened to nearly double that rate, if KMC and NewSouth did not agree to it during negotiations. For these reasons, the Commission must find that the TIC charge is unlawfully discriminatory and unreasonable. *[Sponsored by 2 CLECs: C. Pifer (KMC), J. Fury (NSC)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language provides for recovery of the TIC. It is BellSouth's position that the rate is justified because BellSouth incurs costs beyond those for which the Commission-ordered rates were designed to address, such as the costs of sending records to the CLECs identifying the originating carrier. BellSouth, however, has not demonstrated that the elemental rates that have applied for nearly eight (8) years to BellSouth's transiting function do not adequately provide for BellSouth cost recovery. If these rates no longer provide for adequate cost recovery, BellSouth should conduct a TELRIC cost study and propose a rate in the Commission's next generic pricing proceeding. BellSouth should not be permitted unilaterally to impose a new charge without submitting such charge to the Commission for review and approval. *[Sponsored by 2* ***CLECs****: C. Pifer (KMC), J. Fury (NSC)]*

Q. WHY IS ISSUE 3-6 APPROPRIATE FOR ARBITRATION?

A. BellSouth's position statement states that Issue 3-6 should not be included in this Arbitration because "it involves a request by the CLECs that is not encompassed" in Section 251 of the 1996 Act. This statement is incorrect. Transiting is an interconnection issue firmly ensconced in Section 251 of the Act. Moreover, this functionality has been included in BellSouth interconnection agreements for nearly 8 years – it is not now magically not related to its obligations under Section 251 of the Act. In addition, transiting functionality is something BellSouth offers in Attachment 3 of the Agreement, which sets forth the terms and conditions of BellSouth's obligations to interconnect with CLECs pursuant to section 251(c) of Act. Finally, the Parties have discussed and debated the TIC, although to no resolution, throughout the negotiations of this Agreement. For these reasons, Issue 3-6 is properly before this Commission. *[Sponsored by 2 **CLECs**: C. Pifer (KMC), J. Fury (NSC)]*

Issue No. 3-7 [Section 10.1]: Should CLEC be entitled to symmetrical reciprocal compensation for the transport and termination of Local Traffic at the tandem interconnection rate?[8]

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

A. As posed, the direct answer to the issue statement question is "YES". A CLEC should be entitled to bill, and BellSouth should be obligated to pay, reciprocal compensation for the transport and termination of Local Traffic to CLEC at a symmetrical tandem interconnection rate, inclusive of end office switching, tandem switching, and transport. *[Sponsored by 2 **CLECs**: C. Pifer (KMC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale for our position is that the FCC has a rule that entitles CLECs to symmetrical reciprocal compensation at the composite of the elemental rates established by this Commission and charged by BellSouth. These elemental rates are included in Exhibit A of Attachment 3 and we simply seek to avoid billing disputes that have plagued the parties (and the Commission) in the past. Simply put, it's time to end reciprocal compensation disputes.

The elemental rates for reciprocal compensation include common transport, end-office switching and tandem switching. Under the reciprocal compensation rules adopted by

[8] NewSouth is not arbitrating this issue.

the FCC, the Parties should compensate each other at a symmetrical tandem interconnection rate, whereby each Party is responsible for paying for its respective minutes of use at the same composite rate. The CLECs' proposal simply follows FCC rule 47 C.F.R. § 51.711, which states "...symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services." CLECs are entitled to bill the same aggregate total of transport and termination rates that BellSouth charges the CLECs. The meaning of the word "equal", as used in the FCC's rule, is plain. Thus, CLECs' proposal for symmetrical reciprocal compensation based on the elemental rates is fully supported by the FCC rules. *[Sponsored by 2 CLECs: C. Pifer (KMC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language simply provides that each Party will pay the other Party for per minute of use elements associated with call transport and termination. It avoids the issue of symmetrical compensation. BellSouth's position statement sets forth that CLECs should be entitled to bill BellSouth for reciprocal compensation at symmetrical rates only upon the CLEC's verification that they satisfy the geographic comparability requirement pursuant to the Act. While the CLECs do not disagree that they must provide verification of their geographic comparability, BellSouth's language is inadequate in that BellSouth cannot be the final arbitrator of whether the CLEC meets the geographic comparability requirement. Once the CLECs provide BellSouth their switched service serving area maps, they cannot be held hostage by BellSouth's "approval" of their geographic comparability submission. In BellSouth's Answer, BellSouth took for the very first time the position that the tandem interconnection rate does not include common transport. BellSouth is incorrect. CLECs are entitled to compensation at a rate "equal" to that imposed by BellSouth. The word "equal", as used in the FCC's rule, is unambiguous. If there is a common transport component to BellSouth's transport and termination charges, CLECs are entitled to charge BellSouth an equal amount. BellSouth's proposal is not consistent with the FCC's rule on symmetrical reciprocal compensation and should be rejected by the Commission. *[Sponsored by **2 CLECs**: C. Pifer (KMC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 3-7?

A. The CLECs disagree with BellSouth's proposed restatement of the issue. First, the Parties have not previously raised any disagreement over whether the tandem interconnection rate includes common transport. The CLECs are unaware as to why BellSouth now seeks to raise this issue, through which it appears that BellSouth is hoping to create an exemption from the FCC's symmetrical reciprocal compensation rule. Second, BellSouth creates an issue about the information that a CLEC must provide to establish its entitlement to reciprocal compensation at the tandem interconnection rate. This language does not, however, match BellSouth's position statement that all that is needed is CLEC verification that it meets the geographic comparability test. In any event, both of BellSouth's issues are arguably encompassed in the broader framing of the issue presented by KMC and Xspedius. *[Sponsored by **2 CLECs**: C. Pifer (KMC), J. Falvey (XSP)]*

Issue No. 3-8 [Section 10.2, 10.2.1, 10.3]: Should compensation for the transport and termination of ISP-bound Traffic be subject to a cap?[9]

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-8.

A. As posed, the direct answer to the issue statement question is "NO". Compensation caps set in the FCC's remanded ISP Order on Remand do not extend beyond 2003. *[Sponsored by **2 CLECs**: C. Pifer (KMC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Compensation for the transport and termination for ISP-bound traffic should not be capped under the Agreement because the FCC did not establish any type of compensation cap post-2003 nor did the FCC state anywhere in its ISP Order on Remand that the 2003 growth cap extended beyond 2003. *[Sponsored by **2 CLECs**: C. Pifer (KMC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it relies on and makes reference to a compensation cap that simply does not exist. It is BellSouth's position that, pursuant to the FCC's ISP Order on Remand, the compensation cap set for 2003 should remain in place until the FCC issues a subsequent order. BellSouth is incorrect in that the FCC did not state anywhere in the ISP Order on Remand that the growth cap remains in effect until it issues a new order. BellSouth has been unable to point to such language, but relies entirely on its interpretation, which is unsubstantiated. To be exact, the ISP Order on Remand established growth caps from the effective date of the order until 2003. The

9 NewSouth is not arbitrating this issue.

FCC held, "[i]n 2003, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the 2002 ceiling applicable to that agreement." [01-131, ¶78] BellSouth's position that the 2003 growth cap remains in effect until the FCC issues a subsequent order cannot be reconciled with the plain language of the ISP Order on Remand. It has been nearly four years since the FCC issued the ISP Order on Remand and the FCC has not issued a subsequent order – despite the Federal Court of Appeals for the District of Columbia Circuit decision remanding the order and finding that the legal basis supplied by the FCC for its exclusion of ISP-bound traffic from Section 251(b)(5) reciprocal compensation was once again erroneous. Accordingly, BellSouth cannot unilaterally dictate that, under this Agreement, the FCC's growth cap for 2003 continues. *[Sponsored by* ***2 CLECs****: C. Pifer (KMC), J. Falvey (XSP)]*

Issue No. 3-9 [Section 2.1.12]: How should Local Traffic be defined?[10]

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-9.

A. Local Traffic should be defined as any telephone call that originates in one exchange and is terminated in either the same exchange, or other mandatory local calling area associated with the originating exchange (e.g., mandatory Extended Area Service) as defined and specified in Section A3 of BellSouth's GSST. Designation of Local Traffic should not be dependent on the type of switching technology used to switch and terminate such Local Traffic, including use of frame switching. Local Traffic includes

[10] KMC and NewSouth are not arbitrating this issue.

any cross boundary, intrastate, interLATA or interstate, interLATA calls established as a local call by the ruling regulatory body. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As the Commission is well aware, the definition of Local Traffic is crucial to many provisions of this Agreement as well as the interpretation of various rules and orders regarding reciprocal compensation. As such, Xspedius seeks to make clear the exact type of traffic included and excluded from "Local Traffic." Additionally, the Agreement must ensure that the definition of Local Traffic is not technology-specific so that as CLECs move to different switching technologies, BellSouth will not be able to unilaterally reclassify Local Traffic as non-local based on a new switching technology. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth defines Local Traffic as any telephone call that originates in one exchange and terminates in either the same exchange, or other local calling area associated with the originating exchange as defined and specified its General Subscriber Service Tariff. BellSouth's definition is inaccurate for two reasons. First, BellSouth's language fails to specify that Local Traffic includes only ***mandatory*** Extended Area Service ("EAS") service areas. BellSouth's definition would include ***optional*** EAS areas. Calls to and from customers in such optional EAS areas are not always local. Moreover, it is my understanding that mandatory EAS is a Commission-ordered service area change whereas ***optional*** EAS is created at the discretion of BellSouth in order to craft attractive calling plans. Optional EAS does not go through the same regulatory process as mandatory EAS and the CLECs would have to monitor BellSouth tariffs to even know what optional EAS calling plans were established by BellSouth. If BellSouth wants to create such plans with its customers it has the right to do so, but it should not change the way the calls are treated from an intercarrier compensation perspective. BellSouth's language is also inadequate in that it does not specify that the designation of Local Traffic is not dependent on the type of switching technology used to switch and terminate Local Traffic, including use of frame switching. It is my understanding that there is no FCC or Commission rule that reclassifies local traffic depending on the type of switching technology and BellSouth should not be able to impose any such conditions. As mentioned above, due to the historical and current controversy over the definition of Local Traffic, the Commission should adopt the Xspedius proposed language to promote business certainty between the Parties and limit potential disputes. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Issue No. 3-10 [Section 3.2, Ex. A]: (A) Should BellSouth be required to provide CLEC with OCn level interconnection at TELRIC-compliant rates? (B) What should those rates be?[11]

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-10(A).

A. As posed, the direct answer to the issue statement question is "YES". OCn level interconnection is technically feasible and must be made available at TELRIC-compliant rates. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

[11] KMC and NewSouth are not arbitrating this issue.

A. CLECs should be able to interconnect with BellSouth at any technically feasibly level of interconnection pursuant to section 251(c), including OCn levels. The FCC has held that obligations imposed by section 251(c)(2) and 251(c)(3) include "modifications to incumbent LECs facilities to the extent necessary to accommodate interconnection or access to network elements". OCn level interconnection is a reasonable request given the need to maximize efficiency. Accordingly, BellSouth should provide CLECs OCn level interconnection, pursuant to section 251(c) at TELRIC-compliant rates. As a carrier becomes increasingly successful and volumes of traffic exchanged with the incumbent increase, the current level of interconnection will no longer be efficient. It is perfectly conceivable that OCn level interconnection will be required from an efficiency standpoint in the next three years. There is no question that OCn interconnection is technically feasible provided the appropriate hardware is installed in each party's respective switch. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language does not provide for interconnection at the OCn level. BellSouth's position is that it is not technically feasible to interconnect at the OCn level. BellSouth, however, has not provided any explanation as to why that would be the case. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-10(B).

A. TELRIC compliant rates for OCn interconnection trunks and facilities should be set by the Commission. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As with all rates related to interconnection and access to UNEs, BellSouth must only charge CLECs TELRIC-compliant rates set by the Commission for interconnection at all technically-feasible levels, including OCn level. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language does not address the issue. It is BellSouth's position that OCn level interconnection is not technically feasible and should not be required for this reason. Therefore, according to BellSouth, no rate should be set. As mentioned above, BellSouth has not provided any valid reasons as to why that is the case and as to why it should not be made to comply with FCC rules that require it to provide interconnection at OCn levels at TELRIC compliant rates. Section 251(c)(2)(D) of the Act states that the rates, terms and conditions for such interconnection must be just, reasonable and in accordance with section 252, which includes the 252(d) TELRIC pricing standards. Therefore, to the extent that the Commission has not established a rate for OCn level interconnection, BellSouth should propose a cost study to determine a TELRIC-compliant rate or the Parties should negotiate a TELRIC-compliant rate. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Issue No. 3-11 [Sections 3.3.1, 3.3.2, 3.4.5, 10.10.2]: Should cost-based interconnection (i.e., TELRIC), be limited to the percentage of facilities used for "local" traffic?[12]

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-11.

12 KMC and NewSouth are not arbitrating this issue.

A. As posed, the direct answer to the issue statement question is "NO". Cost-based interconnection should not be limited to the percentage of facilities used for "local" traffic ("PLF"). Xspedius is entitled to cost based interconnection for telephone exchange and exchange access traffic. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Cost-based interconnection should apply to telephone exchange and exchange access traffic, as required by the Act and the FCC's rules. Section 251(c)(2)(A) of the Act specifically states that ILECs have the obligation to interconnect "for the transmission and routing of telephone exchange and exchange access." Furthermore, section 251(c)(2)(D) states that the rates, terms and conditions for interconnection must be just, reasonable and in accordance with section 252, which includes the 252(d) TELRIC pricing standards. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate in that, by application of a so-called "PLF" factor, it seeks to exclude exchange access from the cost-based interconnection scheme mandated by the Act and the FCC's rules. BellSouth tries to confuse the issue by stating that CLECs are not entitled to cost-based rates for facilities utilized for interexchange traffic. BellSouth's position, however, simply ignores the fact that CLECs are LECs just like BellSouth, and that they provide exchange access to facilitate the origination and termination of interexchange (*i.e.,* toll) calls. Calls that traverse local interconnection trunks are exchanged on a LEC-to-LEC basis. It is not a LEC-to-IXC connection, as BellSouth erroneously suggests. As discussed above, cost-based interconnection is clearly applicable to interconnection for telephone exchange and exchange access traffic pursuant to section 251 and 252 of the Act and the FCC's rules and orders. *[Sponsored by **1 CLEC**: J. Falvey (XSP)]*

Q. WHAT IS YOU POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 3-11?

A. The CLECs disagree with BellSouth's proposed restatement of the issue. BellSouth clearly skews the issue with its statement. BellSouth's issue states "should facilities used for toll traffic be offered at TELRIC rates". The issue is not about toll traffic – rather it is about compliance with the FCC's rules which require BellSouth to provide cost-based interconnection for telephone exchange and exchange access traffic. Xspedius uses the word "local" in its issue statement because BellSouth created the "Percent Local Facility" factor and not the "Percent Toll Facility" to implement its policy of non-compliance with Section 251(c)(2) pf the Act. *[Sponsored by **1 CLEC**: J. Falvey (XSP)]*

Issue No. 3-12 [Section 4.5]: What rate should apply in the event that a rate is not set forth in Exhibit A?[13]

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-12.

A. To the extent a rate associated with interconnection trunks and facilities is not set forth in Exhibit A of Attachment 3, and no Commission-approved rate has been set, the rate should be negotiated by the Parties. *[Sponsored by **1 CLEC**: J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. It would be inappropriate to mandate application of a tariff rate in instances where a TELRIC-compliant rate is required, but none has been set by the Commission. If such an

[13] KMC and NewSouth are not arbitrating this issue.

instance were to arise, it would be appropriate for the parties to attempt to negotiate a rate based on a BellSouth TELRIC cost study. If the Parties could not agree on a rate, they would then ask the Commission to set a rate consistent with the TELRIC pricing rules. *[Sponsored by 1 **CLEC**: J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language does not provide that the Parties can negotiate rates for interconnection trunks and facilities not set forth in Exhibit A of Attachment 3. Instead it requires a default to tariffed rates. To my knowledge, BellSouth's tariffed rates have not been deemed TELRIC-compliant. Furthermore, there is no need for the CLECs to engage in the lengthy and expensive BFR process to develop a TELRIC-compliant rate. In this case, that process would not be appropriate because the mandatory offering obviously would be already developed – only the TELRIC rate would be missing. *[Sponsored by 1 **CLEC**: J. Falvey (XSP)]*

Issue No. 3-13 [Section 4.6]: Should the costs of two-way interconnection trunks facilities be split proportionally based on the percentage of traffic originated by each Party or in half?[14]

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-13.

A. For two-way trunk groups that carry only both Parties' non-transit and non-interLATA Switched Access Traffic, each Party should pay its proportionate share of the recurring charges for trunks and associated facilities and nonrecurring charges for additional trunks and associated facilities based on the percentage of the total traffic originated by that

[14] KMC and NewSouth are not arbitrating this issue.

Party. The Parties should determine the applicable percentages twice per year based on the previous six months minutes of use billed by each Party. Each Party should pay its proportionate share of initial facilities based on the joint forecasts for circuits required by each Party. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. To the extent the Parties are carrying non-transit and non-interLATA Switched Access Traffic, the parties should proportionality split the recurring charges for trunks and associated facilities. Since both Parties are utilizing the trunks for the exchange of traffic, each should be proportionally responsible for its share of the recurring trunk charges as measured by the amount of traffic originated by each party and sent over the trunks. The payment scheme proposed by Xspedius will ensure that the Parties are responsible for paying for their fair share of interconnection facilities and will limit the number of potential disputes under the Agreement. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language does not provide for the proportional sharing of charges for such facilities. Instead, BellSouth advocates a straight 50/50 split of the charges, regardless of whether one side is causing more of the costs by sending a greater proportion of originating traffic. BellSouth's language (and position) violates basic cost-causation and recovery principles and does not comport with its obligation to provide cost-based interconnection.

BellSouth offers no valid reason for disagreeing with Xspedius' language, which BellSouth had agreed to previously in an interconnection agreement with e.spire, a company whose assets have in substantial part been acquired by Xspedius. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Issue No. 3-14 [Sections 10.10.4, 10.10.5, 10.10.6,10.10.7]: Should CLEC be permitted to bill BellSouth based on actual traffic measurements, in lieu of BellSouth-reported jurisdictional factors?[15]

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 3-14.

A. As posed, the direct answer to the issue statement question is "YES". Where a CLEC has message recording technology that identifies the jurisdiction of traffic terminated as defined in the Agreement, CLEC should have the option of using that information to bill BellSouth based upon actual measurements and jurisdictionalization, in lieu of factors reported by BellSouth. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. There is no reason why a CLEC, which employs its own message recording technology that identifies the jurisdiction of terminated traffic cannot utilize its technology to bill BellSouth based on the actual measurements and jurisdictionalization instead of BellSouth's factors. BellSouth's factors are designed as a default in cases where a Party does not have traffic recording technology. However, in the instance that a CLEC does have recording technology, there is no reason why the Parties cannot use the CLEC's actual measurements in lieu of BellSouth's default factors. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

[15] KMC and NewSouth are not arbitrating this issue.

A. BellSouth's language does not provide Xspedius with the option of billing based on actual traffic measurements. BellSouth's position statement indicates that it is willing to agree that Xspedius can bill based on actual traffic measurements, but BellSouth has not presented contract language that would flesh-out this proposal. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 3-14?

A. Xspedius disagrees with BellSouth's issue statement because it appears to contemplate an agreement of some sort by the Parties that Xspedius can bill based on actual traffic measurements – Xspedius has yet to see or agree to terms proposed by BellSouth. Until that happens, it would be premature to restate the issue in the manner presented by BellSouth. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

COLLOCATION (ATTACHMENT 4)

Issue No. 4-1 [Section 3.9]: (A) What definition of "Cross Connect" should be included in the Agreement?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 4-1(A).

A. The following definition of "Cross Connect" should be included in the Agreement: "A cross-connection (Cross Connect) is a cabling scheme between cabling runs, subsystems, and equipment using patch cords or jumper wires that attach to connection hardware on each end, as defined and described by the FCC in its applicable rules and orders." *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners' proposed definition of Cross Connect is a verbatim restatement of the FCC's definition of this facility. Petitioners have requested no more than the facilities to which they are entitled. This language is necessary because Petitioners' need to ensure that once they have collocated in a BellSouth premise, they can use Cross Connects to gain access to loops , transport, multiplexers, switch ports, optical terminations and the like. Without such access, the purpose of collocating is moot. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has proposed language that is overly specific and thus restricts Petitioners' access to Cross Connects. BellSouth limits its definition of Cross Connect to "a jumper on a frame … or panel" and, if necessary, the "tie cable connecting the frame/panel with the collocation demarc[.]" This definition does not comport with the FCC's definition, which includes "a cabling scheme between cabling runs [or] subsystems" and equipment. In practice, it could prevent a CLEC from connecting its collocated equipment to loops , transport, multiplexers, switch ports, optical terminations and the like. . Under BellSouth's language, CLEC fear that they would be forced to obtain this connectivity by purchasing "cabling" at unknown rates or by purchasing expensive "local channels," which essentially are cross connects priced at access rates on a minute-of-use basis. Thus, by artificially limiting the definition of Cross Connect, CLECs fear that BellSouth is planning a windfall at the CLECs' expense. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 4-2 [Sections 5.21.1, 5.21.2]: With respect to interference and impairment issues raised outside of the scope of the FCC Rule 51.233 (which relates to the deployment of Advanced Services equipment) what provisions should be included in the Agreement?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 4-2.

A. Provisions should be included to cover the installation and operation of any equipment or services that (1) significantly degrades ("significantly degrades" is as in the FCC rule applicable to Advanced Services); (2) endangers or damages the equipment or facilities of any other telecommunications carrier collocated in the Premises; or (3) knowingly and unlawfully compromises the privacy of communications routed through the Premises; and (4) creates an unreasonable risk of injury or death to any individual or to the public.

The Agreement also should provide that if BellSouth reasonably determines that any equipment or facilities of a Petitioner violates the provisions of Section 5.21, BellSouth should provide written notice to the Petitioner requesting that the Petitioner cure the violation within forty-eight (48) hours of actual receipt of written notice or, at a minimum, to commence curative measures within twenty-four (24) hours and to exercise reasonable diligence to complete such measures as soon as possible thereafter.

The Agreement also should state that, with the exception of instances which pose an immediate and substantial threat of physical damage to property or injury or death to any person, disputes regarding the source of the risk, impairment, interference, or degradation should be resolved pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. This issue is of great importance to Petitioners, as the Agreement provisions that it addresses give BellSouth the right to terminate Petitioners' service. They are "pull the plug" provisions. Because of the enormous competitive and customer service implications of these provisions, their terms should be as precise and definite as possible in order to prevent unwarranted service disruption.

Petitioners' proposed language provides BellSouth full protection for occurrences of interference or impairment that would affect service in a material way or would endanger the privacy or safety of any person. It protects against four types of harm. The first type, drawn in large part from the FCC's interference rules, protects BellSouth and other collocated carriers from interference that "significantly degrades" — defined as "noticeably impairing a service from a user's perspective" — their equipment or service. Allegations of this sort of impairment should be supported by customer complaints or trouble tickets. As to the second type of harm, Petitioners' language guards against actions or occurrences that "endangers or damages the equipment of BellSouth or any other telecommunications carrier," thus protecting the integrity of all operations located within and service provided via the BellSouth premise in which Petitioner is collocated. Third, Petitioners' language states that any knowing or unlawful compromising of a customer's privacy of communications will be covered. This language will ensure that Petitioners take all reasonable steps to ensure that their equipment and technicians preserve customer privacy. Finally, Petitioners have proposed language that their equipment and services shall not impose an "unreasonable risk or injury or death" to any person.

In the event that interference rises to a level in which it poses "an immediate and substantial threat of physical damage to property or injury or death to any person," BellSouth may take whatever action necessary to prevent such injury, including the termination of power to Petitioners' equipment, provided that BellSouth has determined beyond a reasonable doubt that Petitioner's equipment is the cause of such a dire threat.. Where possible, BellSouth must provide Petitioners with notice of such action. Petitioners' language thus ensures a proportional response to interference, and prevents BellSouth from terminating service arbitrarily or for minor infractions. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth also has proposed a four-part interference provision, and it concurs with Petitioner's language regarding an "unreasonable risk of injury or death." In other respects, however, BellSouth has proposed language that is too vague or overly broad, such that it would be entitled to terminate Petitioners' services in response to minor interference. First, in addition to Petitioners' "significantly degrades" language (BellSouth concurs that this term is defined as "noticeably impairing a service from a user's perspective"), BellSouth has added that anything that "interferes with or impairs" service will be deemed actionable interference. This language provides no objective standard for defining which interference justifies service termination. Accordingly, it improperly renders BellSouth the arbiter, without limitation, as to what problems warrant termination. Second, BellSouth proposes to expand the provision to include "equipment, facilities, or any other property of BellSouth or of any other entity or person" (emphasis added). This language is inappropriate, because it imposes the risk of service termination even when the alleged interference does not impact any telecommunications carrier's actual operations or service (BellSouth claims that it does not allow non-telecommunications carriers to collocate – thus, they need no protection). Under this language, a spilled can of soda in an end office common area could result in service termination. Third, BellSouth seeks to hold Petitioners accountable for any compromise of customer privacy, regardless of whether the breach was knowing or unlawful. In effect, this provision creates strict liability on Petitioners for any breach of customer privacy, a result that is neither commercially reasonable nor in keeping with federal law.

In addition, BellSouth proposes a significantly different standard for service termination. If interference poses a threat of "any other significant degradation, interference or impairment of BellSouth's or another entity's service," then it may terminate Petitioners' electrical power. This language, coupled with BellSouth's overly broad definitions of what constitutes interference, gives BellSouth far too much latitude in determining whether to terminate power. Not every instance of interference or impairment warrants interrupting a customer's service. Thus, because of the gravity of the provisions at issue, which empower BellSouth to termination service by interrupting power, the language defining what constitutes interference or impairment must be precise, with an objective standard, and not open to interpretation. More importantly, these provisions must provide for a proportional response to interference, such that Petitioners' services are not terminated for minor interference that is not significantly service-affecting. Customer service must be safeguarded; BellSouth's ability to interrupt service must be closely and fairly defined. To do otherwise would be patently unreasonable as a matter of contract, but also contrary to the public interest. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 4-2?

A. BellSouth's restatement of Issue 4-2 asks broadly what "restrictions should apply to CLEC's use of collocated space." This restatement frames the issue in a much different way, yet BellSouth's position statement nonetheless focuses on the same interference/service degradation issues that Petitioners have raised and discussed. Accordingly, the proposed restatement of Issue 4-2 is somewhat unfocused and unhelpful. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 4-3 [Section 8.1]: Where grandfathering is appropriate, which rates should apply?

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

A. When rates have been "grandfathered," the rates that should apply are those rates that were in effect prior to the Effective Date of the Agreement, unless application of such rates would be inconsistent with the underlying purpose for grandfathering. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The core dispute in this issue (and related Issue 4-5) surrounds Petitioners' unwillingness to double-pay for certain collocation charges. Petitioners' proposed language states that collocation rates should be grandfathered — charged at rates that were in effect prior to this Agreement — "unless application of such rates would be inconsistent with the underlying purpose for grandfathering." That is, Petitioners will pay grandfathered rates unless doing so in effect forces them to double-pay for collocation power and space preparation in the form of previously paid ICB pricing or non-recurring charges and ongoing recurring charges that incorporate recovery for things Petitioners already had paid for. This result would be "inconsistent" with the concept of grandfathering, because it would give BellSouth a windfall in terms of double-recovering space preparation rates — the opposite of what grandfathering is designed to do. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language omits Petitioners' caveat regarding inappropriate grandfathering of rates. In other words, BellSouth is unwilling to ensure that Petitioners do not pay twice for space preparation, first through non-recurring or ICB up-front payments and then through recurring charges designed to cover space preparation costs. This position is unreasonable, as it raises Petitioners' costs needlessly and without justification. Accordingly, this provision should state that grandfathered rates shall apply unless that result in inconsistent with the purpose of grandfathering. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 4-3?

A. BellSouth's restatement of Issue 4-3 is simply "how should grandfathered rates apply?" This language fails to capture the issue of whether grandfathering is appropriate and, if so, which rates should be grandfathered. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 4-4 [Section 8.4]: When should BellSouth commence billing of recurring charges for power?

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

A. Billing for recurring charges for power provided by BellSouth should commence on the date upon which the primary and redundant connections from the Petitioner's equipment in the Collocation Space to the BellSouth power board or BDFB are installed. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners should not pay for power that they are not in a position to use. Billing for power should therefore commence after the requisite power cabling is installed (*i.e.*, when leads are tied down to a fuse panel or BDFB); prior to that time, Petitioners could not access BellSouth's power supply. To bill prior to that time is nothing more than taking Petitioners' money for no services rendered. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's position is that billing for power provided by BellSouth should commence on the Space Acceptance Date or the Space Ready Date if a Space Acceptance inspection does not occur within 15 calendar days of the Space Ready Date. Under this language, Petitioners would be paying for power without even being connected to the BellSouth power infrastructure. The Petitioner would merely be present in the office; its equipment could not run or consume power. There is no reasonable basis for BellSouth to assert that it is owed money in this situation, as it is not being charged by the power company for power that has not been drawn. BellSouth's language should therefore be rejected. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 4-5 [Section 8.6]: Should CLEC be required to pay space preparation fees and charges with respect to collocations when it already has paid space preparation charges through ICB or NRC pricing?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 4-5.

A. The answer to the question posed in this issue is "NO." Space preparation fees should not apply when CLEC already has paid space preparation charges through previously billed ICB or non-recurring space preparation charges. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As is the case regarding Issue 4-3, Petitioners want to ensure that they do not pay space preparation charges twice. Accordingly, Petitioners have proposed language stating that preparation fees "shall not apply" if the carrier "has paid space preparation charges through previously billed ICB [individual case basis] or nonrecurring space preparation charges."

The need for this language stems from a change in the way state commissions have set collocation fees. Originally, fees for space preparation were considered non-recurring costs that a CLEC would have to pay in lump sum prior to occupying the ILEC premises. Because these up-front costs were often quite large, they acted as a barrier to entry. Many state commissions therefore re-configured rates in order that space preparation fees are recovered through monthly rent or other recurring charges. In some instances, however, CLECs had already paid the ICB non-recurring fees prior to the rate changes, and thus faced the possibility that they would pay for space preparation again in the form of rent. This outcome is of course improper.

Petitioners' language thus seeks to ensure that whatever amounts they have already paid "through previously billed ICB or nonrecurring" charges is somehow taken into account with respect to ongoing non-recurring costs. This language will prevent double-payment, and an improper windfall for BellSouth. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would credit Petitioners' previous fee payments only to the extent that "all" charges were paid "in full." This language is unreasonable. Any money that a carrier has already paid to BellSouth must be credited, whether it was 100%, 99%, 50%, or 5% of the fees due. There is no logical basis for BellSouth to assert that a partial payment should not be recognized and credited. Such a provision would permit BellSouth vast over-recovery of its space preparation costs, and would impose unnecessary costs on Petitioners that raise the barrier to entry. It would defeat the purpose of the states' work in re-configuring collocation rates. BellSouth's proposed language should therefore be rejected. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q, WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 4-5?

A. BellSouth's restatement of Issue 4-5 simply changes the tone of Petitioners' issue statement. It does not change the question at all. Whereas Petitioners ask whether they should pay space preparation fees if they "already ha[ve] paid space preparation charges through ICB or NRC pricing," BellSouth asks whether Petitioners should pay fees "that have not already been recovered through previous ICB or NCR charges." Petitioners have already stated, however, that they will pay the appropriate collocation preparation charges not already covered. The true question is whether we must pay them twice. BellSouth's restatement of this issue is thus unnecessary. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 4-6 [Sections 8.11, 8.11.1, 8.12.2]: What rates should apply for BellSouth-supplied DC power?

Q: PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 4-6.

A. Applicable rates should vary depending on whether the Petitioner elects to be billed on a "fused amp" basis, by electing to remain (or install new collocations or augments) under the traditional collocation power billing method, or on a "used amp" basis, by electing to convert collocations to (or install new collocations or augments under) the power usage metering option set forth in Section 9 of Attachment 4. Under either billing method, there will be rates applicable to grandfathered collocations for which power plant infrastructure costs have been prepaid under an ICB pricing or non-recurring charge arrangement, and there will be rates applicable where such grandfathering does not apply and power plant infrastructure is instead recovered via recurring charges, as currently set by the Commission.

Under the fused amp billing option, the Petitioner will be billed at the Commission's most recently approved fused amp recurring rate for DC power. However, if certain arrangements are grandfathered as a result of the Petitioner having paid installation costs under an ICB or non-recurring rate schedule for the collocation arrangement power installation, the Petitioner should only be billed the recurring rate for the DC power in effect prior to the Effective Date of this Agreement, or, if rates that excluded the infrastructure component had not been incorporated into the Parties' most recent Agreement, the most recent Commission approved rate that does not include an infrastructure component should apply.

Under the power usage metering option, recurring charges for DC power are subdivided into a power infrastructure component and an AC usage component (based on DC amps consumed). However, if certain arrangements are grandfathered as a result of the Petitioner having paid installation costs under an ICB or non-recurring rate schedule for the collocation arrangement power installation, the Petitioner should only be billed a recurring rate for the AC usage based on the most recent Commission approved rate exclusive of an infrastructure component (as set by the Commission). *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners position remains that they should pay grandfathered rates when appropriate and that they should have the option of paying only for the power they use. And as explained in Issue 4-8, Petitioners should be permitted to chose the method of billing — on either a "fused amp" or a "used amp" basis — in any BellSouth state. (Although this has been ordered in Tennessee, Florida and Georgia, BellSouth currently refuses to make the option available outside Tennessee.) Under either method, where Petitioners have already paid non-recurring charges for the power infrastructure they require, such payments must be credited in some way to prevent double-dipping by BellSouth. Thus, in the event that a Commission's rates have changed to include infrastructure costs within the monthly recurring power rate, Petitioners should pay grandfathered monthly rates that do not include this component. Petitioners' proposed language therefore states that if they have "paid installation costs under a ICB or nonrecurring rate schedule for the collocation arrangement power installation … the most recent Commission approved rate that does not include an infrastructure component shall apply." *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inappropriate because it requires Petitioners to pay "the rates contained in Exhibit B of this Attachment", regardless of whether grandfathering is appropriate and irrespective of whether a fused or used billing option is chosen. In other words, BellSouth wishes to require Petitioners to pay twice for power infrastructure work already completed, once via ICB NRCs and again through recurring monthly rates. According to BellSouth's position statement, the only exception that BellSouth provides to the "fused amp" billing method is for Tennessee, presumably because that commission already ordered BellSouth to provide used amp billing.

As is the case with collocation build-out charges (Issue 4-5), such a practice is unreasonable and anticompetitive. BellSouth's proposed terms would improperly raise Petitioners' costs and derive a rate windfall. They are not acceptable in any state, regardless of whether, like Tennessee, the state commission has affirmatively ordered used amp billing. Petitioners' language should therefore be adopted. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 4-7 [Section 9.1.1]: Under the fused amp billing option, how will recurring and non-recurring charges be applied and what should those charges be?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 4-7.

A. Under the fused amp billing option, monthly recurring charges for -48V DC power should be assessed per fused amp per month in a manner consistent with Commission orders and as set forth in Section 8 of Attachment 4 (see Issue 4-6 above). Non-recurring charges for –48V DC power distribution, should be as prescribed by the Commission. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. With respect to Issue 4-7, Petitioners again seek to ensure that they pay for the power that they use. Petitioners' language states that monthly charges for DC power will be assessed on a per-amp basis at rates that the Commission approves. This language is appropriately precise as to Petitioners' payment obligations. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is more complicated than what Petitioners propose: charges will be "based upon the engineered and installed power feed fused ampere capacity" and "based on the costs associated with collocation power plant investment and the associated infrastructure." Petitioners are uncertain what "engineered and installed power feed fused ampere capacity" means, other than it is apparently something different from the methodology whereby Petitioners are charged for the number of amps used in a particular month. In fact, it may provide for CLECs to pay for power that they do not use. Accordingly, Petitioners may pay more for power under this terms than is necessary or appropriate. In addition, BellSouth's costing language is vague, and seems to indicate that rates different from Commission-approved rates will apply to DC power. In any event, BellSouth's language is so vague as to be unintelligible, and provides Petitioners with no certainty as to their payment obligations. Such language is simply inappropriate as a matter of contract and should be rejected, or at the least clarified to define which costs will be included in BellSouth's rates. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 4-7?

A. BellSouth has divided Issue 4-7 into subissues (A) and (B). Where CLECs have asked which recurring and non-recurring charges should apply to fused amp billing, BellSouth has divided the issue into (A) "How should recurring and non-recurring charges be applied," and (B) "What should the charges be?" This restatement is unnecessary and does not change Issue 4-7 in any meaningful way. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE RESPOND TO BELLSOUTH'S POSITION AS TO NEW ISSUE 4-7(B).

A. BellSouth states that non-recurring charges for DC power should be "based on the costs associated with collocation power plant investment and the associated infrastructure." Frankly, we are not sure as to what this means and as to whether it could mean that BellSouth wants these rates to be on an ICB basis. Petitioners request that these rates be as prescribed by the Commission and not on an ICB basis. The reason for this position is that Petitioners must be able to plan their network and predict the power-related rates that they will pay. Leaving all power NRCs to be determined on a case-by-case basis imposes too much uncertainty on Petitioner' business plans. Moreover, it permits BellSouth too much discretion in setting rates. Therefore, the Agreement should expressly state that NRCs for DC power will be those adopted by the Commission. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 4-8 [Sections 9.1.2, 9.1.3]: Should CLEC be permitted to choose between a fused amp billing option and a power usage metering option (B) If power usage metering is allowed, how will recurring and non-recurring charges be applied and what should those charges be?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 4-8(A).

A. The answer to the question posed in this issue is "YES." Petitioners should be permitted to choose between a fused amp billing option and a power usage metering option. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Three BellSouth states, Florida, Georgia and Tennessee, have held that BellSouth must permit CLECs to adopt usage-based pricing ("used amp") billing for DC power recurring charges. These commissions have found that forcing CLECs to use fused amp billing is not technically required and results in gross overcharges for power. Many states, including Texas, Illinois and Indiana, have also found it appropriate for CLECs to pay under the used amp method, on the ground that it is unreasonable to charge inflated amounts that reflect power not actually used.

The "fused amp" method is the traditional method for billing recurring charges, and is the only method that BellSouth wishes to permit Petitioners to use. Under this method, the

CLEC pays for the total capacity that it could use, based on the installed infrastructure, rather than the power it actually uses. Because this method often imposes unnecessary costs, and may act as a barrier to entry, Petitioners should be entitled to choose which method BellSouth uses to bill for recurring DC power charges. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth maintains that Petitioners are entitled to choose between used amp and fused amp billing only in Tennessee, in accordance with that Commission's orders. In its position statement, BellSouth states that it refuses to provide this choice in Florida or Georgia — where the Commissions have adopted a similar order — for the preposterous reason that the precise rates, terms and conditions for used amp billing have not been developed, relieving BellSouth of any obligation to provide it. Thus, in any provision discussing usage metering as a billing option, BellSouth has inserted the words "in Tennessee." Although this Commission would have to determine the appropriate way in which to apportion its existing collocation power rates between infrastructure and consumption components, the parties have agreed to all other terms and conditions necessary to implement the used amp billing option. Indeed, it is possible that the Parties could agree to the appropriate apportionment, given an appropriate explanation and opportunity to understand BellSouth's proposed methodology – which presumably would mirror the approach taken in Tennessee.

BellSouth's position is unreasonable. Three BellSouth state commissions already have recognized the competitive value of a used amp billing option, and expressed concern that other billing methods will result in overcharges. And as BellSouth has already been ordered to permit used amp billing in three states, and has implemented such billing in Tennessee, Petitioners should be able to choose this type of billing in any state. Indeed, under the federal rules, any collocation arrangement provided by an ILEC in one state is presumed to be feasible and should be provided in every state in its region. This presumption must hold true for collocation power billing as well. BellSouth demonstrably has the ability to provide used amp billing and thus should be required to provide it upon request in any state.

In sum, what BellSouth requests in this section is nothing more than the right to overcharge CLECs for power they do not use. That result has been rejected by several state commissions, and should similarly be rejected in this proceeding. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 4-8(B).

A. If the Petitioner chooses the power usage metering option, monthly recurring charges for -48V DC power will be assessed based on a consumption component and, if applicable, an infrastructure component, as set forth in Section 8 of Attachment 4 (see Issue 4-6 above). The Commission should ensure that its most recently approved recurring rates are apportioned appropriately into the consumption and infrastructure components. Nonrecurring charges for -48V DC power distribution should be as prescribed by the Commission. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Where Petitioners pay for power on a usage metering basis, the rates should be as set by the Commission unless, as explained in Issue 4-6, such rates would require a Petitioner to pay for infrastructure costs already covered by ICB non-recurring charges. As Petitioners have explained, it is inappropriate, and potentially anticompetitive, to require any carrier to pay both NRCs and redundant recurring charges for the same preparatory work. Thus, monthly charges for DC power should be assessed for the amperes used, according to Commission rates, with credit provided to the extent that infrastructure costs have already been paid but are a component of the Commission's monthly rates as well. This proposal comports with Petitioners' consistent position regarding the interplay of ICB non-recurring charges and monthly recurring charges for collocation-related facilities. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it fails to account for power infrastructure charges already paid by Petitioners and it does not afford Petitioners a metered usage billing option. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 4-9 [Sections 9.3]: For BellSouth-supplied AC power, should CLEC be entitled to choose between a fused amp billing option and a power usage metering option?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 4-9.

A. The answer to the question posed in this issue is "YES." Where a Petitioner elects to install its own DC Power Plant, and BellSouth provides Alternating Current (AC) power to feed Petitioner's DC Power Plant, CLEC should have the option of choosing between fused amp billing and power usage metering options. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. This issue involves a scenario in which Petitioners install their own power converter, and convert BellSouth supplied AC power to DC power for their own use. Petitioners should pay for BellSouth AC power in the same manner as for DC power. Specifically, and as proposed with respect to DC power, Petitioners should have the option of choosing between fused amp and metered usage billing options. Accordingly, Petitioners' proposed language states that "charges for AC power will be assessed in the same manner as charges for DC power are assessed, as set forth in Section 9.1 (including subsections above). This language is precise, definite, and provides BellSouth with fair compensation for the power it provides. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it does not allow Petitioners to choose a metered usage billing option. It also provides no consideration for power infrastructure charges already paid, which Petitioners' Section 9.1 seeks to do. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 4-10 [Sections 13.6]: (A) Should BellSouth have the right to request the removal from BellSouth's Premises of a CLEC employee where the CLEC employee has not been found to have interfered with the property or personnel of BellSouth or another telecommunications carrier in a significant and material way? (B) In instances where interference caused by CLEC employee has not been found to have interfered with the property or personnel of BellSouth or another telecommunications carrier in a significant and material way, should the Parties be required to cooperate to ensure that appropriate remedial measures are taken that are less likely to have a significant impact on CLEC's daily operations?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 4-10(A).

A. The answer to the question posed in this issue is "NO." BellSouth should be entitled to request prompt removal and suspension of access from BellSouth's Premises only in cases where the Petitioner's employee is found interfering with the property or personnel of BellSouth or another telecommunications carrier in a significant and material way. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners are committed to preserving the security of BellSouth offices, and expect their personnel to conduct themselves accordingly while on BellSouth premises. Petitioners therefore agree with BellSouth that any employee who jeopardizes the operations or equipment of another carrier should be barred from entering BellSouth property subject to an investigation.

What Petitioners seek to ensure, however, is that their personnel are not removed from BellSouth's premises for relatively minor infractions that pose no material threat to the operations of BellSouth or other collocated telecommunications carriers. We have proposed language stating that "where CLEC employee is found interfering ... in a significant and material way," that employee may be removed from the premises. This language is intended to distinguish between truly damaging conduct, such as ripping out loop terminations, from trivial mistakes, such as mistakenly taking the attendant's pen at the front desk. This provision, like the provisions discussed within Issue 4-2, should ensure a proportional response to personnel misconduct. It should not be an open-ended permission for BellSouth to evict a technician from its premises without due cause. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would permit it to remove Petitioners' personnel for any interference caused to BellSouth or another carrier. There is no limiting standard in BellSouth's language. This position is unreasonable, as it would grant BellSouth too much latitude to demand suspensions that could seriously threaten a Petitioner's ability to maintain its collocated equipment and ensure high quality service. Petitioners' personnel are highly trained, and in some instances may be the only technician designated for a large service area. If BellSouth were to remove a technician for a minor act of interference — think of the pen example — it may in fact jeopardize the Petitioners' ability to timely address a service issue. This outcome would in turn endanger customer service. Thus, only where an employee interferes with BellSouth's or another carrier's operations "in a significant and material way" should removal be warranted. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 4-10(B).

A. In instances where interference caused by a Petitioner's employee has not been found to have interfered with the property or personnel of BellSouth or another telecommunications carrier in a significant and material way, the Parties should be required to cooperate and communicate, to the extent circumstances permit, to ensure that the Parties may take appropriate remedial measures and so that the Petitioner's personnel are not denied access for activity that does not have a significant and material impact and that would be more suitably addressed through disciplinary measures less likely to have a significant impact on the Petitioner's daily operations. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners maintain that the Agreement should allow for a proportional response to employee misconduct, and should differentiate between serious misconduct and inadvertent mistakes, or conduct that does not interfere with service in a material way. Not all conceivable infractions warrant a disruptive suspension of access. Indeed, the Parties may accomplish more through cooperation. This solution is less disrupting, and thus more reasonable in the case of insignificant and non-material infractions, and should be adopted. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language is inadequate because it does not allow fro a remedy short of suspension of access, no matter how insignificant or non-material the alleged infraction may be. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 4-10?

A. BellSouth has consolidated parts (A) and (B), such that its version of Issue 4-10 simply asks "[u]nder what circumstances should BellSouth be entitled to request that a CLEC employee be removed from BellSouth's premises in the absence of a formal investigation?" In stating the question this way, BellSouth apparently seeks to avoid any discussion of actions that are less severe, as the Petitioners' version of this Issue proposes. This attempt only underscores the need for the Agreement to provide solutions short of removing the CLEC employee, as such removal may be a disproportionate response that could have a significant impact on the Petitioner and its customers.. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

<u>ORDERING (ATTACHMENT 6)</u>

Issue No. 6-1 [Section 2.5.1]: Should payment history be included in the CSR?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 6-1.

A. The answer to the question posed in this issue is "YES." A subscribers' payment history should be included in the CSR to the extent authorized or required by the FCC, Commission or End User. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale is twofold. First, such information must be made available as part of the OSS UNE. BellSouth has this information in its OSS systems and is required by federal law to provide access to it. The FCC's rules do not contain an exemption that permits BellSouth to actively strip customer payment history from a CSR. Second, BellSouth's efforts to actively filters such information out are anticompetitive. BellSouth has such information by virtue of its monopoly legacy and enduring market dominance. It merely seeks to put competitors at a disadvantage by withholding such information. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. HAVE OTHER COMMISSIONS REQUIRED BELLSOUTH TO CEASE STRIPPING SUCH INFORMATION FROM CSRs?

A. Yes, it is my understanding that certain Comm issions already have determined that BellSouth must not shield this information from its competitors in this way. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WOULD BELLSOUTH BE VIOLATING CPNI/PRIVACY RULES BY PROVIDING SUCH INFORMATION?

A. No, just as is the case in those states I just listed, it is my understanding that there would be no such violation here. On this point, it is important to note that the payment history is part of a CSR and that CLECs already get permission in the form of a letter of authorization (LOA) from customers in order to gain access to CSRs. Thus, this issue is not a "privacy" issue – it is squarely a UNE/competition issue. In any event, when a customer gives a CLEC permission to view such information, it simply is not BellSouth's prerogative to say no and to withhold it. In that sense, BellSouth's actions are not only anti-competitive, they're also anti-consumer. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has not suggested alternate language for this provision. BellSouth's position, however, is that payment history should be maintained as confidential information and is not necessary in order for a CLEC to provision service to an end user. This argument simply ignores that such information must be made available fir two independently valid reasons. As I explained, first, the information is part of the OSS UNE and, second, it is not "confidential" if a consumer authorizes its release. BellSouth also claims that its systems will not permit this information to be shared on an end user by end user or CLEC by CLEC basis. But this is not something that needs to be done on an end user-by-end user or CLEC-by-CLEC basis. No systems change is needed other than disabling the system "enhancement" that strips CSR information in certain states. Obviously, if BellSouth can comply with the law and customer requests that they share such information in some states, it can comply in all states. On this point, however, I must add that the need for a systems change, if one were indeed needed, would be no excuse for failing to provide nondiscriminatory access to OSS and for failing to abide by consumers' desire that such information be shared with carriers that may be able to provide them with more favorable service options. BellSouth should therefore not be permitted to remove customer payment history from a CSR, and Petitioners' language should be adopted. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 6-2 [Section 2.5.5]: Should CLEC have to provide BellSouth with access to CSRs within firm intervals?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 6-2.

A. The answer to the question posed in this issue is "NO." CLECs are not required by law to commit to specific intervals, and Petitioners do not have automated systems in place to handle CSR requests. Moreover, BellSouth refuses to commit to deliver CSRs within a firm interval. Petitioners, however, voluntarily will commit to use best efforts to provide CSRs within an average of 5 business days of a valid request, subject to the same exclusions applicable to BellSouth's delivery of CSRs. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners are not incumbent monopolists, and, as such, they are not subject to the unbundling intervals and performance metrics that apply to BellSouth. In fact, Petitioners are not even required to negotiate this issue, but have done so in order to demonstrate that they are committed to take steps necessary to ensure that consumers are well served by a competitive marketplace. Notably, this is the first time that any of the Petitioners have been asked by BellSouth to commit to intervals of this type. Accordingly, a careful and cautious approach is best. The *voluntarily* commitment Petitioners offer commits them to use best efforts — which is a substantial contract term — in providing a CSR to BellSouth within 5 business days. This language should provide BellSouth with ample assurances that it will obtain CSRs in a timely manner. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's position is that CLECs should be required to provide CSRs to BellSouth in the same intervals prescribed by this Commission for BellSouth. In stating that position, BellSouth ignores the fact that the language it has tried to foist upon Petitioners does not contain the same interval included in BellSouth's SEEMs package. BellSouth's CSR SEEMs interval is an average interval subject to a variety of exclusions. BellSouth's proposal excludes the averaging and the applicable exclusions – it simply is not "the same."

Even if BellSouth's proposed interval was the same (which it is not) BellSouth also ignores the fact the standard applies to it because it is an ILEC and as such it has Section 251 unbundling obligations which include access to OSS. CLECs such as the Petitioners are not similarly situated and do not have Section 251 unbundling obligations. On this point, it should be made clear that, to the extent that BellSouth prevails on its "not a Section 251 obligation, so it's not appropriate for arbitration" argument, it should lose this issue, as such a rationale (flawed as it is) should be applied consistently, if it is to be applied at all (and it shouldn't be applied).

In any event, BellSouth's position on this issue is patently unreasonable. CLECs are not and should not be held to the same (or, as BellSouth has proposed, more stringent) unbundling standards as BellSouth; they have never enjoyed a local monopoly nor have they had the economies and scale needed to support automated systems, as BellSouth has. CLECs voluntarily are willing to agree to language that commits them to use best efforts to meet intervals that are eminently reasonable given their circumstances. Accordingly, the Commission should adopt Petitioners' proposal and reject BellSouth's proposal to impose super-251 intervals where none apply. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 6-3 [Sections 2.5.6.2, 2.5.6.3]: (A) What procedures should apply when one Party alleges, via written notice, that the other Party has engaged in unauthorized access to CSR information? (B) How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 6-3(A).

A. Either Party, in the event it suspects that the other Party has accessed CSR information without having obtained the proper End User authorization, should send written notice to the other Party specifying the alleged noncompliance. The Party receiving the notice should be obligated to acknowledge receipt of the notice as soon as practicable, and provide appropriate proof of authorization within seven (7) days or provide notice that appropriate corrective measures have been taken or will be taken as soon as practicable. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners maintain that the improper use of CSR information is inappropriate and anticompetitive. Petitioners' language provides that a Party that questions the other's use of CSR information may request a copy of the end user's LOA permitting such use, and that the requesting party should receive that LOA within seven (7) days. If a the Party that receives such a request is unable to produce the LOA it should inform the requesting Party that it has taken or is committed to take appropriate corrective measures. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth agrees with Petitioners that the Party receiving notice of alleged noncompliance should provide the end user's LOA within seven (7) business days to prove authorization. BellSouth's language, however, fails to acknowledge that it is possible that infractions could occur and that when one is detected, the Parties should commit themselves to take appropriate corrective measures. If Petitioners detect such an infraction they will certainly commit to take corrective measures within 5 days and to undertake commercially reasonable efforts to ensure that such infractions (to the extent that they could be of the continuing type) would cease by the 5th day . Rather than agree to commit to an affirmative obligation to take corrective measures, BellSouth ceases upon an opportunity to threaten disconnection of access to its OSS or the termination of all services for what is unlikely to be anything more than an isolated instance of a rogue salesperson overstepping the rules. If it is anything more than an isolated circumstance, BellSouth should be filing a complaint. In any event, the proposed remedy that BellSouth seeks to wield is way too disproportionate and severe to be wielded at BellSouth's unilaterally discretion. Petitioners will not commit to vague BellSouth language that threatens the suspension of access to OSS and even termination of all services if BellSouth is somehow not satisfied that such corrective actions have been taken or that Petitioner has made commercially reasonable efforts to ensure that an infraction of a continuing nature ceases by the fifth (for suspension of access to OSS) or tenth day (for termination of all services). Once again, BellSouth is proposing to wield its monopoly legacy in a manner that threatens competitors and consumers by allowing

BellSouth to play prosecutor, judge and jury. The Commission should reject this heavy-handed approach and adopt Petitioners' language which includes an affirmative obligation to take appropriate corrective measures and does not threaten consumers. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 6-3(B).

A. If one Party disputes the other Party's assertion of non-compliance, that Party should notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the Parties should cooperatively seek expedited resolution of the dispute. "Self help", in the form of suspension of access to ordering systems and discontinuance of service, is inappropriate and coercive. Moreover, it effectively denies one Party the ability to avail itself to the Dispute Resolution process otherwise agreed to by the Parties. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Self help is nearly always an inappropriate means of handling a contract dispute. If there is a dispute, it should be handled in accordance with the Dispute Resolution provisions of the contract and not under the threat of suspension of access to OSS or termination of all services. If BellSouth is truly concerned about quickly resolving such issues, it should not continue to oppose including a court of law as an appropriate venue for dispute resolution. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language 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). While BellSouth offers as window dressing that if the CLEC disagrees with BellSouth's allegations of unauthorized use, the *CLEC* must proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. However, it is not at all 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. In the end, neither CLECs nor their customers should be forced into such a precarious provision. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 6-4 [Section 2.6]: Should BellSouth be allowed to assess manual service order charges on CLEC orders for which BellSouth does not provide an electronic ordering option?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 6-4.

A. The answer to the question posed in this issue is "NO." If, at any time, electronic interfaces are not available to make placement of an electronic LSR possible, the Petitioner must use the manual LSR process for the ordering of UNEs and Combinations. In such cases where the Petitioner does not willfully choose to use the manual LSR process, it should be assessed the lower electronic LSR OSS rate. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners should not pay manual ordering fees when BellSouth's systems are unable to handle electronic orders. Federal law requires BellSouth to facilitate electronic ordering as much as possible as a means of enabling new entry. Where BellSouth fails to reach this goal, Petitioners are delayed in serving their customers, as manual ordering is a more lengthy process. In this situation, Petitioners should not be doubly taxed by also being forced to pay a higher rate for this process.

At the very least, the Agreement should contain an express parity and nondiscrimination requirement, such that where BellSouth may use electronic ordering for a particular service for itself, it must provide the same electronic ordering for Petitioners. If Petitioners are forced to use manual processes for such orders, they must pay only the electronic ordering charge — not the manual ordering charge. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language and position is based on its view that it is not required to provide electronic ordering capability for every function. BellSouth argues that it has implemented the Change Control Process for a CLEC's requests to change BellSouth's OSS capabilities if Petitioners are not satisfied with existing ordering capabilities. But, as the FCC's orders on OSS unbundling and Section 271 compliance demonstrate, BellSouth has an obligation to facilitate electronic ordering wherever possible. It should not be rewarded for failing to meet that obligation by charging a more expensive ordering fee. This result would in effect reward BellSouth for retaining inefficient systems. Thus, where Petitioner has been relegated to manual ordering, the electronic ordering charge should nonetheless apply. If the Petitioner should choose manual ordering voluntarily, this rule should of course not apply, and the manual order fee should be assessed. In this way, Petitioners will not be disadvantaged twice — through both a delay and an excessive fee — for BellSouth's inability to provide electronic ordering. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. ARE THERE INSTANCES WHERE BELLSOUTH'S ELECTRONIC OSS IS "AVAILABLE", BUT YOU ARE NEVERTHELESS FORCED TO USE MANUAL OSS?

A. Yes. NewSouth's experience has been that a significant amount (we currently estimate 25%) of NewSouth's facility orders have to be submitted manually because of address validation errors. NewSouth has found BellSouth to be delinquent in updating address records -- this delinquency results in NewSouth's having to submit the orders manually. Clearly, in such instances, a CLEC should not have to pay the higher manual OSS charge. *[Sponsored by 1 CLEC: J. Fury (NSC)]*

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

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

A. Rates for Service Date Advancement (a/k/a service expedites) related to UNEs, interconnection or collocation should be set consistent with TELRIC pricing principles. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As explained above in Issue 2-17, all aspects of UNE ordering must be priced at TELRIC. This same rule should apply to Service Date Advancements. CLECs are entitled to access the local network and obtain elements at forward-looking, cost-based rates. Where they require such access on an expedited basis, which is often necessary in order to meet a customer's needs, CLECs should not be subject to inflated, excessive fees that were not set by this Commission and that do not comport with the TELRIC pricing standard. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's position is that it is not required to provide expedited service pursuant to the Act. Therefore, BellSouth's language states that BellSouth's tariffed rates for service date advancement will apply. BellSouth's tariffed rate, however, is $200.00 per element, per day. Thus, for example, a request to speed up an order for a 10-line customer by 2 days would cost $4000.00. This fee is unreasonable, excessive and harmful to competition and consumers. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. IS ISSUE 6-5 AN APPROPRIATE ISSUE FOR ARBITRATION?

A. Obviously, the answer to that question is "yes". The manner in which BellSouth provisions UNEs is absolutely within the parameters of Section 251. Where Petitioners require expedited provisioning, that request remains part of the overall UNE provisioning scheme. And, as we have explained, that request should result in TELRIC rates as for any other UNE order. BellSouth's position that "this issue is not appropriate in this proceeding" is therefore incorrect. 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. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 6-6 [Section 2.6.25]: Should CLEC be required to deliver a FOC to BellSouth for purposes of porting a number within a firm interval?

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

A. The answer to the question posed in this issue is "NO." Petitioners are not required by law to commit to specific intervals, and does not have the necessary automated system in place to meet such requirements. Moreover, BellSouth refuses to commit to deliver FOCs within a firm interval. Petitioner are, however, subject to the same exclusions that apply to BellSouth's delivery of a FOC, willing to commit to use best efforts to return a FOC to BellSouth, for purposes of porting a number, within an average of 5 business days, for noncomplex orders, after the Petitioner's receipt from BellSouth of a valid LSR. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As explained above regarding Issue 6-2, Petitioners are not required to provide, or negotiate to provide, firm intervals to BellSouth for any service. We are not incumbent monopolists. In fact, we are not required to negotiate the issue of service intervals, but have done so to demonstrate our good faith and commitment to ensuring that consumers receive prompt, quality service. Moreover, BellSouth has never sought interval commitments from us prior to this Agreement. Accordingly, we have proposed, however, to promise best efforts — an substantial standard in any contract — to provide FOCs for number porting within 5 business days. These intervals are a reasonable requirement for a new entrant, and do not unduly delay BellSouth's services. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it seeks to impose standards upon CLECs for which there is no statutory basis. Moreover, the standard BellSouth proposes is more stringent than that which applies to its own operations. BellSouth maintains that because it is required to provide FOCs to CLECs in intervals prescribed by this Commission, which carry SEEMS penalties if not met, Petitioners should be held to the same standard. Its purported rationale is that the End User customer is impaired by being unable to receive the same service interval from all local service providers. This position should be rejected. BellSouth itself has refused to provide firm intervals in the Agreement for these very operations, yet it has far greater resources to do so than Petitioners have. Moreover, BellSouth's SEEMS interval for FOCs is itself subject to caveats and exclusions, such that the interval is not always applied. These exclusions include certain holidays, orders classified as "projects," and weekdays between 6:00 pm and 8:00 am, and over the weekend (in other words, non-business hours). BellSouth's proposed language does not include all of these exclusions.

Moreover, BellSouth again ignores the fact that it is subject to Section 251 OSS requirements that simply do not apply to Petitioners. Thus, if BellSouth's argument that issues not expressly addressed by Section 251 "are not appropriate for arbitration," then its attempt to impose FOC intervals on Petitioners is not appropriate for arbitration either. Regardless of the lack of a statutory standard applicable to Petitioners, BellSouth's position is unreasonable. No CLEC has the operational systems that enable it to process orders in the way that BellSouth's OSS does. BellSouth's proposed language is simply too onerous, and is therefore an unreasonable burden to impose. Petitioners have in good faith offered their best efforts to provide FOCs within 5 business days, and that commitment is certainly sufficient to ensure timely service. Petitioners' language should therefore be adopted. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 6-7 [Section 2.6.26]: Should CLEC be required to provide Reject Responses to BellSouth within a firm interval?

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

A. The answer to the question posed in this issue is "NO." Petitioners are not required by law to commit to specific intervals, and do not have the necessary automated system in place to meet such requirements. Moreover, BellSouth refuses to commit to deliver Reject Responses within a firm interval. Petitioners are willing, however, subject to the same exclusions that apply to BellSouth's delivery of Reject Responses, to commit to use best efforts to return Reject Responses to BellSouth, for purposes of porting a number, within an average of 5 business days, for noncomplex orders, after the Petitioner's receipt from BellSouth of a valid LSR. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As explained above regarding Issues 6-2 and 6-6, Petitioners are not required to provide, or negotiate to provide, firm intervals to BellSouth for any service. We have nonetheless agreed to provide BellSouth with a promise to use best efforts to provide a Reject Response within 48 hours. This is an aggressive timeframe, and will provide BellSouth ample time to amend or correct its orders and secure an expeditious resolution of its orders. This proposal is commercially reasonable, especially given that Petitioners' resources cannot match BellSouth's, and is moreover a concession by Petitioners that demonstrates its willingness to cooperate with BellSouth beyond what its legal obligations require. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language is inadequate because it seeks to impose standards upon CLECs for which there is no statutory basis. Moreover, the standard BellSouth proposes is more stringent than that which applies to its own operations. BellSouth again maintains that because it must provide FOC Reject Responses to CLECs in intervals prescribed by this Commission or face SEEMS penalties, then Petitioners must be held to the same standard. End User service is again BellSouth's purported incentive for seeking to impose this standard. Yet even BellSouth's legal obligation to provide Reject Responses within a specific interval is not always applied, because, as with CSR and FOC intervals discussed above, the SEEMS requirements contain the same exceptions: holidays, orders classified as "projects," and non-business hours. Once again, BellSouth does not propose that the same exceptions apply to CLEC intervals.

As Petitioners have explained, however, Section 251 does not require CLECs to adhere to, or even to negotiate, service intervals. Thus, BellSouth's staunch position that issues "are not appropriate for arbitration" unless expressly required by Section 251 must apply equally to this issue. Petitioners must not be held to a standard that BellSouth will not meet as well.

In any event, BellSouth is being unreasonable in its insistence that Petitioners, as new entrants to the local market, must be held to the same ordering standards that BellSouth, by virtue of its monopoly control over all network ordering systems, can satisfy. Twenty-four hours is too short an interval to impose, especially given the fact that CLECs do not have the same unbundling standards as incumbents. Customer service will not suffer significantly under a 48-hour interval, whereas Petitioners would incur too great a burden if forced to develop, in a matter of months, ordering systems that are as extensive as those that BellSouth virtually inherited. Petitioners' language should therefore be adopted. *[Sponsored by 3* ***CLECs:*** *B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 6-8 [Section 2.7.10.4]: Should BellSouth be required to provide performance and maintenance history for circuits with chronic problems?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 6-8.

A. The answer to the question posed in this issue is "YES." BellSouth should disclose all available performance and maintenance history regarding the network element, service or facility subject to the chronic trouble ticket upon request from a Petitioner. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners feel that it is reasonable that they should have access to all available performance and maintenance history regarding a UNE subject to a chronic trouble ticket. Such information could help Petitioners' technicians test and trouble shoot. Moreover, federal law has already imposed this requirement, at least with respect to loops. As explained with respect to Issue 2-25, BellSouth must provide all Loop Makeup information to a requesting CLEC. This obligation includes information about past trouble on a particular loop, as that information may well determine the services that a Petitioner is likely to be able to provide over that loop. Without such information, customer service would be at risk, and in the event of a problem, Petitioners might not have adequate knowledge to fix it quickly. In addition, BellSouth is the sole source for this information, and it certainly relies on this knowledge regularly in serving its own customers. For it to refuse to provide it to a CLEC is unlawfully discriminatory. Where BellSouth has access to a service or information for its own operations, fundamental principles of parity require that CLECs have access to it as well. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has not provided alternative language for this section. Its position is that network performance and maintenance history is BellSouth's proprietary information, and thus will not agree to provide circuit trouble information under the Agreement. This assertion flatly violates federal law, as BellSouth must provide unbundled access to OSS which includes access to information in its possession about the network elements it is required to unbundle (including all Loop Makeup information) to arequesting CLEC. That information is equally "proprietary" as circuit trouble information, and yet the FCC requires its disclosure as a component of the loop provisioning process. In fact, BellSouth is regularly required as a matter of OSS access to disclose information about several aspects of the network, such as collocation space and available facilities, that are no less "proprietary" than what Petitioners seek in this provision. And, as we have explained, the inability to know whether and to what extent a particular loop experienced technical difficulties is absolutely necessary to ensuring the highest quality service for our customers. BellSouth's position is thus unreasonable, discriminatory, and contrary to the public interest. Petitioner's language should be adopted. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 6-9 [Section 2.9.1]: Should charges for substantially similar OSS functions performed by the parties be reciprocal?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 6-9.

A. The answer to the question posed in this issue is "YES." The Parties should bill each other OSS rates pursuant to the terms, conditions and rates for OSS as set forth in Exhibit A of Attachment 2 of the Agreement, for substantially similar OSS functions performed by the Parties. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. In any contract, it is reasonable for the parties to pay each other reciprocal rates for services that is functionally the same or substantially similar. In this instance, it is reasonable for BellSouth to pay us the same amount for OSS features and functionalities that we pay to BellSouth. Each party will be providing the same assistance to the other, and for the same purpose — to connect and serve customers. In addition, as a matter of administrative convenience it greatly simplifies billing and collection when both parties are charging the same fee for the same services. Petitioners' language is therefore extremely reasonable, as well as fair, and should be adopted. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would permit Petitioners to bill the same OSS charge as BellSouth only if we perform OSS functions "pursuant to the terms and conditions under which BellSouth bills [Petitioner] for OSS, including FOC turnaround times the same as BellSouth's, due date intervals the same as BellSouth's … and CSRs handled under the same terms and conditions that BellSouth is held to[.]" In other words, reciprocal rates apply only if Petitioners adhere to the same commission-determined intervals as BellSouth. BellSouth's position is unreasonable, as it seeks to benefit financially from its own imposing of unreasonable interval requirements on the Petitioners. Petitioners are not in the same position as BellSouth, with the same inherited and subsidized facilities, to adhere to the same OSS intervals imposed by the Commission on BellSouth. Yet BellSouth believes that it is appropriate to penalize Petitioners, in the form of zero rates for services performed by CLECs, for not being as advantaged as BellSouth. In addition, BellSouth's language would, by depriving us of any OSS cost recovery, impede Petitioners' ability to develop the OSS systems that could eventually meet BellSouth's desired intervals, which only serves to slow the development of competition. For these reasons, Petitioners' proposal for reciprocal OSS rates should be adopted. *[Sponsored by **3 CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

> *Issue No. 6-10 [Section 3.1.1]: (A) Can BellSouth make the porting of an End User to the CLEC contingent on either the CLEC having an operating, billing and/or collection arrangement with any third party carrier, including BellSouth Long Distance or the End User changing its PIC?*
>
> *(B) If not, should BellSouth be subject to liquidated damages for imposing such conditions?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 6-10(A).

A. The answer to this question, as posed, is "YES." BellSouth is required by law to port a customer once the customer requests to be switched to another local service provider, regardless of any arrangement or agreement (or lack thereof) between a Petitioner and BellSouth Long Distance or another third party carrier. BellSouth's practice represents an anticompetitive leveraging of its ILEC status in favor of, and in collusion with, its Section 272 affiliate. More specifically, BellSouth may not condition its compliance with these obligations under the Agreement upon a Petitioner's or its End-Users' entry into any billing and/or collection arrangement, operational understanding, relationship or other arrangement with one or more of BellSouth's Affiliates, and/or any third party carrier. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Customers are entitled to choose to switch their local service without any conditions placed on them by BellSouth. Petitioners thus seek to include explicit language in the Agreement that BellSouth cannot make the switching of a customer contingent upon whether the chosen CLEC has a billing agreement with BellSouth Long Distance. There is no justifiable basis for BellSouth to refuse to this language. As an initial matter, as we have explained regarding Issue G-14, conditioning performance of any agreement the actions of a third party is unacceptable as a matter of contract. In addition, BellSouth's policy of denying customer choice based on the contractual obligations of their chosen CLEC is punitive and anticompetitive. It is moreover impermissible for BellSouth to thwart Congress's goals of establishing local competition in order to increase or facilitate the market presence of BellSouth's long distance entity. Whether a CLEC has a billing agreement with BellSouth Long Distance is irrelevant to the ability of the CLEC to provide quality local service. Petitioners' language that would preclude BellSouth from refusing to port a customer based on such an unreasonable condition and should therefore be adopted. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has not provided alternative language for this section. BellSouth's position, however, is that if another carrier restricts the conditions under which that carrier's end user can retain a PIC, the Petitioner should be required to either comply with that carrier's requirements or transfer the end-user with another PIC. However, only the CLEC's customer can change a PIC. If BSLD wants to restrict its long distance service offering only to BellSouth customers or to select carriers, that is a matter between it and the customer to resolve. It is no reason to hold-up the fulfillment of the customers choice to change local PICs. BellSouth's reason for getting involved is obvious – but its attempt to protect its supposedly separate affiliate at the expense of competitors and consumers alike should not be countenanced. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 6-10(B).

A. Liquidated damages are appropriate in this instance because it would be impossible or commercially impracticable to ascertain and fix the actual amount of damages as would be sustained by a Petitioner as a result of such action by BellSouth. A liquidated damage amount of $1,000 per occurrence per day is a reasonable approximation of the damages likely to be sustained by a Petitioner, upon the occurrence and during the continuance of any such breach. Liquidated damages should be in addition to and without prejudice to or limitation upon any other rights or remedies a Petitioner and/or any of its End Users may have under this Agreement and/or other applicable documents against BellSouth. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Liquidated damages are a common mechanism in commercial contracts for efficiently and meaningfully addressing a breach committed by the other party. They require no complex figuring of damages, but rather are explicit and definite, thus putting the other party on notice of the consequences of a breach. In this instance, the conduct that Petitioners seek to prevent is egregious, and potentially quite damaging to both competition and consumers. Liquidated damages are a fair and expedient way to resolve what would be decidedly unfair behavior by BellSouth. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth maintains that liquidated damages provisions are inappropriate. Given BellSouth's refusal to agree to Petitioners' proposal for this section, that reaction is unsurprising. Yet where BellSouth unreasonably seeks to advantage its Long Distance entity — a third party to this Agreement — by conditioning the porting of a customer on whether the chosen CLEC has a billing arrangement with that entity, a swift and self-effectuating remedy is warranted. The Agreement should therefore explicitly provide liquidated damages where BellSouth is shown to have conditioned customer porting on the purchase of other BellSouth services. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 6-11 [Sections 3.1.2, 3.1.2.1]: (A) Should the mass migration of customer service arrangements resulting from mergers, acquisitions and asset transfers be accomplished by the submission of an electronic LSR or spreadsheet? *(B) If so, what rates should apply?* *(C) What should be the interval for such mass migrations of services?*

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

A. The answer to this question is "YES." Mass migration of customer service arrangements (*e.g.*, UNEs, Combinations, resale) should be accomplished pursuant to submission of electronic LSR or, if mutually agreed to by the Parties, by submission of a spreadsheet in a mutually agreed-upon format. Until such time as an electronic LSR process is available, a spreadsheet containing all relevant information should be used. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Consolidation in the CLEC industry has recently brought to the forefront issues surrounding mass migration and the need to ensure that there is an efficient, predictable and lawfully priced process in place for accomplishing the mass transfer of customers and associated serving arrangements from one carrier to another. It is in consumers' best interests that such transitions happen seamlessly, quickly and at a reasonable price. Mass migration scenarios that result from CLEC mergers or asset acquisitions should not translate into an opportunity for BellSouth to make things difficult, create delay or to extract a ransom to get the work done.

Because mass migrations at most amount to bulk porting situations, they are not extraordinarily complex and they do not require BellSouth to do new and unique things. Accordingly, they should be made possible by submission of an electronic LSR (or spreadsheet prior to that becoming available) and accomplished within a definite timeframe such as the 10-calendar day interval that Petitioners propose. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. The problem with BellSouth's language is that it leaves the determination of what is expeditious and reasonable entirely up to BellSouth. Moreover, BellSouth controls the means, pace and price for how these things get accomplished. It is no consolation that it promises to do that the same way for everybody. Too many carriers already have faced too many obstacles to getting mass migrations accomplished by BellSouth in a reasonable manner. Yet, facing a task that must be done and the reality that there is nowhere else to go to get it done CLECs ultimately must endure, litigate or pay the price demanded by BellSouth. BellSouth simply should not be permitted to leverage its control over UNEs and other service arrangements in such a way. Because this control necessitates the involvement of BellSouth, mass migrations of customers should be accomplished in predictable time periods and at fair and predictable rates that comport with the TELRIC pricing standard. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

A. An electronic OSS charge should be assessed per service arrangement migrated. In addition, BellSouth should only charge Petitioners a TELRIC-based records change charge, as set forth in Exhibit A of Attachment 2, for migrations of customers for which no physical re-termination of circuits must be performed. Similarly, BellSouth should establish and only charge Petitioners a TELRIC-based charge, as set forth in Exhibit A of Attachment 2, for migrations of customers for which physical re-termination of circuits is required. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As Petitioners have maintained, TELRIC is the appropriate methodology for setting rates that are related to the provisioning of UNEs. Performing mass migrations of customers must be subject to this same standard. This work should not be held to ICB pricing, as it involves no different work than customer porting generally, which is priced at TELRIC.

Pricing on an ICB basis render carriers unable to predict their cost of service and, as suggested by BellSouth, includes no commitment to adhere to TELRIC pricing principles. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. Tellingly, BellSouth proposes no language regarding rates. BellSouth's position, however, is that the rates by necessity must be negotiated between the Parties based upon the particular services to be transferred and the work involved. As we have explained, such "negotiated" rates — ICB prices — are inappropriate for mass migrations. Such rates are easily inflated, due to the advantage in bargaining power enjoyed by BellSouth. For all these reasons, the Agreement should state that mass migrations will be priced at TELRIC. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. DO YOU HAVE ANY EXPERIENCE WITH BELLSOUTH "NEGOTIATED" ICB-PRICING THAT SUGGEST THAT AFFIRMATIVE LANGUAGE REQUIRING TELRIC-BASED PRICING IS NEEDED?

A. Yes. Xspedius once attempted to accomplish the mass migration of several special access circuits to UNE loops. Although this event would require nothing more than a simple records change for each circuit, BellSouth quoted a minimum price of several hundred dollars. In addition, BellSouth proposed several hundred dollars in charges associated with "project management." These proposal obviously outweigh the approximately $21.00 rate approved by the Alabama Commission for converting special access to UNE combinations. Yet, because only a single UNE was involved, BellSouth insisted that it was justified in imposing what amounts to a king's ransom. In the end, the effect of this "negotiated ICB rate" was that Xspedius chose not to order the conversions and BellSouth still reaps the rewards of selling Xspedius over-priced special access. *[Sponsored by 1 CLEC: J. Falvey (XSP)]*

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

A. Migrations should be completed within ten (10) calendar days of an LSR or spreadsheet submission. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. BellSouth must be held to an objective and definite timeframe for porting customers to Petitioners, whether on a small scale or via mass migrations. A 10-day interval is a reasonable requirement, and should be ample time for BellSouth to complete the necessary work. *[Sponsored by 3 CLECs: B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth proposes no language here and appears inclined to leave it all up to negotiations. In its position statement, BellSouth maintains that no finite interval can be set to cover all potential situations, and that while shorter intervals can be committed to and met for small, simple projects, larger and more complex projects require much longer intervals and prioritization and cooperation between the Parties. This position is unreasonable. As we have explained, BellSouth's purported need for special "project management" is unsupported, and should not be used as an excuse to delay the conversion of customers. Mass migrations should not be delayed on the ground that they are somehow different from generic requests to port a customer or update BellSouth's records. Since they simply involve bulk submission of such requests, petitioners' 10-day interval should therefore be stated explicitly in the Agreement. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. IS ISSUE 6-11 AN APPROPRIATE ISSUE FOR ARBITRATION?

A. Yes. The manner in which BellSouth provisions UNEs is absolutely within the parameters of Section 251. The mass migrations of customers served via UNEs, resale and Other Services is inextricably linked to BellSouth's Section 251 obligations. Moreover, it seems implausible that the migration of customers to service configurations covered by the Agreement should not be covered by the Agreement and resolved in this arbitration. BellSouth's position that "this issue is not appropriate in this proceeding" is therefore incorrect. Prescribing the terms by which BellSouth switches customers and updates records associated with UNE and other serving configurations is squarely within the Commission's jurisdiction. *[Sponsored by 3 **CLECs:** B. Murdoch (KMC), J. Fury (NSC), J. Falvey (XSP)]*

BILLING (ATTACHMENT 7)

Issue No. 7-1 [Section 1.1.3]: Should there be a time limit on the parties' ability to engage in backbilling?

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

A. The answer to the question posed in the issue statement is "YES." There should be an explicit, uniform limitation on a Party's ability to engage in backbilling under this Agreement. The Commission should adopt the CLEC proposed language, which would limit a Party's ability to bill for services rendered no more than ninety (90) calendar days after the bill date on which those charges ordinarily would have been billed. For purposes of ensuring that a party could reconcile backbilled amounts, the CLEC proposed language provides that billed amounts for services that are rendered more than one (1) billing period prior to the bill date should be invalid unless the billing Party identifies such billing as "backbilling" on a line-item basis. Finally, the CLEC proposed language provides an exemption to the ninety (90) day limit whereby backbilling beyond ninety (90) calendar days and up to a limit of six (6) months after the date upon which the bill ordinarily would have been issued may be invoiced under the following conditions: (1) charges connected with jointly provided services whereby meet point billing guidelines require either Party to rely on records provided by a third party and such records have not been provided in a timely manner; and (2) charges incorrectly billed due to erroneous information supplied by the non-billing Party. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION THAT BACKBILLING SHOULD GENERALLY BE LIMITED TO NINETY DAYS?

A. It comes down to business and financial certainty. In order for CLECs to pay invoices in a timely manner and keep adequate financial records, there must be a limit on the Parties' ability to backbill for services rendered. The Parties should not have unlimited time to backbill each other in an attempt to recoup past amounts not properly billed. Neither CLECs nor BellSouth should be required to reopen their financial books because the other did not issue accurate invoices in a timely manner. To allow backbilling more than ninety (90) days would create too much business uncertainty between the Parties and ultimately lead to billing disputes. Accordingly, the Commission should adopt the CLEC proposed language which establishes a general ninety (90)-day limit on backbilling. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. ARE THERE ANY CIRCUMSTANCES IN WHICH BACKBILLING MORE THAN NINETY DAYS SHOULD BE PERMITTED?

A. Yes, Petitioners' proposed language contemplates that there may be circumstances under which the Parties may backbill for past due amounts beyond ninety (90) days and up to six (6) months. Such circumstances include backbilling for charges connected with jointly provided services whereby meet point billing guidelines require either Party to rely on records provided by a third party and such records have not been provided in a timely manner; and charges incorrectly billed due to erroneous information supplied by the non-billing Party. Such exemptions to the ninety (90)-day backbilling limit would allow the Parties to recover past amounts non properly billed due to errors beyond their control while establishing a six (6) month limit to avoid excessive backbilling. The CLECs propose a caveat, however, that any amount backbilled more than one (1) billing period must be clearly identified as "backbilling" on a line-item basis. This requirement would allow the Parties to easily identify backbilled amounts, reconcile invoices and will likely decrease the number of billing disputes between the Parties. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language provides that all charges incurred under the Agreement are subject to the state's statute of limitations or applicable Commission rules.

BellSouth's language is inadequate because it fails to provide uniform, workable parameters by which the Parties can invoice each other for services rendered in prior billing periods. Furthermore, the Parties do not agree on the framing of the issues. While CLECs say the issue is whether there should be a limit on backbilling, BellSouth's position is: what limitations period should apply to charges under the agreement and should such limitations period apply to all issue related to billing under the agreement? As discussed below, the statute of limitations vary greatly among the states in the BellSouth territory and, thus, do not provide an effective limit to backbilling.

In Alabama, the statute of limitations is three years. Such a lengthy backbilling period would create too much business uncertainty between the Parties and would force the CLECs to devote substantial time and resources to review and reconcile past bills in order to verify backbilled amounts. Moreover, it is unlikely that CLECs would be able to backbill its customers for such amounts as most end-user customers would not understand, much less accept, a substantially late bill for services the end-user cannot verify were actually rendered.

The state statute of limitations within the BellSouth territory vary greatly. It is unreasonable for a CLEC to have to alter its billing processes to allow for backbilling that could range, for example, from six (6) months in South Carolina to six (6) years in Tennessee. The purpose of this Agreement is to set forth the terms and conditions under which the Parties will interconnect and CLECs will purchase UNEs and related services from BellSouth. Accordingly, the Agreement should serve as a guide to the company personnel responsible for implementing the Agreement. CLEC billing personnel should be able to develop processes implementing the billing provisions of this Agreement, including backbilling policies based on the limits proposed by the CLECs. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. HAVE THE PARTIES AGREED TO LANGUAGE IN OTHER PARTS OF THE AGREEMENT THAT IS INCONSISTENT WITH BELLSOUTH'S PROPOSED LANGUAGE FOR THIS PROVISION?

A. Yes, the Parties agreed to limit billing disputes to amounts no more than two (2) years old. Specifically, Section 2.1.7 of Attachment 7 states, "[n]otwithstanding the foregoing, new billing disputes may not be filed pertaining to a bill when a period of two (2) years from the bill issue date has elapsed." BellSouth agreed to a uniform cap of two (2) years for billing disputes even through such timeframe is longer than the statue of limitations in Florida, Louisiana, and South Carolina, and shorter than the statute of limitations in the other states in the BellSouth region. BellSouth's position with regard to billing disputes is squarely contradictory to its position for backbilling, and BellSouth has not provided any compelling reasons why it will not agree to a uniform time limit for backbilling as it done with respect to billing disputes. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. ARE YOU AWARE OF BACKBILLING BEING ADDRESSED IN ANY STATE INTERCONNECTION ARBITRATION PROCEEDINGS?

A. Yes, it is my understanding that the Georgia Public Service Commission (Docket No. 16583-U) and the North Carolina Public Utilities Commission (Docket No. P-500, Sub. 18) have addressed this issue in the interconnection arbitration between ITC^DeltaCom and BellSouth. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. ARE YOU AWARE OF ANY ARBITRATION DECISIONS ISSUED BY THE GEORGIA OR NORTH CAROLINA COMMISSIONS?

A. I am not aware of any formal orders issued from the Georgia and/or North Carolina Commissions, but I believe the Staff has issued recommendations. It is my understanding that the Georgia Staff recommended a twelve (12)-month backbilling limit, which is consistent with the backbilling limit currently in the AT&T/BellSouth interconnection agreement. The Georgia Staff recommended a twelve (12) month backbilling limit even though the state statute of limitations in Georgia is four (4) years. It would appear that the Georgia Staff recognized the four (4) year state statute of limitations was excessive for backbilling, and a uniform twelve (12) month period is preferable. It is my further understanding that the North Carolina staff recommended a ninety (90)-day backbilling limit with the caveat that the parties could petition the Commission for an extended backbilling period of up to three (3) years, which is the statute of limitations for North Carolina. There are compelling reasons to adopt a 90 (90) day backbilling limit and Petitioners certainly would accept the North Carolina Public Staff's recommendation (as we understand it) on this point. Should this Commission, however, be inclined to follow the North Carolina Public Staff's recommendation and conclude that either Party may petition the Commission for additional relief, such relief must be narrowly defined to cover only those instances where Parties seek to recover past amounts not properly billed due to errors beyond their control. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. ARE YOU AWARE OF ANY OTHER BELLSOUTH INTERCONNECTION AGREEMENTS THAT INCLUDE A UNIFORM LIMIT ON BACKBILLING?

A. Yes, as discussed above with regard to the Georgia Staff recommendation, the AT&T/BellSouth Agreement includes a twelve (12)-month limit on backbilling; the MCI/BellSouth agreement provides a twelve (12)-month limit as well. Accordingly, both AT&T, MCI and all other carriers that have adopted these two interconnection agreements (likely a substantial number of carriers) are following a uniform limit on backbilling. BellSouth has agreed to a uniform backbilling limit in other interconnection agreements and has not provided any persuasive reasons why it cannot agree to the same with the Petitioners. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 7-1?

A. The CLECs disagree with BellSouth's proposed restatement of issue 7-1. While the CLECs simply frame the issue as whether there should be a limit on backbilling, BST restates the issue as to what limitations period should apply to charges under the Agreement and should such limitations period apply to all issues related to billing under the Agreement. During negotiations, however, BellSouth never proposed extending such a limitation to billing disputes and the resolution thereof. Indeed, BellSouth's proposed expansion of the issue appears largely intended to create mischief, as BellSouth knows full-well that it often takes months and sometimes years to resolve billing disputes. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

A. Petitioners submit that a Party should be entitled to make one corporate name, OCN, CC, CIC or ACNA change ("LEC Change") in the other Party's databases, systems and records within any twelve (12) month period without charge. For any additional "LEC Changes", TELRIC compliant charges should be assessed. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Due to the current status of the telecommunications industry, it is likely a company will go through a corporate reorganization, merger, acquisition, etc. that will require some type of system, database, or records change(s) to reflect the change ("LEC Change"). It is my understanding that generally "LEC Changes" are simple administrative changes that are not unduly time or labor intensive. Therefore, CLECs should be afforded one "LEC Change" in any twelve (12) month period without charge.

In the commercial setting, businesses have to deal every day with corporate reorganizations, mergers, acquisitions, etc. Most businesses, however, do not get to impose a charge for making a system modification to recognize such a change in corporate status or identity. Rather, it is treated as a cost of doing business. Nonetheless, BellSouth seeks to impose charges, via the cumbersome and uncertain BFR/NBR processes, to recover costs for implementing "LEC Changes". To the extent the Commission concludes that BellSouth may recover such cost, BellSouth should only be able to do so if a CLEC requests a "LEC Change" more than once in a twelve-month period and any such charge for additional "LEC Changes" should be TELRIC compliant rates, as they are a necessary part of the business of gaining access to and using cost-based interconnection, UNEs and collocation. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. ARE YOU AWARE OF THIS PROVISION BEING INCLUDED IN ANY OTHER INTERCONNECTION AGREEMENTS?

A. Yes, it is my understanding that SBC had included, in its 13-State Agreement, a provision that provides for a one-time OCN/AECN change, without charge, as part of a corporate name change. For example, this provision is included in the Stonebridge Communications, Inc.'s 13-State Agreement, which SBC lists as current. [Section 4.9, GT&Cs]. It is also included in the Digital Telecommunications, Inc.'s 13-State Agreement [Section 4.9, GT&Cs]. Further, the Time Warner/SBC Wisconsin Agreement, which is a modified 13-State Agreement, also provides for a one-time OCN/AECN change without charge [Section 4.8, GT&Cs]. *[Sponsored by **2 CLECs:** C. Pifer (KMC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would require a CLEC to go through the BFR/NBR process in order to conduct a "LEC Change". Specifically, BellSouth's language states, [CLEC] shall bear all costs incurred by BellSouth to convert [CLEC] to the new ACNA(s)/BAN(s)/CC(s)/CIC(s)/OCN(s)... and will be handled by the BFR/NBR process." It is BellSouth's position that CLECs should be responsible for all "reasonable records change charges" via the BFR/NBR process. It is my understanding that the BFR/NBR process is a lengthy, expensive and typically unsatisfactory process. The BFR process is used to develop a new or modified UNE or related services pursuant to the Act, and the NBR process is used to develop an entirely new network element or service not required by the Act. By requesting a "LEC Change", CLECs are hardly requesting anything that rises to the level of a new UNE or new service. Rather, CLECs are asking for BellSouth to make an administrative change in its systems and databases to reflect a corporate identity change. Petitioners have specifically negotiated this provisions to incorporate language addressing "LEC Changes" in the Agreement because they do not want to be subject to BellSouth's murky BFR/NBR process for this type of request. Further, Petitioners want certainty as to the cost BellSouth will charge for a "LEC Change". Ultimately, these types of records changes must be done and Petitioners do not want to be put in the position of having to pay whatever price BellSouth demands, no matter how excessive. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

A. Petitioners submit that "LEC Changes" should be accomplished in thirty (30) calendar days. Furthermore, "LEC Changes" should not result in any delay or suspension of ordering or provisioning of any element or service provided pursuant to this Agreement, or access to any pre-order, order, provisioning, maintenance or repair interfaces. Finally, with regard to a Billing Account Number ("BAN"), the CLECs proposed language provides that, at the request of a Party, the other Party will establish a new BAN within ten (10) calendar days. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As discussed above, a "LEC Change" is simply an administrative records change in BellSouth's systems and databases and, accordingly, thirty (30) days is ample time to complete such a change. Furthermore, the Agreement should be clear that "LEC Changes" will not disturb or delay the provisioning of any service orders or the operational interfaces between Petitioners and BellSouth, including access to BellSouth's OSS. The Agreement must be clear on this point so that there is no opportunity to use a "LEC Change" as an excuse for provisioning delays or denial of the ability to access BellSouth's OSS (and the attendant ability to order UNEs and other services). Finally, due to the importance of accurate billing between BellSouth and a CLEC, the Parties should establish BANs for the other party within ten (10) calendar days. A billing account change should be a simple records change and should be done on an expedited basis to avoid any billing discrepancies and the disputes that might result. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth does not include any intervals for completing "LEC Changes" in its proposed language. It is also my understanding that there are no intervals for "LEC Changes" or equivalents in any of the BellSouth intervals guidelines or operational guides. BellSouth's proposed language provides that "LEC Changes" be handled by the BFR/NBR process. This Commission should find that intervals for "LEC Changes" should not be left to BellSouth's discretion though the amorphous BFR/NBR processes. The Agreement should include precise intervals that the Parties can rely on in their course of dealings under the Agreement. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS ISSUE 7-2 APPROPRIATE FOR ARBITRATION?

A. In its position statement, BellSouth asserts that Issue 7-2 should not be included in this Arbitration because "it involves a request by the CLECs that is not encompassed" in Section 251 of the 1996 Act. BellSouth is mistaken. Regardless of whether LEC Changes are expressly mandated under Section 251 or state law, this issue plainly involves BellSouth's OSS and billing for UNEs, collocation and interconnection which is clearly encompassed by Section 251. Moreover, this issue goes directly to ensuring that BellSouth's practices are just and reasonable, which are always within the jurisdiction of this Commission. For these reasons, Issue 7-2 is properly before this Commission. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

A. Payment of charges for services rendered should be due thirty (30) calendar days from receipt or website posting of a complete and fully readable bill or within thirty (30) calendar days from receipt or website posting of a corrected or retransmitted bill, in those cases where correction or retransmission is necessary for processing. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners need at least thirty (30) days to review and pay invoices. In other commercial settings in which parties have established business relationships, the payor may be afforded forty-five (45) days or more to pay an invoice. Furthermore, 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, in order to try to settle as many billing issues as possible, Petitioners agreed to BellSouth's proposal for a thirty (30)-day payment deadline (one billing cycle). Under such a strict deadline, it is imperative that CLECs be given the full thirty (30) days to review and pay those bills. It is Petitioners' experience, however, that BellSouth is consistently untimely in posting or delivering its bills and those bills are often incomplete and sometimes incomprehensible. Therefore, in effect BellSouth is actually giving Petitioners far fewer than thirty (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. Thus, the Commission should find that the thirty (30)-day payment due date must be established from the time a Petitioner receives a complete and fully readable bill via mail or website posting. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. BY THE TIME YOU RECEIVE BELLSOUTH'S BILLS, HOW MUCH TIME DO YOU TYPICALLY HAVE TO PAY THEM?

A. NewSouth's experience has been that, by the time it receives its bills from BellSouth, it has anywhere from 19-22 days to process bills for payment. 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. *[Sponsored by 1 CLEC: J. Fury (NSC)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language provides that payment of charges for services rendered must be made on or before the next bill date. This language is inadequate in that it 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 Petitioner. BellSouth's language also makes no attempt to mitigate the problems caused in circumstances when its invoices are incomplete and/or incomprehensible. When this occurs, the CLEC already has a late start in paying the invoice and then may also need to spend extraordinary amounts of time attempting to reconciling an such invoices. Therefore, under BellSouth's proposal Petitioners are not getting thirty (30) days to remit payment.

The Commission should take note that not only is less than thirty (30) days to remit payment for services rendered unacceptable in most commercial settings, but CLECs have the added burden of extraordinary pressure from BellSouth to pay on time. The alterative to paying on time is that Petitioners' capital will be tied up in security deposits and/or late payments. By proposing the next bill date as the payment due date as opposed to thirty (30) days after receipt of a complete and readable bill, BellSouth does not afford Petitioners adequate time to review and pay invoices and unfairly raises the likelihood that a Petitioner would be forced to tie-up much needed capital in a deposit. BellSouth is, in essence, using its monopoly legacy and bargaining position to force CLECs to either remit payment faster than almost any other business or in the alternative face substantial late payment penalties and increased security deposits. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 7-4 [Section 1.6]: (A) What interest rate should apply for late payments? (B) What fee should be assessed for returned checks?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 7-4(A).

A. The interest rate that should apply for late payments is a region-wide rate of one (1) percent per month under the Agreement. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Agreement should establish a definite, consistent interest rate for late payments. A uniform rate will allow the Parties to easily implement this provision of the Agreement, on a multi-state basis, and alleviate the need for billing personnel to engage in research to determine the appropriate late payment interest rate. Furthermore, BellSouth's FCC Tariff. No. 1 includes a one (1) percent interest rate on late payments for all interstate services. BellSouth should follow the same approach for late payment interest rates under this Agreement. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language provides that the Parties will use the late payment interest rates set forth in three separate tariffs: the General Subscriber Services Tariff, Private Line Tariff, and the Interstate Access Tariff. Petitioners cannot reasonably be expected to determine the correct late payment interest rate by searching and tracking three separate tariffs and then trying to guess which one applies in which instances. BellSouth has not provided, through the negotiations process, any rational or logical method for

Petitioners to ascertain which rate, from which tariff, applies for each state. BellSouth's proposed contract language is no more help as it simply states that the late payment interest rate, from the above mentioned three tariffs, will apply, as appropriate. Under BellSouth's proposal, not only would Petitioners be required to check up to 27 BellSouth tariffs to determine the appropriate late payment interest rate, but they would also have to monitor all twenty-seven (27) tariffs on a regular basis to keep track of any changes.

During negotiations, BellSouth repeatedly argued that its billing systems could not handle a single percentage for late payments for the entire BellSouth region. The Commission should recognize that this is a tired and unpersuasive argument as BellSouth found a one (1) percent interest rate acceptable for late payments on all interstate services, regardless of the BellSouth state or states involved, and has not provided any valid reasons why the same cannot apply to billing under Petitioners' interconnection agreements. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 7-4(B).

A. A uniform region-wide $20 fee for all returned checks should apply. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. A definite, consistent returned check fee should be established in the Agreement for ease of use as well as consistent and predictable dealings between the Parties. Twenty dollars ($20) is a reasonable amount and is reflective of the returned check fees included by BellSouth in its General Subscriber Services Tariffs ($20 in Alabama, $20 in Florida; $30 in Georgia; and $25 in North Carolina). *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth proposes that the Parties use the state-specific returned check fees set forth in BellSouth's General Subscribe Services Tariff, or, in the absence of a rate in the tariff, the amount permitted by state law. As with the late payment interest rate discussed above, BellSouth's proposal would be onerous on Petitioners in that the Petitioners would need to check (and track for changes) BellSouth's state General Subscriber Services Tariff as well as state statutes, in order to validate a returned check fee imposed by BellSouth. Petitioners' billing audit and payment employees should not have to conduct legal research to implement this Agreement. There is a simple and far less burdensome solution available, which is to establish a standard and certain rate in the Agreement. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

A. Petitioners as well as BellSouth should have the right to suspend access to ordering systems and to terminate particular services or access to facilities that are being used in an unlawful, improper or abusive manner. However, such remedial action should be limited to the services or facilities in question and such suspension or termination should not be imposed unilaterally by one Party over the other's written objections to or denial of such accusations. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. To terminate services or deny access to ordering systems is an "end-game" for CLECs. Petitioners will be unable to conduct business without access to BellSouth ordering systems and customers will lose service if BellSouth terminates their access to services and facilities. Such drastic measures must not be taken, therefore, without following standard procedures set forth in the Agreement. While we understand the need for BellSouth to ensure the integrity of its network, BellSouth should not be able to unilaterally terminate facilities or deny access to ordering systems if there is any dispute as to the unlawfulness or improper use of its network or facilities. The Dispute Resolution provisions of the Agreement must trump any self-help BellSouth may seek to undertake against a Petitioner in such circumstances. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth proposes that either Party should have the right to suspend or terminate service to **all** existing services in the event a Party believes the other Party is using **any** of its services or facilities in an unlawful, improper or abusive manner, and such use is not corrected within thirty (30) calendar days. BellSouth's proposed language, however, fails to acknowledge that a CLEC may question or even deny its allegation of unlawful, improper or abusive use and that the Parties may in fact disagree over whether or not such violation has occurred or continues to occur. Instead, BellSouth's proposed language simply provides that it may engage in self-help by terminating services or denying access to ordering systems after providing notice if such alleged improper use is not corrected. Because this outcome is an "end game" for CLECs, BellSouth must be prohibited from engaging in self-help if there is a dispute. Accordingly, the Agreement should require that the Parties adhere to the Dispute Resolution provisions in the event of a dispute regarding use of the other Party's network or facilities. Otherwise, BellSouth will be able to leverage its monopoly power over CLECs by engaging in self-help whereby the remedy BellSouth significantly would outweigh the infraction (*i.e.*, "lights-out" regardless of how insignificant the infraction and irrespective of whether the CLEC disputes BellSouth's allegations). The Commission should prevent this result as competitors and Alabama consumers could be irreparably harmed by BellSouth's attempt to secure and exercise "self-help" in a manner that capitalizes on its monopoly legacy and overwhelming market dominance. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 7-6 [Section 1.7.2]: Should CLEC be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

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

A. The answer to the question posed in the issue statement is "NO." CLECs should not be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination. Rather, if a Petitioner receives a notice of suspension or termination from BellSouth, with a limited time to pay non-disputed past due amounts, Petitioner should be required to pay only those amount past due as of the date of the notice and as expressly and plainly indicated on the notice, in order to avoid suspension or termination. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. If a Petitioner receives a notice of suspension or termination from BellSouth, it will be Petitioner's immediate goal to pay the past due amounts included in the notice to avoid suspension and termination. If the Petitioner must attempt to calculate and pay past due amounts in addition to those specified in BellSouth's notice, the Petitioner unfairly will risk suspension or termination due to possible calculation and timing errors. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. COULD YOU PLEASE EXPLAIN WHAT WOULD LIKELY HAPPEN AT YOUR COMPANY UPON RECEIPT OF A NOTICE OF SUSPENSION OR TERMINATION DUE TO NONPAYMENT?

A. Yes, if I or someone at my company received a notice of suspension or termination from BellSouth, it would be nothing less than a "fire drill". Whoever received the notice would immediately work to determine whether such payments were missing, not posted, disputed, or simply due and, in the latter case would arrange to deliver payment to BellSouth as fast as possible. Access to BellSouth's OSS is essential to the daily operation of our company – we take the threat of suspension of such access very seriously. Obviously, the threat of termination is taken very seriously, as well given that would result in massive service outages across our Alabama customer base. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. UNDER SUCH A SCENARIO, HOW WOULD YOU BE HINDERED IF YOU WERE REQUIRED TO CALCULATE OTHER POSSIBLE PAST DUE AMOUNTS?

A. Under the threat of suspension or termination, our billing personnel would be working as fast as possible to track and pay the amount specified as past due on the suspension or termination notice. Obviously, there is time pressure to perform an investigation into the circumstances and to resolve the matter by identifying any discrepancies and securing payment of the amount specified. Any time or resources that we would have expend in trying to calculate any possible additional past due amounts that may become past due in the time period between the date on which BellSouth calculated the past due amount (which may or may not be known) and the date on which BellSouth would receive and post payment would be taken away from time needed to investigate and secure payment of the amount specified on the suspension or termination notice. But, the more significant hindrance is the "shell game" that would ensue if Petitioner had to guess the precise amount that BellSouth calculated upon receipt and posting of payment that was needed to satisfy the payment of all amounts past due requirement BellSouth seeks to impose. Under that circumstance, only BellSouth can know (and control) the answer to that calculation, as it knows the date upon which it first calculated the past due amount included in the notice and the date upon which it posts receipt of payment. Indeed, under BellSouth's proposal, it could simply delay posting of payment by a day if it was determined to suspend or terminate service. Like many others, this BellSouth proposal seeks unfairly to leverage its monopoly legacy and overwhelming dominance by putting Petitioners in a position that would not be acceptable in a typical commercial setting.

The worst part of it, however, is that BellSouth once again proposes to use the specter of consumer affecting service outages as a means of putting CLECs at the mercy of a reluctant seller. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth proposes that in response to a notice of suspension or termination, a CLEC must pay not only the amount included in the notice, but all other amounts not in dispute that become past due. BellSouth's proposed language places too much burden and risk on CLECs who are forced to calculate possible past due amounts in addition to those included in the BellSouth notice to avoid suspension or termination of service. As I just explained, BellSouth's proposal amounts to a high stakes shell game that could result in massive service outages for our Alabama customers, if we fail to properly track, time, trace and predict BellSouth behavior in a manner that allows us to arrive at a "magic number" needed to avoid suspension or termination. Obviously, such terms and conditions are unreasonable in any setting and especially in this one where consumers' service hangs in the balance. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 7-6?

A. The CLECs disagree with BellSouth's proposed restatement of the issue as it ignores the critical aspect of the issue which is the danger that there could be a calculation error based on erroneous assumptions regarding timing, posted disputes or some other factors.

There are simply too many variables and the stakes are simply too high to play the kind of shell-game BellSouth seeks to impose and have control over. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 7-7 [Section 1.8.3]: How many months of billing should be used to determine the maximum amount of the deposit?

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

A. The maximum amount of a deposit should not exceed two month's estimated billing for new CLECs or one and one-half month's actual billing for existing CLECs (based on average monthly billings for the most recent six (6) month period). *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The CLECs involved in the negotiation process have engaged in tremendous compromise with BellSouth in an attempt to settle deposit issues and limit the issues for arbitration. It is not typical in commercial relationships for one side to continually try to extract deposits from the other. Nevertheless, in trying to settle deposit issues, the Petitioners agreed to language that expands BellSouth's right to collect deposits well beyond what is found in its typical tariffs. In addition to attempting to resolve an issue that has long vexed the Parties (a protracted battle over these issues was played out at before the FCC little more than a year ago), the Parties tried, through negotiations, to develop new contract language for deposits uniformly applicable across the nine (9) state BellSouth region. The primary goals of this exercise were to draft deposit provisions that address BellSouth's asserted need for security deposits with Petitioners' asserted need to limit tying-up capital in such deposits and to be able to clearly ascertain the circumstances when deposits would be required and returned.

In particular, Petitioners believe that the deposit terms should reflect that each, directly and through its predecessors, has already had a long and substantial business relationship with BellSouth. Accordingly, it is reasonable to treat Petitioners differently from other entities that have no established business relationship with BellSouth. The one and one-half month's actual billing deposit limit for existing CLECs proposed by Petitioners is reasonable given that balances can be predicted with reasonable accuracy and that significant portions of services are billed in advance. Moreover, Petitioners believe that it is more generous to BellSouth than terms to which BellSouth has previously agreed. Additionally, the calculations for existing CLECs, which include all the CLECs in this arbitration, should be based on average monthly billings for the most recent six (6) month period. This way, any deposit required by BellSouth will reflect the most recent billing patterns and will eliminate any potential to skew a deposit requirement by using a base timeframe that may not accurately reflect the CLECs' current billing. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth proposed language establishes a deposit based on an estimated two month's actual billing for existing customers and two month's estimated billing for new customers. BellSouth's language fails to take into account that the CLECs involved in this arbitration have established business relationships with BellSouth with significant billing history. For these reasons, they should not be subject to the same deposit requirements as new CLEC customers with no established business relationship with BellSouth. Through these negotiations, BellSouth has argued that the Agreement must include deposit provisions that not only work for the these four CLECs, but that will also work for other carriers that may adopt the Agreement. To accommodate BellSouth's position in that this Agreement will likely be adopted by other carriers, the CLEC proposed language includes a separate deposit requirements for existing CLEC customers (one and one-half month's actual billing) as well as new CLEC customers (two month's estimated billing). This dual approach can apply in a reasonable and non-discriminatory manner to both the CLECs involved in the instant case as well as any new carriers that may adopt the final Agreement. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 7-8 [Section 1.8.3.1]: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC?

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

A. The answer to the question posed in the issue statement is "YES." The amount of security due from an existing CLEC should be reduced by amounts due to CLEC by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in the deposit provisions of Attachment 7 of the Agreement. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As mentioned above, Petitioners have compromised significantly throughout the negotiations of these deposit provisions in order to reach a reasonable and balanced solution that can work throughout the BellSouth territory. As such, the CLECs conceded to give up the right to reciprocal deposits in an effort to settle one potential arbitration issue. But, if Petitioners do not collect deposits they should at least have the ability to reduce the amount of security due to BellSouth by the amounts BellSouth owes CLEC that have aged thirty (30) days or more. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. DOES BELLSOUTH TYPICALLY HAVE SIGNIFICANT BALANCES OWED TO CLECs AGED OVER THIRTY DAYS?

A. **Yes,** BellSouth does not have a pristine or even good payment record when it comes to paying CLECs the amounts BellSouth owes under its interconnection agreements. Thus, reducing deposit amounts the Petitioners would owe BellSouth is a reasonable means to protect the CLECs' financial interest - as the remainder of the deposit provisions protect BellSouth's financial interests. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth has not proposed any language on this issue. BellSouth fails to address is the fact that CLECs have no remedy in the security deposit context if BellSouth is late in paying invoices to the CLECs. Since the CLECs suffer financially when payment of invoices are late or not paid in full, but are unable to request security deposits from BellSouth, they should at least be able to reduce the security amount when BellSouth has failed to make timely payments to CLECs. Furthermore, the CLECs' offset proposal is proper in that once the amount of deposit the CLECs owes BellSouth is decreased by amounts BellSouth has failed to pay the CLECs, the resulting amount will more accurately reflect BellSouth's actual exposure to potential nonpayment. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 7-9 [Section 1.8.6]: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?

Q: PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 7-9.

A. The answer to the question posed in the issue statement is "NO". BellSouth should have a right to terminate services to CLEC for failure to remit a deposit requested by BellSouth **only** in cases where: (a) CLEC agrees that such a deposit is required by the Agreement, or (b) the Commission has ordered payment of such deposit. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As with numerous other provisions in this Attachment, Petitioners' proposed language counters BellSouth's proposal to "pull the plug" on CLEC service without following the Dispute Resolution provisions of the Agreement. Such self-help actions must be limited to those circumstances where the CLEC agrees that a deposit is required by the Agreement, or the Commission has ordered payment for the deposit. If there is a dispute as to the need or amount of a security deposit, BellSouth must not be able to terminate service to CLEC without following the Dispute Resolution provisions of the Agreement. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would allow BellSouth to terminate service to CLEC under any circumstance in which CLEC has not remitted a deposit requested by BellSouth within thirty (30) calendar days. Such broad and sweeping language would allow BellSouth to circumvent the Dispute Resolution provisions of the Agreement and simply "pull the plug" on CLEC services even in the event of a valid dispute regarding the required amount of a requested security deposit. BellSouth must be required to follow the Dispute Resolution provisions and the Commission must prevent BellSouth from taking any unilateral self-help action that will ultimately harm or terminate consumers' service. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

A. If the Parties are unable to agree on the need for or amount of a reasonable deposit, either Party should be able to file a petition for resolution of the dispute and both parties should cooperatively seek expedited resolution of such dispute. *[Sponsored by **3 CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. It is reasonable to assume that the Parties may disagree as to the need for or required amount of a security deposit. In the event of such a dispute, either Party may file a petition for dispute resolution in accordance with the Dispute Resolution provisions set forth in the Agreement. Such action is consistent with how disputes are handled throughout the Agreement and is the purpose of the Dispute Resolution provisions. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language acknowledges that the Parties can file a petition for dispute resolution in the event there is a dispute as to the need and amount of deposit, but BellSouth proposes that the CLECs must post a payment bond for the amount of the requested deposit during the pendency of the dispute resolution proceeding. According to BellSouth's language, posting a bond is a condition to avoid suspension or termination of service during the pendency of the dispute proceeding. This BellSouth bond requirement completely negates the purpose of the Dispute Resolution provisions. If a CLEC is forced to post its funds during the pendency of the dispute resolution proceeding, that unfairly puts the CLEC in the position of losing the dispute (and BellSouth in the position of winning the dispute) before it has been properly adjudicated and resolved. Thus, BellSouth's proposed language would effectively allow BellSouth to override the Dispute Resolution provisions of the Agreement by terminating service to CLEC if CLEC does not post a payment bond for the amount of the requested deposit that CLEC, in that instance, already would have asserted is not required under the Agreement. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Issue No. 7-11 [Section 1.8.9]: Under what conditions may BellSouth seek additional security deposit from CLEC?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 7-11.

A. Subject to a standard of commercial reasonableness and the standards for deposit requirements set forth in Attachment 7 of the Agreement, BellSouth should be able to seek an additional deposit if a material change in the circumstances of CLEC so warrants and/or gross monthly billing has increased more than twenty-five (25) percent beyond the level most recently used to determine the level of deposit. Further, BellSouth should not be entitled to make such additional requests based solely on increased billing more frequently than once in any six (6) month period. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Agreement should include specific benchmarks under which BellSouth can request additional security deposits from CLECs. Otherwise, there will likely be numerous disputes and never-ending discussions between the Parties over whether additional security is required. It would be commercially unreasonable for a CLEC to have to pay additional security to BellSouth if the CLEC's monthly billing increases, say two (2) or three (3) percent. It is, however, reasonable to increase the security amount if the CLEC monthly billing increases by twenty-five (25) percent or more. To the extent BellSouth may seek additional security due to increased billing, the Agreement must establish a cap on the amount of times that BellSouth can request an increase in security. If not, BellSouth may continually burden CLECs with repeated requests for increased security. CLECs should not have to endure requests for additional security more than once every six (6) months. Under Petitioners' proposed language, BellSouth has sufficient opportunity to protect its financial interest without placing excessive time and resource burdens on Petitioners. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language provides that it may seek additional security if a material change in the circumstances of CLEC so warrants and/or gross monthly billing has increased beyond the level most recently used to determine the level of security deposit. BellSouth's proposed language does not provide any limit on its ability to request additional security. In an event to settle deposit issues, the CLECs agreed to a "material change" benchmark which the Parties agreed would cover bankruptcy filings and similar instances. Since the CLECs agreed to a "material change" standard in an attempt reach agreement, BellSouth should be agreeable to a more precise twenty-five (25) percent increase in billing standard. The two standards, together, provide a balanced approach to deposits that adequately protect both Parties and achieve reasonable business certainty so that the Parties will avoid likely disputes over this issue. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

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

A. Notice of suspension for additional applications for service, pending applications for service, and access to BellSouth's ordering systems should be sent to CLECs pursuant to the requirements of Attachment 7 and also should be sent via certified mail to the individual(s) listed in the Notices provision of the General Terms and Conditions. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The Parties have agreed, in the General Terms and Conditions, to identify a person to receive notices under the Agreement. Specifically, Section 24.1 of the General Terms and Conditions states, "[e]very notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered by hand, by overnight courier or by U.S. Mail postage prepaid, addressed to: [identified CLEC/BellSouth recipient]." This provision is not in dispute. Access to BellSouth ordering systems is part of the Agreement and is fundamental to a CLEC's business. Nevertheless, BellSouth proposes that a notice of suspension for applications for services as well as access to ordering systems only be sent to the CLEC billing contact and not also to the notice receipt set forth in the General Terms and Conditions A notice of suspension of access to ordering systems is too important to a CLEC's business to be sent only to the billing contact who likely is buried in bills from BellSouth and other vendors. The very purpose of including a notice recipient in the General Terms and Conditions is to provide a central person to receive all notices of importance to the implementation of the Agreement. As stated, there is almost no notice more important than one that will potentially terminate a CLEC's access to ordering systems. The notice provision included in the General Terms and Conditions was drafted to address this exact type of notice, one of dire consequence to CLECs if not addressed immediately. Therefore, BellSouth must not be allowed to create an exception to the rule for this type of suspension notice. Accordingly, the Commission should find that BellSouth must provide notice of suspension of access to BellSouth's ordering systems to the billing contact as well as the notice recipient identified in the General Terms and Conditions. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language provides that an initial notice that a CLEC's 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 payment of outstanding amounts are not paid by the fifteenth (15th) calendar day following the date of the notice is system generated and will only be supplied to CLEC's billing contact. As mentioned previously, access to ordering systems is vital to a CLEC's business and it is imperative that such a notice will be provided to the billing contact but also to the legal/regulatory/carrier relations contact or contacts identified in the General Terms and Conditions of this Agreement. Even if such notice is system generated, there is no valid reason why BellSouth cannot ensure that the same notice is also provided to the notice recipient(s) identified in the General Terms and Conditions. The issues of access to OSS and UNE provisioning are too important for BellSouth not to do so. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ISSUE 7-12?

A. The CLECs disagree with BellSouth's proposed restatement of the issue because it does not reflect the disputed language proposed by BellSouth and it appears to be another needless disagreement with Petitioners' issue statement. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

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

(ATTACHMENT 11)

Issue No. 11-1 [Sections 1.5, 1.8.1, 1.9, 1.10]: (A) Should BellSouth be permitted to charge CLEC the full development costs associated with a BFR? (B) If so, how should these costs be recovered?

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 11-1(A).

A. The answer to the question posed in the issue statement is "NO." CLECs should not be charged the full development costs for a new service or modified network element ordered via the BFR process. Rather, the charges associated with the development should be apportioned among various CLECs that may benefit from the new service or network element. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. When BellSouth develops a new or modified UNE, interconnection or collocation offering via the BFR process, not only will the CLEC requesting the BFR benefit from the development of that new or modified offering, but other CLECs, who subsequently purchase the new/modified service or UNE, will benefit from the development as well. Accordingly, the CLEC that requested the BFR should not be required to bear the entire burden of the development costs of a service or element that may benefit a substantial part of the CLEC community as well as Alabama consumers. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would require the CLEC requesting the BFR to pay the full development costs for the resulting new service or modified network element. BellSouth argues that it is entitled to recover its costs in provisioning services to CLEC, and BellSouth further argues that the CLEC making a BFR is making a unique request to BellSouth, and therefore that CLEC should bear the full development costs. What BellSouth fails to address is that other CLECs will likely purchase the new service or modified network element and will not bear any of the development costs. This would put the CLECs who subsequently purchase the new service or element at a financial advantage over the CLEC requesting the BFR, as they did not have to pay any of the development costs, but reap the benefit of the new or modified offering. In other words, BellSouth's proposal creates a first-mover penalty that threatens to inhibit innovation and new service offerings from which consumers could greatly benefit. *[Sponsored by 3 CLECs: C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY SHOULD DEVELOPMENT COSTS BE ASSESSED DIFFERENTLY FOR A BFR THAN A NBR?

A. The BFR process, as defined in the Agreement, is utilized when BellSouth is requested to provide a new or modified network element, interconnection option or other service option pursuant to the Act that was not previously provided for in the Agreement. On the other hand, the NBR process is utilized when a CLEC requests a new service, or element that is not required by the Act. I understand that if my company requests a new service or network element that BellSouth is not required to provide pursuant to the Act, it would be my company's responsibility to pay for the development of that new service or product.

With the BFR process, however, a CLEC has requested that BellSouth develop a service or modified network element that it is legally obligated to provide. BellSouth must make such service and/or network element available to all CLECs and, therefore, the development costs should be apportioned to all CLECs that would benefit from the service and network element. To do otherwise, would unjustly force the first CLEC who requests a new service or element to bear all the development costs, while all the CLECs who subsequently purchase the new service or element get a "free ride" on the development. Furthermore, if a CLEC is required to bear all the development costs, a new service or modified network element that would benefit the CLEC community and enhance competition in Alabama may not get developed as it could be cost prohibitive for a CLEC to engage in the BFR process. Ultimately it is the consumers that lose out from the lack of enhanced, competitive services deployed in Alabama. To avoid this result, the Commission should find that all CLECs in Alabama would benefit from a new service or element development through the BFR and therefore direct BellSouth to establish a cost structure whereby the development costs can be apportioned among the CLECs that benefit from the new service or modified network element. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ISSUE 11-1(B).

A. To the extent that BellSouth can charge the requesting CLEC for the development costs associated with the BFR, such costs should be assessed though the nonrecurring and recurring rates for the service or modified network element. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. If a CLEC must bear the burden paying the full development costs for a new service or modified network element resulting from the BFR process, such costs should be included in the rates for the new service or element through the nonrecurring and recurring charges for that new service or modified network element. The CLEC requesting the BFR should not be required to pay the full development costs in one lump sum in order for BellSouth to process the BFR. Rather, the development costs should be spread out through the nonrecurring and recurring charges the CLEC must pay for use of the service or network element. *[Sponsored by 3 **CLECs:** C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language would require the CLEC to pay all the development costs up front as a condition to BellSouth processing the BFR. BellSouth's proposal is unsatisfactory because a CLEC should not be required to incur the significant expense for the development of a service or network element before the service or network element is available. Rather, BellSouth should assess development charges through the nonrecurring and recurring rates, as it does for all other UNEs and related services in the Agreement.

To the extent that development costs for a particular UNE or service are assessed on a CLEC via the nonrecurring and recurring charges, there are compelling reasons why such costs should be recovered through recurring charges. The key distinguishing characteristic between the costs that should be recovered in recurring charges and those that can be recovered in nonrecurring charges is whether the cost is associated with facilities that will be used to provide service to subsequent customers without change.

Based on this test, no development costs belong in the nonrecurring charges for UNEs because all of the development costs are for facilities will be used to provide service to both current and future customers.

Moreover, while the incidence of development costs may be a one-time event, that circumstance does not change the basic fact that the cost is properly treated as a recurring charge. Proper identification of one-time costs is particularly important in a competitive environment where more than one local exchange carrier, including the incumbent, may use a particular facility at different points in that facility's economic life. If the first telecommunications provider to use the facility bears all the forward-looking costs of a one-time activity that benefits multiple users, then obviously the first user will be forced to pay more than its fair share. Current customers should not subsidize the costs of providing plant for future customers. *[Sponsored by 3* ***CLECs:*** *C. Pifer (KMC), J. Fury (NSC), J. Falvey (XSP)]*

VERIFICATION

I, Raymond Chad Pifer, being first duly sworn, state that I am Regulatory Counsel for KMC Telecom Holdings, Inc.; that I am authorized to make this Verification on its behalf; that I have read the foregoing Petition; and that the statements in the foregoing Testimony of Joint Petitioners, except as otherwise specifically attributed, are true and correct to the best of my knowledge, information and belief.

Raymond Chad Pifer

Raymond Chad Pifer
Regulatory Counsel

Subscribed and sworn to before me this 5 day of April, 2004.

Debra A. Fontenot

Notary Public

My Commission expires: 12/16/07

DEBRA A. FONTENOT
MY COMMISSION EXPIRES
DEC. 16 2007
FORSYTH COUNTY, GEORGIA
NOTARY PUBLIC

DC01/HEITJ/218853.1

VERIFICATION

I, Brian Christopher Murdoch, being first duly sworn, state that I am the Director of Carrier Management of KMC Telecom Holdings, Inc.; that I am authorized to make this Verification on its behalf; that I have read the foregoing Petition; and that the statements in the foregoing Testimony of Joint Petitioners, except as otherwise specifically attributed, are true and correct to the best of my knowledge, information and belief.

Brian Christopher Murdoch
Director of Carrier Management

Subscribed and sworn to before me this 5th day of April, 2004.

Debra A. Fontenot

Notary Public

My Commission expires: 12/16/07

DEBRA A. FONTENOT
MY COMMISSION EXPIRES
DEC. 16 2007
FORSYTH COUNTY, GEORGIA
NOTARY PUBLIC

VERIFICATION

I, John Fury, being first duly sworn, state that I am the Manager of Carrier Relations of NewSouth Communications Corp.; that I am authorized to make this Verification on its behalf; that I have read the foregoing Petition; and that the statements in the foregoing Testimony of Joint Petitioners, except as otherwise specifically attributed, are true and correct to the best of my knowledge, information and belief.

John Fury
Manager, Carrier Relations

Subscribed and sworn to before me this 5th day of ~~March~~ April, 2004.

Notary Public

My Commission expires:______________

My Commission Expires July 8, 2008

DC01/HEITJ/218853.1

VERIFICATION

I, James C. Falvey, being first duly sworn, state that I am Senior Vice President, Regulatory Affairs of Xspedius Communications, LLC; that I am authorized to make this Verification on its behalf; that I have read the foregoing Petition; and that the statements in the foregoing Testimony of Joint Petitioners, except as otherwise specifically attributed, are true and correct to the best of my knowledge, information and belief.

James C. Falvey
James C. Falvey
Sr. Vice President, Regulatory Affairs

Subscribed and sworn to before me this 5 day of April 2004.

Notary Public

RABINAI E. CARSON
NOTARY PUBLIC
HOWARD COUNTY
MARYLAND
My Commission Expires Apr. 26, 2007

My Commission expires:______

DC01/HEITJ/218853.1

VERIFICATION

I, Marva Brown Johnson, being first duly sworn, state that I am Senior Counsel and Assistant Secretary of KMC Telecom V, Inc., KMC Telecom III, LLC, and KMC Data LLC; that I am authorized to make this Verification on its behalf; that I have read the foregoing Petition; and that the statements in the foregoing Testimony of Joint Petitioners, except as otherwise specifically attributed, are true and correct to the best of my knowledge, information and belief.

Marva Brown Johnson
Senior Counsel and Assistant Secretary
Regulatory Affairs

Subscribed and sworn to before me this 6th day of April, 2004.

Notary Public

My Commission expires: Nov 5, 2005

MATTHEW LEMONDS
MY COMMISSION # DD 069904
EXPIRES: November 5, 2005
Bonded Thru Notary Public Underwriters

Docket No. 2004-00044
Exhibit 2

BEFORE THE

LOUISIANA PUBLIC SERVICE COMMISSION

NEWSOUTH COMMUNICATIONS CORP., KMC TELECOM V, INC., KMC TELECOM III, LLC, and XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF BATON ROUGE, LLC, XSPEDIUS MANAGEMENT CO. OF LOUISIANA, LLC and XSPEDIUS MANAGEMENT CO. OF SHREVEPORT, ex parte

In re: Joint Petition for Arbitration of an Interconnection agreement with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Communications Act of 1934, as amended.

DOCKET NO. U-27798

STAFF MOTION AND RECOMMENDATION RELATED TO BELLSOUTH'S MOTION TO SEVER OR TO IMPOSE PROCEDURAL RESTRICTIONS

On motion of the Louisiana Public Service Commission ("Commission"), through undersigned counsel, in response to *"Bellsouth's Motion To Sever Or To Impose Procedural Restrictions" ("Motion")*, Staff recommends the following:

1. That Bellsouth's Motion is denied.
2. As it relates to common testimony, Petitioners nominate one witness ("Common Witness") to testify on behalf of all Petitioners. There can be a Common Witness for each issue or sub-issue in dispute. The Common Witness' testimony will inure to the benefit of all Petitioners.

3. If Bellsouth objects to the Common Witness' testimony on the grounds of hearsay; and the objections are sustained, each Petitioner will have an opportunity to have a predetermined witness ("Fact Specific Witness") testify on its behalf in order to introduce the hearsay testimony of the Common Witness.
4. Each Petitioner will have an opportunity to file company specific testimony and have an opportunity for a witness testify to those company specific facts.

Respectfully submitted:

Edmond D. Jordan (Bar No. 25429)
Staff Attorney
Louisiana Public Service Commission
P.O. Box 91154
Baton Rouge, Louisiana 70821-9154
Ph. (225) 342-9888

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all parties of record by placing same in the United States Mail, properly addressed and postage prepaid, on this 13TH day of April 2004.

Edmond D. Jordan

Docket No. 2001-00044
Exhibit 2

BEFORE THE

LOUISIANA PUBLIC SERVICE COMMISSION

NEWSOUTH COMMUNICATIONS CORP., KMC TELECOM V, INC., KMC TELECOM III, LLC, and XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, XSPEDIUS MANAGEMENT CO. OF BATON ROUGE, LLC, XSPEDIUS MANAGEMENT CO. OF LOUISIANA, LLC and XSPEDIUS MANAGEMENT CO. OF SHREVEPORT, ex parte	*	**DOCKET NO. U-27798**
In re: Joint Petition for Arbitration of an Interconnection agreement with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Communications Act of 1934, as amended.	*	

* *

ORDER

Considering the forgoing *Motion & Recommendation*;

IT IS HEREBY ORDERED:

1. That "Bellsouth's Motion To Sever Or To Impose Procedural Restrictions" is denied.

2. As it relates to common testimony, Petitioners nominate one witness ("Common Witness") to testify on behalf of all Petitioners. There can be a Common Witness for each issue or sub-issue in dispute. The Common Witness' testimony will inure to the benefit of all Petitioners.

3. If Bellsouth objects to the Common Witness' testimony on the grounds of hearsay; and the objections are sustained, each Petitioner will have an opportunity to have a

predetermined witness ("Fact Specific Witness") testify on its behalf in order to introduce the hearsay testimony of the Common Witness.

4. Each Petitioner will have an opportunity to file company specific testimony and have an opportunity for a witness testify to those company specific facts.

Baton Rouge, Louisiana this ______ day of __________, 2004.

____
Administrative Law Judge
Louisiana Public Service Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the individuals on the attached Service List by mailing a copy thereof, this 15th day of April 2004.

Dorothy J. Chambers

SERVICE LIST – PSC 2004-00044

Jake E. Jennings
NewSouth
Two North Main Street
Greenville, SC 29601

Bo Russell
NuVox
301 North Main Street, Suite 5000
Greenville, SC 29601

Marva Brown Johnson
KMC Telecom
1755 North Brown Road
Lawrenceville, GA 30043

James C. Falvey
Xspedius
Suite 200
7125 Columbia Gateway Drive
Columbia, MD 21046

John J. Heitmann
Enrico C. Soriano
Heather T. Hendrickson
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036

John E. Selent
Dinsmore & Shohl LLP
1400 PNC Plaza
500 W. Jefferson Street
Louisville, KY 40202