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May 3, 2005

via Hand Delivery

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

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

Dear Ms. O'Donnell:

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

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

Very truly yours,

DINSMORE & SHOHL LLP

John E. Selent

JES/kwi
Enclosures
cc: Amy E. Dougherty, Esq.
John Heitmann, Esq.

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN RE:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF LEXINGTON, LLC, AND XSPEDIUS MANAGEMENT CO. OF LOUISVILLE, LLC	)	**CASE N0. 2004-0044**

SUPPLEMENTAL TESTIMONY OF THE JOINT PETITIONERS

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

May 3, 2005

PRELIMINARY QUESTIONS

Q. SINCE FILING YOUR REBUTTAL TESTIMONY ON DECEMBER 17, 2004, HAVE THE PARTIES RESOLVED ANY ADDITIONAL ISSUES?

A. Yes. Since the Joint Petitioners filed their Rebuttal Testimony on December 17, 2004, the Parties have resolved the following Issues: 8/G-8, 27/2-9, 43/2-25, 46/2-28, 50/2-32, 57/2-39, 63/3-4, 94/6-11, 95/7-1, 96/7-2, 99/7-5 and 106/7-12.

Q. DO YOU HAVE ANY SUPPLEMENTAL TESTIMONY FOR ISSUE 23 AND THE SUPPLEMENTAL ISSUES?

A. No, not at this time. The Parties have agreed to file a Joint Motion with the Commission seeking to move certain arbitration issues to the Generic Proceeding in Docket No. 2004-00427 and to declare certain arbitration issues moot. As will be stated in the Parties' Motion, the TRRO has rendered Issues 109/S-2 (impact of intervening FCC order on the FCC's Interim Rules Order), 110/S-3 (vacatur or modification of the FCC's Interim Rules Order) and 112/S-5 (rates, terms and conditions frozen by the FCC's Interim Rules Order) moot. Moreover, the Motion will seek to move Issue 23/2-5 and Supplemental Issues 108/S-1, 111/S-4, 113/S-6, 114/S-7 into the Generic Proceeding for resolution as these Issues are impacted by the FCC's release of the TRRO. The Parties' Joint Motion also will request that the resolution of those issues be incorporated back into this docket so that the results can be folded into the agreements that result from this arbitration proceeding.[1]

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[1] Joint Petitioners anticipate that this joint motion will be filed later today or tomorrow.

Q. FOR WHICH ISSUES WILL YOU BE PROVIDING SUPPLEMENTAL TESTIMONY?

A. We will provide supplemental testimony on only a subset of the remaining unresolved issues where there have been new language proposals or other developments we want to bring to the Commission's attention. This supplemental testimony is intended to supplement and not replace our previously filed testimony in this docket.

GENERAL TERMS AND CONDITIONS[2]

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

Q. HAS YOUR POSITION CHANGED ON THIS ITEM 2/ISSUE G-2?

A. No. It is still the Joint Petitioners' position that the term "End User" should be defined as "the customer of a Party". *[Sponsored: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. Since the Joint Petitioners filed their Rebuttal Testimony, BellSouth has modified its proposed contract language. Specifically, BellSouth went from one definition of End User - the ultimate user of the Telecommunications Services - to three separate definitions: End User (upper case), Customer, and end user (lower case).[3] Aside from the legal arguments, from a logistical perspective, using three separate definitions throughout the Agreement is unnecessarily complex and will cause confusion between the Parties. Most problematic is that BellSouth proposes to the term "end user" twice,

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2 Please note that an updated Exhibit A has been attached to this Supplemental Testimony that reflects the new revised contract language. Also, please note that NuVox/NewSouth witness Jerry Willis will be adopting testimony previously filed by John Fury.

3 This is the second revised proposal received from BellSouth since the filing of testimony in this proceeding. Joint Petitioners had worked with BellSouth to review the preceding proposal and each use of it in the interconnection agreement. BellSouth's proposed revision has caused Joint Petitioners to have to conduct that review from scratch. While Joint Petitioners will complete such a review and will continue to work with BellSouth to resolve this issue, we continue to maintain that our definition – which may not be used to expand or to curtail rights to use UNEs, collocation and interconnection – is the most appropriate and is preferable to anything BellSouth has proposed thus far.

once in upper case to mean a retail customer and once in lower case to mean the End User (in upper case) or any other retail customer of a Telecommunications Service. There is absolutely no reason to use the term "end user" twice, especially when the definition of end user cross references the definition of End User. Such complexity will only serve to hinder the implementation of the Agreement and may result in needless disputes between the Parties.

From a legal perspective, BellSouth's newly proposed definitions, if used improperly, could unlawfully restrict the manner in which Joint Petitioners use UNEs. The FCC has maintained that UNEs may be used by CLECs without limitations imposed by ILECs. Moreover, as stated in our Direct Testimony, "there is no apparent policy or legal basis to support BellSouth's apparent attempt to limit who can or cannot be Petitioners' customers or whether Petitioners can serve them using UNEs." Joint Petitioners' Direct at 19:12-14. BellSouth's new multi-definition approach does nothing to resolve the fact that is the use – or misuse of the proposed definitions – could unlawfully limit the types of customers the Joint Petitioners may serve and stifling competition in Kentucky. Accordingly, the Commission should adopt the definition proposed by the Joint Petitioners, which is easily applied, and comports with all relevant guidelines on how CLECs may use UNEs.[4]

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[4] BellSouth has inserted its new End User/Customer/end user definitions throughout the Agreement. Since the Joint Petitioners have addressed the definition issue in response to this Issue 2/G-2, we will not address every instance in which BellSouth has made this change. Joint Petitioners have no objection to BellSouth's amendment of its own language proposals, provided that such amendments are not intended to expand burdens imposed on Joint Petitioners or to curtail the rights of Joint Petitioners. If either is the case, Joint Petitioners request that the Commission reject such language proposals, even if it is inclined to adopt any BellSouth language proposals (as a general manner, Joint

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

Q. HAS YOUR POSITION CHANGED ON THIS ITEM 4/ISSUE G-4?

A. No. It is still the Joint Petitioners' position that in cases other than gross negligence and willful misconduct by the other party, or other specified exemptions as set forth in CLECs' proposed language, liability should be limited to an aggregate amount over the entire term equal to 7.5% of the aggregate fees, charges or other amounts paid or payable for any and all services provided or to be provided pursuant to the Agreement as of the day on which the claim arose. This 7.5% figure acts as a cap on damages, and not, as BellSouth has mischaracterized it, a guarantee of maximum damages. The injured Party would be entitled only to the damages arising from the other Party's negligence, which must be proven before a competent tribunal, up to a maximum of 7.5% of revenue paid or billed as of the day the claim arose. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES BELLSOUTH'S PROPOSAL REPRESENT THE INDUSTRY STANDARD?

A. No. BellSouth's proposal represents the standard that BellSouth offers in its template interconnection agreement. It is not in our view "the industry standard" or a standard which should otherwise be imposed by this Commission on Joint Petitioners. Notably, BellSouth's proposal differs markedly from the limitation of liability language used by AllTel in its agreements. A copy of AllTel's limitation of language is attached hereto as

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Petitioners request that the Commission adopt each and every one of Joint Petitioners' language proposals and reject each and every one of BellSouth's language proposals).

Exhibit B. And as Joint Petitioners have indicated previously, BellSouth's proposal also differs markedly from limitation of liability provisions contained in certain CSAs entered into by the Joint Petitioners. Even where Joint Petitioners operate under similar limitation of liability proposals which limit liability to bill credits (note that few customers purchase services out of Joint Petitioners' tariffs, which also differ to some degree from the BellSouth standard), Joint Petitioners' practical experience is that, in order to retain a customer, Joint Petitioners often have to give the customer more that the bill credits to which they otherwise be entitled.

Q. DO YOU HAVE ANY CLARIFICATIONS TO MAKE REGARDING YOUR PROPOSED LANGUAGE?

A. Yes. During depositions of Joint Petitioner witnesses by BellSouth in Raleigh, it became evident that certain terms used by Joint Petitioners in their proposal could be subject to differing interpretations. To clear any ambiguity and to ensure that the Joint Petitioners maintain a single position for each issue they are jointly arbitrating, Joint Petitioners will stipulate the following:

- By "amounts paid or payable", Joint Petitioners stipulate that this means amounts paid or billed.
- By "the day the claim arose", Joint Petitioners stipulate that this means the day of the incident that gives rise to a claim.

With these proposals, it should be quite clear that it is BellSouth and not the Joint Petitioners that is "gaming".

Q. DO YOU HAVE ANYTHING FURTHER TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. The Joint Petitioners have amended their language to clarify the relationship between Issue 4 (limitation of liability) and Issue 7 (indemnification). Joint Petitioners' new language for Section 10.4.1 omits the phrase "except for any indemnification obligations of the parties hereunder." In removing that phrase, the Joint Petitioners make clear that the liability construct in Section 10.4.1 matches their construct for indemnification in Section 10.5. That is, in Section 10.4.1 there is no cap on damages caused by the other party's gross negligence or willful misconduct. Thus, in Section 10.5 there is no cap on a party's indemnification obligations when it causes damage through gross negligence or willful misconduct. In Section 10.4.1, there is a 7.5% cap on liability caused by simple negligence, calculated from the total revenue paid or billed as of the day the claim arose. Similarly, with Joint Petitioners' new language, there is a 7.5% cap on indemnification when a party causes damages via simple negligence. Joint Petitioners' new language for Section 10.4.1 thus ensures that the two provisions are parallel. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

> ***Item No. 5, Issue No. G-5*** *[Section 10.4.2]: To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future), should it be obligated to indemnify the other Party for liabilities not limited?*

Q. HAS YOUR POSITION CHANGED ON THIS ITEM 5/ISSUE G-5?

A. No. It is still the Joint Petitioners' position that cannot limit BellSouth's liability in contractual arrangements wherein BellSouth is not a party. Moreover, Petitioners will not indemnify BellSouth in any suit based on BellSouth's failure to perform its

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

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. As we have arbitrated this issue in other states, it has become clear that BellSouth is placing undue reliance on its own over-generalization, and misconception of Joint Petitioners' tariffs. As stated previously, Joint Petitioners rarely sell out of their tariffs. Like BellSouth, we use CSAs. Unlike BellSouth, we are prepared to testify that our CSAs do contain limitation of liability provisions that deviate from those found in our tariffs. Thus, while BellSouth seeks to hinder our ability (by imposing additional costs) to agree to commercially reasonable provisions that include less than the maximum limitation of liability allowed by law, BellSouth seeks to retain its own unhindered right

to do so and thereby gain competitive advantage over Joint Petitioners.[5] Accordingly, BellSouth's proposed language is anticompetitive and unnecessary – and it should be rejected.

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

Q. HAS YOUR POSITION CHANGED ON THIS ITEM 6/ISSUE G-6?

A. No. It is still the Joint Petitioners' position that an express statement is needed because the limitation of liability terms in the Agreement should in no way be read so as to preclude damages that CLECs' customers incur as a foreseeable result BellSouth's performance of its obligations under the Agreement, including its provisioning of UNEs and other services. Damages to customers that result directly, proximately, and in a reasonably foreseeable manner from BellSouth's (or a CLEC's) performance of obligations set forth in the Agreement that were not otherwise caused by, or are the result of, a CLEC's (or BellSouth's) failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage should be considered direct and compensable under the Agreement for simple negligence or nonperformance purposes. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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5 Given the historical nature and volume of services provided by Joint Petitioners to BellSouth under their interconnection agreements, BellSouth's proposed language for Issue 5 would have little if any impact on BellSouth while it could have significant and significantly detrimental impact on Joint Petitioners.

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. During the course of conducting these arbitrations in various states BellSouth has taken to the assertion that the Joint Petitioners have conceded that their own proposed language is of no force or effect. If that were really the case (which it is not), BellSouth should have no problem accepting it. The truth of the matter is that BellSouth intends to quash any end user's efforts to seek redress against BellSouth. We think that is inappropriate as a matter of law and public policy. Because the Agreement is a wholesale agreement that contemplates the provision of services to end users, there may be cases where damages to end users are both direct and reasonably foreseeable. To ensure that BellSouth is held accountable for its own acts and cannot foist costs associated with them on Joint Petitioners, the Commission should adopt Joint Petitioners' proposed language for this issue.

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

Q. HAS YOUR POSITION CHANGED ON THIS ITEM 7/ ISSUE G-7?

A. No. It is still the Petitioners' position that the Party providing service under the Agreement should be indemnified, defended and held harmless by the Party receiving services against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications. Additionally, customary provisions should be included to specify that the Party receiving services under the Agreement should be indemnified, defended and held harmless by the Party providing services against any claims, loss or damage to the extent reasonably arising from: (1) the

providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent cased by the providing Party's negligence, gross negligence or willful misconduct. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. Since filing our Rebuttal Testimony, BellSouth has modified its proposed contract language. Specifically, BellSouth has included the caveat that the Party providing services under the Agreement will be indemnified, "except to the extent caused by the providing Party's gross negligence or willful misconduct." This brings the Parties' proposed language slightly closer in that the Parties now appear to agree that the Party receiving services under the Agreement will not have to indemnify the providing Party in cases of gross negligence or willful misconduct. However, BellSouth still proposes that Joint Petitioners defend and hold harmless BellSouth in cases where BellSouth, as the providing party, is grossly negligent or engages in willful misconduct. Joint Petitioners adamantly oppose such a provision and continue to oppose (adamantly) BellSouth's insistence on "backward" indemnification provisions wherein the receiving party indemnifies the providing party for the providing party's negligence.[6] Joint Petitioners should not get left holding the bag for BellSouth's negligence – it is not our cost of doing business, as BellSouth disingenuously claims.

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6 Joint Petitioners note that the AllTel agreement excerpt provided as Exhibit B also contains indemnification provisions which differ markedly from those backward provisions that BellSouth proposes the Commission foist upon the Joint Petitioners in this arbitration.

BellSouth also incorrectly maintains that indemnification of the Party receiving services is "not appropriate" in this Agreement as it is governed by sections 251 and 252 of the Act and therefore, is not a true commercial agreement. Blake Direct at 14:2-16. There is no substance to Ms. Blake's argument. As indicated in our Rebuttal Testimony, Sections 251 and 252 do not contain any mandate or directive to reverse typical indemnification obligations. *See* Joint Petitioners' Rebuttal at 29:8-20. Moreover, interconnection agreements are most certainly commercial agreements. The fact that the Commission becomes involved in the arbitration process is merely reflective of Congress's recognition of disparate bargaining power as between CLECs and ILECs and in no way suggests that these agreements are not "commercial" in nature.

In addition to the Parties' dispute over who should be indemnified under the Agreement, the Parties still dispute whether breach of Applicable Law should be indemnified. The Joint Petitioners propose that the providing Party must indemnify the receiving Party for any failure to abide by Applicable Law, whereas BellSouth argues that violation of Applicable Law is not a breach of this Agreement. BellSouth is incorrect as, Applicable Law, as precisely defined by the Parties in Section 32 of the General Terms and Conditions, does, by operation of the Georgia law insisted upon by BellSouth and agreed to by Joint Petitioners as governing law, become part of the Agreement to the extent the parties do not agree to be an exception or to be bound by terms that conflict with and thereby displace specific provisions of Applicable Law. Thus, Applicable Law is limited in scope by definition and it is indeed part of the Agreement. The role of Applicable Law is discussed in detail in response to Issue 12/G-12.

Finally, to clear any ambiguity, Joint Petitioners will stipulate that their proposed 7.5% cap on liability for negligence (which is our proposal for Issue 4) applies with respect to indemnification for negligence, as well. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 9, Issue No. G-9 *[Section 13.1]: Should a court of law be included in the venues available for initial dispute resolution?*

Q. HAS YOUR POSITION CHANGED ON THIS TO ITEM 9/ISSUE G-9?

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

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. We want to make clear that in seeking to preserve the right to choose to go to a state or federal court of competent jurisdiction in the first instance, Joint Petitioners are not questioning this Commission's concurrent jurisdiction over Section 252 agreements and its areas of substantive expertise. Joint Petitioners in this instance are merely seek in to preserve rights and options. Any petitioner should have the right to select a forum with jurisdiction. Federal and state courts have jurisdiction over interconnection agreements. The FCC and this Commission also have jurisdiction. BellSouth has offered nothing in return for its proposed limiting of our right to choose a court of law as a dispute resolution forum in the first instance and we are unwilling to simply give them up as the preservation of this and other rights likely will become instrumental in our self-preservation. Finally, we note respectfully that BellSouth is requesting that this Commission to some extent strip state and federal courts of jurisdiction. Obviously, this is not something that the Commission can or should do.*[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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

Q. HAS YOUR POSITION CHANGED ON THIS ITEM 12/ISSUE G-12?

A. No. It is still the Petitioners' position that nothing in the Agreement should be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, as defined in the Agreement, except in such cases where the Parties have explicitly agreed

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

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. Since filing their Rebuttal Testimony both the Joint Petitioners and BellSouth have modified their proposed contract language. The Joint Petitioners have attempted to clarify their intent by proposing revised language that more accurately reflects their position. The Joint Petitioners had initially proposed language stating that nothing in the Agreement would limit the Parties' rights under Applicable Law, unless they agreed to a limitation or exception, we have now revised our language to be specific that the Parties must agree "to an *exception to a requirement of Applicable Law or to abide by provisions which conflict with and thereby displace corresponding requirements of Applicable Law.*" This new language is clearer and ensures that the Parties understand that the Agreement is governed by Applicable Law, unless specifically agreed to otherwise. Joint Petitioners' position and proposed language is consistent with both Georgia law (which the parties have selected as governing) and federal law.

Whereas the Joint Petitioners have modified their proposed language to add clarity, BellSouth has modified its language to establish greater uncertainly. According to BellSouth's latest proposed deviation from governing Georgia law, the non-

telecommunications law existing at the time of contracting is deemed incorporated into the Agreement, but "substantive Telecommunications law" is excluded from Applicable Law and is not deemed incorporated into the Agreement. Joint Petitioners have entertained BellSouth's request for a blanket exception (with regard to "substantive Telecommunications law") to the already agreed-upon principles of governing Georgia Law and we have rejected it.

According to BellSouth's language, should a Party believe that a requirement or obligation set forth by an FCC or Commission rule, order or *substantive Telecommunication Law* applies to the Agreement and is not memorialized in the Agreement, that Party must petition the Commission for resolution. Presumably, this would mean that the Joint Petitioners would have to request that the Commission determine that the law means what it says and that the Parties did not agree to an exception from it or to terms that would conflict with and thereby replace it. This new and needless layer of litigation is wasteful and needlessly seeks to impose costs on the Joint Petitioners and this Commission. BellSouth's latest proposal continues to attempt to turn already agreed to Georgia contracting law on its head. Accordingly, the Commission should reject BellSouth's language as a continued effort to gain non-negotiated exceptions from Applicable Law and adopt the Joint Petitioners' proposed language, which appropriately incorporates Applicable Law and in a manner consistent with Georgia law already agreed to by the Parties. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

NETWORK ELEMENTS (ATTACHMENT 2)

Item No. 26, Issue No. 2-8 *[Section 1.7]: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?*

Q. HAS YOUR POSITION CHANGED ON THIS ITEM 26/ISSUE 2-8.

A. No. It is still the Petitioners' position that 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. By that we mean that BellSouth should be required to permit commingling and should be required to perform the functions necessary to commingle a Section 251 UNE or UNE combination with any wholesale service, including those obtained from BellSouth pursuant to any method other than Section 251 unbundling (this would include Section 271 unbundling). *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. The Joint Petitioners and BellSouth have modified their proposed contract language since filing their Rebuttal Testimony. The Joint Petitioners have modified their language to track and incorporate the FCC's commingling rules at 47 C.F.R. §§ 51.309(e) and (f). Neither BellSouth nor the Commission should have any concerns adopting the language proposed as it specifically references the FCC's rules listed above. BellSouth, on the other hand, has modified its language to state that "[n]othing in this Section shall prevent <<customer_short_name>> from commingling Network Elements with tariffed special access loops and transport services." BellSouth's additional language does nothing to

help resolve the issue, as BellSouth's language would still prevent the Joint Petitioners from commingling a Section 251 UNE or UNE Combination with Section 271 network elements. As stated in our Direct Testimony, there is nothing in the TRO or the FCC's rules that prohibits a CLEC from commingling a UNE or UNE Combination with any facility or service it may obtain from BellSouth pursuant to section 271. Joint Petitioners' Direct at 52: 6-9. BellSouth's persistent argument that an Errata to the TRO substantively changed the commingling rule is incorrect as a matter of law. BellSouth Blake Direct at 27:5-15. The Errata did not carve-out the exception for elements offered only to Section 271 that BellSouth claims. Indeed, BellSouth inexplicably ignores paragraph X of the Errata which deleted the final sentence of footnote 1990. By deleting that sentence which, contrary to the commingling rules and text of the commingling section of the TRO, had indicated that there is no obligation to commingle "checklist items". The deletion of that language removes any doubt that the remaining rules and TRO text require commingling including commingling of Section 251 UNEs with elements offered pursuant to section 271. Accordingly, BellSouth's proposed language is still in conflict with federal law and should be rejected, and the Commission should adopt the Joint Petitioners' newly-revised language which specifically incorporates the FCC's commingling rules.

Item No. 51, Issue No. 2-33 *[Sections 5.2.6, 5.2.6.1, 5.2.6.2, 5.2.6.2.1, 5.2.6.2.3]: (A)* ***This issue has been resolved.***

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

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

Q. HAS YOUR POSITION CHANGED ON THESE ITEMS 51(B)/ISSUE 2-33(B) AND 51(C)/ISSUE 23(C).

A. No. With regard to Item 51(B)/Issue 2-33(B), it is still the Petitioners' 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. With regard to Item 51(C)/Issue 2-33(C), it is still the Joint Petitioners' position that the audit should be conducted by a third party independent auditor mutually agreed upon by the Parties. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. Since the Joint Petitioners filed their Rebuttal Testimony, the Parties have modified the language to reflect some resolutions. Specifically, BellSouth included language that it would identify the cause for the EEL audit request and would provide such notice to the Petitioners 30 days before it seeks to commence the audit. These language changes reflect the Parties resolution subissue A. Moreover, the Parties have agreed on language for section 5.2.6.2.3 regarding reimbursement rights..

The Parties, however, still have two fundamental disagreements over the EEL audit provisions in the Agreement. First, the Parties disagree as to what the "Notice of Audit" must contain. This issue also encompasses a dispute over the scope of any audit. BellSouth's proposed language is vague and only states that it will identify the cause for the Audit. This is because BellSouth believes that it is entitled to audit all of a Joint Petitioners' EELs upon request. Obviously, this position is an affront to the "limited right to audit" the FCC made provision for and renders meaningless the "for cause" auditing standard adopted by the FCC and agreed to by the parties. Alternatively, the Joint Petitioners' proposed language is precise and states that BellSouth will identify the particular circuits for which BellSouth alleges non-compliance with the FCC-mandated service eligibility criteria and provide documentation to justify its allegations of cause. Although BellSouth asserts that neither notice nor documentation are expressly required by the TRO, the TRO does require that audits be limited and that they only be conducted under a "for cause" auditing standard. Moreover, the FCC has recognized that the TRO only "basic principles for EEL audits" which the states can and should fill-out.

Second, the Parties still disagree as to the impartiality of the independent third-party auditor. The Joint Petitioners maintain, as reflected in their proposed language, that to ensure impartiality, the Parties must agree on the third-party auditor. While BellSouth's position is that mutual agreement would only serve to delay the audit, Blake Direct at 33:32, the Joint Petitioners argue that mutual agreement is essential to avoiding undue delay and protracted disputes over the independence of a proposed auditor in any given context.[7] Joint Petitioners Rebuttal at 64:3-4. Moreover, the fact that any auditor may pledge generally to remain AICPA-compliant does not solve individual issues or conflicts that may arise in a particular situation. The TRO, through its incorporation of AICPA standards, requires that an auditor be independent in both appearance and fact. Issues regarding the independence of an auditor must be resolved as they arise. The law requires independence and it does not require a party to succumb to an unlawful audit which it may only complain about later. Accordingly, the Commission should adopt the language proposed by the Petitioners to ensure that BellSouth does not have the ability to impose on Joint Petitioners an auditor that is not independent in appearance or fact. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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[7] Although one might think of Deloitte and KPMG as independent auditors, the fact is that they cannot serve as independent auditors in all instances. Each of these firms has cited conflicts in rejecting a request of one of the Joint Petitioners to serve as an auditor. There also may particular facts that bar (or should bar) and auditor form serving as an independent auditor. Those facts may not be previously known and may only become apparent during the course of an audit. Indeed, with respect to NuVox in particular, it does not appear that KPMG is qualified to serve as an independent auditor.

ORDERING (ATTACHMENT 6)

Item No. 86, Issue No. 6-3 *[Sections 2.5.6.2, 2.5.6.3] (A) This issue has been resolved. (B) How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?*

Q. HAS YOUR POSITION CHANGED ON THIS ITEM 86(B)/ISSUE 6-3(B)?

A. No. It is still the Joint Petitioners' position that if one Party disputes the other Party's assertion of non-compliance, that Party should notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the Parties should cooperatively seek expedited resolution of the dispute. "Self help", in the form of suspension of access to ordering systems and discontinuance of service, is inappropriate and coercive. Moreover, it effectively denies one Party the due process contemplated by Dispute Resolution provisions incorporated in the General Terms and Conditions of the Agreement. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. When the Joint Petitioners filed their Direct Testimony with the Commission, with the Exhibit A, part of the disputed text was not included in that Exhibit A. The revised Exhibit A attached hereto corrects that error. The language proposed by Joint Petitioners sets forth a reasonable process that will occur should a Party receive a notice of noncompliance with CSR access rules. It does not provide for unilateral imposition of "pull-the-plug" type remedies such as suspension of ordering and provisioning functions or termination of all services to Joint Petitioners and their Kentucky customers. Such remedies are disproportionate in almost any conceivable context and the threat of them is simply coercive. Such remedies should only be imposed by the Commission after careful review of all the facts and an appropriate assessment of how any contemplated remedies address the perceived harms and may impact customers. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. HAS BELLSOUTH REVISED ITS PROPOSE LANGUAGE FOR THIS ISSUE?

A. Yes. However, the revised proposal does nothing to cure the impossibly short time frames or to alleviate BellSouth's ability to threaten coercively with pull-the-plug remedies. We do note, however, that BellSouth now accepts that the traditional dispute resolution process will apply and in this context, that means the alleging party would seek dispute resolution. We also note that BellSouth witnesses have testified under oath in other jurisdictions that any dispute would trigger an obligation (for BellSouth as the alleging party) to file for dispute resolution and that it would not seek to impose any remedy during the pendancy of such a dispute. We need to see those commitments

memorialized in contract language. The continued presence of unreasonably short response times and pull-the-plug remedies in BellSouth's, proposal creates needless ambiguity and too much room for gamesmanship by BellSouth and its fleet of attorneys.

BILLING (ATTACHMENT 7)

Item No. 100, Issue No. 7-6 *[Section 1.7.2]: Should CLEC be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?*

Q. HAS YOUR POSITION CHANGED ON THIS ITEM 100/ISSUE 7-6.

A. No. It is still the Petitioners' position that CLECs should not be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination. Rather, if a Petitioner receives a notice of suspension or termination from BellSouth, with a limited time to pay non-disputed past due amounts, Petitioner should be required to pay only those amounts past due as of the date of the notice and as expressly and plainly indicated on the notice, in order to avoid suspension or termination. Otherwise, CLEC will risk suspension or termination due to possible calculation and timing errors. The fact that Petitioners have long billing histories with BellSouth and may be able to estimate amounts owed does not ensure that they will correctly calculate the exact owed on a rush basis to avoid service termination. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. Since the Joint Petitioners filed their Rebuttal Testimony, BellSouth has modified its contract language. Specifically, BellSouth has proposed language that upon request, BellSouth will provide information regarding additional amounts owed after BellSouth issues a notice of suspension or termination for non payment. Although the Joint Petitioners recognize BellSouth's attempt to resolve the issue, BellSouth still misses the mark. As an initial matter, BellSouth will only provide information regarding additional amounts owed ***upon request***. This is unacceptable. The cure-amount should be stated in dollars and cents on the face of any suspension or termination notice. This issue is too important to leave to subsequent requests and miscommunications or non-responses that could result therefrom. With remedies as potentially devastating as suspension and termination, margins for error need to be eliminated. BellSouth's proposed acceleration and consolidation of past due amounts across potentially hundreds of bills (regionally, NuVox alone receives over 1,100 invoices from BellSouth every month from BellSouth) simply leaves too much room for error.. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

> ***Item No. 101, Issue No. 7-7*** *[Section 1.8.3]: How many months of billing should be used to determine the maximum amount of the deposit?*

Q. HAS YOUR POSITION CHANGED ON THIS ITEM 101/ISSUE 7-7?

A. Yes, in that we now offer an alternative position. It is still the Joint Petitioners' position that the maximum amount of a deposit should not exceed two month's estimated billing for new CLECs or one and one-half month's actual billing for existing CLECs (based on

average monthly billings for the most recent six (6) month period). The one and one-half month's actual billing deposit limit for existing CLECs is reasonable given that balances can be predicted with reasonable accuracy and that significant portions of services are billed in advance.

In the alternative, the maximum amount of a deposit BellSouth may request should not exceed one month for services billed in advance and two months for services billed in arrears. BellSouth recently agreed to this alternative set of maximum amounts with ITC^DeltaCom. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. As indicated in our revised position statement for this issue, Joint Petitioners are willing to accept the deposit maximum that BellSouth recently agreed to with DeltaCom. A copy of that provision (contained in the current BellSouth/ITC^DeltaCom interconnection Agreement for Georgia) is attached hereto as Exhibit C. We find that this provision is reasonable and it complements the deposit provisions we already have agreed to with BellSouth. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Item No. 102, Issue No. 7-8 *[Section 1.8.3.1]: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC?*

Q. HAS YOUR POSITION CHANGED WITH RESPECT TO ITEM 102/ISSUE 7-8?

A. No. It is still the Joint Petitioners' position that the amount of security due from an existing CLEC should be reduced by amounts due to CLEC by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in the deposit provisions of Attachment 7 of the Agreement. This provision is appropriate given that the Agreement's deposit provisions are not reciprocal and that BellSouth's payment history with CLECs is often poor. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

A. Yes. Since the Joint Petitioners filed their Rebuttal Testimony, BellSouth has changed its position from providing no contract language for this issue to proposing the following provision:

> The amount of the security due from <<customer_short_name>> shall be reduced by the undisputed amounts due to <<customer_short_name>> by BellSouth pursuant to Attachment 3 of this Agreement that have not been paid by the Due Date at the time of the request by BellSouth to <<customer_short_name>> for a deposit. Within ten (10) days of BellSouth's payment of such undisputed past due amounts to <<customer_short_name>>, <<customer_short_name>> shall provide the additional security necessary to establish the full amount of the deposit that BellSouth originally requested.

Although the Petitioners acknowledge BellSouth's effort to provide a proposal for this issue, BellSouth's proposal nonetheless fails to provide the Petitioners adequate protection from BellSouth's untimely payment of amounts owed. The purpose of this set-off provision is to attempt to level the playing field in terms of risk. If BellSouth withholds amounts that it owes to Petitioners, thus increasing their financial risk, it should not also be permitted to demand a full deposit from Petitioners to address its own financial risk. The Agreement does not provide for reciprocal deposits, and thus, the Petitioners should have the ability to reduce the amount of any security deposit request (which are typically made once a year) by amounts BellSouth owes the Petitioners that have aged 30 days or more. Joint Petitioners' Direct at 115:14-20. BellSouth's proposal limits those past due amounts that can be considered for set-off to undisputed amounts. However, BellSouth has a history of unsuccessfully withholding disputing extraordinary amounts. For Xspedius and the company from which Xspedius acquired many of its current assets those amounts have exceeded $20 million. Furthermore, BellSouth refuses to hold itself to the same "good payment" standard that applies to the Petitioners and that is already included in the Agreement. Instead, under BellSouth's proposal, within 10 days of BellSouth paying amounts owned pursuant to Attachment 3, the Petitioners must pay the additional security deposit amount to establish the full amount of the deposit that BellSouth originally requested. Notably, Petitioners must satisfy a whole host of criteria, above and beyond paying past due amounts, to meet the good payment standard under the Agreement and be alleviated of a deposit requirement. Moreover, BellSouth's proposal provides that it is entitled to the full amount of deposit it originally requested, even it that is more than the amount agreed to (deposit requests are typically negotiated to an amount

less than the maximum amount which BellSouth typically requests). . Thus, in practice, BellSouth's proposal would result in a rolling offset that would result in a largely meaningless offset obligation (as BellSouth could simply avoid it by disputing amounts past due). Worse still, BellSouth's language appears to trigger an absolute right to any deposit originally requested by BellSouth. Joint Petitioners and BellSouth should resolve any disputes regarding deposits via negotiations, and those fail, via the Agreement's standard dispute resolution provisions. As stated previously, the Commission should adopt the language proposed by the Joint Petitioners which allows the Petitioners to have the ability to reduce the amount of the security due to BellSouth, since they cannot collect deposits themselves to offset their own financial exposure created by BellSouth's payment practices. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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

Q. HAS YOUR POSITION CHANGED WITH RESPECT TO THIS ITEM 104/ISSUE 7-10.

A. No. It is still the Joint Petitioners position that if the Parties are unable to agree on the need for or amount of a reasonable deposit, either Party should be able to file a petition for resolution of the dispute and both parties should cooperatively seek expedited resolution of such dispute. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DO YOU HAVE ANYTHING TO SUPPLEMENT YOUR DIRECT OR REBUTTAL TESTIMONY WITH RESPECT TO THIS ISSUE?

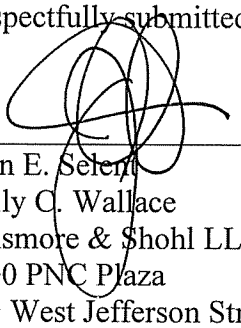
A. Yes. Since the Joint Petitioners filed their Rebuttal Testimony, BellSouth has modified its proposed contract language. BellSouth previously had proposed language that should the Parties be engaged in a dispute proceeding regarding the amount or need for a security deposit, BellSouth would not terminate a Petitioner's service if the Petitioner posted a payment bond for the amount of the requested deposit. BellSouth now proposes language that a Petitioner must post a payment bond for 50% of the amount of the requested deposit. That only resolves half of the problem with respect to only one aspect of this issue. As stated previously, deposit disputes should be addressed via the dispute resolution provisions contained in the General Terms and Conditions of the Agreement. BellSouth cannot be permitted to foist upon Joint Petitioners a 30-day nine-state deposit complaint filing obligation (we have never seen BellSouth make anything other than a regional deposit request – and, to the best of our recollection, we have always by negotiation agreed to a deposit that was less than the amount originally requested) coupled with a requirement that a bond (in any amount) be posted during the pendancy of such a dispute. This provision is lopsided and heavy-handed. The posting of bonds ties-up capital for CLECs and sometimes requires substantial renegotiation of financing arrangements. It should only be required *after* an independent decision-maker determines that BellSouth has the right to such a deposit (a bond is a form of deposit). Indeed, if applied to one recent deposit request made to one of the Joint Petitioners, BellSouth's proposed language would have resulted in the filing of needless complaints and roughly a $3 million bond when the Parties were able amicably to negotiate a deposit refund

hearings in companion cases to this arbitration being conducted in other states, BellSouth's witness Blake has consistently stated that BellSouth would not accept a similar provision wherein it would be required to file complaints and return half the amount of any deposit refund requested by a Joint Petitioner while a dispute over such a refund request was pending. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

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

Respectfully submitted,



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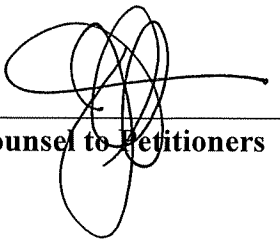
CERTIFICATE OF SERVICE

It is hereby certified that the foregoing was served by mailing a copy of the same to the parties identified on the attached service list by First Class United States Mail, postage prepaid, this 31st day of May, 2005.



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KENTUCKY PUBLIC SERVICE COMMISSION
CASE NO. 2004-00044
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JOINT PETITIONERS' EXHIBIT A

DISPUTED CONTRACT LANGUAGE BY ISSUE[1]

GENERAL TERMS AND CONDITIONS

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

1.7 [CLEC Version] **End User** means the **customer of a Party**.

[BellSouth Version] **End User, as used in this Interconnection Agreement,** means the **retail customer of a Telecommunications Service, excluding ISPs/ESPs, and does not include Telecommunications carriers such as CLECs, ICOs and IXCs.**

Customer, as used in this Interconnection Agreement, means the wholesale customer of a Telecommunications Service that may be an ISP/ESP, CLEC, ICO or IXC.

end user, as used in this Interconnection Agreement, means the End User or any other retail customer of a Telecommunications Service, including ISPs/ESPs, CLECs, ICOs and IXCs, that are provided the retail Telecommunications Service for the exclusive use of the personnel employed by ISPs/ESPs, CLECs, ICOs and IXCs, such as the administrative business lines used by the ISPs/ESPs, CLECs, ICOs and IXCs at their business locations, where such ISPs/ESPs, CLECs, ICOs and IXCs are treated as End Users.

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

10.4.1 [CLEC Version] **With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by either Party, any End User of either Party, or by any other person or entity, for damages associated with any of the services provided pursuant to or in connection with this Agreement, including but not limited to the installation, provision,**

[1] Revised for filing 05/03/05

preemption, termination, maintenance, repair or restoration of service, and, in any event, subject to the provisions of the remainder of this Section, each Party's liability shall be limited to and shall not exceed in aggregate amount over the entire term hereof an amount equal to seven-and-one half percent (7.5%) of the aggregate fees, charges or other amounts paid or payable to such Party for any and all services provided or to be provided by such Party pursuant to this Agreement as of the Day on which the claim arose; provided that the foregoing provisions shall not be deemed or construed as (A) imposing or allowing for any liability of either Party for (x) indirect, special or consequential damages as otherwise excluded pursuant to Section 10.4.4 below or (y) any other amount or nature of damages to the extent resulting directly and proximately from the claiming Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to all applicable damages or (B) limiting either Party's right to recover appropriate refund(s) of or rebate(s) or credit(s) for fees, charges or other amounts paid at Agreement rates for services not performed or provided or otherwise failing to comply (with applicable refund, rebate or credit amounts measured by the diminution in value of services reasonably resulting from such noncompliance) with the applicable terms and conditions of this Agreement. Notwithstanding the foregoing, claims or suits for damages by either Party, any End User of either Party, or by any other person or entity, to the extent resulting from the gross negligence or willful misconduct of the other Party, shall not be subject to the foregoing limitation of liability.

[BellSouth Version] Except for any indemnification obligations of the Parties hereunder, **and except in cases of the provisioning Party's gross negligence or willful misconduct,** each Party's liability to **the other for any loss, cost, claim, injury, liability or expense, including reasonable attorneys' fees relating to or arising out of any negligent act or omission in its performance of this Agreement, whether in contract or in tort,** shall be limited to **a credit for the actual cost of the** services **or functions** not performed or **improperly performed.**

Item No. 5, Issue No. G-5 [Section 10.4.2]: To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future), should it be obligated to indemnify the other Party for liabilities not limited?

10.4.2 [CLEC Version] **No Section.**

[BellSouth Version] **Limitations in Tariffs. A Party may, in its sole discretion, provide in its tariffs and contracts with its End Users, customers and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to the End User, customer or third party for (i) any loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such loss and (ii) consequential damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a loss as a result thereof, such Party shall 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 limitations of liability that such other Party included in its own tariffs at the time of such loss.**

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

10.4.4 [CLEC Version] Nothing in this Section 10 shall limit a Party's obligation to indemnify or hold harmless the other Party set forth elsewhere in this Agreement. Except in cases of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages **provided that neither the foregoing nor any other provision of this Section 10 shall be deemed or construed as imposing any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder**

and were not and are not directly and proximately caused by or the result of such Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the services or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

[BellSouth Version] Nothing in this Section 10 shall limit a Party's obligation to indemnify or hold harmless the other Party set forth elsewhere in this Agreement. Except in cases of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the services or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

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

10.5 [CLEC Version] Indemnification for Certain Claims. The Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim **for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications. The Party receiving services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party providing services hereunder against any claim, loss or damage to the extent 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 caused by the providing Party's negligence, gross negligence or willful misconduct.**

[BellSouth Version] Indemnification for Certain Claims. The Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, **except to the extent caused by the providing Party's gross negligence or willful misconduct,** defended and held harmless by the Party receiving services hereunder against any claim**, loss or damage arising from the receiving Party's use of the services provided under this Agreement pertaining to (1) claims** for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications**, or (2)** any claim, loss or damage **claimed by the**

End User or customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations arising out of this Agreement.

Item No. 9, Issue No. G-9 [Section 13.1]: Should a court of law be included in the venues available for initial dispute resolution?

13.1 [CLEC Version] Except **as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the FCC, the Commission or a court of law for a resolution of the dispute. Either Party may seek expedited resolution by the Commission, and may request that resolution occur in no event later than sixty (60) calendar days from the date of submission of such dispute. The other Party will not object to such expedited resolution of a dispute. If the FCC or Commission appoints an expert(s) or other facilitator(s) to assist in its decision making, each party shall pay half of the fees and expenses so incurred to the extent the FCC or the Commission requires the Parties to bear such fees and expenses.** Each Party reserves any rights it may have to seek judicial review of any ruling made by the FCC, the Commission or a court of law concerning this Agreement. **Until the dispute is finally resolved,** each Party shall continue to perform its obligations under this Agreement, **unless the issue as to how or whether there is an obligation to perform is the basis of the dispute, and shall continue to provide all services and payments as prior to the dispute** provided however, that neither Party shall be required to act in any unlawful fashion.

13.1 [BellSouth Version] Except **for procedures that outline the resolution of billing disputes which are set forth in Section 2 of Attachment 7 or as otherwise set forth in this Agreement, each Party agrees to notify the other Party in writing of a dispute concerning this Agreement. If the Parties are unable to resolve the issues relating to the dispute in the normal course of business then either Party shall file a complaint with the Commission to resolve such issues or, as explicitly otherwise provided for in this Agreement, may proceed with any other remedy pursuant to law or equity as provided for in this Section 13.**

13.2 **Except as otherwise stated in this Agreement, or for such matters which lie outside the jurisdiction or expertise of the Commission or FCC, if any dispute arises as to the enforcement of terms and conditions of this Agreement, and/or as to the interpretation of any provision of this Agreement, the aggrieved Party, to the extent seeking resolution of such**

dispute, must seek such resolution before the Commission or the FCC in accordance with the Act. Each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Either Party may seek expedited resolution by the Commission. **During the Commission proceeding** each Party shall continue to perform its obligations under this Agreement; provided, however, that neither Party shall be required to act in an unlawful fashion.

13.3 **Except to the extent the Commission is authorized to grant temporary equitable relief with respect to a dispute arising as to the enforcement of terms and conditions of this Agreement, and/or as to the interpretation of any provision of this Agreement, this Section 13 shall not prevent either Party from seeking any temporary equitable relief, including a temporary restraining order, in a court of competent jurisdiction.**

13.4 **In addition to Sections 13.1 and 13.2 above, each Party shall have the right to seek legal and equitable remedies on any and all legal and equitable theories in any court of competent jurisdiction for any and all claims, causes of action, or other proceedings not arising: (i) as to the enforcement of any provision of this Agreement, or (ii) as to the enforcement or interpretation under applicable federal or state telecommunications law. Moreover, if the Commission would not have authority to grant an award of damages after issuing a ruling finding fault or liability in connection with a dispute under this Agreement, either Party may pursue such award in any court of competent jurisdiction after such Commission finding.**

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

32.2 [CLEC Version] **Nothing in this Agreement shall be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, except in such cases where the Parties have explicitly agreed to an exception to a requirement of Applicable Law or to abide by provisions which conflict with and thereby displace corresponding requirements of Applicable Law. Silence shall not be construed to be such an exemption to or displacement of any aspect, no matter how discrete, of Applicable Law.**

[BellSouth Version] [BellSouth Version] **This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right or other requirement, not expressly memorialized herein, is applicable under this**

Agreement by virtue of a reference to an FCC or Commission rule or order or, with respect to substantive Telecommunications law only, Applicable Law, and such obligation, right or other requirement is disputed by the other Party, the Party asserting that such obligation, right or other requirement is applicable shall petition the Commission for resolution of the dispute and the Parties agree that any finding by the Commission that such obligation, right or other requirement exists shall be applied prospectively by the Parties upon amendment of the Agreement to include such obligation, right or other requirement and any necessary rates, terms and conditions, and the Party that failed to perform such obligation, right or other requirement shall be held harmless from any liability for such failure until the obligation, right or other requirement is expressly included in this Agreement by amendment hereto.

ATTACHMENT 2

NETWORK ELEMENTS AND OTHER SERVICES

Item No. 23, Issue No. 2-5 [Section 1.11.1]: What rates, terms, and conditions should govern the CLECs' transition of existing network elements that BellSouth is no longer obligated to provide as UNEs to other services?

[CLEC Version] In the event section 251 UNEs or Combinations are no longer offered pursuant to, or are not in compliance with, the terms set forth in the Agreement, including any transition plan set forth herein or established by the FCC or Authority, BellSouth may provide notice ("transition notice") to <<customer_short_name>> identifying specific service arrangements (by circuit identification number) that it no longer is obligated to provide as section 251 UNEs and that it insists be transitioned to other service arrangements. <<customer_short_name>> will acknowledge receipt of such notice and will have 30 days from such receipt to verify the list, notify BellSouth of initial disputes or concerns regarding such list, or select alternative service arrangements (or disconnection). <<customer_short_name>> and BellSouth will then confer to determine the appropriate orders to be submitted (i.e., spreadsheets, LSRs or ASRs). Such orders shall be submitted within 10 days of agreement upon the appropriate method (i.e., spreadsheets, LSRs or ASRs) and such agreement shall not be unreasonably withheld or delayed. There will be no service order, labor, disconnection, project management or other nonrecurring charges associated with the transition of section 251 UNEs to other service arrangements. The Parties will absorb their own costs associated with effectuating the process set forth in this section. In all cases, until the transition of any section 251 UNE to another service arrangement is physically completed (which, in the case of transition to another service arrangement provided by an entity other than BellSouth or one of its affiliates, shall be the time of disconnection), the applicable recurring rates set forth in the parties' interconnection agreement that immediately preceded the current Agreement or that were otherwise in effect at the time of the transition notice shall apply.

[BellSouth Version] In the event that <<customer_short_name>> has not entered into a separate agreement for the provision of Local Switching or services that include Local Switching, <<customer_short_name>> will submit orders to either disconnect Switching Eliminated Elements or convert such Switching Eliminated Elements to Resale within thirty (30) calendar days of the last day of the Transition Period. If <<customer_short_name>> submits orders to transition such Switching Eliminated Elements to Resale within thirty (30) calendar days of the last day of the Transition Period, applicable recurring and nonrecurring charges shall apply as set forth in the

appropriate BellSouth tariff, subject to the appropriate discounts described in Attachment 1 of this Agreement. If <<customer_short_name>> fails to submit orders within thirty (30) calendar days of the last day of the Transition Period, BellSouth shall transition such Switching Eliminated Elements to Resale, and <<customer_short_name>> shall pay the applicable nonrecurring and recurring charges as set forth in the appropriate BellSouth tariff, subject to the appropriate discounts described in Attachment 1 of this Agreement. In such case, <<customer_short_name>> shall reimburse BellSouth for labor incurred in identifying the lines that must be converted and processing such conversions. If no equivalent Resale service exists, then BellSouth may disconnect such Switching Eliminated Elements if <<customer_short_name>> does not submit such orders within thirty (30) calendar days of the last day of the Transition Period. In all cases, until Switching Eliminated Elements have been converted to Comparable Services or disconnected, the applicable recurring and nonrecurring rates for Switching Eliminated Elements during the Transition Period shall apply as set forth in this Agreement. Applicable nonrecurring disconnect charges may apply for disconnection of service or conversion to Comparable Services.

1.11.2 **Other Eliminated Elements. Upon the end of the Transition Period, <<customer_short_name>> must transition the Eliminated Elements other than Switching Eliminated Elements ("Other Eliminated Elements") to Comparable Services. Unless the Parties agree otherwise, Other Eliminated Elements shall be handled in accordance with Sections 1.11.2.1 and 1.11.2.2 below.**

1.11.2.1 **<<customer_short_name>> will identify and submit orders to either disconnect Other Eliminated Elements or transition them to Comparable Services within thirty (30) calendar days of the last day of the Transition Period. Rates, terms and conditions for Comparable Services shall apply per the applicable tariff for such Comparable Services as of the date the order is completed. Where <<customer_short_name>> requests to transition a minimum of fifteen (15) circuits per state, <<customer_short_name>> may submit orders via a spreadsheet process and such orders will be project managed. In all other cases, <<customer_short_name>> must submit such orders pursuant to the local service request/access service request (LSR/ASR) process, dependent on the Comparable Service elected. For such transitions, the non-recurring and recurring charges shall be those set forth in BellSouth's FCC No. 1 tariff, or as otherwise agreed in a separately negotiated agreement. Until such time as the Other Eliminated Elements are transitioned to such Comparable Services, such Other Eliminated Elements will be provided pursuant to the rates, terms and conditions applicable to the subject Other Eliminated Elements during the Transition Period as set forth in this Agreement.**

1.11.2.2 **If <<customer_short_name>> fails to identify and submit orders for any Other Eliminated Elements within thirty (30) calendar days of the last day of the Transition Period, BellSouth may transition such Other Eliminated Elements to Comparable Services. The rates, terms and conditions for such Comparable Services shall apply as of the date following the end of the Transition Period. If no Comparable Services exist, then BellSouth may disconnect such Other Eliminated Elements if <<customer_short_name>> does not submit such orders within thirty (30) calendar days of the last day of the Transition Period. In such case <<customer_short_name>> shall reimburse BellSouth for labor incurred in identifying such Other Eliminated Elements and processing such orders and <<customer_short_name>> shall pay the applicable disconnect charges set forth in this Agreement. Until such time as the Other Eliminated Elements are disconnected pursuant to this Agreement, such Other Eliminated Elements will be provided pursuant to the rates, terms and conditions applicable to the subject Other Eliminated Elements during the Transition Period as set forth in this Agreement.**

1.11.3 **To the extent the FCC issues an effective Intervening Order that alters the rates, terms and conditions for any Network Element or Other Service, including but not limited to Local Switching, Enterprise Market Loops and High Capacity Transport, the Parties agree that such Intervening Order shall supersede those rates, terms and conditions set forth in this Agreement for the affected Network Element(s) or Other Service(s).**

1.11.4 **Notwithstanding anything to the contrary in this Agreement, in the event that the Interim Rules are vacated by a court of competent jurisdiction, <<customer_short_name>> shall immediately transition Local Switching, Enterprise Market Loops and High Capacity Transport pursuant to Section 1.11 through 1.11.2.2 above, applied from the effective date of such vacatur, without regard to the Interim Period or Transition Period.**

1.11.5 **Notwithstanding anything to the contrary in this Agreement, upon the Effective Date of the Final FCC Unbundling Rules, to the extent any rates, terms or requirements set forth in such Final FCC Unbundling Rules are in conflict with, in addition to or otherwise different from the rates, terms and requirements set forth in this Agreement, the Final FCC Unbundling Rules rates, terms and requirements shall supercede the rates, terms and requirements set forth in this Agreement without further modification of this Agreement by the Parties.**

1.11.6 **In the event that any Network Element, other than those already addressed above, is no longer required to be offered by BellSouth pursuant to Section 251 of the Act, <<customer_short_name>> shall immediately transition such**

elements pursuant to Section 1.11 through 1.11.2.2 above, applied from the effective date of the order eliminating such obligation.

Item No. 26, Issue No. 2-8 [Section 1.13]: 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?

1.7 [CLEC Version] **BellSouth shall permit <<customer_short_name>> to commingle a UNE or Combination of UNEs with any wholesale service, consistent with 47 C.F.R. 51.309(e). BellSouth shall perform the functions necessary to commingle a UNE with any wholesale service, consistent with 47 C.F.R. 51.309(f).**

[BellSouth Version] **Notwithstanding any other provision of this Agreement, BellSouth will not commingle UNEs or Combinations of UNEs with any service, Network Element or other offering that it is obligated to make available only pursuant to Section 271 of the Act. Nothing in this Section shall prevent <<customer_short_name>> from commingling Network Elements with tariffed special access loops and transport services.**

Item No. 36, Issue No. 2-18 [Section 2.12.1]: (A) How should Line Conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to line conditioning?

2.12.1 [CLEC Version] **BellSouth shall perform line conditioning in accordance with FCC 47 C.F.R. 51.319 (a)(1)(iii). Line Conditioning is as defined in FCC 47 C.F.R. 51.319 (a)(1)(iii)(A).** Insofar as it is technically feasible, BellSouth shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.

[BellSouth Version] **Line Conditioning is defined as a RNM that BellSouth regularly undertakes to provide xDSL services to its own customers. This may include the removal of any device, from a copper loop or copper sub-loop that may diminish the capability of the loop or sub-loop to deliver high-speed switched wireline telecommunications capability, including xDSL service. Such devices include, but are not limited to; load coils, low pass filters, and range extenders.** Insofar as it is technically feasible, BellSouth shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.

Item No. 37, Issue No. 2-19 [Section 2.12.2]: Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less?

2.12.2 [CLEC Version] **No Section.**

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

Item No. 38, Issue No. 2-20 [Sections 2.12.3, 2.12.4]: Under what rates, terms and conditions should BellSouth be required to perform Line Conditioning to remove bridged taps?

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

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

2.12.4 [CLEC Version] **No Section.**

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

Item No. 51, Issue No. 2-33 [Sections 5.2.6, 5.2.6.1]: (A) ***This issue has been resolved.***

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

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

5.2.6 [CLEC Version] To invoke its limited right to audit, BellSouth will send a Notice of Audit to <<customer_short_name>>, identifying **the particular circuits for which BellSouth alleges non-compliance and** the cause upon which BellSouth rests its allegations. **The Notice of Audit shall 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 will be delivered to <<customer_short_name>> **with all supporting documentation** no less than thirty (30) calendar days prior to the date upon which BellSouth seeks to commence the audit.

[BellSouth Version] To invoke its limited right to audit, BellSouth will send a Notice of Audit to <<customer_short_name>> identifying the cause upon which BellSouth rests its allegations. Such Notice of Audit will be delivered to <<customer_short_name>> no less than thirty (30) calendar days prior to the date upon which BellSouth seeks to commence the audit.

5.2.6.1 [CLEC Version] The audit shall be conducted by a third party independent auditor **mutually agreed-upon by the Parties** and retained and paid for by BellSouth. The audit shall commence at a mutually agreeable location (or locations).

[BellSouth Version] The audit shall be conducted by a third party independent auditor retained and paid for by BellSouth. The audit shall commence at a mutually agreeable location (or locations).

ATTACHMENT 3

INTERCONNECTION

Item No. 65, Issue No. 3-6 [Section 10.11. 1 (KMC/XSP), 10.8.1 (NSC/NVX)]: Should BellSouth be allowed to charge the CLEC a Transit Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

10.10.1 [CLEC Version] Each Party shall provide tandem switching and transport services for the other Party's Transit Traffic. Rates for Local Transit Traffic and ISP-Bound Transit Traffic shall be the applicable Call Transport and Termination charges (i.e., common transport and tandem switching charge; end office switching charge is not applicable) as set forth in Exhibit A to this Attachment. Rates for Switched Access Transit Traffic shall be the applicable charges as set forth in the applicable Party's Commission approved Interstate or Intrastate Switched Access tariffs as filed and effective with the FCC or Commission, or reasonable and non-discriminatory web-posted listing if the FCC or Commission does not require filing of a tariff. Billing associated with all Transit Traffic shall be pursuant to MECAB guidelines.

[BellSouth's Version] Each Party shall provide tandem switching and transport services for the other Party's Transit Traffic. Rates for Local Transit Traffic and ISP-Bound Transit Traffic shall be the applicable Call Transport and Termination charges (i.e., common transport and tandem switching charges and **tandem intermediary charge**; end office switching charge is not applicable) as set forth in Exhibit A to this Attachment. Rates for Switched Access Transit Traffic shall be the applicable charges as set forth in the applicable Party's Commission approved Interstate or Intrastate Switched Access tariffs as filed and effective with the FCC or Commission, or reasonable and non-discriminatory web-posted listing if the FCC or Commission does not require filing of a tariff. Billing associated with all Transit Traffic shall be pursuant to MECAB guidelines.

ATTACHMENT 6

ORDERING

Item No. 86, Issue No. 6-3 [Sections 2.5.6.2, 2.5.6.3]: (A) ***This issue has been resolved.*** *(B) How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?*

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

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

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

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

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

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

2.6.5 [PARTIES DISAGREE ON THE RATE, NOT THE LANGUAGE] Service Date Advancement Charges (a.k.a. Expedites). For Service Date Advancement requests by <<customer_short_name>>, Service Date Advancement charges will apply for intervals less than the standard interval as outlined in Section 8 of the LOH, located at http://interconnection.bellsouth.com/guides/html/leo.html. The charges shall be as set-forth in Exhibit A of Attachment 2 of this Agreement and will apply only where Service Date Advancement has been specifically requested by the requesting Party, and the element or service provided by the other Party meets all technical specifications and is provisioned to meet those technical specifications. If <<customer_short_name>> accepts service on the plant test date (PTD) normal recurring charges will apply from that date but Service Date Advancement charges will only apply if <<customer_short_name>> previously requested the order to be expedited and the expedited DD is the same as the original PTD.

ATTACHMENT 7
BILLING

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

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

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

Item No. 100, Issue No. 7-6 [Section 1.7.2]: Should CLEC be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination?

1.7.2 [CLEC Version] **Each Party** reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the **Due Date, the billing Party may** provide written notice **to the other Party** that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, **as indicated on the notice in dollars and cents**, is not received by the fifteenth (15th) calendar day following the date of the notice. In addition, **the billing Party** may, at the same time, provide written notice that **the billing Party** may discontinue the provision of existing services to **the other Party** if payment of such amounts, **as indicated on the notice (in dollars and cents),** is not received by the thirtieth (30th) calendar day following the date of the Initial Notice.

[BellSouth Version] **BellSouth** reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the **bill date in the month after the original bill date, BellSouth** will provide written notice to **<<customer_short_name>>** that additional applications for service may be

refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, **and all other amounts not in dispute that become past due subsequent to the issuance of the written notice ("Additional Amounts Owed"),** is not received by the (15th) calendar day following the date of the notice. In addition, **BellSouth** may, at the same time, provide written notice that **BellSouth** may discontinue the provision of existing services to **<<customer_short_name>>** if payment of such amounts**, and all other Additional Amounts Owed that become past due subsequent to the issuance of the written notice**, is not received by the thirtieth (30th) calendar day following the date of the initial notice. **Upon request, BellSouth will provide information to <<customer_short_name>> of the Additional Amounts Owed that must be paid prior to the time periods set forth in the written notice to avoid suspension of access to ordering systems or discontinuance of the provision of existing services as set forth in the initial written notice.**

Item No. 101, Issue No. 7-7 [Section 1.8.3]: How many months of billing should be used to determine the maximum amount of the deposit?

1.8.3 [CLEC Version] The amount of the security shall not exceed two (2) month's estimated billing for new CLECs or **one and one-half month's** actual billing **under this Agreement** for existing CLECs **(based on average monthly billings for the most recent six (6) month period).** Interest shall accrue per the appropriate BellSouth tariff on cash deposits.

[BellSouth Version] The amount of the security shall not exceed two (2) month's estimated billing for new CLECs or actual billing for existing CLECs. Interest shall accrue per the appropriate BellSouth tariff on cash deposits.

Item No. 102, Issue No. 7-8 [Section 1.8.3.1]: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC?

1.8.3.1 [CLEC Version] **The amount of security due from an existing CLEC shall be reduced by amounts due <<customer_short_name>> 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 Section 1.8.5.1, and subject to the standard set forth in Section 1.8.5.**

[BellSouth Version] The amount of the security due from **<<customer_short_name>>** shall be reduced by **the undisputed** amounts due **to** <<customer_short_name>> by BellSouth **pursuant to Attachment 3 of this**

Agreement that have not been paid by the Due Date at the time of the request by BellSouth to <<customer_short_name>> for a deposit. Within ten (10) days of BellSouth's payment of such undisputed past due amounts to <<customer_short_name>>, <<customer_short_name>> shall provide the additional security necessary to establish the full amount of the deposit that BellSouth originally requested.

Item No. 103, Issue No. 7-9 [Section 1.8.6]: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?

1.8.6 [CLEC Version] In the event <<customer_short_name>> fails to remit to BellSouth any deposit requested pursuant to this Section **and either agreed to by <<customer_short_name>> or as ordered by the Commission** within thirty (30) calendar days **of such agreement or order**, service to <<customer_short_name>> may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to <<customer_short_name>>'s account(s).

[BellSouth Version] **Subject to Section 1.8.7 following,** in the event <<customer_short_name>> fails to remit to BellSouth any deposit requested pursuant to this Section within thirty (30) calendar days **of <<customer_short_name>>'s receipt of such request,** service to <<customer_short_name>> may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to <<customer_short_name>>'s account(s).

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

1.8.7 [CLEC Version] The Parties will work together to determine the need for or amount of a reasonable deposit. **If the Parties are unable to agree, either Party** may file a petition for resolution of the dispute and both parties shall cooperatively seek expedited resolution of such dispute.

[BellSouth Version]. The Parties will work together to determine the need for or amount of a reasonable deposit. **If <<customer_short_name>> does not agree with the amount or need for a deposit requested by BellSouth, <<customer_short_name>>** may file a petition with the Commissions for resolution of the dispute and both Parties shall cooperatively seek expedited resolution of such dispute. **BellSouth shall not terminate service during the**

pendency of such a proceeding provided that <<customer_short_name>> posts a payment bond for 50% of the requested deposit during the pendency of the proceeding.

SUPPLEMENTAL ISSUES
(ATTACHMENT 2)

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

Language to be provided by the Parties.

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

Language to be provided by the Parties.

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

Language to be provided by the Parties.

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

Language to be provided by the Parties.

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

Language to be provided by the Parties.

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

Language to be provided by the Parties.

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

Language to be provided by the Parties.

INTERCONNECTION AGREEMENT

BETWEEN

ALLTEL SOUTH CAROLINA, INC.

&

NEWSOUTH COMMUNICATIONS CORPORATION

TABLE OF CONTENTS

7.0 Liability and Indemnification

7.1 Limitation of Liabilities

With respect to any claim or suit for damages arising out of mistakes, omissions, defects in transmission, interruptions, failures, delays or errors occurring in the course of furnishing any service hereunder, the liability of the Party furnishing the affected service, if any, shall be the greater of two hundred and fifty thousand dollars ($250,000) or the aggregate annual charges imposed to the other Party for the period of that particular service during which such mistakes, omissions, defects in transmission, interruptions, failures, delays or errors occurs and continues; provided, however, that any such mistakes, omissions, defects in transmission, interruptions, failures, delays, or errors which are caused by the gross negligence or willful, wrongful act or omission of the complaining Party or which arise from the use of the complaining Party's facilities or equipment shall not result in the imposition of any liability whatsoever upon the other Party furnishing service.

7.2 No Consequential Damages

EXCEPT AS SPECIFICALLY PROVIDED IN THIS AGREEMENT, NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, OR SPECIAL DAMAGES SUFFERED BY SUCH OTHER PARTY (INCLUDING WITHOUT LIMITATION DAMAGES FOR HARM TO BUSINESS, LOST REVENUES, LOST SAVINGS, OR LOST PROFITS SUFFERED BY SUCH OTHER PARTY), REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, WARRANTY, STRICT LIABILITY, OR TORT, INCLUDING WITHOUT LIMITATION NEGLIGENCE OF ANY KIND WHETHER ACTIVE OR PASSIVE, AND REGARDLESS OF WHETHER THE PARTIES KNEW OF THE POSSIBILITY THAT SUCH DAMAGES COULD RESULT. EACH PARTY HEREBY RELEASES THE OTHER PARTY (AND SUCH OTHER PARTY'S SUBSIDIARIES AND AFFILIATES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS) FROM ANY SUCH CLAIM. NOTHING CONTAINED IN THIS SECTION WILL LIMIT EITHER PARTY'S LIABILITY TO THE OTHER PARTY FOR (i) WILLFUL OR INTENTIONAL MISCONDUCT (INCLUDING GROSS NEGLIGENCE) OR (ii) BODILY INJURY, DEATH, OR DAMAGE TO TANGIBLE REAL OR TANGIBLE PERSONAL PROPERTY.

7.3 Obligation to Indemnify

7.3.1 Each Party shall be indemnified and held harmless by the other Party against claims, losses, suits, demands, damages, costs, expenses, including reasonable attorneys' fees ("Claims"), asserted, suffered, or made by third parties arising from (i) any act or omission of the indemnifying Party in connection with its performance or non-performance under his Agreement; and (ii) provision of the indemnifying Party's services or equipment, including but not limited to claims arising from the provision of the indemnifying Party's services to its end users (e.g., claims for interruption of service, quality of service or billing disputes) unless such act or omission was caused by the negligence or willful misconduct of the indemnified Party. Each Party shall also be indemnified and held harmless by the other Party against claims and damages of persons for services furnished by the indemnifying Party or by any of its subcontractors, under worker's compensation laws or similar statutes.

7.3.2 Each Party, as an Indemnifying Party agrees to release, defend, indemnify, and hold harmless the other Party from any claims, demands or suits that asserts any infringement or invasion of privacy or confidentiality of any person or persons caused or claimed to be caused, directly or indirectly, by the Indemnifying Party's employees and equipment associated with the provision of any service herein. This provision includes but is not limited to suits arising from unauthorized disclosure of the end user's name, address or telephone number.

7.3.3 ALLTEL makes no warranties, express or implied, concerning NewSouth's (or any third party's) rights with respect to intellectual property (including without limitation, patent, copyright and trade secret rights) or contract rights associated with NewSouth's interconnection with ALLTEL's network use or receipt of ALLTEL services.

7.3.4 When the lines or services of other companies and carriers are used in establishing connections to and/or from points not reached by a Party's lines, neither Party shall be liable for any act or omission of the other companies or carriers.

7.4 Obligation to Defend; Notice; Cooperation

Whenever a claim arises for indemnification under this Section (the "Claim"), the relevant Indemnitee, as appropriate, will promptly notify the Indemnifying Party and request the Indemnifying Party to defend the same. Failure to so notify the Indemnifying Party will not relieve the Indemnifying Party of any liability that the Indemnifying Party might have, except to the extent that such failure prejudices the Indemnifying Party's ability to defend such Claim. The Indemnifying Party will have the right to defend against such Claim in which event the Indemnifying Party will give written notice to the Indemnitee of acceptance of the defense of such Claim and the identity of counsel selected by the Indemnifying Party. Except as set forth below, such notice to the relevant Indemnitee will give the Indemnifying Party full authority to defend, adjust, compromise, or settle such Claim with respect to which such notice has been given, except to the extent that any compromise or settlement might prejudice the Intellectual Property Rights of the relevant Indemnities. The Indemnifying Party will consult with the relevant Indemnitee prior to any compromise or settlement that would affect the Intellectual Property Rights or other rights of any Indemnitee, and the relevant Indemnitee will have the right to refuse such compromise or settlement and, at such Indemnitee's sole cost, to take over such defense of such Claim. Provided, however, that in such event the Indemnifying Party will not be responsible for, nor will it be obligated to indemnify the relevant Indemnitee against any damages, costs, expenses, or liabilities, including without limitation, attorneys' fees, in excess of such refused compromise or settlement. With respect to any defense accepted by the Indemnifying Party, the relevant Indemnitee will be entitled to participate with the Indemnifying Party in such defense if the Claim requests equitable relief or other relief that could affect the rights of the Indemnitee and also will be entitled to employ separate counsel for such defense at such Indemnitee's expense. In the event the Indemnifying Party does not accept the defense of any indemnified Claim as provided above, the relevant Indemnitee will have the right to employ counsel for such defense at the expense of the Indemnifying Party, and the Indemnifying Party shall be liable for all costs associated with Indemnitee's defense of such Claim including court costs, and any settlement or damages awarded the third party. Each Party agrees to cooperate and to cause its employees and agents to cooperate with the other Party in the defense of any such Claim.

REDACTED

By and Between

BellSouth Telecommunications, Inc.

And

ITC^DeltaCom Communications, Inc.
d/b/a ITC^DeltaCom d/b/a Grapevine

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General Terms and Conditions

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AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, and ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom d/b/a Grapevine, hereinafter referred to as ("ITC^DeltaCom") an Alabama corporation, and shall be deemed effective on the Effective Date, as defined herein. This agreement may refer to either BellSouth or ITC^DeltaCom or both as a "Party" or "Parties. "

WITNESSETH

WHEREAS, BellSouth is an incumbent local exchange telecommunications company authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, ITC^DeltaCom is a competitive local exchange telecommunications company ("CLEC") authorized to provide telecommunications services in the state of Georgia; and

WHEREAS, the Parties wish to interconnect their facilities, purchase unbundled elements and/or resale services, and exchange traffic pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 ("the Act").

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and ITC^DeltaCom agree as follows:

Definitions

Access Service Request or "ASR" means an industry standard form used by the Parties to add, establish, change or disconnect trunks for the purposes of interconnection.

Act means the Communications Act of 1934, 47 U.S.C. 151 et seq., as amended, including the Telecommunications Act of 1996, and as interpreted from time to time in the duly authorized rules and regulations of the FCC or the Commission/Board.

Advanced Intelligent Network or "AIN" is Telecommunications network architecture in which call processing, call routing and network management are provided by means of centralized databases.

Affiliate is an entity that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another entity. For purposes of this paragraph, the term "own" or "control" means to own an equity interest (or equivalent thereof) of more than 10 percent.

Attachment 7

Billing and Billing Accuracy Certification

CLEC in the state and does not include any parents or separate affiliates. Notice, for purposes of this Deposit Policy, is defined as written notification to the Chief Financial Officer, General Counsel, and Vice President of Line Cost Accounting of ITC^DeltaCom.

1.11.1 New Customers and existing Customers may satisfy the requirements of this section with a D&B credit rating of 5A1 or through the presentation of a payment guarantee executed by another existing customer of BellSouth and with terms acceptable to BellSouth where said guarantor has a credit rating equal to 5A1. Upon request, Customer shall complete the BellSouth credit profile and provide information, reasonably necessary, to BellSouth regarding creditworthiness.

1.11.2 With the exception of new Customers with a D&B credit rating equal to 5A1, BellSouth may secure the accounts of all new Customers as set forth in subsection 1.11.4. In addition, new Customers will be treated as such until twelve months from their first bill/invoice date, and will be treated as existing Customers thereafter.

1.11.3 If a Customer has filed for bankruptcy protection within twelve (12) months of the effective date of this Agreement, BellSouth may treat Customer, for purposes of establishing a security on its accounts as a new customer as set forth in subsection 1.11.7.

1.11.4 The security required by BellSouth shall take the form of cash, an Irrevocable Letter of Credit (BellSouth Form), Surety Bond (BellSouth Form), or, in BellSouth's sole discretion, some other form of security proposed by Customer. The amount of the security shall not exceed one months estimated billing for services billed in advance and two months billing for services billed in arrears and if provided in cash, interest on said cash security shall accrue and be paid in accordance with the terms in the Commission approved General Subscriber BellSouth tariff for the appropriate state.

1.11.5 Any such security shall in no way release Customer from the obligation to make complete and timely payments of its bill.

1.11.6 No security deposit shall be required of an existing Customer who has a good payment history and meets two (2) liquidity benchmarks sets forth below in Sections 1.11.6.2 and 1.11.6.3. BellSouth may secure, pursuant to Section 1.11.9, the accounts of existing Customers where an existing Customer does not have a good payment history as defined in Section 1.11.1.6.1. If an existing Customer has a good payment history but fails to meet the two (2) liquidity benchmarks defined in Sections 1.11.6.2 and 1.11.6.3, BellSouth may secure the Customer's accounts, pursuant to Section 1.11.9.