STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-772, SUB 8
DOCKET NO. P-913, SUB 5
DOCKET NO. P-1202, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.	))))))	ORDER RULING ON OBJECTIONS AND REQUIRING THE FILING OF THE COMPOSITE AGREEMENT

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Robert V. Owens, Jr., and Lorinzo L. Joyner

BY THE COMMISSION: On July 26, 2005, the Commission issued its *Recommended Arbitration Order* (*RAO*) in this docket. The Commission made the following:

FINDINGS OF FACT

1. The term "End User" should be defined as "the customer of a party."

2. The industry standard limitation of liability limiting the liability of the provisioning party to a credit for the actual cost of services or functions not performed or improperly performed should apply.

3. If a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from its decision not to include the limitation of liability.

4. The rights of end users should be defined pursuant to state contract law.

5. The Agreement should state that incidental, indirect, and consequential damages should be defined pursuant to state law.

6. The proposal of the Joint Petitioners (including NewSouth Communications Corp. (NewSouth), NuVox Communications, Inc. (NuVox), and Xspedius Communications, LLC on behalf of its operating subsidiary, Xspedius Management Co. Switched Services, LLC (Xspedius)) found in Section 10.5 of their Appendix A should be approved.

7. The parties may seek resolution of disputes arising out of the Agreement from the Commission, the Federal Communications Commission (FCC), or courts of law.

8. The Agreement should contain the language proposed by BellSouth Telecommunications, Inc. (BellSouth) as modified by the Conclusions in this issue.

9. BellSouth shall permit a requesting carrier to commingle an unbundled network element (UNE) or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that the requesting carrier has obtained at wholesale from an incumbent local exchange company (ILEC) pursuant to a method other than unbundling under Section 251(c)(3) of the Telecommunications Act of 1996 (TA96 or the Act). However, this does not include services, network elements, or other offerings made available only under Section 271 of the Act.

10. The term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51.319(a)(1)(iii)(A). BellSouth should perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii).

11. The line conditioning activity of load coil removal on copper loops should not be limited to copper loops with only a length of 18,000 feet or less.

12. Any copper loop ordered by a competing local provider (CLP) with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. Line conditioning orders that require the removal of other bridged tap (bridged tap between 0 and 6,000 feet) should be performed at the BellSouth UNE rates previously adopted by the Commission.

13. Thirty to forty-five days advance notice of an audit provides a CLP with an adequate time to prepare. In its Notice of Audit BellSouth shall state its concern that the requesting CLP has not met the qualification criteria and set out a concise statement of its reasons therefore. BellSouth may select the independent auditor without the prior approval of the CLP or the Commission. Challenges to the independence of the auditor may be filed with the Commission after the audit has been concluded. BellSouth is not required to provide documentation to support its basis for an audit, as distinct from a statement of concern, or seek concurrence of the requesting carrier before selecting the audit's location.

14. BellSouth should not be permitted to charge a Tandem Intermediary Charge (TIC) when providing a tandem transit function for CLPs.

15. The Joint Petitioners' proposed language concerning how disputes over alleged unauthorized access to customer service record (CSR) information should be handled under the Agreement is reasonable and appropriate. Accordingly, the

Commission adopts the Joint Petitioners' proposed language for Sections 2.5.5.2 and 2.5.5.3 of Attachment 6 of the Agreement.

16. BellSouth must provide service expedites at total element long-run incremental cost (TELRIC)-compliant rates. BellSouth and the Joint Petitioners are instructed to negotiate in good faith an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

17. The payment due date should be 26 days from the date of receipt of the bill. Accordingly, the Commission requires the Joint Petitioners and BellSouth to properly amend the proposed language in the Agreement in Attachment 7, Section 1.4, in accordance with this decision.

18. It is appropriate to adopt the Joint Petitioners' proposed language concerning suspension or termination notices for Section 1.7.2 of Attachment 7 of the Agreement.

19. The deposit requirements specified in Commission Rule R12-4 are applicable and the language proposed by BellSouth should be incorporated into the Agreement.

20. The Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice.

21. The language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 is appropriate.

22. The language proposed by the Joint Petitioners on the need for or amount of a deposit to be included in Section 1.8.7 of the Agreement is appropriate.

On September 1, 2005, BellSouth and the Joint Petitioners each separately filed their Objections to the *RAO*. The following chart indicates the issues for which a Motion for Reconsideration has been filed:

Finding of Fact No.	**Party filing Motion for Reconsideration/Clarification**
2	Joint Petitioners
3	Joint Petitioners
4 and 5	Joint Petitioners
6	BellSouth
8	Joint Petitioners
9	Joint Petitioners
10, 11, and 12	BellSouth

Finding of Fact No.	Party filing Motion for Reconsideration/Clarification
13	Joint Petitioners
14	BellSouth
15	BellSouth
16	BellSouth
17	BellSouth
18	BellSouth
19	Joint Petitioners
20	Joint Petitioners
21	Joint Petitioners

On September 8, 2005, the Commission issued an *Order* requesting comments and reply comments on the Objections filed concerning the *RAO*. On September 26, 2005, the Joint Petitioners filed a Motion for Extension of Time to File Initial Comments and to Consolidate Comment Cycle. On September 27, 2005, BellSouth filed a Response to the Motion. By Order and Errata Order dated September 28, 2005, the Commission retained the comment and reply comment cycles, but extended the due dates to October 14, 2005, and October 26, 2005, respectively.

Initial comments were filed on October 14, 2005 by BellSouth, the Joint Petitioners, and the Public Staff.

Reply comments were filed on October 26, 2005 by BellSouth, the Joint Petitioners, and the Public Staff.

On December 14, 2005, BellSouth filed a copy of the Recommendation of the Arbitration Panel to the Mississippi Public Service Commission (PSC) in its Joint CLP Arbitration as supplemental authority in this docket.

On January 11, 2006, BellSouth filed a copy of an Ohio PSC Order as additional supplemental authority in support of its comments.

On January 13, 2006, BellSouth filed a copy of an Indiana PSC Order as additional supplemental authority in support of its comments.

Following is a discussion, by Finding of Fact, of the outstanding Objections to the *RAO*. Appendix A provides a list of the acronyms used in this Order.

FINDING OF FACT NO. 2 (ISSUE NO. 2 – MATRIX ITEM NO. 4): What should be the limitation on each party's liability in circumstances other than gross negligence or willful misconduct?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth's language providing that liability with respect to this issue should be limited to service credits should be adopted.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 2 because they believed that the Commission's reliance on the FCC's *Verizon Arbitration Order* was misplaced and that, contrary to the Commission's view, their proposed "Day the Claim Arise" language is not imprudent.

Regarding the former, the Joint Petitioners argued that they are not seeking the "perfect service" sought by WorldCom, Inc. (WorldCom) in the *Verizon Arbitration Order* but only a small and reasonable measure of relief. They also maintained that BellSouth treats its retail customers more favorably than its wholesale customers in liability situations. Concerning the latter, the Joint Petitioners argued that their proposal captures and implements the concept of "risk versus revenue" and is thus commercially reasonable.

INITIAL COMMENTS

BELLSOUTH: BellSouth argued that the Commission's decision should be upheld. The *Verizon Arbitration Order* stands for the proposition that an ILEC's liability to a CLP should be the same as an ILEC has to its retail customers. Other state commissions have reached similar conclusions. BellSouth asserted that the Joint Petitioners can cite to no interconnection agreement containing language that is similar to what they propose. Contrary to the Joint Petitioner's assertions, BellSouth has not testified that it provides itself more favorable terms in customer contracts than it does to CLPs. BellSouth further argued that the Joint Petitioners' argument that their proposal is commercially reasonable is both repetitive and flawed. Interconnection agreements are not typical or ordinary commercial contracts and should not be construed as such. The Joint Petitioners' "Day Claim Arose" standard is one-sided and only benefits the Joint Petitioners.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe the objections of the Joint Petitioners on this issue warranted a change in the Commission's decision.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners repeated that both they—and BellSouth—find it commercially reasonable to negotiate for liability in excess of bill credits. The Joint Petitioners also maintained that the use of a constant of 7.5% of the amounts paid or payable for all service provided under the Agreement on the day the claim giving rise to liability arose, not contingent on the time the liability was incurred, was fair and reasonable.

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO* the Commission characterized this issue as presenting the choice between the adoption of a "cap" of 7.5% of the amounts paid or payable for all service provided under the Agreement on the day the claim giving rise to liability arose, as advocated by the Joint Petitioners, or the payment of a credit for the actual cost of services or functions unperformed or performed improperly, as advocated by BellSouth. The Commission concurred with BellSouth, which had, among other things, argued that the Joint Petitioners' proposal irrationally limited or expanded damages based on the point in time that the event occurred giving rise to the liability. The Commission noted that, while the parties may certainly negotiate a liability cap between themselves, it would be imprudent to impose a limit "related to the *timing* of the event rather than the event itself." (emphasis in original). Therefore, the Commission adopted BellSouth's proposal.

The arguments put forward by the Joint Petitioners on reconsideration are essentially repetitive of the arguments they have originally put forward and the Commission has rejected. The Commission is therefore not persuaded that Finding of Fact No. 2 should be reconsidered.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 2.

FINDING OF FACT NO. 3 (ISSUE NO. 3 – MATRIX ITEM NO. 5):

Joint Petitioners' Issue Statement: Should each party be required to include specific liability-eliminating terms in all its tariffs and end-user contracts (past, present, and future) and to the extent that a Party does not or is unable to do so, should it be obligated to indemnify the other Party?

BellSouth's Issue Statement: If the CLP elects not to place in its contracts with end users and/or tariff standard industry limitations of liability, who should bear the risks that result from this business decision?

INITIAL COMMISSION DECISION

The Commission concluded that, if a party elects not to place standard industry limitations of liability in its contracts with end users or in its tariffs, that party shall indemnify the other party for any loss resulting from that decision. Accordingly, BellSouth's proposed language in the Agreement in the General Terms and Conditions, Section 104.2 was adopted.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of the Commission's decision arguing that it hamstrings the Joint Petitioners' ability to compete, while their revised proposal is commercially reasonable.

INITIAL COMMENTS

BELLSOUTH: BellSouth argued that the Joint Petitioners' Motion for Reconsideration is devoid of merit and should be rejected. BellSouth stated that it was not seeking to dictate terms to the Joint Petitioners. In fact, BellSouth's language is the language that has governed the Parties' relationship for several years and has never been the subject of dispute. BellSouth should not be made to suffer any financial hardship as a result of the Joint Petitioners' business decision not to limit liability. Other state commissions, such as the Florida PSC and the Kentucky PSC, support the Commission's analysis of this issue. The Commission's decision does not impair the Joint Petitioners' ability to compete, and the Joint Petitioners have not shown factually how it does or might do so. The Joint Petitioners have revised their proposal to the extent of proposing language to include the words "to a commercially reasonable extent" (sic), but this does not cure the underlying problem with the Joint Petitioners' position.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe the objections of the Joint Petitioners warranted a change in the Commission's decision.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners argued that BellSouth's comments provide no basis for denying the relief sought herein by the Joint Petitioners. Both BellSouth's premises for argument and factual assertions are in error. The commercial

reasonableness standard proposed by the Joint Petitioners will allow the parties to compete fairly.

PUBLIC STAFF: The Public Staff reiterated its view that it did not believe that the Joint Petitioners' objections warranted reconsideration of this issue.

DISCUSSION

In the *RAO*, the Commission identified the fundamental issue here as being whether BellSouth can require the Joint Petitioners to indemnify it if they do not limit their liability to their customers in their own tariffs and contracts. The Commission noted that BellSouth said "yes", while the Joint Petitioners said "no". The Joint Petitioners maintained that they cannot limit BellSouth's liability in third-party contracts and that BellSouth's language impairs their ability to compete. BellSouth argued that its language was not aimed at third-party contracts but at the contract between itself and the Joint Petitioners. BellSouth maintained that its language simply required the Joint Petitioners to bear the risk of their business decisions. The Public Staff, while expressing concern about the rights of consumers and about the BellSouth language allowing the parties to limit their liability to end users and third parties for losses in contract or in tort, stated that its concerns were allayed because the BellSouth language does not dictate the terms of the agreements between CLPs and customers but provides them the discretion to include such limitation of liability. The Public Staff said there was no evidence of present or prospective harm.

The Commission stated that it believed that the arguments advanced by BellSouth were the more persuasive and that, therefore, its contract language should be adopted. Upon reconsideration, the Commission finds the arguments of the Joint Petitioners to be largely repetitive of arguments that have already been made and rejected. Accordingly, the Commission believes that Finding of Fact No. 3 should not be reconsidered.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 3.

FINDINGS OF FACT NOS. 4 AND 5 (ISSUE NOS. 4 AND 5 – MATRIX ITEM NO. 6):

Joint Petitioners' Issue Statement: Should limitation or liability for indirect, incidental, or consequential damages be construed to preclude liability for claims or suits for damages incurred by CLP's (or BellSouth's) end-users to the extent such damages result directly and in a reasonably foreseeable manner from BellSouth's or CLP's performance obligations set forth in the Agreement?

BellSouth's Issue Statement: How should indirect, incidental, or consequential damages be defined for purposes of the Agreement.

INITIAL COMMISSION DECISION

The Commission concluded that the rights of end-users should be defined pursuant to state contract law. The Commission further concluded that incidental, indirect, and consequential damages should be defined pursuant to state law. Accordingly, the Commission ruled that BellSouth's proposed language for Section 104.4 should be adopted.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of these issues. The Joint Petitioners argued that, contrary to the Commission's and BellSouth's suggestion, the language the Joint Petitioners proposed was neither unnecessary nor potentially confusing.

INITIAL COMMENTS

BELLSOUTH: BellSouth rejected the Joint Petitioners' view that the Joint Petitioners' proposed language was necessary and clear. BellSouth cited to NuVox witness Russell's testimony to the effect that the Joint Petitioners' language was to ensure that damages arising directly and proximately from "BellSouth's negligence, gross negligence or willful misconduct cannot be termed in this Agreement as incidental or consequential because we cannot contract to take away the rights of third parties." This construction has the effect of subverting the parties' agreement that no party would be liable to the other for indirect, consequential, and incidental damages. Both the Kentucky PSC and the Florida PSC, in similar arbitration proceedings, agreed with BellSouth's and this Commission's decision on these issues.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe the objections of the Joint Petitioners on these issues warranted a change in the Commission's conclusions.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners maintained that their position had always been clearly stated that parties should be responsible for damages that are direct and foreseeable. The Joint Petitioners said that there had been disagreement and confusion on this issue between the parties, for which both parties are responsible; but they urged that they had set forth the reasonable premise that direct and foreseeable damages are excluded from indirect, incidental, and consequential damages.

PUBLIC STAFF: The Public Staff reiterated its view that the objections of the Joint Petitioners do not warrant changing the Commission's conclusion on this issue.

DISCUSSION

In the *RAO*, the Commission found that the language proposed by the Joint Petitioners was unnecessary and potentially confusing. The Commission noted that end users are not parties to this Agreement or arbitration, and their rights should therefore be defined, not by the Agreement, but according to state contract law. As such, the Commission believed the Joint Petitioners' proposed language to be superfluous and indirect, incidental, and consequential damages should be defined by state law.

The Commission believes that its original decision on this issue was well-founded, and the arguments put forward by the Joint Petitioners to be not particularly compelling. Indeed, in a moment of comparative candor, the Joint Petitioners admitted that they had perhaps contributed to some of the confusion surrounding this issue. The Commission concurs but is not persuaded to adopt the Joint Petitioners' language.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Findings of Fact Nos. 4 and 5.

FINDING OF FACT NO. 6 (ISSUE NO. 6 – MATRIX ITEM NO. 7): What should the indemnification obligations of the Parties be under the Agreement?

INITIAL COMMISSION DECISION

The Commission concluded that the Joint Petitioners' proposed language for Section 10.5 in the General Terms and Conditions of the Agreement should be approved.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth sought reconsideration of this issue. BellSouth argued that the Joint Petitioners' language requires BellSouth to indemnify the Joint Petitioners in virtually all circumstances while imposing essentially no indemnification obligations on the Joint Petitioners. The language the Joint Petitioners endorse imposes greater obligations than the Joint Petitioners have placed in their own tariffs where they are the providing parties. Such expansive language runs counter to the holding in the FCC's *Verizon Arbitration Order*. By contrast, the Commission rejected the Joint Petitioners' expansive view regarding the definition of applicable law. Since the standard here relates to applicable law, the Commission should take a similar narrow view on this issue. Moreover, even when read together with the Commission's ruling on Issue No. 3 (Matrix Item No. 5), the Joint Petitioners' language regarding indemnification is still at issue and objectionable. BellSouth's proposed language complies with industry standards and requires the receiving party to indemnify the providing party in only two

limited situations: (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 under this Agreement."

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners argued that BellSouth's Motion for Reconsideration concerning this issue should be denied. The Joint Petitioners argued that the language adopted by the Commission does not violate the *Virginia Arbitration Order* or any state commission order. The clause at issue here is not a blanket indemnity provision such as that in the *Virginia Arbitration Order* but one more narrowly focused. The Joint Petitioners also denied that the Commission's decision here conflicted with its decision elsewhere – it does not redefine Applicable Law but rather includes it as defined. Moreover, consistent with their own tariffs, the Joint Petitioners do not require the receiving party to indemnify the providing party for the providing party's negligence, nor is the language cast in such a way as to benefit only the Joint Petitioners.

PUBLIC STAFF: The Public Staff did not believe that BellSouth's objections warranted a change in the Commission's conclusions on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth replied that the indemnification language adopted by the Commission is unique and is contrary to industry standards. BellSouth stated that the Kentucky PSC and the Florida PSC have already rejected such language in similar proceedings before them. In contrast to the *Virginia Arbitration Order*, the language adopted here is extremely broad and one-sided.

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff reiterated its position that the objections of BellSouth did not warrant reconsideration of the Commission's decision.

DISCUSSION

This issue concerns the indemnification obligations of the parties. In the *RAO,* the Commission adopted the language proposed by the Joint Petitioners as follows: "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 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's principal argument is that this provision unfairly opens it to potentially extremely expansive liability. However, the Commission in its Discussion in the *RAO* on this issue noted that the Conclusion in this issue must be read together with the Commission's adoption of Finding of Fact No. 3. Finding of Fact No. 3 was decided favorably to BellSouth concerning limitations on liability. This decision, upheld in this Order, provides that if a party elects not to place standard industry limitations of liability in its contracts with end users or its tariffs, that party shall indemnify for any loss resulting from this decision. The Commission found that this provision "appears to remove BellSouth's objection to the Joint Petitioners' proposals. Without that objection, there appears to be no issue."

Of course, it should be anticipated that a party whose language was not adopted may continue to argue that its language should be adopted, but this does not change the fact that the adoption of BellSouth's language with reference to Finding of Fact No. 3 substantially mitigates the exposure that BellSouth might otherwise have with reference to the language adopted here. BellSouth has not offered any new, much less persuasive, arguments for the Commission to reconsider its decision. The Commission, therefore, does not believe that its decision on this Finding of Fact should be changed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 6.

FINDING OF FACT NO. 8 (ISSUE NO. 8 – MATRIX ITEM NO. 12): Should the agreement explicitly state that all existing state and federal laws, rules, regulations and decisions apply unless otherwise specifically agreed to by the parties?

INITIAL COMMISSION DECISION

The Commission concluded that the BellSouth language should be adopted as modified to read: "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 an FCC or Commission rule or order or, with respect to Applicable Law relating to substantive Telecommunications law only, and such obligation, right or other requirement is disputed by the other Party, the Party asserting such obligation, right, or other requirement is applicable shall petition the Commission, a court of law, or the FCC for resolution of the dispute."

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration on the basis that the provision adopted by the Commission is potentially prejudicial and contrary to Georgia's contract law, inasmuch as Georgia law provides the "[s]ilence as to that law is, so to speak, no defense." According to the Joint Petitioners, the apparent obligation under the Commission's conclusion to reference all provisions incorporated appears to stand on its head the very contract law agreed to. If the Commission wishes to stand by its language, the Joint Petitioners asked to be given the opportunity to add to the document references and further requested for clarification and guidance in this regard.

INITIAL COMMENTS

BELLSOUTH: BellSouth characterized the Joint Petitioners' arguments on consisting of "rambling parentheticals and fragmented, erroneous critiques" of the Commission's conclusions. BellSouth denied the Joint Petitioners' description of this issue as requiring compliance with Georgia contract law. Simply stated, BellSouth will comply with applicable law, including Georgia law, to the extent applicable. The Joint Petitioners' language creates fertile ground for mischief and, by creating ambiguity and encouraging litigation, defeats the purpose of arbitrations. The Joint Petitioners' view that the law in effect at the time of execution of the Agreement should be automatically incorporated, unless the parties agree otherwise, is simply unworkable. Here again, in similar arbitration proceedings, the Kentucky PSC and the Florida PSC agreed with BellSouth's position and the Commission's decision. As for the Joint Petitioners' request to "add to the document references," the Joint Petitioners do not indicate what such references might be and their plea for guidance only serves to illustrate how unworkable their request is.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the Commission's conclusions on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners noted that the parties have agreed to abide by Applicable Law and, to the degree they have not negotiated to the contrary, the predefined Applicable Law applies. Contrary to BellSouth's assertions, the Joint Petitioners cannot take a telecommunications rule or order that is contrary to how the parties address the issue and attempt to enforce it against BellSouth. The Joint Petitioners also argued that BellSouth's reliance on the Florida PSC and the Kentucky PSC decisions were misplaced. In both cases, the Joint Petitioners are intending or undertaking reconsideration or appeal.

PUBLIC STAFF: The Public Staff reiterated its view that the objections of the Joint Petitioners do not warrant a change in the Commission's conclusions.

DISCUSSION

In the *RAO*, the Commission viewed the original proposed language of both parties to be problematical. The Commission noted that the purpose of a contract is to memorialize the parties' mutual agreement as of a particular point in time for the term of the contract, and the general purpose of the typical applicable law provision in a contract is to ensure that the parties do not break the law. Thus, the specific terms of the contract are to have primary significance and, if there are particular laws which the parties wish to provide terms, but which they do not want to rewrite or negotiate, these specific laws can be incorporated by reference.

The principal defect that the Commission saw in the Joint Petitioners' language was that it purported to import the entirety of "Applicable law," except where the parties have agreed otherwise. The Commission feared that this amounted to a "roving expedition" for a party to seek out other law—no matter how discrete—to supply terms for the Agreement. The Commission believed this to be going too far and to be out of harmony with what a standard applicable law provision is supposed to be.

The principal defect that the Commission saw in BellSouth's language was the insertion of a "prospectivity" clause which, as the Public Staff pointed out, would give an incentive for the parties to engage in extreme positions and posturing. "Prospectivity" is also out of harmony with what a standard applicable law provision is supposed to do. Nevertheless, the Commission saw the BellSouth language as more susceptible to reform. The Commission therefore amended BellSouth's original language. BellSouth has not sought reconsideration of those amendments.

The Commission concluded by saying that it was doubtful any language could be framed that would anticipate all possible disputes given the volume of law, legal principles, and possible fact situations involved. If they are so disposed, the parties are free to negotiate something which seems better to them.

The Joint Petitioners' line of argument on reconsideration is essentially what they have argued from the beginning. While this may have the virtue of consistency, it has not added to its persuasiveness. The Joint Petitioners' default suggestion concerning further document references and detailed Commission guidance thereto is untimely and illustrates the difficulties, if not the unworkability, of the Joint Petitioners' proposal. If the Joint Petitioners wish to pursue that route, they may seek an amendment to the Agreement with BellSouth.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 8.

FINDING OF FACT NO. 9 (ISSUE NO. 9 – MATRIX ITEM NO. 26): Should BellSouth be required to commingle a UNE or UNE combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth shall permit a requesting carrier to commingle a UNE or UNE combination obtained pursuant to Section 251 with one or more facilities or services that the requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act. However, this does not include services, network elements, or other offerings made available only under Section 271 of the Act.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 9, arguing that the Commission has tentatively rejected the Joint Petitioners' language for Matrix Item No. 26 based on two incorrect findings: first, that the FCC held that its commingling rule does not apply to Section 271 elements; second, that BellSouth is correct in asserting that only tariffed elements are eligible for commingling. The Joint Petitioners contended that neither of these findings is supported by the *TRO*, and that their Brief demonstrated that the FCC made clear that it never intended to exclude Section 271 elements from commingling. Accordingly, the Joint Petitioners claimed that the Commission's tentative decision is not in keeping with federal law.

The Joint Petitioners argued that FCC Rules 51.309(e) and (f) give the Joint Petitioners the right to connect Section 251 UNEs with any element or service obtained at wholesale. The Joint Petitioners claimed that Rule 51.309 has no limitation and does not exclude any type of element or wholesale offering. The text of the *TRO* also does not contain the exception claimed by BellSouth and embraced in the *RAO*. The Joint Petitioners argued that their Brief further demonstrated that BellSouth's argument in attempting to exclude Section 271 elements from commingling was unsupported, was contrary to established telecommunications law and practice, and did not hold up to cross-examination.

The Joint Petitioners asserted that this is an issue of paramount importance for facilities-based competitors such as the Joint Petitioners, as application of the FCC's new impairment tests may result in the need to replace Section 251 UNEs, particularly dedicated transport, with network elements unbundled pursuant to Section 271. Notably, these elements will be the same, only under Section 271, a just and reasonable pricing standard applies instead of TELRIC. These Section 271 elements will be necessary to connect to UNEs, such as UNE loops, that are still available pursuant to Section 251 and that were previously used in combination with Section 251 transport (i.e. EELs). In this regard, the Joint Petitioners noted that they do not agree that tariffed special access satisfies the Section 271 checklist requirements, as such

offerings (which were available at the time the Act was enacted and, if indeed satisfactory, would have made the Section 271 checklist unnecessary) are not made pursuant to Section 252 interconnection agreements.

The Joint Petitioners maintained that the FCC did not hold that Section 271 elements are ineligible for commingling. The *RAO* quotes a passage from the *TRO* as grounds to reject the Joint Petitioners' language: "[w]e decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251." This passage appears in Footnote 1990 of the *TRO*. The Joint Petitioners contended that they do not support BellSouth's argument for two reasons. First, to combine is not the same mandate as to commingle. These terms of art refer respectively to the connecting of likes (combining of Section 251 elements with Section 251 elements, which is required, and combining of Section 271 elements with Section 271 elements, which is not required) and dislikes (commingling of Section 251 elements with any other wholesale offering, including those mandated by Section 271, which, pursuant to Section 251 and Section 201 is required). The rule requiring commingling of elements was promulgated under Section 251, as well as Sections 201 and 202, which prohibit unjust and unreasonable practices.[1] It was codified in a wholly separate rule - 47 C.F.R. § 51.309. The combinations rule is contained in 47 C.F.R. § 51.315. Thus, the Joint Petitioners asserted, the FCC's conclusion that ILECs need not combine Section 271 elements with Section 251 UNEs should not be read to mean something that the FCC did not say, in Footnote 1990 or anywhere else, that ILECs need not commingle these items with UNEs offered pursuant to Section 251 of the Act.

Further, the Joint Petitioners argued, though the *TRO* may "refer [] to tariffed access services" in the context of commingling, such references cannot be deemed to contravene the plain language of FCC Rule 51.309 that contains no such tariffing limitation. Indeed, the tariff references in the *TRO* are mere suggestions rather than commands. The Joint Petitioners stated that Paragraph 579 of the *TRO* states that ILECs must commingle Section 251 UNEs with "services (e.g., switched and special access services offered pursuant to tariff)." The Joint Petitioners contended that tariffed services were only one example, not an exhaustive list, of items to be commingled with Section 251 UNEs. Similarly, Paragraph 581 of the *TRO* states that ILECs must commingle UNEs with services "including interstate access services." The Joint Petitioners asserted that access services are tariffed and must be commingled, but this provision establishes a clear requirement and in no way purports to limit services that must be commingled. In summary, nothing in the *TRO* states that elements obtained at wholesale are exclusively those provided pursuant to a tariff.

INITIAL COMMENTS

BELLSOUTH: BellSouth stated that the Joint Petitioners' arguments in support of their objections are two-fold: (1) BellSouth has an obligation to commingle Section 251 and Section 271 services because commingling and combining are two different things; and

[1] *TRO*, at ¶ 581.

(2) the phrase "wholesale services" includes Section 271 services. BellSouth asserted that both of these arguments are incorrect and should be rejected.

First, BellSouth argued that the Commission correctly determined that BellSouth has no obligation to commingle Section 251 and Section 271 services. Contrary to the Joint Petitioners' attempt to distinguish commingling from combining, the FCC defined commingling in the *TRO* as the combining of a Section 251 element with a wholesale service obtained from an ILEC by any method other than unbundling under Section 251(c)(3) of the Act. BellSouth pointed out that the Joint Petitioners agreed at the hearing that commingling is the same as combining. BellSouth noted that, specifically, KMC witness Johnson testified that commingling means combining elements that are different in terms of their regulatory nature.

BellSouth maintained that it has no Section 271 obligation to combine Section 271 elements or to combine elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act.[2] Further, with the *TRO Errata Order,* the FCC deleted the only reference in the *TRO* that would have required ILECs to combine Section 251 and Section 271 services.[3] BellSouth stated, based on the above, that the Commission correctly determined that "the FCC did not intend for ILECs to commingle Section 271 elements with Section 251 elements." The Florida PSC also recently reached this same conclusion in its recent arbitration proceeding involving the Joint Petitioners and BellSouth:

> . . . In Paragraph 584 of the *TRO,* the FCC said 'as a final matter we require the incumbent LECs to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to Section 271 and any services offered for resale pursuant to Section 251(c)(4) of the Act.' The FCC's errata to the *TRO* struck the portion of Paragraph 584 referring to '... any network elements unbundled pursuant to Section 271....' The removal of this language illustrates that the FCC did not intend commingling to apply to Section 271 elements that are no longer also required to be unbundled under Section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to Section 271. . .[4]

Thus, BellSouth maintained that the Commission correctly excluded Section 271 services from BellSouth's commingling obligations.

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[2] *See TRO* at ¶ 655, Footnote 1990. ("We decline to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under Section 251."); *United States Telecom Ass'n v. FCC,* 359 F.3d at 589 (D.C. Cir. 2004) *(USTA II).*

[3] *See TRO Errata Order* at ¶ 27.

[4] FPSC Order No. PSC-05-0975-FOF-TP at 19.

Second, BellSouth argued that the Commission cannot adopt the Joint Petitioners' proposed language, because the Commission has no jurisdiction to determine or enforce the terms and conditions under which BellSouth must provide elements pursuant to Section 271. On the contrary, Congress gave the FCC the exclusive right to enforce compliance with Section 271. 47 U.S.C. § 271(d)(6)(A). As the FCC explained, the Act grants "sole authority to the [FCC] to administer... Section 271."[5] BellSouth maintained that the only role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271 approval process.[6]

BellSouth asserted that a state commission's authority to arbitrate and approve interconnection agreements entered into pursuant to Section 251 is specifically limited by the Act to implementing Section 251 obligations, not Section 271 obligations.[7] Accordingly, BellSouth argued that Congress did not authorize a state commission to enforce Section 271 obligations, to establish any Section 271 obligations, to establish rates for any Section 271 obligation, or to otherwise regulate Section 271 obligations.[8]

BellSouth noted that the United States District Court for the Eastern District of Kentucky confirmed this bedrock jurisdictional prohibition in finding that "[t]he enforcement authority for Section 271 unbundling duties lies with the FCC and must be challenged there first."[9] Likewise, the United States District Court for the Southern District of Mississippi held that, "even if Section 271 imposed an obligation to provide unbundled switching independent of Section 251 with which BellSouth had failed to comply, Section 271 explicitly places enforcement authority with the FCC...." *BellSouth Telecommunications, Inc. v. Mississippi Public Ser. Comm 'n, 368 F.* Supp. 2d 557 (S.D. Miss. 2005). This court concluded by stating that "[t]hus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long-distance service." *Id* at 566 (emphasis added).

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[5] *InterLATA Boundary Order*, 14 FCC Rcd at 14400-01, ¶¶ 17-18; *see also*, *TRO* at ¶¶ 664, 665. ("Whether a particular checklist element's rate satisfies the just and reasonable standard of Section 201 and 202 is a fact-specific inquiry that the Commission will under take...."; "... Section 271(d)(6) grants the Commission enforcement authority to ensure that the BOC continues to comply with the market opening requirements of Section 271. BellSouth stated, in particular, this section provides the Commission with enforcement authority where a BOC 'has ceased to meet any of the conditions required for such approval.'").

[6] 47 U.S.C. § 271(d)(2)(B); *see also Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n,* 359 F.3d 493, 497 (7th Cir. 2004) (state commission cannot "parley its limited role" in consulting with the FCC on a BOC's application for long-distance relief to impose substantive requirements under the guise of Section 271 after that application has been granted).

[7] *See* 47 U.S.C. § 252(c), (d); *see also Coserv Ltd. Liab. Co. v. Southwestern Bell Tel. Co.,* 350 F.3d 482, 487-88 (5th Cir. 2003) (ILEC has no duty to negotiate items not covered by Section 251); *MCI Telecomms. Corp, v. BellSouth Telecomms., Inc.,* 298 F.3d 1269, 1274 (11th Cir. 2002) (same).

[8] *See UNE Remand Order* at ¶ 470; *TRO* at ¶¶ 656, 664; *USTA II*, 359 F.3d at 237-38.

[9] *BellSouth Telecommunications, Inc. v. Cinergy Communications Co. ET AL.,* Civil Action No. 3:05-CV-16-JMH at 12 (Apr. 22, 2005).

BellSouth stated that to adopt the Joint Petitioners' arguments regarding commingling would be to determine or enforce the terms and conditions under which BellSouth must provide services pursuant to Section 271. As made clear above, BellSouth asserted that the Commission has no authority to do that. BellSouth noted that the Kansas Corporation Commission (Kansas Commission) made this expressly clear in a recent arbitration proceeding:

> The FTA's (the Act's) 271 provisions explicitly provide that a BOC, desirous of entering the interLATA marketplace, may apply to the FCC for authorization to do so (§ 271(d)(1)); the FCC determines the BOC's qualification for interLATA authority (§ 271(d)(3)); and, it is the FCC that possesses the sole authority to determine if the BOC continues to abide by the 271 requirements (§ 271(d)(6)). The only state participation in the 271 qualification inquiry is consultation with the FCC to verify BOC compliance with 271 requirements. The clear implication here is that there is no place for independent state action. The Commission concludes for the foregoing reasons, and those expressed by the Arbitrator, that the FCC has preemptive jurisdiction over 271 matters.[10]

Third, BellSouth maintained that the Commission should reject the Joint Petitioners' arguments because it results in effectively recreating UNE-P with Section 271 services in contravention of federal law. BellSouth argued that the FCC made clear in the *TRRO*, that there is "no Section 251 unbundling requirement for mass market local circuit switching nationwide."[11] BellSouth pointed out that this Commission has already determined that it "does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P."[12] Likewise, BellSouth noted that the New York PSC, as well as the Mississippi Federal District Court, have indicated that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to Section 271-based UNE-P arrangements.'"[13] Accordingly, BellSouth asserted that the regulatory landscape is now clear - UNE-P is abolished and state commissions cannot recreate it with Section 271 elements.

BellSouth further noted that the Florida PSC, in a sound analysis, used the elimination of UNE-P in the *TRRO* to adopt BellSouth's position on commingling in the Florida Joint Petitioner arbitration proceeding, as follows: "Further, we find that connecting a

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[10] *In the Matter of Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.,* Docket No. 05-BTKT-365-ARB, *et al.* at ¶¶ 13-14 (July 18, 2005) (emphasis added).

[11] *TRRO* at Paragraph 199.

[12] *In re: Complaints Against BellSouth Telecommunications, Inc., Regarding Implementation of the TRRO*, Docket No. P-55, Sub 1550 at 13 (April 25th 2005).

[13] *BellSouth v. Mississippi Public Serv. Comm'n,* Civil Action No. 3:05CV173LN at 16-17 (stating that the court would agree with the New York PSC's findings) (quoting *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y. P.S.C. (March 16, 2005)).

Section 271 switching element to a Section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential recreation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition."[14] BellSouth contended that this additional reason further supports the Commission's decision.

In any event, BellSouth noted that, as made clear by their objections, the Joint Petitioners want to commingle Section 251 loops with Section 271 transport. BellSouth provides Section 271 transport via its access tariff, and there is nothing in the Commission's decision that would prohibit the Joint Petitioners from commingling Section 251 loops with tariffed access services. Indeed, they could commingle those services today (if they were subject to a *TRO* and *TRRO* compliant agreement). Thus, BellSouth commented that it appears that the Joint Petitioners' objection with the Commission's decision is simply a rate issue, because they do not want to pay tariffed rates for transport. Such an objection does not support a reversal of the correct and well-reasoned decision of the Commission. This is especially true because only the FCC has jurisdiction to determine whether a rate under Section 201 is "just and reasonable." And, only the FCC or a federal court can address violations of Section 201.[15] Thus, BellSouth argued that the Joint Petitioners are not harmed by the Commission's decision, and any challenge to BellSouth's Section 271 transport rates must be made at the FCC and not before this Commission.

Fourth, BellSouth argued that the Joint Petitioners' reliance on the *TRO Errata Order* to Footnote 1990 of the *TRO* is misplaced. Specifically, the Joint Petitioners focus on the FCC's deletion of the last sentence of Footnote 1990 in the *TRO Errata Order*, which provided that ILECs have no obligation to commingle Section 251 with Section 271 elements. The FCC deleted this sentence because it held immediately prior that ILECs have no obligation to combine Section 271 services with services no longer required to be unbundled pursuant to Section 251 (Footnote 1990) and because of the FCC's deletion to the reference of Section 271 services in Paragraph 584 (*TRO Errata Order* ¶27). Thus, BellSouth maintained that there is nothing monumental about the FCC's *TRO Errata Order* regarding Footnote 1990. It was simply an attempt to remove redundant, unnecessary language.

Fifth, BellSouth further asserted that, contrary to the Joint Petitioners' arguments and as found by the Commission, Section 271 services are excluded from the definition of wholesale services as it relates to commingling. BellSouth stated that this conclusion is supported by the express wording of the *Supplemental Order Clarification (SOC)* released on June 2, 2000, the *TRO,* the *TRO Errata Order*, and the *TRRO.* Specifically, Paragraph 579 of the *TRO* states that the commingling obligations addressed in the

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[14] FPSC Order No. PSC-05-0975-FOF-TP at 19.

[15] *See* 47 U.S.C. §§ 201, 207; *Citibank v. Graphic Scanning Corp.,* 618 F.2d 222, 225 (6th Cir. 1980) ("This is so notwithstanding that the Act vests exclusive jurisdiction over claims for damages for statutory violations of the Act in federal courts or the FCC.") (Citations omitted).

TRO arose from the *SOC*.[16] The *SOC,* in turn, defined commingling as "i.e. combining loops or loop-transport with tariffed special access services...."[17] Thus, what the FCC changed in the *TRO* was the commingling obligation set forth in the *SOC*–the obligation to combine loops with tariffed special access circuits.

Moreover, BellSouth argued that, in the *TRO Errata Order*, the FCC deleted the only reference to Section 271 services in the entire commingling section of the *TRO.* The Joint Petitioners do not dispute this fact or the fact that the *TRO Errata Order* is in force and effect. In fact, contrary to the Joint Petitioners' interpretation of this issue, throughout the entire commingling section in the *TRO* the FCC limits its description of the wholesale services that are subject to commingling to tariffed access services.[18] BellSouth argued that these passages, in conjunction with the *TRO Errata Order*, make it clear that the FCC never intended for ILECs to commingle Section 271 elements with Section 251 elements.

Furthermore, BellSouth contended that the FCC confirmed that the phrase "wholesale services" does not include Section 271 services in the *TRRO.* Particularly, in addressing conversion rights, the FCC in the *TRO* used the same wholesale services phrase that it used in describing ILECs' commingling obligations.[19] In the *TRRO,* the FCC described its holding in the *TRO* regarding conversions to be limited to the conversion of tariffed services to UNEs: "We determined in the *TRO* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations ...." *TRRO* at ¶ 229. Thus, BellSouth asserted, the FCC has subsequently construed the phrase wholesale services to be limited to tariffed services, which is consistent with BellSouth's position.

Accordingly, BellSouth stated that to adopt the Joint Petitioners' argument would mean that the FCC meant for wholesale services to have two different meanings in the same order. BellSouth argued that such a finding is illogical and also in violation of basic statutory construction principles. BellSouth asserted that the only logical conclusion based upon the express wording of the *TRO,* as well as the *TRO Errata Order* (and the *TRRO),* is that BellSouth has no obligation to commingle Section 271 elements with Section 251 elements.

Sixth, and finally, BellSouth argued that the Commission should not be persuaded by the Joint Petitioners' argument that the manner in which BellSouth complies with its Section 271 obligations somehow undermines its commingling arguments. Specifically, the fact that BellSouth complies with its Section 271 obligations to provide loops and transport via its access tariff and its Section 271 switching obligation via a commercial agreement is of no consequence. The loop and transport access services in BellSouth's

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[16] *See TRO* at ¶ 529.

[17] (*SOC* at ¶ 28).

[18] *See TRO* at Paragraphs 579, 580, 581, 583.

[19] *See TRO* at Paragraph 585 ("We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations....").

tariffs were available well before the Act was implemented, and are generally available to BellSouth customers. The fact that these same services also happen to satisfy BellSouth's obligation to make available loops and transport elements under Section 271 neither eliminates BellSouth's obligation to commingle Section 251 elements with these access services, nor creates an obligation for BellSouth to commingle Section 251 elements with Section 271 elements that are not otherwise available from BellSouth. BellSouth argued that, regardless of how BellSouth complies with its Section 271 obligations, BellSouth has no obligation to commingle Section 251 elements with services provided only pursuant to Section 271.

For all of these reasons, BellSouth urged the Commission to confirm the Commission's decision that BellSouth has no obligation to commingle Section 251 services with services that BellSouth makes available only pursuant to Section 271.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff stated that the Joint Petitioners objected to the Commission's conclusions that the commingling rule does not apply to Section 271 elements and that only tariffed elements are eligible for commingling. The Public Staff noted that the Joint Petitioners discussed in their brief that FCC Rules 51.309(e) and (f) give them the right to connect Section 251 UNEs with any element or service obtained at wholesale. These rules are without limitation and do not exclude any type of element or wholesale offering. The Public Staff stated that it agrees with the Joint Petitioners; the rules are unambiguous, and their legality is unchallenged by any party.[20]

The Public Staff stated that it also believes that the *RAO* mistakenly equates the terms commingle and combine. The Public Staff opined that "combining" is the joining of like elements, such as two or more Section 251 UNEs. The Public Staff opined that "commingling" is the joining of two or more unlike elements, such as Section 251 UNEs and special access service, or, in the case at hand, Section 251 UNEs and Section 271 elements. Paragraph 579 of the *TRO* specifically defines commingling as:

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

The Public Staff opined that the FCC made a clear distinction between combining and commingling in Paragraph 572 of the *TRO* when it stated that it would address its "rules for UNE combinations, specific issues pertaining to EELs, the ability of requesting

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[20] *See MCIMetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc.,* 352 F.3d 872, 881 (4th Cir. 2003) (construing 47 C.F.R. § 51.703(b) and finding that a state commission is bound by an FCC rule that is unambiguous and unchallenged).

carriers to commingle UNEs and UNE combinations with other wholesale services, [and] issues surrounding conversions of access services to UNEs."

In addition, the Public Staff stated that it believes that the Commission's conclusions fail to account for the FCC's intent regarding commingling of Section 271 elements. The Public Staff argued that this intent is demonstrated in the *TRO Errata Order* where the FCC removed the sentence, "We also decline to apply our commingling rule... to services that must be offered pursuant to these checklist items."[21] The Public Staff asserted that the removal of this language strongly supports the conclusion that the FCC did not intend to exempt Section 271 elements from the commingling requirement. The Public Staff argued that, had the FCC intended for Section 271 elements to be exempt from the commingling requirements, it would not have needed to remove this language.

The Public Staff further stated that the FCC also evinced this intent in Footnote 1787 of the *TRO*, where it stated that, "[i]n light of the determinations we make herein, we grant WorldCom's request to clarify that requesting carriers may commingle UNEs with other types of services." WorldCom had requested that the FCC clarify "that requesting carriers are entitled to access to UNEs in a fashion that allows them to commingle local and access traffic, or local and interstate traffic, for the efficient provision of telecommunications services."[22] The Public Staff averred that, although WorldCom did not specifically request commingling of Section 271 elements in its clarification motion, the FCC's grant of WorldCom's request for clarification indicated it contemplates more services to be commingled with Section 251 UNEs than just the LECs' tariffed access services.

The Public Staff commented that BellSouth's argument that the FCC means only tariffed services when it refers to wholesale services is somewhat misleading. At the time the *TRO* was issued, ILECs offered no alternatives to the loop, transport, and switching Section 251 UNEs other than their tariffed offerings. Thus, the only real examples that the FCC could use for wholesale services were the ILECs' tariffed services.

Further, the Public Staff asserted that, by specifying that tariffed services are merely examples of wholesale services in Paragraph 579 of the *TRO,* the FCC does not limit the term wholesale service to tariffed offerings. The Public Staff opined that, by spelling out that the commingling requirement is applicable generally to wholesale services, the FCC automatically included any future wholesale service, such as Section 271 elements, in this requirement without the constant revision of its rules.

The Public Staff recommended that the Commission reconsider its conclusions with regard to this issue and instead find that BellSouth should permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or

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[21] Footnote 1990 of the *TRO*.

[22] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Petition of MCI WorldCom, Inc. for Clarification, pp. 21-23, February 17, 2000.

more facilities or services that the requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act, including those obtained as Section 271 elements.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners contended that the lack of an obligation to combine Section 271 elements with other Section 271 elements cannot lawfully be transformed into an exception to the FCC's unqualified requirement that ILECs provide for commingling of Section 251 elements with any other service provided on a wholesale basis. The Joint Petitioners opined that this obligation includes those made available only under Section 271.

The Joint Petitioners argued that, despite their clear explanation of the conceptual difference between commingling and combining elements, BellSouth continues to obfuscate. BellSouth's attempt to show that the Joint Petitioners made some fatal concession is misguided. First, BellSouth ignored the fact that witness Johnson stated that commingling involves the "combining [o]f elements that are different in terms of their regulatory nature". Thus, the Joint Petitioners opined that witness Johnson's testimony supports their assertion that the combining of Section 271 elements with other Section 271 elements (elements of the same regulatory nature) is different from commingling.

Second, the Joint Petitioners stated that BellSouth failed to disclose that witness Johnson precisely explained the differences between combining and commingling ("as defined in the *TRO* specifically, the FCC lifted its prohibition on combining wholesale services with UNEs in order to allow CLPs to commingle tariff services or wholesale services with Section 251 UNEs."). The Joint Petitioners opined that witness Johnson confirmed that Section 271 elements are wholesale services. Thus, the Joint Petitioners maintained that commingling of Section 251 elements with Section 271 elements and combining Section 271 elements with other Section 271 elements are different concepts. The Joint Petitioners argued that commingling Section 251 elements with other wholesale offerings, including those mandated by Section 271, is required by Section 251, as interpreted and implemented by the FCC.[23] The Joint Petitioners argued that the FCC's revision to Footnote 1990 of the *TRO* clarified that Section 271 elements are not subject to a Section 271 combinations rule, but are subject to the FCC's Section 251 commingling rule.

The Joint Petitioners asserted that BellSouth also mistakenly claimed that, by adopting the Joint Petitioners' language, the Commission will recreate UNE-P. The Joint Petitioners stated that UNE-P includes local switching elements and the local loop, all priced at TELRIC pursuant to Section 251. The Joint Petitioners argued that, on the other hand, a commingled arrangement replacing UNE-P would not include all elements

[23] *See* 47 C.F.R. §§ 51.309, 51.315.

priced at TELRIC. Thus, the Joint Petitioners argued, the two scenarios result in different pricing and therefore commingling does not result in the "all Section 251 UNE" combination commonly referred to as UNE-P.

Finally, the Joint Petitioners noted that BellSouth relied on the holding of the Florida PSC to support its claim that BellSouth is under no obligation to commingle Section 271 elements with Section 251 elements. The Joint Petitioners contended that the Florida PSC's decision creates an implied exception that cannot be squared with the second part of the FCC's *TRO Errata Order*, which deleted the FCC's Footnote 1990 sentence that had said "[w]e decline to apply our commingling rule... to services that must be offered pursuant to these checklist items." The Joint Petitioners opined that the Florida PSC made no attempt to read the *TRRO* as a whole and, as a result, reached an erroneous conclusion.

PUBLIC STAFF: The Public Staff recommended that the Commission reconsider its conclusions in the *RAO* such that Finding of Fact No. 9 should read as follows:

> BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Telecommunications Act of 1996 (the Act), including those obtained as Section 271 elements.

The Public Staff disagreed with the Commission's conclusion that Section 271 services are excluded from the definition of "wholesale services" as it relates to commingling.

The Public Staff stated that the resolution of the commingling issue depends on whether Section 271 elements, local switching in particular, are wholesale services. The Public Staff opined that BellSouth provides Section 271 elements as wholesale services pursuant to the common definition of "wholesale" found in Black's law dictionary. The Public Staff maintained that, in the *RAO*, the Commission noted that, in Paragraph 579 of the *TRO* the FCC "repeatedly references 'switched and special access services offered pursuant to tariff' when using the term wholesale services. In describing wholesale services that are subject to commingling, the FCC refers to tariffed access services."

However, the Public Staff maintained that, on September 16, 2005, the FCC granted in part a petition for forbearance filed by Qwest Corporation (Qwest) seeking relief from statutory and regulatory obligations that apply to it as an incumbent telephone company. The Public Staff stated that, in the press release announcing the decision, the FCC stated the following:

> The Commission leaves in place other section 251(c) requirements such as interconnection and interconnection-related collocation obligations as well as *section 271 obligations to provide wholesale access to local loops,*

local transport, and local switching at just and reasonable prices." [emphasis added]

The Public Staff maintained that BellSouth acknowledged at the hearing that it provides certain Section 271 elements, such as transport elements, as wholesale services through its special access tariff. However, the Public Staff argued that Rule 51.5 does not qualify "wholesale" to mean only those wholesale services offered by an ILEC through its tariffs, and the FCC has used the term "wholesale" recently when referring to Section 271 obligations to provide access to local switching, local loops, and local transport, without limiting its meaning to "switched and special access services offered pursuant to tariff." Thus, the Public Staff asserted, the Commission may reconsider its Finding of Fact No. 9 in this docket based on the plain language of the rule and the evidence at the hearing.

DISCUSSION

After careful consideration, the Commission concludes that it should reconsider its decision in the *RAO* finding that services, network elements, or other offerings made available only under Section 271 of the Act should not be subject to commingling with Section 251 elements or combinations thereof. Instead, the Commission now believes that such commingling should be allowed for both legal and public policy reasons.

This has been an extraordinarily difficult issue to grapple with. All the parties have presented strong and cogent arguments, and reasonable persons can disagree about which arguments are better and more convincing. The task of decision has been complicated by the relative opaqueness of the FCC's pronouncements on the subject. This lack of clear FCC guidance has been a serious handicap for both the parties and the Commission. It is thus not surprising that, construing the same language, different State commissions have reached different conclusions on this issue and that no consensus appears evident. For its part, the Commission must examine this matter according to what it believes constitutes the better legal and public policy considerations.

In brief, the Commission has come to believe on reconsideration that Section 271 services, elements, or offerings constitute "wholesale services" within the meaning of the commingling rule and therefore that they should be made available on a commingled basis with Section 251 UNEs. The Commission has also come to believe that this is the sounder public policy choice, largely because it ensures the availability of Section 271 services, elements, and offerings in a more predictable and practically usable form to competitors. The Commission believes that this is consistent with the FCC's general stress on the continued *availability* of certain Section 271 services, elements, and offerings by RBOCs in a delisted Section 251 UNE environment, with due recognition that those Section 271 services, elements, and offerings, among other things, are subject to a different rate standard from their Section 251 counterparts.

Concerning the legal arguments, the Joint Petitioners filed a Motion for Reconsideration on this issue requesting that the Commission reconsider Finding of Fact No. 9 since, they argued, it was based on two incorrect findings: first, that the FCC held that its commingling rule does not apply to Section 271 elements; and second, that BellSouth is correct in asserting that only tariffed elements are eligible for commingling. The Joint Petitioners contended that neither of these findings is supported by the *TRO,* and that their Brief demonstrated that the FCC made clear that it never intended to exclude Section 271 from commingling. Accordingly, the Joint Petitioners claimed that the Commission's tentative decision is not in keeping with federal law.

The Public Staff filed initial comments and reply comments agreeing with the Joint Petitioners that the Commission's decision on Finding of Fact No. 9 should be reconsidered. The Public Staff stated that it agreed with the Joint Petitioners that the FCC's rules are unambiguous, and their legality is unchallenged by any party.

The Commission notes that FCC Rule 51.309(e) states:

> Except as provided in § 51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

The Rule clearly states that commingling of UNEs or combinations of UNEs with wholesale services obtained from an ILEC shall be permitted, while not, in any way, limiting the type of wholesale service. In fact, as noted on Page 22 of the *RAO*, BellSouth acknowledged in this docket that it does occasionally provide some Section 271 elements as wholesale services. In particular, BellSouth stated that it agreed to commingle UNEs with tariffed services or resold services and that it would commingle a Section 271 transport element. However, BellSouth maintained, it will not commingle switching because it does not provide switching as a wholesale service. The Commission does not believe that FCC Rule 51.309(e) allows BellSouth to determine which Section 271 elements are indeed wholesale services and which Section 271 elements are not wholesale services.

The Commission further notes that in Paragraph 579 of the *TRO*, the FCC specifically stated that commingling involves the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services **that a requesting carrier has obtained at wholesale** from an ILEC pursuant to **any** method other than unbundling under Section 251(c)(3) of the Act. Specifically, Paragraph 579 of the *TRO* states, in its entirety:

> We eliminate the commingling restriction that the Commission adopted as part of the temporary constraints in the Supplemental Order Clarification and applied to stand-alone loops and EELs. We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (e.g., switched and special access

> services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request. By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that **a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act**, or the combining of a UNE or a UNE combination with one or more such wholesale services. Thus, an incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier **has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act**. In addition, upon request, an incumbent LEC shall perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier **has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act**. As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services. [Emphasis added.]

The Commission believes that Section 271 elements qualify as wholesale services that a requesting carrier can obtain from an ILEC under a method other than Section 251 unbundling.

The Commission also notes that Paragraph 579 of the *TRO* removes the commingling restriction that the FCC adopted as part of its temporary constraints in its *SOC*. However, further in Part VII.A(2)(c) of the *TRO*, specifically at Paragraph 584, the FCC states, as modified by the *TRO Errata Order*, that, "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to section 251(c)(4) of the Act." Therefore, the FCC's discussion on commingling in the *TRO* was **not** limited to the previous commingling restriction from the *SOC*; if it was, Paragraph 584 would not have been included in the *TRO*.

Further, the Commission believes that the FCC's *TRO Errata Order*, which eliminated the phrase "any network elements unbundled pursuant to section 271 and" from Paragraph 584, must be read in context and within the framework of the *TRO*. After the altered sentence, the remaining portion of Paragraph 584 discusses commingling and services offered pursuant to resale. Furthermore, the FCC dedicated a separate section of the *TRO* to Section 271 issues, specifically, Section VIII.A. It is within that section that the FCC states that a BOC's obligations under Section 271 are not

necessarily relieved based on any determination the FCC made under the Section 251 unbundling analysis (See Paragraph 655 of the *TRO*). Therefore, the Commission believes that the logical interpretation of the FCC's changes in the *TRO Errata Order* to Paragraph 584 was that the FCC would discuss Section 271 elements and commingling under its separate Section 271 part of the *TRO* (namely, Section VIII.A).

Turning to Section VIII.A of the *TRO* concerning Section 271 issues, the Commission notes that the FCC's *TRO Errata Order* also altered Footnote 1990 to delete the following sentence: "We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items." Footnote 1990 was attached to the following sentence in Paragraph 655 of the *TRO*: "As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis." The Commission believes that the fact of the matter is that if the FCC had intended to relieve BOCs of their obligation to commingle Section 251 elements with Section 271, wholesale elements, it would not have deleted the last sentence in Footnote 1990. Without the *TRO Errata Order*, the FCC would have declined to require BOCs to commingle Section 251 elements with Section 271 elements; with the removal of this language, the FCC clearly intended not to decline, or rather to continue to enforce, its requirement for BOCs to commingle Section 251 elements with Section 271 elements.

As the Public Staff noted, the ultimate question is whether Section 271 UNEs are wholesale services which must be commingled pursuant to FCC Rule 51.309(e). The Commission agrees with the Joint Petitioners and the Public Staff and believes that all Section 271 elements are wholesale services. In reaching this conclusion, the Commission is convinced by several references made by the FCC in its December 2, 2005[24] *Memorandum Opinion and Order* addressing a Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area (FCC 05-170; WC Docket No. 04-223; adopted on September 16, 2005), as follows:

> . . . Indeed, Qwest's section 251(c)(4) and **section 271(c) wholesale obligations** remain in place. . . [Paragraph 67 – Emphasis added.]
>
> . . . We believe that in conjunction with the extensive facilities-based competition from Cox (both existing and potential), this competition that **relies on Qwest's wholesale inputs** – which must be priced at just, reasonable and nondiscriminatory rates and is subject to Qwest's **continuing obligations under section 251(c)(4) and section 271(c)** – supports our conclusion that . . . [Paragraph 68 with footnotes omitted and emphasis added.]

[24] The Commission notes that the FCC's *Qwest Order* was released after the *RAO*, Motions for Reconsideration, initial comments, and reply comments were filed in this docket.

> We deny Qwest's Petition for forbearance to the extent Qwest seeks relief from its section 271(c)(2)(B) obligations to provide access to loops, transport and switching in the Omaha MSA (i.e., checklist items 4-6). In contrast to checklist items 1 through 3 and 14, which incorporate by reference other provisions of the Act, checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide **wholesale access to loops, transport and switching**[25], irrespective of any impairment analysis under section 251 to provide unbundled access to such elements. . . [Paragraph 100 with footnotes omitted and emphasis added.]
>
> . . . The Commission also has explained that it is reasonable to conclude that section 251 and section 271 establish independent obligations because the entities to which these provisions apply are different – namely, section 251(c) applies to all incumbent LECs, while section 271 imposes obligations only on BOCs. . . [Footnote 246.]
>
> We conclude that Qwest has not demonstrated that sufficient facilities-based competition exists in the Omaha MSA to justify forbearance from **Qwest's wholesale access obligations under sections 271(c)(2)(B)(iv)-(vi)**. . . [Paragraph 103 – Emphasis added.]
>
> . . . Our justification for forbearing from Qwest's section 251(c)(3) obligations for loops and transport in certain areas depends in part on the continued applicability of **Qwest's wholesale obligation to provide these network elements under sections 271(c)(2)(B)(iv) and (v)**. . . [Paragraph 105 – Emphasis added.]

The Commission believes that if the FCC had intended to limit commingling to only switched and special access services offered pursuant to a tariff, the FCC would have, specifically and definitively stated that instead of continuously referencing services obtained at wholesale by a (or any) method other than unbundling under Section 251(c)(3) of the Act.

Finally, the Commission believes that, in addition to the legal analysis above, requiring commingling of Section 251 elements with Section 271 elements is better public policy. As previously noted, the Commission believes that reconsideration on this issue is appropriate to ensure the availability of Section 271 services, elements, and offerings in a more predictable and practically usable form to competitors. The entire reason for making Section 271 elements available is to allow a competitor to serve end-user customers. Placing limits on the manner in which a competitor can utilize Section 271 elements as advocated by BellSouth runs counter to this policy goal. The

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[25] The Commission notes that the FCC references wholesale access to Section 271(c)(2)(B) (the competitive checklist) and specifically to switching, which is checklist item 6. Therefore, BellSouth's position that it will not commingle switching because it does not provide switching as a wholesale service is unpersuasive and inconsistent with the FCC's recent *Qwest Order*.

Commission believes that its decision herein is in harmony with the FCC's general emphasis on the continued access by competitors to certain Section 271 services, elements, and offerings by RBOCs regardless of any de-listing due to a nonimpairment analysis under Section 251.

Based upon the foregoing, the Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration on Finding of Fact No. 9 and to alter Finding of Fact No. 9 to state, as follows:

> BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act, including those obtained as Section 271 elements.

CONCLUSIONS

The Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration and, thus, alter Finding of Fact No. 9, as outlined hereinabove. The Commission notes that its decision herein does not address the issue of the appropriateness of including Section 271 elements in interconnection agreements. Nor does the decision herein address the issue of the appropriate rates for Section 271 elements. These issues, in addition to the specific commingling issue decided herein, will be addressed by the Full Commission by order in the change of law docket (Docket No. P-55, Sub 1549).

FINDING OF FACT NO. 10 (ISSUE NO. 10 – MATRIX ITEM NO. 36): How should line conditioning be defined in the Agreement; and what should BellSouth's obligations be with respect to line conditioning?

FINDING OF FACT NO. 11 (ISSUE NO. 11 – MATRIX ITEM NO. 37):

Joint Petitioners' Issue Statement: Should the Agreement contain specific provisions limiting the availability of line conditioning to copper loops of 18,000 feet or less?

BellSouth's Issue Statement: Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less?

FINDING OF FACT NO. 12 (ISSUE NO. 12 – MATRIX ITEM NO. 38): Under what rates, terms, and conditions should BellSouth be required to perform line conditioning to remove bridged taps?

INITIAL COMMISSION DECISION

In Findings of Fact Nos. 10, 11, and 12, the Commission concluded as follows:

10. The term, line conditioning, should be defined in the Agreement as set forth in FCC Rule 51.3219(a)(1)(iii)(A). BellSouth should perform line conditioning in accordance with FCC Rule 51.319(a)(1)(iii).

11. The line conditioning activity of load coil removal on copper loops should not be limited to copper loops with only a length of 18,000 feet or less.

12. Any copper loop ordered by a CLP with over 6,000 feet of combined bridged tap will be modified, upon request from the CLP, at no additional charge, so that the loop will have a maximum of 6,000 feet of bridged tap. Line conditioning orders that require the removal of other bridged tap (bridged tap between 0 and 6,000 feet) should be performed at the BellSouth UNE rates previously adopted by the Commission.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: In its Objection No. 2, BellSouth objected to Findings of Fact Nos. 10, 11, and 12 in the *RAO*. BellSouth asserted that the Commission erred in requiring BellSouth to perform line conditioning for the Joint Petitioners that exceeds what BellSouth provides to its own customers in contravention of its nondiscrimination obligations under the Act. BellSouth argued that both the *TRO* and the FCC Rules relating to line conditioning require the Commission to reach a different conclusion and rule in favor of BellSouth. In its Footnote No. 3 of its September 1, 2005 Motion for Reconsideration, BellSouth observed that these line sharing issues are also captured by Issue No. 26, in Docket No. P-55, Sub 1549 (change of law docket): "What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?"

BellSouth maintained that it is undisputed that BellSouth's line conditioning obligation is derived from its Section 251(c) duty to provide nondiscriminatory access. Further, BellSouth stated that the FCC has expressly held, in relation to line conditioning, that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves." As such, BellSouth asserted that both the FCC Rules and the *TRO* require the Commission to find that BellSouth's line conditioning obligations are limited to what BellSouth provides to its own customers.

BellSouth noted that, in the *RAO*, the Commission focused on the express wording of FCC Rule 51.319(a)(1)(iii)(A) and held that "ILEC's line conditioning obligations remained virtually the same as they did before the *TRO*, with the exception that the line conditioning obligations were expanded to include copper subloops." BellSouth stated that it could appreciate the Commission's decision, because the subject matter can be confusing in light of the various FCC decisions. However, BellSouth argued that the Commission's analysis and findings are incorrect as a matter of law.

BellSouth observed that its line conditioning obligations in FCC Rule 51.319(a)(1)(iii) expressly state that line conditioning applies to copper loops being requested "under

paragraph (a)(1) of this section . . . ." Next, BellSouth noted that Paragraph (a)(1) of the section states that "[a]n incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the copper loop on an unbundled basis." BellSouth argued that the obligation to provide nondiscriminatory access to the copper loop is identical to BellSouth's general obligation to provide access to local loops as set forth in subsection (a) of the same Rule 51.319(a), which provides that "[a]n incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the local loop on an unbundled basis, in accordance with Section 252(c) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section." Accordingly, BellSouth maintained that its obligation to provide line conditioning is limited and based upon its obligation to provide nondiscriminatory access to copper loops, specifically, and local loops, generally, pursuant to Section 251(c)(3) of the Act and the FCC's rules.

Further, BellSouth stated that nondiscriminatory access is defined under the FCC Rules (47 C.F.R. § 51.311(a) and (b)) established in the *TRO* in the following manner:

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

BellSouth asserted that, prior to the *TRO*, the FCC's Rules provided that, upon request, an ILEC had to provide access to UNEs superior in quality to that which it provides itself, which is exactly what the Joint Petitioners are asking here. In particular, BellSouth stated that the prior rule (47 C.F.R. § 51.311(c) (2001 ed.)) provided the following: "To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network elements, that an incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be superior in quality to that which the incumbent LEC provides to itself." BellSouth observed that this "superior in quality" standard was struck down by the Eighth Circuit in *Iowa Utilities Board.*[26] BellSouth argued that the FCC memorialized this nondiscrimination requirement in the *TRO*, wherein, at Paragraph 643, it found that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide [digital subscriber line] xDSL

[26] *Iowa Util. Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000), *aff'd in part and reversed in part on other grounds*, *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) (*Iowa Utilities Board*).

services to their own customers. . . incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves. . . line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251 (c)(3) nondiscrimination obligations."

Accordingly, BellSouth contended that the parameters of its line conditioning obligations changed in the *TRO*, even though the definition of line conditioning in Rule 51.319(a)(1)(iii) did not. Thus, BellSouth maintained that its obligation to perform line conditioning for the Joint Petitioners is limited as a matter of law to its nondiscrimination obligation under the Act, which requires BellSouth to provide to the Joint Petitioners the same type of line conditioning that it provides to itself, nothing more. In addition, BellSouth noted that the Florida PSC, in an arbitration proceeding in Docket No. 040130-TP[27], reached this same conclusion such that it rejected the Joint Petitioners' interpretation and proposed language and held that "to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders."

Furthermore, BellSouth commented that the fact that the Commission established TELRIC pricing for load coil removal and bridged taps of any length in 2001 does not require a different conclusion because these UNE rates were established prior to the FCC's issuance of the *TRO* and the new rules relating to BellSouth's nondiscrimination obligation. In summary, BellSouth contended that the Commission should make the *RAO* consistent with BellSouth's nondiscrimination obligations under the Act, adopt BellSouth's language for Issue Nos. 10-12 (Matrix Item Nos. 36-38), and find that BellSouth's obligation to provide line conditioning at TELRIC is limited to the type of line conditioning BellSouth provides to itself.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners maintained that BellSouth's arguments are not compelling and they provide no sound reasons for the Commission to modify the *RAO* in any respect with regard to these issues.

The Joint Petitioners noted that BellSouth has lodged a single objection on these three separate issues with the principal theory in BellSouth's objection being that the Commission's decisions effectively provide the Joint Petitioners with access to a superior network. As noted in the *RAO*, the FCC in its *TRO*, at Paragraph 643, states that "[l]ine conditioning does not constitute the creation of a superior network, as some incumbent LECs argue." Further, the Joint Petitioners observed that the FCC in Paragraph 643 also states that "requiring the conditioning of xDSL-capable loops is not

[27] An Exhibit A was attached to BellSouth's filing of objections in this docket. Said Exhibit A is a copy of the Florida PSC Staff's recommendations set forth in its July 21, 2005 Memorandum in Docket No. 040130-TP and the Florida PSC's August 30, 2005 Vote Sheet ruling on said recommendations.

mandating superior access." The Joint Petitioners pointed out that the FCC did not qualify these statements or make compliance with its independent line conditioning rule contingent upon a BellSouth decision to make such line conditioning available (routinely) on a retail basis. Thus, the Joint Petitioners argued that, without having to go further, the Commission should dismiss BellSouth's superior network argument which already has been rejected by the FCC in the *TRO.*[28]

Next, the Joint Petitioners pointed out that, notwithstanding the foregoing and without citation, BellSouth is asserting that a superior network results when it is required to condition loops beyond the parameters in which it boldly claims it is routinely willing to condition loops for its own retail customers. The Joint Petitioners asserted that there is no legal basis for BellSouth's argument, which incorporates a carefully skewed re-articulation of the Act's nondiscrimination standard, which ignores the fact that the *copper loop* is the network element to which the nondiscrimination obligation attaches and that obligation commands that CLPs be afforded the same access to the loop that BellSouth has – not the same gated access that BellSouth elects to provide to its retail customers (who are not similarly entitled to purchase such loops at TELRIC pricing). Thus, the Joint Petitioners stated that the Act's nondiscrimination standard commands that CLPs will have cost-based access to copper loops, which the FCC has defined to include line conditioning,[29] irrespective of whether BellSouth elects to perform such conditioning "routinely" or claims that it does not or perhaps "no longer" performs[30] such conditioning routinely and does so only when it can charge "special construction" or similarly unpredictable and non-TELRIC compliant pricing.[31] The Joint Petitioners asserted that the *RAO* comports fully with the Act's nondiscriminatory access obligation, as it provides the Joint Petitioners with the same nondiscriminatory access to copper loops, including the ability to condition them for use in providing advanced services that BellSouth has – regardless of whether BellSouth elects to make such conditioning available to its retail customers on a routine basis. Moreover, the Joint Petitioners stated that, given that BellSouth conditions loops of all lengths routinely to provide DS1 service, the basis upon which BellSouth claims it does not condition loops routinely is

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[28] The Joint Petitioners remarked that, "notably, the *USTA II* provided BellSouth the opportunity to challenge the FCC's finding that line conditioning does not create a superior network, but FCC determination was not at issue in the case before the court. BellSouth may not lodge an indirect challenge to the FCC's decision through this proceeding."

[29] See *TRO*, Paragraph 643, where the FCC stated: "[w]e therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element."

[30] See *In the Matter of Joint Petition for Arbitration of NewSouth Communications Corp., et al.,* Georgia PSC, Docket No. 18409-U, Hearing Transcripts at Page 813:16-17 (February 8-10, 2005). The Joint Petitioners observed that, therein, BellSouth witness Fogle stated in the Georgia hearing that "we no longer routinely remove load coils."

[31] The Joint Petitioners observed that the *RAO* notes that the FCC readopted its line conditioning obligations for the same reasons stated in the *UNE Remand Order* and that in the *UNE Remand Order* the FCC required line conditioning regardless of whether the ILEC did it for its own customers.

anything but clear.[32] Thus, the Joint Petitioners asserted that there is nothing in the Act, the *TRO*, or the FCC's rules that says line conditioning is limited to those functions BellSouth determines it is willing to offer "routinely" to its retail customers. In addition, the Joint Petitioners maintained that the *Iowa Utilities Board* finding pertaining to interconnection, upon which BellSouth heavily relies, lends no credence to BellSouth's theory as it merely holds that the FCC could not mandate superior access to interconnection.

Further, the Joint Petitioners commented that the *TRO* clearly notes that the FCC's intent behind its line conditioning obligations is that the obligations "*cover loops of all lengths*" and, thus, the limitation proposed by BellSouth is not in the FCC's Order.[33] In other words, as explained by the Joint Petitioners, line conditioning applies to the entire loop (not just to portions of the loop) and to loops in excess of 18,000 feet ("long loops"), and a superior network does not result where line conditioning is requested beyond an incumbent's self-imposed parameters. The Joint Petitioners maintained that, as the FCC repeatedly has found, line conditioning results in the modification of the existing network and not the construction of an un-built superior one.[34] The Joint Petitioners maintained that nondiscriminatory access requires that the Joint Petitioners have the same access to the loop that BellSouth has, regardless of whether BellSouth elects to take advantage of its access by conditioning the loop in order to provide a retail advanced services offering.[35]

Furthermore, the Joint Petitioners asserted that if the Commission were to reverse its decision, then it would bestow upon BellSouth the ability to wipe out its line conditioning obligations in their entirety. The Joint Petitioners pointed out that, at the hearing, in this proceeding, Commissioner Kerr recognized that BellSouth's position necessarily reaches this untenable conclusion. The Joint Petitioners also noted that other state commissions have seen this, as well. In particular, the Joint Petitioners stated that in Georgia, a panel member (Commissioner Burgess) observed during hearing in an arbitration proceeding that "literally you [BellSouth] could wipe away your [its]

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[32] At this point, the Joint Petitioners cited the following: *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 Paragraphs 172-173 (1999) (*UNE Remand Order), reversed and remanded in part sub. nom. United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) *(USTA), cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n,* 123 S.Ct 1571 (2003 Mem.); *see also TRO*, Paragraph 642, where the FCC stated: "[a]ccordingly, we readopt the [FCC's] previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order."*

[33] See *TRO*, Paragraph 642, Footnote 1947.

[34] See *TRO*, Paragraph 643; see also *UNE Remand Order*, Paragraph 173.

[35] See *UNE Remand Order*, Paragraph 173, where the FCC disagreed with GTE's contention "that the Eighth Circuit, in *Iowa Utils. Bd. v. FCC* decision, overturned the rules established in the *Local Competition First Report and Order* that required incumbents to provide competing carriers with conditioned loops capable of supporting advanced services even where the incumbent is not itself providing advanced services to those customers."

requirement and obligation" and that BellSouth is attempting "to change" the rules.[36] The Joint Petitioners stated that, simply put, what BellSouth wants is in direct defiance of the FCC's line conditioning rules. The Joint Petitioners contended that the clear intent in creating the rules was not to provide incumbents with the ability to dictate their line conditioning obligations. Indeed, it is the position of the Joint Petitioners that if the Commission were to reverse its recommendation here, then BellSouth will cease conditioning loops at TELRIC rates, regardless of loop length, which would be detrimental to the deployment of competitive advanced services and contrary to the Act, the FCC's rules, and the federal regulatory scheme.

In addition, the Joint Petitioners asserted that BellSouth's argument that the parameters of BellSouth's line conditioning obligations changed with the *TRO,* even if such change was not reflected in the FCC's rules, is also untenable. The Joint Petitioners maintained that the Commission already has soundly rejected this claim in its *RAO.*[37] The Joint Petitioners commented that the Commission correctly notes that the FCC's adoption of its routine network modification rules in the *TRO* did not change BellSouth's line conditioning obligations. In the *RAO*, the Commission noted that in the *TRO*, the FCC stated that it was readopting its previous line conditioning rules for the reasons previously set forth by the FCC in the *UNE Remand Order.*[38] The Joint Petitioners contended that if, as BellSouth claims, the *TRO*'s adoption of the routine network modification rules changed line conditioning obligations, then the FCC certainly would have noted the change in how the rules would be applied and would have modified the basis it set forth for re-adopting the line conditioning rules. The Joint Petitioners opined that the only change in application evident on the record is that the line conditioning obligations were extended to include copper subloops.[39] The Joint Petitioners maintained that the FCC would not have noted only this single change in application if there were another.

In response to BellSouth's notation concerning the Florida PSC's action on similar issues in an arbitration proceeding, the Joint Petitioners commented that under the standard embraced by the Florida PSC, the Joint Petitioners, at least in certain contexts, apparently have no rights greater than Florida retail customers. The Joint Petitioners asserted that the Florida PSC's decision renders, in many respects, the Act and the FCC's line conditioning rules a nullity; and the Joint Petitioners intend to appeal the Florida PSC's ruling to federal court. The Joint Petitioners also noted that in the concurrent Kentucky arbitration proceeding, the Kentucky PSC made the same finding

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[36] See Georgia Transcript of Hearing of an arbitration proceeding between NewSouth, et al., with BellSouth, in Docket No. 18409-U, at Page 816:13-14 and Page 812:18.

[37] See *RAO* at Pages 32-33.

[38] Id. at Page 34, citing *TRO* Paragraph 250, Footnote 747; see also Id. at Page 35, citing *TRO* Paragraph 642.

[39] Id. at Page 28.

as the Commission here on all three line conditioning issues in its Order released September 26, 2005, in Case No. 2004-00044.[40]

Finally, the Joint Petitioners argued that BellSouth's position is belied by the FCC's purpose in creating the line conditioning rules. The Joint Petitioners explained that as noted in the *TRO*, "line conditioning speeds the deployment of advanced services by ensuring that competitive LECs are able to obtain, as a practical matter, a local loop UNE with the features, functions, and capabilities necessary to provide broadband services."[41] By setting limitations on when line conditioning will be provided at TELRIC rates, the Joint Petitioners stated that BellSouth is attempting to hobble the Joint Petitioners' ability to innovate and compete.

In summary, the Joint Petitioners maintained that for each of the forgoing reasons, as well as those already stated so well by the Commission in its *RAO,* BellSouth's arguments offer no compelling reason why the Commission should change its initial decisions on these three issues and, therefore, the Commission should affirm its decisions on Issue Nos. 10-12 (Matrix Item Nos. 36-38).

PUBLIC STAFF: The Public Staff stated that BellSouth's objections with respect to these findings do not warrant a change in the Commission's conclusions rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth responded to the Joint Petitioners' initial comments by stating that the Joint Petitioners made two erroneous arguments: (1) BellSouth's nondiscrimination obligations require it to provide a copper loop only on a nondiscriminatory basis; and (2) adoption of BellSouth's position will "hobble" the Joint Petitioners' ability to compete. BellSouth asserted that both of these arguments should be rejected by the Commission.

First, BellSouth stated that the Joint Petitioners claimed that BellSouth's nondiscrimination obligation "commands that CLPs be afforded the same access to the loop that BellSouth has – not the same gated access that BellSouth elects to provide to its retail customers . . . ." BellSouth argued that this assertion is incorrect as a matter of law. BellSouth stated that FCC Rule 51.319(a) provides that "[a]n incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the local loop on an unbundled basis, in accordance with Section 251(c) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section." BellSouth maintained that its obligation to provide line conditioning is limited to its obligation to

[40] See *In the Matter of Joint Petitioner for Arbitration of NewSouth Communications Corp. et al.,* Kentucky PSC, Order, Case No. 2004-00044 (released September 26, 2005) (*Kentucky Arbitration Order*) at Pages 10-14.

[41] See *TRO* Paragraph 644.

provide nondiscriminatory access to copper loops pursuant to Section 251(c) of the Act and the FCC's rules.

BellSouth stated that its nondiscriminatory access obligation requires it to provide CLPs with the "quality of an unbundled network element, as well as the quality of the access to such unbundled network... [that is] at least equal in quality to that which the incumbent LEC provides itself." (47 C.F.R. § 51.311(a)and (b)). In other words, it is BellSouth's position that the nondiscrimination obligation requires it to provide the Joint Petitioners with the same quality UNE that it provides to itself, nothing more; and this obligation takes into account line conditioning. Again, BellSouth noted that the FCC's rules in the *TRO,* as well as federal courts, have rejected a "superior in quality" obligation.[42]

Next, BellSouth asserted that the FCC's statement in Paragraph 643 of the *TRO* that line conditioning does not "constitute the creation of a superior network" does not support the decision reached in the *RAO.* BellSouth represented that the FCC made this finding in rejecting Verizon's argument that providing line conditioning to a CLP customer that is not receiving advanced services from the ILEC constitutes the creation of a superior network for the CLP's end user. BellSouth maintained that this statement does not, however, translate into BellSouth being obligated to provide line conditioning to CLPs that exceeds what it provides for its retail customers; and BellSouth believes that this is made clear in the remaining section of *TRO* Paragraph 643, where the FCC further describes the incumbent LECs' line conditioning obligations.

In particular, BellSouth explained that the FCC stated in Paragraph 643 that "line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." Further, BellSouth noted that the FCC went on to state that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations."

Second, BellSouth stated that the Joint Petitioners argued that adoption of BellSouth's position for line conditioning would prohibit them from competing. BellSouth noted that the Joint Petitioners made the unsupported statements that BellSouth's position would "bestow upon BellSouth the ability to wipe out its line conditioning obligations in their entirety" and that "if the Commission were to reverse its recommendation here, then

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[42] *Iowa Util. Bd. v. FCC,* 219 F.3d 744, 758 (8th Cir. 2000), *aff'd in part and reversed in part on other grounds, Verizon Communications, Inc. v. FCC,* 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002). BellSouth noted that prior to the implementation of the FCC's Rules in the *TRO,* the FCC's Rules provided that, upon request, an ILEC had to provide access to UNEs superior in quality to that which it provides itself. 47 C.F.R. § 51.311(c) (2001 ed.).

BellSouth will cease conditioning loops at TELRIC rates, regardless of loop length." BellSouth asserted that these are erroneous arguments.

BellSouth argued that changing the *RAO* to reflect BellSouth's position will not result in BellSouth refusing to condition any loops at TELRIC rates, as BellSouth has agreed to provide the Joint Petitioners with the same line conditioning that it provides its own end users at TELRIC. BellSouth explained that it will condition all loops by removing load coils on loops up to 18,000 feet at TELRIC. However, BellSouth stated that the removal of load coils beyond 18,000 feet would be done pursuant to special construction charges.

Further, BellSouth commented that just as specious is the Joint Petitioners' claim that, by adopting BellSouth's language, BellSouth could effectively prevent any line conditioning from occurring by deciding not to provide any line conditioning to itself. While technically possible, BellSouth observed that this hypothetical is not very practical because BellSouth "is very interested in selling its DSL services."

BellSouth again recommended that the Commission conclude that BellSouth's obligation to provide line conditioning at TELRIC is limited to the type of line conditioning BellSouth provides to itself. Further, in response to the Joint Petitioners' notation concerning the Kentucky PSC's action on similar issues in an arbitration proceeding, wherein the Kentucky PSC made the same finding as the Commission here on all three line conditioning issues in its Order in Case No. 2004-00044, BellSouth commented that it has sought rehearing of this decision.

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff reiterated its position that BellSouth's objections with respect to these findings do not warrant a change in the Commission's conclusions rendered in the *RAO*, which was issued after extensive testimony and briefing by the parties. The Public Staff did not provide any other comments on these issues.

DISCUSSION

In summary, in regard to Findings of Fact Nos. 10, 11, and 12 (Matrix Item Nos. 36, 37, and 38) in the *RAO*, BellSouth requested that the Commission reconsider said findings and conclude that BellSouth's language should be adopted for these three findings, such that BellSouth's obligation to provide line conditioning at TELRIC rates would be limited to only the type of line conditioning BellSouth provides to itself.

In opposition, the Joint Petitioners asserted that BellSouth's arguments are not compelling and provide no sound reasons for the Commission to modify the *RAO* in any respect regarding these issues. Likewise, the Public Staff commented that BellSouth's objections with respect to these findings do not warrant a change in the Commission's conclusions rendered in the *RAO*.

Based upon our further review of these matters, the Commission agrees with the Joint Petitioners and the Public Staff that these findings in the *RAO* should not be modified. The Commission finds no new or compelling rationale in BellSouth's arguments that warrants any change in our prior decisions with respect to these issues.

In the *RAO*, the Commission found that BellSouth's line conditioning obligations were not changed by the *TRO*, nor were the line conditioning rules and the routine network modification rules changed by the *TRRO*[43]. The Commission believes it is appropriate to affirm our initial findings on these issues. In support of such affirmation, the Commission finds it pertinent to note just a couple of paragraph excerpts from the *RAO* as follows:

> . . . . The Commission notes that the text of Paragraph 642 [in the *TRO*] explicitly indicates that the FCC readopted its previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order*. In addition, in said Paragraph and Footnotes, the FCC (1) required incumbent LECs to provide access, on an unbundled basis, to xDSL-capable stand-alone copper loops because competitive LECs are impaired without such loops; (2) recognized that access to xDSL-capable stand-alone copper loops may require incumbent LECs to condition the local loop for the provision of xDSL-capable services; (3) explained that line conditioning is necessary because of the characteristics of xDSL service, i.e., certain devices added to the local loop to provide voice service disrupt the capability of the loop in the provision of xDSL services; (4) concluded that providing a local loop without conditioning the loop for xDSL services would fail to address the impairment CLPs face; (5) required incumbent LECs to provide line conditioning to requesting carriers; (6) identified the removal of bridge taps, load coils, and similar devices as part of the line conditioning obligation; and (7) observed that the *Line Sharing Order* refined the conditioning obligation to cover loops of any length, to recognize the potential degradation of analog voice service, and to enable incumbent LECs to charge for conditioning loops. Based upon the foregoing, the Commission does not believe that BellSouth's line conditioning obligations have now been constrained by the FCC's inclusion in Rule 51.319 of its routine network modifications' Section (a)(8).
>
> . . . . The Commission does not believe that the FCC's statement in Paragraph 643 [in the *TRO*], that 'line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers' supports BellSouth's position that line conditioning should be defined as a routine network modification that BellSouth regularly undertakes to provide xDSL

[43] *Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, *Order on Remand*, FCC 04-290, rel. February 4, 2005. (*Triennial Review Remand Order* or *TRRO*).

services to its own customers and that BellSouth's line conditioning obligations should be limited to what BellSouth routinely provides for its own customers. The Commission believes that this language merely means that the function of line conditioning is to be properly seen as a routine network modification, i.e, the function of line conditioning, constitutes a form of routine network modification, not the conditions under which this function is performed. The Commission observes that in Footnote 1951, the FCC stated that '[w]e note that all BOCs offer xDSL service throughout their service areas.' Furthermore, the FCC found that 'Competitors cannot access the loop's inherent 'features, functions, and capabilities' unless it has been stripped of accretive devices. We therefore view loop conditioning as intrinsically linked to the local loop and include it within the definition of the loop network element.' Consistent with that finding, the Commission notes that in the FCC's specific unbundling requirements, Rule 51.319(a)(1), the FCC provided, in part, that 'A copper loop is a stand-alone local loop comprised entirely of copper wire or cable. Copper loops include two-wire and four-wire analog voice-grade copper loops, digital copper loops (e.g., DS0s and integrated services digital network lines), as well as two-wire and four-wire loops conditioned to transmit the digital signals needed to provide digital subscriber line services, regardless of whether the copper loops are in service or held as spares.' (Emphasis added.)

CONCLUSIONS

The Commission finds that it is appropriate to deny BellSouth's request and to affirm and uphold our initial rulings, as set forth in the *RAO* in Findings of Fact Nos. 10, 11, and 12 (Matrix Item Nos. 36, 37, and 38).

FINDING OF FACT NO. 13 (ISSUE NO. 13 – MATRIX ITEM NO. 51):

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

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

INITIAL COMMISSION DECISION

The Commission concluded that the *TRO* sufficiently outlines the requirements for an audit. A 30 – 45 day notice of the audit provides a CLP with adequate time to prepare. In its Notice of Audit, BellSouth should state its concern that the requesting CLP has not met the qualification criteria and a concise statement of its reasons thereof. The Commission further concluded that BellSouth may select the independent auditor without the prior approval of the CLP or this Commission. Challenges to the independence of the auditor may be filed with the Commission after the audit has concluded. Additionally, the Commission concluded that BellSouth is not required to

provide documentation, as distinct from a statement of concern, to support its basis for audit or seek concurrence of the requesting carrier before selecting the audit's location.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration for several reasons. With respect to Matrix Item No. 51(B), the Joint Petitioners argued that a true "for cause" standard for audits is necessary for the auditors to be implemented in a meaningful, verifiable way. Audits are costly and intrusive, and the standards that trigger an audit should be higher than what the Commission has endorsed. With respect to Matrix Item No. 51(C), the Joint Petitioners argued that it is crucial that auditors be truly independent. BellSouth has already agreed to use mutually approved auditors in other contexts, and BellSouth's resistance in this case is puzzling. Conflicts involving auditors do occur and are better dealt with up front rather than after-the-fact.

INITIAL COMMENTS

BELLSOUTH: BellSouth argued that the Commission had correctly rejected the Joint Petitioners' proposals as unnecessary and illegal impediments to BellSouth's audit rights. With respect to Matrix Item No 51(B), BellSouth noted that it has no ability to challenge a CLP's EEL self-certification from the outset, so audit rights are provided to insure compliance with EEL eligibility. Additional conditions such as those the Joint Petitioners seek cannot be found in the *TRO* and should not be imposed. Furthermore, BellSouth argued that the Joint Petitioners' "costly and intrusive" argument regarding audits is a red herring. The Joint Petitioners are simply trying to erect more barriers to BellSouth's rightful exercise of its audit rights. With respect to Matrix Item No. 51(C), BellSouth argued that a requirement for mutual agreement for the selection of an auditor is not workable, as NuVox's position on KPMG illustrates. KPMG is NuVox's external auditor, yet NuVox argued that KPMG was not independent, even after BellSouth and NuVox had agreed to use KPMG. In any event, mutual agreement on an auditor is not sanctioned by the *TRO*.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the Commission's decision on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: With respect to Matrix Item No. 51(B), the Joint Petitioners argued that BellSouth had presented little that was new. The Joint Petitioners stated that the *RAO* decision will not prevent litigation and that they would not cede to any attempt by BellSouth to gut or end-run the protections against abusive EEL audits established by the FCC. With respect to Matrix Item No. 51(C), the Joint Petitioners contended that BellSouth also had little to offer other than what the Joint Petitioners call

"blatant mischaracterization of the dispute over KPMG's independence." The Joint Petitioners said that KPMG "was caught providing certain information to BellSouth in violation of [a nondisclosure agreement] it executed with NuVox." Prior to this incident NuVox had only expressed opposition to a single auditor proposed by BellSouth, which the Georgia Public Service Commission (Georgia PSC) also found unfit.

PUBLIC STAFF: The Public Staff reiterated its view that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

Finding of Fact No. 13, which, in part, addresses Matrix Item No. 51(B), has to do with whether there is a notice requirement and, if so, what should the notice contain. While the Commission found that the *TRO* did not require notice of an audit, advance notice would afford the CLP the opportunity to compile appropriate documentation. The Commission held that the ILEC need not supply carriers additional documentation to support their request, but, as distinct from documentation, it should state its concern. Since BellSouth has agreed to provide notice to a CLP stating the cause for the audit, the Commission found this proposal to be reasonable.

Finding of Fact No. 13, which, in part, addresses Matrix Item No. 51(C), has to do with who performs the audit and how it should be performed. The Joint Petitioners insisted that the auditor should be an independent auditor mutually agreed upon, while BellSouth asserted that the requirements that the Joint Petitioners want added do not appear in the *TRO*. The Commission in the *RAO* noted that it had addressed the issue of auditor selection in Docket No. P-772, Sub 7, in its *Order Granting Motion for Summary Disposition and Allowing Audit* issued on August 24, 2004, and *Order Denying Motion for Reconsideration* issued on January 20, 2005. (This matter is currently on appeal in the U.S. District Court, Eastern District, Western Division). In accordance with its decisions in Docket No. P-772, Sub 7, the Commission rejected the additional requirements sought by the Joint Petitioners.

The Commission believes that these issues have been sufficiently addressed both in this arbitration and in Docket No. P-772, Sub 7. The Commission believes that it has carefully construed the applicable law regarding audits, and it is not persuaded by the Joint Petitioners' argumentation that it should reconsider its decisions on this Finding of Fact. So far the Joint Petitioners have had four bites of the apple on this issue in this venue, perhaps a few more courtesy of the Competitive Carriers of the South (CompSouth) in Docket No. P-55, Sub 1549, with no doubt even more being in store on the federal level, by which time the apple will have been thoroughly consumed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 13.

FINDING OF FACT NO. 14 (ISSUE NO. 14 – MATRIX ITEM NO. 65): Should BellSouth be allowed to charge the CLP a Tandem Intermediary Charge (TIC) for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

INITIAL COMMISSION DECISION

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

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth sought reconsideration of Finding of Fact No. 14 arguing that the Commission's decision is incorrect as a matter of law. BellSouth stated that, in contrast to the Commission's decision, the FCC has pronounced that, to date, the Commission's rules have not required ILECs to provide transiting. Similarly, the FCC's Wireline Competition Bureau (WCB) in the *Virginia Arbitration Order* declined to find that ILECs have an obligation to provide a transit function at TELRIC. BellSouth stated that the WCB subsequently reaffirmed these principles in denying AT&T's request for reconsideration, wherein it found that (1) it "did not find that Verizon had a legal obligation to provide transit service at TELRIC"; (2) it "did not agree with AT&T's assertion that the Virginia Commission would have been required to agree with AT&T that Verizon must provide transit service under the Act, nor do we agree that the Bureau was required to so conclude." BellSouth further stated that the Commission should not feel constrained by its decision in Docket No. P-19, Sub 454. In addition, BellSouth noted that decisions that are contrary to the *RAO* are not limited to the FCC, citing the Georgia and Florida PSC decisions on this issue. BellSouth urged the Commission to reconsider its previous decision or, at a minimum, avoid finding that BellSouth has a Section 251 obligation to provide the transit service until the FCC addresses the issue in the context of its *Intercarrier Compensation* rulemaking proceeding.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners argued that the Commission should keep with its initial recommendation on this issue. The Joint Petitioners noted that in Paragraph 534, Footnote 1640 of the *TRO*, the FCC plans to address transiting in its pending *Intercarrier Compensation* rulemaking proceeding. The Joint Petitioners argued that, if transiting is determined by the FCC to be outside the scope of BellSouth's Section 251 and TELRIC pricing obligations, BellSouth can invoke the change of law provisions in the Agreement and it can petition the Commission to establish an appropriate rate. The Joint Petitioners conceded that, until the FCC opines on whether it believes transit service is a Section 251 obligation, it simply makes sense to maintain the status quo by adopting the Commission's initial recommendation on this issue.

PUBLIC STAFF: The Public Staff argued that BellSouth provided no basis for modifying the Commission's conclusion. The Public Staff stated that the Commission has considered this matter in great detail before in Docket No. P-19, Sub 454 and concluded that Verizon South Inc. has a legal obligation to provide tandem transit service under both state and federal law. The Public Staff noted that the Commission declined, however, to decide the appropriate rate to be charged for tandem transit service, and deferred the matter to Docket No. P-100, Sub 151. However, the Public Staff opined that Docket No. P-100, Sub 151 has not provided an answer to this question. Moreover, the Public Staff noted that the current appeal of the Commission's Order in Docket No. P-19, Sub 454, has been stayed pending negotiations between parties regarding the manner in which tandem transit traffic is to be routed and billed. The Public Staff stated that based upon recent filings in that docket, there appears to be some dispute as to the status of negotiations. The Public Staff contended that the issue of the appropriate rates, terms and conditions for BellSouth to charge for transit traffic from the Joint Petitioners is left to this proceeding. The Public Staff believes that the Commission appropriately concluded that BellSouth should not be permitted to charge a TIC.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that both the Public Staff and the Joint Petitioners argue that there is no FCC decision that expressly finds that BellSouth is not obligated to provide a transit service at TELRIC and, thus, the Commission can make such a finding in the absence of a contrary federal ruling. BellSouth asserted that this argument, however, does not reflect the fact that the FCC has repeatedly refused to find that ILECs have an obligation to provide transit service under Section 251 of the Act. BellSouth noted that the WCB refused to find such an obligation in the *Virginia Arbitration Order*, and the FCC stated in Paragraph 534, Footnote 1640 of the *TRO* that, "[t]o date, the Commission's rules have not required incumbent LECs to provide transiting." Thus, BellSouth argued that, while the FCC has not expressly held that ILECs do not have to provide the transit function at TELRIC, it is clear that the FCC has refused to make such a finding to date, notwithstanding many opportunities to do so. BellSouth maintained that, if the FCC decides differently in the *Intercarrier Compensation* rulemaking proceeding and finds for the first time that ILECs have a Section 251(c) obligation to provide the transit function at TELRIC, then the Commission can apply that ruling on a going-forward basis.

BellSouth urged the Commission to reconsider its decision and allow BellSouth to charge the TIC rate of $.0015. BellSouth suggested that, if the Commission still has concerns about the rate, the Commission could elect to follow the Georgia PSC's approach and order BellSouth's proposed rate until such time as a permanent rate is established. BellSouth further suggested that, even if the Commission rejects the $.0015 rate, the Commission should find that BellSouth is allowed to charge some interim rate or at least provide BellSouth with the ability to back bill the Joint Petitioners from the date a Commission-approved rate is established.

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff did not provide any additional reply comments on this issue.

DISCUSSION

In the *RAO*, the Commission found that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs. As discussed above, in Docket No. P-19, Sub 454, the Commission held that ILECs have a legal obligation to provide the transit function under both state and federal law. As pointed out by the Commission in its *September 22, 2003 Order*, in Docket No. P-19, Sub 454, the tandem transit function may also involve a billing intermediary function, and the rates for providing this service are not required to be TELRIC-based.

On March 3, 2005, the FCC released its *Further Notice of Proposed Rulemaking in the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, FCC 05-33 (March 3, 2005) (*Further NPRM*). In this notice of proposed rulemaking, the FCC discusses intermediary carriers and the reciprocal compensation rules. The FCC's discussion in the *Further NPRM* is relevant to the decision at issue here.

In the *Further NPRM*, the FCC observes that it has not adopted rules governing the charges of intermediary (i.e. transiting) carriers. The FCC states the following:

> The reciprocal compensation provisions of the Act address the exchange of traffic between an originating carrier and a terminating carrier, but the Commission's reciprocal compensation rules do not directly address the intercarrier compensation to be paid to the transit service provider.[44]

The FCC states further,

> If rules regarding transit service are warranted, we seek comment on the scope of such regulation. Specifically, we seek comment on whether transit service obligations under the Act should extend solely to the incumbent LECs or to all transit service providers, including competitive LECs. [45]

And additionally,

> [W]e seek further comment on the appropriate pricing methodology, including the possibility of requiring that transit service be offered at the same rates, terms, and conditions as the incumbent LEC offers for equivalent exchange access services (e.g., tandem switching and tandem

[44] *Further NPRM*, at ¶ 120.

[45] *Further NPRM*, at ¶ 130.

switched transport) and how this option would be affected by our proposals to alter the current switched access regime.[46]

Based on the foregoing, the Commission finds it appropriate to uphold its decision until such time as the FCC addresses the issue in the context of the *Intercarrier Compensation* rulemaking proceeding.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 14.

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

INITIAL COMMISSION DECISION

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

Section 2.5.5.2 – Joint Petitioners

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

Section 2.5.5.3 – Joint Petitioners

Disputes over Alleged Noncompliance. If one Party disputes the other Party's assertion of non-compliance, that Party shall notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. In such instance, the Parties

[46] *Further NPRM*, at ¶ 132.

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.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 15 stating that the Commission erred in adopting the Joint Petitioners' proposed language regarding how disputes over alleged unauthorized access to CSR information should be handled under the Agreement.

BellSouth maintained that, in adopting the Joint Petitioners' language, the Commission "agree[d] with the Joint Petitioners that it is unclear from BellSouth's proposed language whether BellSouth gets to pull the plug while a dispute concerning noncompliance is pending." BellSouth stated that its proposed language, however, clearly provides that disputes over unauthorized access to CSR information will be handled pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions section of the Agreement. BellSouth asserted that under the clear wording of the Dispute Resolution provision, access to ordering systems will not be suspended nor will services be terminated while such a dispute is pending. Accordingly, BellSouth argued that its proposal gives the Joint Petitioners exactly what they want.

In contrast, BellSouth maintained, the Joint Petitioners' proposal is unacceptable for many reasons. First, BellSouth argued, the Joint Petitioners' language is unduly vague. For example, BellSouth noted, under the Joint Petitioners' language the offending Party is required to undertake "appropriate corrective measures", which is subject to debate and cannot be reconciled with the Parties' contractual obligation "to access CSR information only in strict compliance with applicable laws." Second, BellSouth maintained, the Joint Petitioners do not impose any time period in which to cure any unauthorized access even though the Joint Petitioners concede that they can produce a LOA in as little as two business days. Third, and perhaps most importantly, BellSouth opined, the Joint Petitioners' proposal provides no remedy or recourse if the accused party ignores its legal and contractual obligations and thus fails to respond to a request to provide an appropriate LOA.

BellSouth argued that under its proposal, suspension and termination rights are triggered only if a Party: (1) disregards its obligation to produce an appropriate LOA upon request; and (2) thereafter fails to dispute (i.e. ignores) a notice that specifies the alleged CSR-related noncompliance. BellSouth maintained that suspension or termination of service based upon undisputed allegations that a party is engaging in unauthorized, unlawful, or fraudulent activity is not a new concept. In fact, BellSouth maintained, the Joint Petitioners retain the right to immediately terminate service provided to their North Carolina end users under similar circumstances.

For the foregoing reasons, BellSouth asserted, the Commission should modify its *RAO* to adopt BellSouth's proposed language for Matrix Item No. 86(B).

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners stated in initial comments that, although BellSouth claims otherwise, its language proposal with regard to unauthorized access to CSRs does not give the "Joint Petitioners exactly what they want." The Joint Petitioners stated that they have explained as much in their brief. The Joint Petitioners maintained that, despite assurances that BellSouth provides in its brief, BellSouth refuses to incorporate such assurances into its proposed language in North Carolina. Instead, the Joint Petitioners argued that BellSouth intentionally leaves its proposal unacceptably vague and leaves the Joint Petitioners and their customers dangerously exposed to potential coercion and manipulation (when BellSouth will rely solely on the language of the Agreement and not on its curious attempt to get the Commission to approve language that appears designed to provide potential for future coercion and manipulation).

The Joint Petitioners stated that they are fully committed to complying with all regulations regarding access to CSRs. Nevertheless, the Joint Petitioners maintained that their proposal for Matrix Item No. 86(B) ensures that their service is protected while disputes over unproven BellSouth allegations of CSR abuse are resolved by a neutral decision maker such as the Commission. The Joint Petitioners noted that they have agreed to provide a LOA upon request and have never given BellSouth cause for concern in the past. Yet, the Joint Petitioners opined, because disputes may still arise, even when a LOA is provided, the Joint Petitioners wish to remain protected from service suspension or termination unless it is proven they are in violation of the law. Even then, the Joint Petitioners stated they would, with the dispute resolved, prefer an opportunity to cure or correct the violation that does not impact their customers so adversely. The Joint Petitioners argued that BellSouth's language does not afford the Joint Petitioners that protection, but rather effectively entitles BellSouth to suspend or terminate all of the Joint Petitioners' services at its whim. The Joint Petitioners stated that they simply cannot live with the uncertainty and unpredictability in BellSouth's language. Moreover, the Joint Petitioners asserted that nothing in BellSouth's language assures the Joint Petitioners that a LOA will save them from suspension and termination.

The Joint Petitioners noted that, as support of its Objection, BellSouth asserted that the Joint Petitioners "retain the right to immediately terminate service provided to their North Carolina end users under similar circumstances." The Joint Petitioners maintained that this argument, for which BellSouth provides no citation to the NuVox and Xspedius "rights" it refers to, is in any event, fatally flawed. The Joint Petitioners opined that even if the Joint Petitioners retain similar rights as to an individual end user, the situation would not be analogous to the suspension and termination rights afforded BellSouth

under its proposed language. More specifically, the Joint Petitioners stated that BellSouth makes an apples-to-oranges comparison between a retail service offering and a wholesale service offering. In other words, the Joint Petitioners maintained that if the Joint Petitioners were to exercise that right, then only a single North Carolina customer would lose service; but if BellSouth were to exercise its right under its proposed language, then thousands of North Carolina customers would be deprived of service and for actions not any one of them had taken. In essence, the Joint Petitioners argued that BellSouth attempts to interrupt service to the Joint Petitioners' customers as a means of gaining an unfair competitive advantage.

The Joint Petitioners maintained that the Commission should affirm its decision for Matrix Item No. 86(B).

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that the Joint Petitioners filed comments to BellSouth's Objections as to the Panel's findings for Issue No. 15 (Matrix Item No. 86(B)) regarding disputes over unauthorized access to CSRs. BellSouth noted that, without citing any portion of BellSouth's proposed language, the Joint Petitioners continue to claim that BellSouth's proposal is "unacceptably vague and leaves Joint Petitioners and their customers dangerously exposed to potential coercion and manipulation." BellSouth argued that the Commission should disregard this argument. BellSouth stated that its proposed language clearly provides that disputes over unauthorized access to CSRs will be handled pursuant to the Dispute Resolution provisions in the General Terms and Conditions section of the Agreement. BellSouth noted that, under the clear wording of this provision, access to ordering systems will not be suspended nor will services be terminated while such a dispute is pending. Accordingly, BellSouth stated that its proposal gives the Joint Petitioners exactly what they want, insurance that "their service is protected while disputes over unproven BellSouth allegations of CSR abuse are resolved by a neutral decision maker such as the Commission."

BellSouth maintained that, in adopting BellSouth's proposed language, the Florida PSC recognized that the Joint Petitioners have an irrational fear of BellSouth's language. BellSouth noted that the Florida PSC stated "BellSouth witness Ferguson claims that its proposed modified language to the Interconnection Agreement should have resolved this issue and further does not understand why the proposed language does not calm the Joint Petitioners' fears. We agree." BellSouth asserted that the Commission should not be fooled by the Joint Petitioners' unsupported fears.

Again, BellSouth stated that under its proposal, suspension and termination rights are triggered only if a Party: (1) disregards its obligation to produce an appropriate LOA; and (2) thereafter fails to dispute (i.e. ignores) a notice that specifies the alleged

CSR-related noncompliance (*See* BellSouth Exhibit A, Attachment 6, §§ 2.5.5.2 and 2.5.5.3). For the foregoing reasons, BellSouth stated, the Commission should modify its *RAO* to adopt BellSouth's proposed language for Matrix Item No. 86(B).

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission notes that BellSouth asserted that the Joint Petitioners' proposed language is unacceptable for many reasons. First, BellSouth argued that the Joint Petitioners' language is unduly vague. The Commission notes that the Joint Petitioners also asserted that BellSouth's proposed language is unacceptably vague. The Commission does not agree with BellSouth that the Joint Petitioners' proposed language is unduly vague.

Second, BellSouth maintained that the Joint Petitioners' proposed language does not impose any time period in which a Party must cure any unauthorized access even though the Joint Petitioners concede that they can produce a LOA in as little as two business days. The Commission believes that this argument by BellSouth does have merit. The Commission believes that it is appropriate to impose time periods in the language. Therefore, the Commission concludes that it is appropriate to modify the Joint Petitioners' proposed language in this regard, as follows:

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

Section 2.5.5.3
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~~ **seven (7) business days** or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the

non-compliance **within seven (7) business days**, 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.

Third, and perhaps most importantly, BellSouth opined, the Joint Petitioners' proposal provides no remedy or recourse if the accused Party ignores its legal and contractual obligations and thus fails to respond to a request to provide an appropriate LOA. The Commission believes that, under the Joint Petitioners' proposed language, if the accused Party ignores the request to provide an appropriate LOA or fails to respond to a notice of noncompliance, the other Party should proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions of the Agreement. The Commission believes that invoking the dispute resolution provisions sufficiently qualifies as a remedy or recourse for the accusing Party and is a more reasonable course of action in such circumstances.

The Commission believes that BellSouth has provided no new or compelling arguments, with the exception of not imposing specific time periods, which warrant the Commission to alter its decision to adopt the Joint Petitioners' proposed language. The Commission does, however, believe it is appropriate to alter the Joint Petitioners' proposed language to include specific time periods for action by an accused Party.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Motion for Reconsideration on this issue, thereby affirming its decision to adopt the Joint Petitioners' proposed language concerning disputes over alleged unauthorized access to CSR information. However, the Commission does find it appropriate to alter the Joint Petitioners' proposed language to include specific time periods for action by an accused Party, as follows:

Section 2.5.5.2

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

Section 2.5.5.3

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~~ **seven (7) business days** or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance **within seven (7) business days**, 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.

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

INITIAL COMMISSION DECISION

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

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 16 stating that the Commission erred, as a matter of law, in arbitrating this issue as it involves a service that BellSouth is not obligated to provide under Section 251. Additionally, BellSouth maintained that the Commission erred, as a matter of law, in ruling that BellSouth must expedite service orders at TELRIC-compliant rates.

BellSouth stated that, as an initial matter, the Commission should refrain from arbitrating this issue. BellSouth noted that, as stated in its brief, this item is not appropriate for arbitration under Section 252 of TA96, because BellSouth has no Section 251 obligation to expedite service orders. BellSouth asserted that compulsory arbitration under Section 252 should be properly limited to those issues necessary to implement a Section 252 agreement. BellSouth argued that expedite charges are not necessary to implement the Agreement. As such, BellSouth commented that the Commission should reconsider its initial decision and decline to arbitrate Matrix Item No. 88.

BellSouth stated that, assuming *arguendo* that the Commission addresses the issue, the Commission should reconsider its *RAO* because it is incorrect as a matter of law. BellSouth noted that, in finding that BellSouth has an obligation to provide expedited

services at TELRIC, the Commission cited to Section 251(c)(3) of TA96 and FCC Rule 51.311(b). BellSouth asserted that Section 251(c) obligates BellSouth to provide "nondiscriminatory access" to UNEs. BellSouth noted that FCC Rule 51.311(b) requires such access to "be at least [equal] in quality to that which the incumbent LEC provides to itself." BellSouth argued that nothing in Section 251(c)(3) or in FCC Rule 51.311(b), however, requires or implies that an ILEC must provide services to a CLP that are superior in quality to those provided to a retail customer requesting similar services.

BellSouth maintained that its obligation under Section 251 is to provide service within standard provisioning intervals – intervals that have already been established by the Commission. Specifically, BellSouth noted, the Commission recognized the obligation to provide service in standard intervals in establishing a performance measurement plan (collectively, the Service Quality Measurement (SQM)/Self-Effectuating Enforcement Mechanism (SEEM) plan) in North Carolina. BellSouth stated that the SQM/SEEM plan is designed to ensure that BellSouth meets its Section 251 obligation to provide service to CLP customers on a nondiscriminatory basis by establishing certain time periods for the provision of service. Further, BellSouth maintained that the SQM/SEEM plan requires BellSouth to pay penalties if BellSouth fails to provision services within these established intervals. Significantly, BellSouth argued that the Joint Petitioners concede that the SQM/SEEM plan contains no "expedited" provisioning measures. BellSouth asserted that if service expedites were a Section 251 obligation, the Commission would have established an interval for them.

Rather, BellSouth maintained that the standard for service expedites is nondiscrimination. BellSouth asserted that it meets its nondiscrimination obligations by charging its retail and CLP customers the same service expedite rate - $200 per circuit per day - from its federal access tariff. BellSouth stated that by charging CLPs and its retail customers the same rate for this optional, voluntary service, BellSouth complies with all of its obligations regarding the provision of service expedites.

BellSouth argued that, tellingly, the Joint Petitioners cannot cite to any authority (state or federal) that specifically supports the proposition that an ILEC must expedite service orders at TELRIC. In contrast, BellSouth noted, a state commission recently addressed this issue by adopting BellSouth's position. Specifically, BellSouth stated, the Florida PSC refused to require BellSouth to provide expedites at TELRIC and held that BellSouth's tariffed rate should apply unless the parties negotiate different rates. In reaching this conclusion, BellSouth maintained, the Florida PSC cited to FCC Rule 51.311(b) and found that BellSouth meets its nondiscrimination obligation by charging identical service expedite rates to CLPs and its retail customers. Specifically, BellSouth maintained that the Florida PSC stated, as follows:

> Accordingly, where technical feasibility is not an issue, incumbents are required to provide access to UNEs *at parity* (as a minimum) to that provided to their retail customers. It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer requesting similar

services. So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites, and there is no conflict with Rule 51.311(b).

BellSouth argued that, at its core, the Commission's ruling gives the Joint Petitioners something more than standard provisioning intervals priced at TELRIC without any legal or policy justification for doing so. Accordingly, BellSouth asserted that the Commission should refrain from setting rates for voluntarily-offered services, and should adopt BellSouth's position on Matrix Item No. 88, as it is reasonable and nondiscriminatory.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners stated that BellSouth's objection to the Commission's ruling on service order expedites is comprised of two arguments, and neither argument is persuasive. The Joint Petitioners maintained that for the following reasons, the Commission should affirm its decision for this issue in its entirety.

The Joint Petitioners asserted that BellSouth's first argument that "the Commission should refrain from arbitrating this issue," for "this item is not appropriate for arbitration under Section 252 of the Act, because BellSouth has no Section 251 obligation to expedite service orders" is wrong in several ways. Most fundamentally, the Joint Petitioners argued that BellSouth errs in asserting that it has no Section 251 obligation to expedite orders for UNEs. The Joint Petitioners maintained that for the reasons set forth by the Commission in its initial decision and by the Joint Petitioners in their brief, BellSouth does indeed have a Section 251 obligation to provide access to UNEs on a nondiscriminatory basis at TELRIC rates. The Joint Petitioners opined that because BellSouth expedites the provision of analogous circuits for itself when providing services to its retail customers, BellSouth has a Section 251 obligation to expedite UNE orders upon request on a nondiscriminatory basis. The Joint Petitioners maintained that this functionality is part and parcel of UNE provisioning. The Joint Petitioners asserted that CLPs are not retail customers and they do not pay retail for such services; TA96 provides them with the ability to attain such services at TELRIC rates so as to provide them with a meaningful opportunity to compete.

The Joint Petitioners opined that BellSouth's argument also fails because it ignores the very fact that the parties voluntarily negotiated terms for this Section 252 interconnection agreement that provide for such expedites. The Joint Petitioners noted that the only issue not resolved through negotiation was the rate to be applied to such expedites. The Joint Petitioners stated that the Commission necessarily arbitrated that issue and the parties presented testimony and briefing on it. Indeed, the Joint Petitioners asserted that under the rationale of the *Coserve* case, which provides that state commissions in Section 252 arbitrations have the jurisdiction to arbitrate Section 251 obligations, as well as those issues voluntarily negotiated by the parties, there is no doubt that the Commission has jurisdiction to arbitrate this issue.

The Joint Petitioners maintained that BellSouth's erroneous assertion that the Commission's *RAO* on this issue is incorrect as a matter of law rests upon two sub-arguments, neither of which has merit. First, the Joint Petitioners noted that BellSouth claimed that because the Commission has set intervals for provisioning UNEs and those intervals do not include service expedites, there cannot be a Section 251 obligation to perform such expedites – otherwise, the Commission would have created an interval for service expedites. The Joint Petitioners maintained that this circular argument is flawed in several respects. The Joint Petitioners argued that BellSouth cannot deduce and attribute to the Commission a conclusion or rationale never supplied by the Commission in its performance measurements order. Obviously, the Joint Petitioners opined that the Commission does not agree with the rationale, as it has correctly declined to endorse BellSouth's unfounded assertion that its Section 251 obligations are limited to providing UNEs in certain intervals. In addition, the Joint Petitioners stated that service expedite requests do not lend themselves to the creation of standard intervals as they are themselves a request to obtain a UNE outside a standardized interval. Thus, the Joint Petitioners argued that BellSouth's assertion that there can be no Section 251 obligation because no interval has been set by the Commission is nonsensical.

Second, the Joint Petitioners stated that BellSouth suggested that the Commission's decision here somehow results in the provision of services to the Joint Petitioners that are superior in quality to those provided to BellSouth retail customers. The Joint Petitioners argued that in no way does the Commission's decision provide the Joint Petitioners with services that are superior in quality. Instead, the Joint Petitioners argued that they are simply assured that they get the same access BellSouth gets at the TELRIC rates they are entitled to under TA96. The Joint Petitioners asserted that the Commission's enforcement of TA96's nondiscriminatory access requirement in no way creates a superior service obligation; the Joint Petitioners get the same loops and the same opportunity to expedite as BellSouth gets in providing services to its retail unit and in turn to its retail customers.

The Joint Petitioners asserted that the Commission should affirm its decision for Matrix Item No. 88.

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that the Commission Panel erred, as a matter of law, in arbitrating this issue as it involves a service that BellSouth is not obligated to provide under Section 251. Additionally, BellSouth maintained that the Commission erred, as a matter of law, in ruling that BellSouth must expedite service orders at TELRIC.

BellSouth asserted that the Joint Petitioners take issue with BellSouth's Objections to the Commission's finding on Issue No. 16 (Matrix Item No. 88), wherein the Commission incorrectly concluded that BellSouth has an obligation to expedite service orders at TELRIC. BellSouth argued that, citing no authority other than the Commission's *RAO*, the Joint Petitioners proclaim that "BellSouth does indeed have a Section 251 obligation to provide access to UNEs [including expediting UNE orders] on a nondiscriminatory basis at TELRIC rates." BellSouth commented that, as an initial matter, the Kentucky and Florida PSCs have rejected the Joint Petitioners' arguments regarding this issue, finding that BellSouth's pricing of expedites is nondiscriminatory and that service expedites are not a Section 251 obligation. Accordingly, BellSouth maintained, there are two decisions directly on point that refute the Joint Petitioners' arguments and suggest that the Commission should modify its *RAO* and find in favor of BellSouth.

Next, BellSouth stated that the Joint Petitioners contended that because they "are not retail customers and do not pay retail rates for such services [expedites]; the Act provides them with the ability to attains (sic) such services [expedites] at TELRIC rates so as to provide them with a meaningful opportunity to compete." BellSouth argued that the Joint Petitioners' contentions are factually and legally incorrect. First, BellSouth opined that the Joint Petitioners currently do pay the same tariffed rates for service expedite requests that BellSouth's retail customers pay. Second, BellSouth maintained that the assertion that CLP status somehow automatically entitles the Joint Petitioners to TELRIC pricing for service expedites is simply wrong. Fundamentally, BellSouth argued that, in the absence of a finding of impairment (and there is none in this case), TELRIC pricing is inappropriate and impermissible. BellSouth noted that *USTA II*, 359 F.3d at 589 states, "we find nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment [under Section 251]". Accordingly, BellSouth asserted that the Commission should reject any argument that TELRIC pricing is applicable in any instance other than Section 251(c). BellSouth contended that, at its core, the Commission's ruling gives the Joint Petitioners something more than standard provisioning intervals priced at TELRIC without any legal or policy justification for doing so. Accordingly, BellSouth asserted, the Commission should refrain from setting rates for voluntarily-offered services and should adopt BellSouth's position on Matrix Item No. 88, as it is reasonable and nondiscriminatory.

JOINT PETITIONERS: The Joint Petitioners did not file reply comments on this issue.

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission does not believe that BellSouth provided any new or compelling arguments which warrant a change in the Commission's decision on this issue. The Commission continues to agree with the Public Staff that, if technically feasible, an ILEC should provide a CLP with access to UNEs at least equal in quality to that which the

ILEC provides to itself. The Commission also believes that expediting service to customers is simply one method by which BellSouth can provide access to UNEs and that, since BellSouth offers service expedites to its retail customers, it must provide service expedites at TELRIC rates pursuant to Section 251 and Rule 51.311(b). As noted by the Public Staff in its proposed order, the $200 per circuit, per day rate from BellSouth's federal access tariff that BellSouth proposes as its rate to the Joint Petitioners is the rate BellSouth charges its large retail customers. However, there is no cost support for the rate. Based upon the foregoing, the Commission finds it appropriate to uphold the *RAO* in this regard.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Objection to Finding of Fact No. 16, thereby affirming its initial decision that BellSouth must provide service expedites at TELRIC-compliant rates. In addition, BellSouth and the Joint Petitioners should negotiate, in good faith, an appropriate rate for service expedites. If the parties are unable to negotiate a rate, BellSouth should submit a TELRIC cost study for the Commission's review and approval.

FINDING OF FACT NO. 17 (ISSUE NO. 17 – MATRIX ITEM NO. 97): When should payment of charges for service be due?

INITIAL COMMISSION DECISION

The Commission concluded that the payment due date should be 26 days from the date of receipt of the bill. Accordingly, the Commission required the Joint Petitioners and BellSouth to properly amend the proposed language in the Agreement in Attachment 7, Section 1.4, in accordance with the decision.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 17 stating that the Commission should clarify that its Payment Due Date ruling applies only to bills that are received electronically.

BellSouth stated that it seeks clarification regarding the Commission's Finding of Fact No. 17, as well as its conclusion with respect to Matrix Item No. 97. Specifically, BellSouth noted that the Commission concluded that "the payment due date should be 26 days from the date of receipt of the bill." BellSouth stated that it does not object to the Commission's ruling to the extent that it sets a payment due date of 26 days from receipt of the bill, for electronic bills only. BellSouth maintained that this clarification should not concern the Joint Petitioners because they receive most of their bills electronically. Further, BellSouth commented that this clarification is necessary because BellSouth does not know when bills that are sent via U.S. mail are received by the Joint Petitioners.

BellSouth noted that the Agreement that will ultimately be approved by the Commission will be available for adoption by other CLPs. BellSouth stated that, unlike the Joint Petitioners, such CLPs may not receive the majority of their bills in an electronic format (it is a CLP's choice as to whether it wants to receive bills electronically). BellSouth maintained that, for bills that are mailed, in addition to not knowing when such bills are received by a CLP, BellSouth has a concern that a CLP may abuse the "date received" standard in order to avoid the timely payment of bills. Accordingly, BellSouth respectfully requested the Commission to clarify that for electronic bills only, the payment due date should be 26 days from the receipt of such bills; in all other instances, the payment due date should be the next bill issuance date. BellSouth asserted that such clarification should have a minimal impact on the Joint Petitioners, and it will have no impact whatsoever if the Joint Petitioners elect to receive all bills electronically. Further, BellSouth argued, such clarification will protect BellSouth from abuse by CLPs that do not receive bills in an electronic format.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not file initial comments on this issue.

JOINT PETITIONERS: The Joint Petitioners noted that BellSouth's Objection appears to be in the nature of a request for clarification, and yet it would vitiate a good portion of the Commission's finding. The Joint Petitioners maintained that BellSouth wants the Commission to clarify its decision to the extent that the 26-days from receipt payment period will apply only to bills received electronically. To support its request, the Joint Petitioners noted that BellSouth claimed: (1) that the clarification should not concern the Joint Petitioners because they receive most of their bills electronically; (2) that the clarification is necessary because BellSouth does not know when bills sent via U.S. mail are received; and (3) that other CLPs can adopt this Agreement and take advantage of the "date received" standard. The Joint Petitioners argued that these reasons for clarification are unconvincing and should not at all be considered as grounds for modifying the Commission's decision.

The Joint Petitioners asserted that BellSouth's claim that the Joint Petitioners should not be concerned with such a clarification is unduly presumptuous and should not be considered. The Joint Petitioners argued that they are indeed concerned because they do not receive all bills electronically. The Joint Petitioners argued that they need sufficient time to review bills, regardless of the format in which they are received. In addition, the Joint Petitioners noted, BellSouth's claim that it cannot determine the receipt date for bills sent by U.S. mail already has been disproven. As the Joint Petitioners have maintained, and as the Commission recognized in its recommendation, courier services – such as UPS and FedEx – and the United States Postal Service have long provided return receipt or delivery confirmation services to their customers. The Joint Petitioners also stated that, as for other CLPs taking advantage of the "date received" standard, this is an argument based upon nothing but unsupported speculation that other CLPs could, or somehow would, manipulate the date received standard, which is easily made transparent.

The Joint Petitioners argued that BellSouth presented no compelling reason why the Joint Petitioners' electronic and mailed bills should be treated differently. Accordingly, the Joint Petitioners asserted that the Commission should reject BellSouth's request and keep with its initial finding that the payment due date will be 26 days from bill receipt, regardless of the format in which the bill is delivered.

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth asserted that the Commission should clarify that its Payment Due Date ruling applies only to bills that are received electronically.

BellSouth maintained that it is disappointing, but not surprising, that the Joint Petitioners object to BellSouth's request for clarification regarding the Panel's findings as to Matrix Item No. 97 and the payment due date. BellSouth stated that, despite the fact that the Joint Petitioners receive most of their bills electronically and can choose to receive all bills electronically, the Joint Petitioners oppose BellSouth's request for the Commission to clarify that its payment due date ruling applies to electronic bills only. BellSouth argued that this clarification is necessary because BellSouth does not know when bills that are sent via U.S. mail are received by the Joint Petitioners. BellSouth noted that the Joint Petitioners appear to assert that BellSouth can (and should) incur the additional cost and time necessary to use delivery confirmation services to track receipt of mailed bills. BellSouth noted that the Joint Petitioners have not offered to pay for such additional costs, and imposing such additional costs is inappropriate given the fact that this Commission and the FCC have already found that BellSouth's billing practices are nondiscriminatory and provide CLPs with a meaningful opportunity to compete in the local market.

Accordingly, BellSouth requested the Commission to clarify that, for electronic bills only, the payment due date should be 26 days from the receipt of such bills; in all instances, the payment due date should be by the next bill issuance date. In the alternative, BellSouth maintained that the Commission should clarify that the Joint Petitioners are required to pay BellSouth for all costs associated with confirming delivery of mailed bills.

JOINT PETITIONERS: The Joint Petitioners did not address this issue in their reply comments.

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission notes that, in its *RAO*, it found that the Commission's decision in the ITC^DeltaCom Communications, Inc. (ITC^DeltaCom) / BellSouth arbitration proceeding was reasonable and applicable to this proceeding as well. The Commission noted that BellSouth did not provide any compelling arguments why a 26-day billing period, as was adopted in the ITC^DeltaCom/BellSouth docket, was not appropriate in this proceeding. The Commission does not believe that BellSouth has provided any new or compelling reasons for the Commission to alter its initial decision on this issue. The Commission's decision in the ITC^DeltaCom/BellSouth arbitration docket did not distinguish between electronic or mailed bills, and, therefore, it is not appropriate for the decision in this case to make such a distinction. Therefore, the Commission finds it appropriate to affirm its initial decision on this issue.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Objection to Finding of Fact No. 17, thereby affirming its initial decision that the payment due date should be 26 days from the date of receipt of the bill.

FINDING OF FACT NO. 18 (ISSUE NO. 18 – MATRIX ITEM NO. 100):

Joint Petitioners' Issue Statement: Should a CLP 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?

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

INITIAL COMMISSION DECISION

The Commission concluded that it is appropriate to adopt the Joint Petitioners' proposed language, as follows, concerning suspension or termination notices for Section 1.7.2 of Attachment 7 of the Agreement:

> **Section 1.7.2 – Joint Petitioners**
> 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 (15^{th}) 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 (30^{th}) calendar day following the date of the Initial Notice.

MOTIONS FOR RECONSIDERATION

BELLSOUTH: BellSouth objected to Finding of Fact No. 18 stating that the Commission erred in adopting the Joint Petitioners' proposed language. BellSouth argued that the Commission's ruling effectively gives the Joint Petitioners a rolling 15-day extension to pay undisputed billings.

BellSouth asserted that in adopting the Joint Petitioners' proposed language (and thus obligating BellSouth to provide service and access to ordering systems despite not being paid undisputed, past due, and previously billed charges), the Commission concluded that "the potential sanctions for nonpayment are too sever[e] to let the risk of calculation errors potentially occur." However, BellSouth stated that it has committed to advise the Joint Petitioners of the undisputed, past due, and previously billed amounts that must be paid to avoid suspension or termination of service.

Further, BellSouth maintained that the Joint Petitioners know when they receive bills, they know when the bills are due, and they concede that the amount of such bills can be predicted with a reasonable degree of accuracy. Moreover, BellSouth asserted that the Joint Petitioners presented no evidence that so-called "calculation errors" have ever resulted in suspension or termination action and did not produce one example of any suspension/termination notice that required the undertaking of any calculation on behalf of the Joint Petitioners. Moreover, BellSouth stated that Joint Petitioners witness Russell testified that NuVox has paid all BellSouth bills in a timely manner for seven years. BellSouth asserted that, to state the obvious, a CLP that pays its bills in a timely manner does not interact with BellSouth's collections organization. Accordingly, BellSouth argued that the Commission should disregard (or at least discount) the Joint Petitioners' hypothetical concerns about BellSouth's collections practices.

Accordingly, BellSouth maintained that there is no guess work involved in BellSouth's collections process and, thus, no potential for calculation errors. BellSouth argued that holding otherwise allows the Joint Petitioners to have a revolving extension of payment of undisputed, past due, previously billed amounts – a privilege not afforded to others similarly situated in the industry.

Finally, BellSouth asserted that termination of service for nonpayment is a universally accepted and straightforward principle. BellSouth stated that the financial risk BellSouth faces when CLPs do not pay for services rendered is no "game", but a stark reality of the telecommunications world. Accordingly, BellSouth maintained that the Commission should: (1) disregard the Joint Petitioners' unsupported assertion about collections "shell games"; and (2) allow BellSouth to protect its financial interest by giving BellSouth the right to discontinue providing service to any Joint Petitioner that fails to timely pay

for services rendered. BellSouth asserted that the Commission should reconsider its initial decision and adopt BellSouth's proposal for Matrix Item No. 100.

INITIAL COMMENTS

BELLSOUTH: BellSouth did not address this issue in its initial comments.

JOINT PETITIONERS: The Joint Petitioners noted that BellSouth argued that the Commission's decision "allows the Joint Petitioners to have a revolving extension for payment of undisputed, past due, previously billed amounts – a privilege not afforded to others similarly situated in the industry." The Joint Petitioners argued that BellSouth's conclusion is nonsensical and unpersuasive. Accordingly, the Joint Petitioners recommended that the Commission should disregard BellSouth's argument and affirm its initial decision in the *RAO*.

The Joint Petitioners maintained that BellSouth provides no support for its "rolling 15-day extension" argument, as there is none. The Joint Petitioners asserted that the Commission's decision on this issue has nothing to do with when payment is due or at which point late payment charges will continue to accrue. The Joint Petitioners argued that by adopting the Joint Petitioners' position and language on this issue, the Commission's *RAO* is reasonably attempting to eliminate the potential for calculation errors that could result in suspension or termination – events that could have a hugely detrimental impact on the Joint Petitioners and their North Carolina customers. The Joint Petitioners stated that the Commission's decision also ensures that the Joint Petitioners will have a full 15 and 30 days within which to verify the amount demanded and make payment to BellSouth before the threat of suspension or termination arises and without the undue complexity and unfairness of aggregating and collapsing these 15 to 30-day notice periods for subsequent accounts that may become past due (for which a separate billing notice will be sent and the same straightforward process would apply).

The Joint Petitioners noted that in support of its objection, but not clearly related to its argument, BellSouth also pointed to its post-hearing offer to advise the Joint Petitioners of additional amounts due to avoid suspension and termination that are not included in the figure it provides with the notice. For the reasons explained in the Joint Petitioners' brief, the Joint Petitioners asserted that this commitment to provide additional unspecified information upon request and within an unspecified timeframe does not satisfactorily eliminate the potential for erroneous or even wrongful suspension or termination. To the contrary, the Joint Petitioners argued that it seems to add more uncertainty to the process, as the Joint Petitioners and this Commission have no grounds upon which they could conclude that such information will be timely, accurate, or reliable.

Accordingly, the Joint Petitioners recommended that the Commission affirm its finding on this item in its *RAO*.

PUBLIC STAFF: The Public Staff stated that it does not believe that BellSouth's objections warrant a change in the Commission's conclusions on this issue rendered in the *RAO*.

REPLY COMMENTS

BELLSOUTH: BellSouth stated that the Commission Panel erred in adopting the Joint Petitioners' proposed language because there is no "guess work" involved with the Joint Petitioners knowing that they should timely pay undisputed amounts. BellSouth argued that the Commission's ruling effectively gives the Joint Petitioners a rolling 15-day extension to pay undisputed billings.

BellSouth noted that, in opposing BellSouth's Objections to the Commission's findings regarding Matrix Item No. 100, the Joint Petitioners asserted that the "Commission's decision on this issue has nothing to do [with] when payment is due" and that by adopting the Joint Petitioners' position the Commission "reasonably attempt[ed] to eliminate the potential for calculation errors that could result in suspension or termination [of service]." First, BellSouth stated that it agrees that this issue has nothing to do with the Joint Petitioners' obligation to timely pay previously billed amounts. Second, BellSouth noted, regarding supposed calculation errors, the Joint Petitioners provide no evidence in support of, or attempt to articulate how, such errors could occur given the fact that BellSouth has committed to advise the Joint Petitioners of the undisputed, past due, and previously billed amounts that must be paid to avoid suspension or termination of service. Indeed, BellSouth noted that the Florida PSC determined that BellSouth's language and practice takes any guesswork out of the collection process. BellSouth asserted that the Commission should reach the same conclusion here.

Accordingly, BellSouth argued that the Commission should reverse its prior ruling and find that there is no guesswork involved in BellSouth's collections process and find in favor of BellSouth. BellSouth asserted that holding otherwise allows the Joint Petitioners to have a revolving extension for payment of undisputed, past due, previously billed amounts – a privilege *not* afforded to others similarly situated in the industry. BellSouth noted that the Florida PSC found, "We do not believe the Joint Petitioners should view the due date of a treatment notice as an automatic extension of the payment due date of the original bill."

JOINT PETITIONERS: The Joint Petitioners did not address this issue in their reply comments.

PUBLIC STAFF: The Public Staff reiterated its belief that BellSouth's objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

The Commission notes that BellSouth has provided no new or compelling arguments concerning this issue. The Commission further notes that BellSouth's commitment to advise the Joint Petitioners of undisputed, past due, and previously billed amounts that must be paid to avoid suspension or termination of service relies exclusively on a request made by a Joint Petitioner (i.e., BellSouth will provide this information only upon request by the competitor).

The substantive difference between BellSouth's proposed language and the Joint Petitioners' proposed language concerns amounts not in dispute that become past due subsequent to the issuance of the written notice. Under BellSouth's proposed language, if a Joint Petitioner pays all past due, undisputed amounts within 15 days of a notice, but other amounts become past due subsequent to the issuance of the notice, then the Joint Petitioner will be subject to suspension or termination by BellSouth. The Commission continues to believe that the potential sanctions for nonpayment are too severe to let the risk of calculation errors potentially occur. Under the Joint Petitioners' proposed language, BellSouth must explicitly show the amount due, in dollars and cents, to avoid suspension or termination; the Commission continues to believe that this language is appropriate and reasonable.

Therefore, the Commission concludes that it is appropriate to deny BellSouth's Motion for Reconsideration concerning Finding of Fact No. 18, thereby affirming its decision to adopt the Joint Petitioners' proposed language for Section 1.7.2 of Attachment 7 of the Agreement.

CONCLUSIONS

The Commission finds it appropriate to deny BellSouth's Motion for Reconsideration concerning Finding of Fact No. 18, thereby affirming its decision to adopt the Joint Petitioners' proposed language for Section 1.7.2 of Attachment 7 of the Agreement.

FINDING OF FACT NO. 19 (ISSUE NO. 19 – MATRIX ITEM NO. 101): How many months of billing should be used to determine the maximum amount of the deposit?

INITIAL COMMISSION DECISION

The Commission concluded that the deposit requirements specified in Commission Rule R12-4 are applicable and the language proposed by BellSouth should be incorporated into the Agreement.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 19 arguing that the Commission recommended that the Agreement entitled

BellSouth to a full two-months' deposit on the ground that Commission Rule R12-4, which governs retail end-users' deposit obligations, requires this deposit standard. The Joint Petitioners have requested that the Agreement provide for either (1) the deposit requirement to which BellSouth agreed in the ITC^DeltaCom Agreement of one-month's deposit for services paid in advance and two-months' deposit for services paid in arrears, or (2) their initially proposed deposit of one-and-one-half month's deposit for the Joint Petitioners and two-months for new CLPs. The Joint Petitioners argued that this two-month deposit obligation, given the ITC^DeltaCom deposit language, contravenes the Act's nondiscrimination requirement, because there is no basis for distinguishing the Joint Petitioners from ITC^DeltaCom such that a larger maximum deposit provision should be imposed upon them. The Joint Petitioners stated that, in addition, it is based upon a rule that does not and should not apply to a Section 252 wholesale (as opposed to non-Section 252 retail) contract arrangement.

The Joint Petitioners claimed that BellSouth admittedly has agreed with ITC^DeltaCom to a less onerous maximum deposit provision than what it demands from the Joint Petitioners. The Joint Petitioners argued that this inequity is a clear case of discrimination, violating the principle of Section 251 that BellSouth must treat all CLPs in the same manner and must treat them in the same manner it treats itself. The Joint Petitioners asserted that given the Commission's commitment to ensuring parity, it should not permit BellSouth to demand a larger maximum deposit provision than that which it voluntarily agreed to with ITC^DeltaCom.

In addition, the Joint Petitioners stated that the Commission's reliance on Commission Rule R12-4, which applies to retail end-users, to set deposit language for a wholesale interconnection agreement is inappropriate. The Joint Petitioners argued that comparing a wholesale agreement to a retail agreement is misleading and ineffective. The Joint Petitioners asserted that the type of service, and more importantly, the amounts of money involved, in this Agreement are more complex and far more substantial than what is involved in simple retail service to end-user customers.

INITIAL COMMENTS

BELLSOUTH: BellSouth stated that the Joint Petitioners make the unsupported argument that the Commission's reliance on Rule R12-4 is misplaced, as it allegedly applies to retail end-users only. BellSouth asserted that the Commission's deposit rules make no distinction between wholesale and retail customers. In fact, the words "wholesale" and "retail" do not appear in the Commission's deposit rules. To the contrary, Commission Rule R12-1 provides that "[a]ny utility requiring a deposit shall apply a deposit policy in accord with these rules in an equitable and nondiscriminatory manner to all applicants for service and to all customers...." BellSouth stated that setting aside whether or not the Commission's deposit rules technically apply to the Joint Petitioners, BellSouth's maximum deposit-cap proposal is nondiscriminatory (as it applies to both retail and CLP customers) and it mirrors the Commission's maximum deposit rule (Rule R12-4(a)). Thus, BellSouth opined that, a maximum deposit amount equal to two-months' billing is in accord with the stated public policy of the Commission.

The Joint Petitioners have offered no credible reason why they should be afforded special treatment that is inconsistent with such public policy.

BellSouth stated that the Joint Petitioners make the unsupported and inaccurate claim that there is no basis for distinguishing the Joint Petitioners from ITC^DeltaCom for maximum deposit purposes. As an initial matter, the Commission's deposit rules, as well as the agreed-upon deposit criteria in the Agreement, recognize that the amount of deposit (if any) that may be required from a customer turns on the credit risk presented by such customer.[47] There is nothing in the record that establishes that ITC^DeltaCom and the Joint Petitioners pose the same credit risk to BellSouth. Thus, BellSouth asserted that, there is nothing to support the assertion that the Joint Petitioners should be treated the same as ITC^DeltaCom for deposit purposes.

In addition and more fundamental, BellSouth claimed that, the Joint Petitioners are not requesting the same treatment as ITC^DeltaCom. Rather, the Joint Petitioners want the ITC^DeltaCom deposit-cap language without the deposit criterion that accompanies the cap. Specifically, the deposit criterion contained in the BellSouth/ITC^DeltaCom interconnection agreement is much more stringent than the deposit criterion contained in the Agreement which is the subject of this arbitration. BellSouth pointed out that, not surprisingly, it offered the Joint Petitioners the same deposit language in its entirety that it agreed to with ITC^DeltaCom, but the Joint Petitioners rejected it. BellSouth argued that, because the Joint Petitioners are not seeking the complete ITC^DeltaCom deposit language, their claim of discrimination lacks any merit. Simply put, there is nothing discriminatory in the fact that different deposit criterion results in a different deposit-cap. To the contrary, BellSouth argued that, allowing the Joint Petitioners to "pick and choose" the ITC^DeltaCom maximum security deposit provision, while permitting them to throw out the associated ITC^DeltaCom deposit criterion, as well as rejecting the ITC^DeltaCom Agreement in its entirety, is inappropriate and impermissible, as it resurrects a "pick and choose" regime that the FCC abandoned in July 2004.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the conclusions on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners stated that BellSouth, in an attempt to defend its discriminatory refusal to agree to the same maximum deposit provision that it agreed to with ITC^DeltaCom, mistakenly claims that the Joint Petitioners are trying to "pick and choose" deposit language from the ITC^DeltaCom Agreement. Contrary to BellSouth's misleading assertion, the Joint Petitioners are not trying to engage in "pick and choose" in contravention to the FCC's new rule implementing how Section 252(i) is

[47] Commission Rule R12-1; *see* Attachment 7, Section 1.8.5.

to be implemented. The Joint Petitioners stated, indeed, they have negotiated an entire Agreement and are now arbitrating it before the Commission. By doing so, the Joint Petitioners stated that, they obviously have chosen not to invoke their Section 252(i) rights in this context.

The Joint Petitioners claimed that, this diversionary tactic was employed by BellSouth because BellSouth is unable to supply a sound basis for defending its unlawfully discriminatory demand to impose a more onerous maximum deposit provision on the Joint Petitioners than it has agreed to impose on other CLPs. The Joint Petitioners stated that BellSouth, in an effort to defend its discriminatory conduct, claims that there is nothing in the record that establishes that ITC^DeltaCom and the Joint Petitioners pose the same credit risk to BellSouth. The Joint Petitioners maintained that there also is nothing to the contrary on the record. The Joint Petitioners argued that credit risk has no direct correlation to the establishment of a maximum deposit provision, but rather, is a factor in determining how much a carrier must provide up to the deposit maximum.

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO*, the Commission found that the deposit requirements specified in Commission Rule R12-4 are applicable for these circumstances and the language proposed by BellSouth should be incorporated into the Agreement. The Joint Petitioners have not offered any new or persuasive arguments for the Commission to reconsider its decision. The Commission, therefore, does not believe that its decision on this finding of fact should be changed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 19.

FINDING OF FACT NO. 20 (ISSUE NO. 20 – MATRIX ITEM NO. 102): Should the amount of the deposit BellSouth requires from a CLP be reduced by past due amounts owed by BellSouth to the CLP?

INITIAL COMMISSION DECISION

The Commission concluded that the Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 20 arguing that the Commission's reliance on Rule R12-4 is inapposite and unhelpful in the context of this wholesale interconnection agreement. The Joint Petitioners stated that the Commission reasons that because Commission Rule R12-4 does not have a provision by which a retail end-user may offset against a BellSouth deposit request, then Petitioners are similarly not entitled to such an offset. Yet, the lack of any offset provision in Commission Rule R12-4, rather than militating against the Joint Petitioners' proposal, only underscores the fact that the rule cannot be applied in the context of a Section 252 agreement. The Joint Petitioners argued that consumers do not need offset provisions; it is difficult to conceive of a situation in which BellSouth would owe a consumer fees for services rendered. Accordingly, the Joint Petitioners asserted that the Commission's application and reliance on Commission Rule R12-4 is improper in this context.

The Joint Petitioners commented that, by contrast, they are quite often owed considerable sums by BellSouth, often in the tens of millions of dollars. The Joint Petitioners argued that there is no legitimate reason that any CLP should pay a deposit when BellSouth is in essence holding that CLP's money already. The Joint Petitioners asserted that it is for this reason that two other state commissions, Kansas and Oklahoma, have held that deposit offsets are appropriate. The Joint Petitioners noted that these commissions found that requiring an offset is simply the fair and appropriate resolution to the ILEC's combined poor-payment history and large-deposit requests. The Joint Petitioners claimed that the rationale of these decisions applies to this case as well, as BellSouth has demonstrated a poor-payment history and a penchant for deposits. And, all BellSouth need do to avoid an offset is to comply with the same good payment history standard that applies to the Joint Petitioners.

The Joint Petitioners argued that because deposits have the potential to tie up so much of the Joint Petitioners' capital, they could hinder the Joint Petitioners' ability to deploy new products and services for North Carolina customers. This result is not ameliorated by the other options to address late payments that the Commission proposes—e.g. the assessment of late charges, the suspension of service, or the disconnection after notice (the latter two would threaten needlessly the small businesses that rely on the Joint Petitioners' services). The Joint Petitioners argued that late fees do not counterbalance the harm of carrying millions of dollars in uncollectibles while simultaneously devoting millions of dollars in deposits. The Joint Petitioners maintained that an offset is the only method for correcting this clear inequity to a meaningful degree.

INITIAL COMMENTS

BELLSOUTH: BellSouth stated that the Commission correctly concluded that Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by BellSouth. The Joint Petitioners objected to the Commission's decision by claiming that the Commission's deposit rules should have been disregarded when determining

this issue. Again, BellSouth argued that, the Commission's policy, as set forth in Commission Rule R12-1, plainly provides that "any utility requiring a deposit from its customers shall fairly and indiscriminately administer a reasonable policy... in accord with these rules, for the requirement of a deposit...." BellSouth asserted that, the Commission reasonably concluded that, since its rules do not provide for such an offset, it should not create one for the Joint Petitioners. BellSouth stated that, similar to Item No. 101 (maximum deposit amount), the Joint Petitioners have offered no credible reason why they should be afforded special treatment that is inconsistent with such public policy.

Moreover, BellSouth noted that the Commission's conclusion is the same conclusion reached by the Kentucky and Florida PSC. BellSouth commented that the rationale stated by the Florida PSC is particularly insightful:

> [P]erhaps most important, we find that requiring a deposit from the Joint Petitioners and the dispute of charges or late payment made by BellSouth are separate issues. A deposit required under the interconnection agreement is intended to protect the ILEC from the financial risk of non-payment for services provided to the CLEC. If BellSouth has a billing dispute or is late paying the Joint Petitioners, it should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount of services provided to the Joint Petitioners.[48]

Finally, BellSouth argued that, the Joint Petitioners claim that BellSouth has a penchant for deposits. However, the record demonstrates that BellSouth has actually lowered NuVox's deposit and that Xspedius' deposit is substantially less than two-months' billing. In summary, BellSouth maintained that neither the facts nor the Commission's Rules support a reversal of the Commission's ruling that a deposit offset provision is inappropriate.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the conclusions on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners asserted that BellSouth offers no new arguments in its comments on this issue and does not offer anything to refute the Joint Petitioners' argument that the Commission's retail rules should not apply to this issue. Moreover, the Joint Petitioners stated, as demonstrated in the record, due to the

[48] FPSC Order No. PSC-05-0975-FOF-TP at 71.

less-than perfect payment history of BellSouth, there is a real need for the Joint Petitioners to protect themselves from past-due amounts. BellSouth refers to the Florida and Kentucky PSC decisions on this issue to support its comments. However, the Kentucky PSC decision does little to support BellSouth. The Joint Petitioners stated that, the Kentucky PSC did not adopt the Joint Petitioners' proposed language, noting BellSouth has agreed that in the event a deposit is requested of the CLEC, the deposit will be reduced by an amount equal to undisputed past due amounts, if any, that BellSouth owes the CLEC. The Joint Petitioners have sought reconsideration and clarification on this issue. With regard to the Florida PSC decision, the Joint Petitioners asserted that the Florida PSC was incorrect in holding that BellSouth's late payment should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount or services provided to the Joint Petitioners. The Joint Petitioners argued that this rationale is misguided because the amount of services BellSouth provides to the Joint Petitioners is not at issue; rather it is the amount of money that the Joint Petitioners are required to freeze in deposits while simultaneously being deprived of money due from BellSouth. The Joint Petitioners argued that it is patently unfair to require the Joint Petitioners to post deposits without tying such an obligation to BellSouth's establishment of a good payment record.

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO*, the Commission found that the Joint Petitioners should not be allowed to offset security deposits by amounts owed to them by another carrier, but may exercise other options to address late payments, such as the assessment of interest or late payment charges, suspension of service, or disconnection after notice. The Joint Petitioners have not offered any new or compelling arguments for the Commission to reconsider its decision. The Commission, therefore, does not believe that its decision on this finding of fact should be changed.

CONCLUSIONS

The Commission finds it appropriate not to reconsider Finding of Fact No. 20.

FINDING OF FACT NO. 21 (ISSUE NO. 21 – MATRIX ITEM NO. 103): Should BellSouth be entitled to terminate service to a CLP pursuant to the process for termination due to non-payment if the CLP refuses to remit any deposit required by BellSouth within 30 calendar days?

INITIAL COMMISSION DECISION

The Commission concluded that the language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 is appropriate.

MOTIONS FOR RECONSIDERATION

JOINT PETITIONERS: The Joint Petitioners sought reconsideration of Finding of Fact No. 21 arguing that the Commission recommended the rejection of the Joint Petitioners' language that would protect them from complete service shut-down if they fail to comply with BellSouth's deposit demands within 30 days. The Joint Petitioners stated that the Commission reasoned that sufficient protections are in place—namely the billing dispute process—that would ensure that the Joint Petitioners are not abused through this provision. The Joint Petitioners argued that these protections are not in fact sufficient to protect either the Joint Petitioners or their North Carolina customers.

The Joint Petitioners commented that BellSouth should not be entitled to terminate service to a Joint Petitioner for failure to pay a deposit within 30 days unless (1) the Petitioner agreed to submit the requested amount, or (2) the Commission ordered the Petitioner to submit the requested amount. Suspension or termination of service is too grave a remedy for what amounts to a dispute over, or failure to agree on, the precise amount requested. And despite the fact that the parties agree on the general criteria for triggering deposits, the fact remains that legitimate disputes can often arise over the precise dollar amount that is reasonable based on the circumstances. The Joint Petitioners argued that they should not be forced, on pain of summary termination, to remit a deposit that has not been agreed to and may reasonably be determined to be excessive and unnecessary.

The Joint Petitioners stated that underlying the Commission's decision appears to be the idea that Joint Petitioners' language would require that BellSouth seek advance approval from both a CLP and the Commission every time it requested a deposit from a CLP. The Joint Petitioners argued that conclusion somewhat overstates the issue, as this scenario is not what the Joint Petitioners hope to accomplish with their proposed language. The Joint Petitioners argued that, simply put, they do not want BellSouth to have an unqualified right to terminate their services based on an unsatisfied deposit demand, which is markedly different than non-payment for services rendered. The Joint Petitioners conceded that, indeed, the Joint Petitioners and BellSouth always have been able to resolve deposit requests amicably through negotiation without Commission involvement and without the balance shifting threat of service business destroying and customer impacting termination. The Joint Petitioners stated that the Commission ought not to shift this balance now.

INITIAL COMMENTS

BELLSOUTH: BellSouth commented that the Commission correctly concluded that BellSouth should be able to terminate service because of non-payment of a deposit and that BellSouth's proposed language should be included in the parties' interconnection agreement. BellSouth stated that, in adopting BellSouth's language, the Panel found that sufficient protections were in place in the event there was a disagreement regarding a deposit demand. BellSouth commented that, indeed, the Parties have agreed to a specific deposit dispute provision. BellSouth noted that the Joint Petitioners curiously

failed to mention that the Parties have an agreed upon deposit dispute provision. Instead, BellSouth argued that the Joint Petitioners continue to confuse this straight-forward issue by asserting that legitimate disputes can arise regarding deposit demands. BellSouth stated that the Commission should disregard the Joint Petitioners' continued attempt to create confusion, as aptly observed by the Florida PSC:

> We are concerned that the Joint Petitioners either do not understand the issue or have tried to expand the issue to include dispute resolution provisions.[49]

Further, BellSouth noted that the parties have agreed upon criteria that governs when BellSouth may demand a deposit (Attachment 7, Section 1.8.5) and have criteria that governs when BellSouth must refund a deposit (Attachment 7, Section 1.8.10). BellSouth asserted that given these contractual provisions, and the undisputed fact that it takes BellSouth approximately 74 days to terminate service for non-payment under the Agreement, it is reasonable, appropriate, and necessary for BellSouth to have the ability to protect its financial interests and terminate service to a Joint Petitioner that ignores a deposit demand.

BellSouth urged the Commission to confirm the *RAO* and find that if a Joint Petitioner: (1) fails to remit a deposit demand, and (2) does not dispute such demand in accordance with Attachment 7, Section 1.8.7, then BellSouth may terminate service within 30 calendar days.

JOINT PETITIONERS: The Joint Petitioners did not file initial comments on this issue.

PUBLIC STAFF: The Public Staff did not believe that the Joint Petitioners' objections warranted a change in the conclusions on this issue.

REPLY COMMENTS

BELLSOUTH: BellSouth did not file reply comments on this issue.

JOINT PETITIONERS: The Joint Petitioners stated, as with its other comments on their objections, that BellSouth's opposition to the Joint Petitioners' objection on this issue relies principally on a mischaracterization of the Joint Petitioners' position. The Joint Petitioners have argued that suspension or termination is too grave a remedy to be imposed in the absence of an agreement or in the event of a dispute over a deposit. The Joint Petitioners consistently have refused to agree to allow for suspension or termination related to a deposit request in all but two straight-forward instances: (1) the Joint Petitioners and BellSouth have agreed on a deposit amount, and (2) the Commission has ordered payment of a deposit. The Joint Petitioners claimed that if they fail to deliver an agreed-upon or Commission-ordered deposit, they have agreed that suspension or termination should be an option.

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[49] Florida PSC Order No. PSC-05-0975-FOF-TP at 72.

The Joint Petitioners argued that BellSouth disingenuously has responded to this clarity with charges that the Joint Petitioners are confusing the issue by claiming legitimate disputes can arise regarding deposit demands. The Joint Petitioners' statement, however, is not a part of an effort by the Joint Petitioners to confuse; rather, it is part of an effort to clear-up confusion that BellSouth deliberately has tried to create. The Joint Petitioners have consistently maintained that the remedies proposed by BellSouth are too dire to impose in any circumstance other than the two set forth above. Thus, the Joint Petitioners stated that, a failure to agree and a dispute are two instances in which the Joint Petitioners believe that BellSouth should not be left to its own devices to threaten or impose draconian, customer-impacting remedies. The Joint Petitioners stated, to be sure, resolved Item No. 104 now properly refers deposit disputes to the standard dispute resolution process and no longer includes the burden shifting language originally proposed by BellSouth. However, the Joint Petitioners stated that it does not cover a failure to agree and they never have conceded that suspension or termination would be appropriate in that context.

The Joint Petitioners asserted that the Commission's tentative conclusion suggests that the Joint Petitioners will have an obligation to agree or to dispute within 30 days or expose themselves and their customers to dire consequences. The Joint Petitioners object to that conclusion as the Joint Petitioners' experience indicates that the 30-day timeframe is too tight. The Joint Petitioners contended that there may be a number of reasons for a failure to agree—usually these relate to information regarding payment of undisputed amounts and a host of other factors to be considered—and, while these reasons may eventually lead to a dispute, there is no guarantee that a dispute will be fully identified within a 30-day period. The Joint Petitioners explained, for there is no sliding scale for translating deposit criteria into precise deposit amounts, and BellSouth deposit requests historically have exceeded two-months' billings and have inevitably been based on faulty information reflecting inadequate BellSouth practices for posting payments and disputes. As explained previously, sorting this out often takes considerable amounts of time. Thus, the Joint Petitioners argued that there may be instances when a failure to agree exists beyond 30 days while the parties are exchanging information and negotiating resolution of a deposit request. Nevertheless, under the resolution proposed by the Commission, such failures to agree must (or will) be deemed disputes within 30 days, so as to provide adequate and necessary protection to the Joint Petitioners and their North Carolina customers.

Finally, the Joint Petitioners commented that BellSouth once again relies on the Florida PSC's Order. The Joint Petitioners asserted that the Florida PSC Order on this issue makes plain that the Florida PSC did not understand the issue, the language proposed by the Joint Petitioners on their position. Indeed, the Florida PSC determined that the Joint Petitioners' proposal would require BellSouth to acquire the CLP's or the Commission's approval before asking for a deposit. The Joint Petitioners stated that they never took that position; and it is not reflected in their language. The Joint Petitioner's asserted that it cannot suffice as the basis for reasoned decision making in Florida or anywhere else. By contrast, the Joint Petitioners believed that the Kentucky PSC's decision shows no confusion on this issue. In its arbitration order, the Kentucky

PSC held that BellSouth should not be permitted to terminate CLP services when the CLP has met all of its financial obligations to BellSouth with the exception of the demand deposit.

PUBLIC STAFF: The Public Staff reiterated its belief that the Joint Petitioners' objections do not warrant a change in the Commission's conclusions on this issue.

DISCUSSION

In the *RAO*, the Commission found that the language proposed by BellSouth with respect to termination of service due to non-payment of a deposit for Section 1.8.6 of the Agreement is appropriate. The Commission concludes that the Joint Petitioners have provided no new or compelling arguments for the Commission to reconsider its decision. The Commission, therefore, finds it appropriate to affirm its initial ruling on this issue.

CONCLUSIONS

The Commission finds that it is appropriate to affirm and uphold Finding of Fact No. 21, and finds that if a Joint Petitioner: (1) fails to remit a deposit demand, and (2) does not dispute such demand in accordance with Attachment 7, Section 1.8.7, then BellSouth may terminate service within 30 calendar days.

IT IS, THEREFORE, ORDERED as follows:

1. That, in accordance with the Commission's January 24, 2001 and November 3, 2000 Orders issued in Docket No. P-100, Sub 133, the Joint Petitioners and BellSouth shall jointly file a Composite Agreement by no later than Friday, March 10, 2006.

2. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

3. That the Commission denies all objections to Findings of Fact Nos. 2, 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, and 21, thereby upholding and affirming its original decisions regarding these issues.

4. That for Finding of Fact No. 9, the Commission finds it appropriate to grant the Joint Petitioners' Motion for Reconsideration. Therefore, Finding of Fact No. 9 is altered to read:

> BellSouth shall permit a requesting carrier to commingle a UNE or a UNE combination obtained pursuant to Section 251 with one or more facilities

or services that a requesting carrier has obtained at wholesale from an ILEC pursuant to a method other than unbundling under Section 251(c)(3) of the Act, including those obtained as Section 271 elements.

5. That for Finding of Fact No. 15, the Commission finds it appropriate to deny BellSouth's Motion for Reconsideration, thereby affirming its decision to adopt the Joint Petitioners' proposed language concerning disputes over alleged unauthorized access to CSR information. However, the Commission does find it appropriate to alter the Joint Petitioners' proposed language to include specific time periods for action by an accused Party, as outlined hereinabove.

ISSUED BY ORDER OF THE COMMISSION.

This the 8th day of February, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Commissioner Robert V. Owens, Jr. dissents from the majority's decision on reconsideration on Finding of Fact No. 9.

bp020806.01

Glossary of Acronyms
Docket Nos. P-772, Sub 8; P-913, Sub 5; and P-1202, Sub 4

Act	Telecommunications Act of 1996
Agreement	Interconnection Agreement
BellSouth	BellSouth Telecommunications, Inc.
BOCs	Bell Operating Companies
CLEC	Competitive Local Exchange Company
CLP	Competing Local Provider
Commission	North Carolina Utilities Commission
CompSouth	The Competitive Carriers of the South
CSR	Customer Service Record
DSL	Digital Subscriber Line
EEL	Enhanced Extended Link (Loop)
FCC	Federal Communications Commission
ILEC	Incumbent Local Exchange Company (Carrier)
ISP	Internet Service Provider
ITC or ITC^DeltaCom	ITC^DeltaCom Communications, Inc.
Joint Petitioners	NewSouth, NuVox, and Xspedius
LOA	Letter of Authorization
NewSouth	NewSouth Communications Corp.
NPRM	Notice of Proposed Rulemaking
NuVox	NuVox Communications, Inc.
PSC	Public Service Commission
Public Staff	Public Staff – North Carolina Utilities Commission
RAO	Recommended Arbitration Order
SEEM	Self-Effectuating Enforcement Mechanism
SOC	Supplemental Order Clarification
SQM	Service Quality Measurement
TA96	Telecommunications Act of 1996
TELRIC	Total Element Long-Run Incremental Cost
TIC	Tandem Intermediary Charge
TRO	Triennial Review Order
TRRO	Triennial Review Remand Order

UNE	Unbundled Network Element
Verizon	Verizon Virginia, Inc.
WCB	Wireline Competition Bureau (of the FCC)
WorldCom	WorldCom, Inc.
xDSL	Digital Subscriber Line
Xspedius	Xspedius Communications, LLC on behalf of its operating subsidiary, Xspedius Management Co. Switched Services, LLC