**BEFORE THE**
**FLORIDA PUBLIC SERVICE COMMISSION**

**IN RE:**

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| **JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF JACKSONVILLE, LLC** | ) ) ) ) ) ) ) | **DOCKET N0. 040130-TP** |

# TESTIMONY OF THE JOINT PETITIONERS

**Hamilton Russell on behalf of NuVox Communications, Inc. and NewSouth Communications Corp.**

**January 10, 2005**

## PRELIMINARY STATEMENTS

## WITNESS INTRODUCTION AND BACKGROUND

**NuVox/NewSouth: Hamilton ("Bo") Russell**

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

A. My name is Hamilton E. Russell, III. I am employed by NuVox as Vice President, Regulatory and Legal Affairs. My business address is 301 North Main Street, Suite 5000, Greenville, SC 29601.

**Q. PLEASE DESCRIBE YOUR POSITION AT NUVOX.**

A. I am responsible for legal and regulatory issues related to or arising from NuVox's purchase of interconnection, network elements, collocation and other services from BellSouth. In addition, I was primarily responsible for negotiation of the NuVox-BellSouth Interconnection Agreement presently in effect. I participated actively in the negotiation of the Agreement that is the subject of this arbitration.

**Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.**

A. I received a B.A. degree in European History from Washington and Lee University in 1992 and a J.D. degree from the University of South Carolina School of Law in 1995. I have been employed by NuVox and its predecessors since February of 1998. From July of 1995 until January of 1998 I was an associate with Haynsworth Marion McKay & Guerard, LLP. From August of 1993 until July of 1995 I worked for the Office of the Speaker of the South Carolina House of Representatives.

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

A. I have submitted testimony to the following commissions: the Public Service Commission of South Carolina; the Georgia Public Service Commission; and the North Carolina Utilities Commission.

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

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

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| General Terms and Conditions | 2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 8/G-8, 9/G-9, 12/G-12 |
| Attachment 2: Unbundled Network Elements | 23/2-5, 26/2-8, 27/2-9, 36/2-18, 43/2-25, 46/2-28, 50/2-32, 51/2-33(B) & (C) |
| Attachment 3: Interconnection | 63/3-4 |
| Attachment 6: Ordering | 86/6-3(B), 94/6-11 |
| Attachment 7: Billing | 95/7-1, 96/7-2, 97/7-3, 99/7-5, 100/7-6, 101/7-7, 102/7-8, 103/7-9, 104/7-10 |
| Supplemental Issues | 108/S-1 thru 114/S-7 |

[1] The following issues have been settled: 1/G-1, 3/G-3, 10/G-10, 11/G-11, 13/G-13, 14/G-14, 15/G-15, 16/G-16, 17/1-1, 18/1-2, 19/2-1, 20/2-2, 21/2-3, 22/2-4, 24/2-6, 25/2-7, 28/2-10, 29/2-11, 30/2-12, 31/2-13, 32/2-14, 33/2-15, 34/2-16, 35/2-17, 39/2-21, 40/2-22, 41/2-23, 42/2-24, 44/2-26, 45/2-27, 47/2-29, 48/2-30, 49/2-31, 51/2-33(A), 52/2-34, 53/2-35, 54/2-36, 55/2-37, 56/2-38, 57/2-39, 58/2-40, 59/2-41, 60/3-1, 61/3-2, 62/3-3, 64/3-5, 66/3-7, 67/3-8, 68/3-9, 69/3-10, 70/3-11, 71/3-12, 72/3-13, 73/3-14, 74/4-1, 75/4-2, 76/4-3, 77/4-4, 78/4-5, 79/ 4-6, 80/4-7, 81/4-8, 82/4-9, 83/4-10, 84/6-1, 85/6-2, 86/6-3(A), 87/6-4, 89/6-6, 90/6-7, 91/6-8, 92/6-9, 93/6-10, 98/7-4, 105/7-11, 106/7-12, 107/11-1, and 115/S-8.

**Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

**A.** The purpose of my testimony is to offer support for the CLEC Position, as set forth with respect to each unresolved issue subsequently herein, and associated contract language on the issues indicated in the chart above.

## GENERAL TERMS AND CONDITIONS[2]

*Item No. 1, Issue No. G-1 [Section 1.6]:* ***This issue has been resolved.***

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

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

**A.** Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Marva Brown Johnson on this issue, as though it were reprinted here.

*Item No. 3, Issue No. G-3 [Section 10.2]:* ***This issue has been resolved.***

[2] **Please note that the disputed contract language for all issues raised in this testimony has been attached to this testimony as *Exhibit A*.** With the exception of the language that pertains to the Supplemental Issues, the contract language contained therein represents the most recent proposals as of the date of this filing. Joint Petitioners received BellSouth's proposed contract language that relates to the Supplemental Issues well beyond the time in which it was promised and only recently had the opportunity to discuss the proposals with BellSouth. Accordingly, Joint Petitioners are not in a position to incorporate in any way BellSouth's new contract language proposals into this filing.

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

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

A. In cases other than gross negligence and willful misconduct by the other party, or other specified exemptions as set forth in CLECs' proposed language, liability should be limited to an aggregate amount over the entire term equal to 7.5% of the aggregate fees, charges or other amounts paid or payable for any and all services provided or to be provided pursuant to the Agreement as of the day on which the claim arose.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. Petitioners and BellSouth should establish and fix a reasonable limitation on their respective risk exposure, in cases other than gross negligence or willful misconduct. As this Agreement is an arm's-length contract between commercially-sophisticated parties, providing for reciprocal performance obligations and the pecuniary benefits as to each such Party, the Parties should, in accordance with established commercial practices, contractually agree upon and fix a reasonable and appropriate, relative to the particular substantive scope of the contractual arrangements at issue here, maximum liability exposure to which each Party would potentially be subject in its performance under the Agreement. The Petitioners, as operating businesses party to a substantial negotiated contractual undertaking, should not be forced to accept and adhere to BellSouth's "standard" limitation of liability provisions, simply because BellSouth has traditionally been successful to date in leveraging its monopoly legacy to dictate terms and impose such provisions on its diffuse customer base of millions of consumers and dozens of carriers requiring BellSouth service. Petitioners'

proposal represents a compromise position between limitation of liability provisions typically found in the absence of overwhelming market dominance by one party, in commercial contracts between sophisticated parties and the effective elimination of liability provision proposed by BellSouth. As any commercial undertaking carries some degree of a risk of liability or exposure for the performing party, such risks (along with the contractual, financial and/or insurance protections and other risk-management strategies routinely found in business deals to manage these issues) are a natural and legitimate cost of doing business, regardless of the nature of the services performed or the prices charged for them. As Petitioners are merely requesting that BellSouth accept some measure, albeit a modest one relative to universally-regarded commercial practices, of accountability and contractual responsibility for performance and do not seek to expose BellSouth to any particular risks or excess levels of risk that would not otherwise fall within the general commercial-liability coverage afforded by any typical insurance policy, the incremental cost or exposure for these ordinary-course, insurable risks is nonexistent or minimal to BellSouth beyond possible costs incurred for the insurance premiums, financial reserves and/or other risk-management measures already maintained by BellSouth in the usual conduct of its business, costs that would in any event likely constitute joint and common costs already factored into BellSouth's UNE rates.

Petitioners' proposal is structured on a "rolling" basis, such that no Party will incur liabilities that in aggregate amount exceed a contractually-fixed percentage of the actual revenue amounts that such Party will have collected under the Agreement up to the date of the particular claim or suit. Thus, for example, an event that occurs in

Month 12 of the term of the Agreement would, in the worst case, result in a maximum liability equal to 7.5% of the revenue collected by the liable Party during those first 12 months of the term. This amount is fair and reasonable, and in fact, is far less than that would be at issue under standard liability-cap formulations – starting from a minimum (in some of the more conservative commercial contexts such as government procurements, construction and similar matters) of 15% to 30% of the total revenues actually collected or otherwise provided for over the entire term of the relevant contract — more universally appearing in commercial contracts. Petitioners' proposed risk-vs.-revenue trade-off has long been a staple of commercial transactions across all business sectors, including regulated industries such as electric power, natural resources and public procurements and is reasonable in telecommunications service contracts as well.

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

A. BellSouth maintains that an industry standard limitation of liability should apply, which limits the liability of the provisioning party to a credit for the actual cost of the services or functions not performed, or not properly performed. This position is flawed because it grants Petitioners no more than what long-established principles of general contract law and equitable doctrines already command: the right to a refund or recovery of, and/or the discharge of any further obligations with respect to, amounts paid or payable for services not properly performed. Such a provision would not begin to make Petitioners whole for losses they incur from a failure of BellSouth systems or personnel to perform as required to meet the obligations set forth in the

Agreement in accordance with the terms and subject to the limitations and conditions as agreed therein. It is a common-sense and universally-acknowledged principle of contracting that a party is not required to pay for nonperformance or improper performance by the other party. Therefore, BellSouth's proposal offers nothing beyond rights the injured party would otherwise already have as a fundamental matter of contract law, thereby resulting in an illusory recovery right that, in real terms, is nothing more than an elimination of, and a full and absolute exculpation from, any and all liability to the injured party for any form of direct damages resulting from contractual nonperformance or misperformance. Additionally, it is not commercially reasonable in the telecommunications industry, in which a breach in the performance of services results in losses that are greater than their wholesale cost — these losses will ordinarily cost a carrier far more in terms of direct liabilities vis-à-vis those of their customers who are relying on properly-performed services under this Agreement, not to mention the broader economic losses to these carriers' customer relationships as a likely consequence of any such breach. Petitioner's proposal for a 7.5% rolling liability cap is therefore more appropriate as a reasonable and commercially-viable compromise and should be adopted.

***Item No. 5, Issue No. G-5*** *[Section 10.4.2]: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks?*

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

**A.** To the extent that a CLEC does not, or is unable to, include specific elimination-of-liability terms in all of its tariffs and End User contracts (past, present and future),

and provided that the non-inclusion of such terms is commercially reasonable in the particular circumstances, that CLEC should not be required to indemnify and reimburse BellSouth for the portion of any loss that BellSouth might somehow incur that would have been limited as to the CLEC (but not as to non-contracting parties such as BellSouth) had the CLEC included in its tariffs and contracts the elimination-of-liability terms that BellSouth was successful in including in its tariffs at the time of such loss. Petitioners simply cannot limit BellSouth's liability in contractual arrangements wherein BellSouth is not a party. Nor is there any legal obligation or compelling reason for them to attempt to do so. Simply put, Petitioners will not indemnify BellSouth in any suit based on BellSouth's failure to perform its obligations under this contract or to abide by Applicable Law. BellSouth's failure to perform as required is its own responsibility and BellSouth should bear any and all risks associated with such failures. Finally, BellSouth should not be able to dictate the terms of service between Petitioners and their customers by, among other things, holding Petitioners liable for failing to mirror BellSouth's limitation of liability and indemnification provisions in CLEC's End User tariffs and/or contracts.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. First, the language in CLEC tariffs or other customer contracts cannot protect a non-party to those contracts, such as BellSouth, from suits by or potential liability to customers who experience damages as a result of BellSouth's breach of the Agreement or failure to abide by applicable law. Second, it is not reasonable to impose on Petitioners the burden of guaranteeing that their customers will accede to liability language identical to what BellSouth generally obtains. Petitioners do not

have the market dominance or negotiating power of BellSouth, and thus do not have the same leverage as BellSouth to dictate terms vis-à-vis their customers. As such, holding Petitioners to a standard that, in actual effect, assumes comparable negotiating positions for Petitioners and BellSouth in their respective markets is inappropriate, since it is clearly in each Party's own business interest, first and foremost, to at all times seek and secure in each particular aspect of its business operations the most favorable limitations on liability that it possibly can obtain. For these reasons, Petitioners propose that they be required to do no more than negotiate liability language that actually reflects the terms that they could reasonably be expected to secure in their exercise of diligence and commercially reasonable efforts to maintain effective contractual protections for their own direct liability interests that are most critical to their respective businesses. As such, Petitioners request that the Agreement allow them to offer a measure of commercially reasonable terms on liability that they may need in the exercise of their reasonable business judgment to make available to customers in order to conduct their businesses. Accordingly, these terms may at some point need to make allowances, although Petitioners would naturally prefer not to do so if they were in a position to deny such terms, for some level of recovery for service failures. While each Party under the Agreement surely has a significant liability interest in ensuring that the other Party maintains an aggressive approach to tariff-based limitation of liability, such concerns are already adequately and more appropriately addressed by existing provisions of the Agreement and applicable commercial law stipulating that a Party is precluded from recovering damages to the extent it has failed to act with due care and commercial

reasonableness in mitigation of losses and otherwise in its performance under the Agreement. In other words, any failure by Petitioners to adhere to these existing standards of due care, commercial reasonableness and mitigation in their tariffing and contracting efforts would, in itself, bar recovery for any otherwise-avoidable losses. In order to allay any concern BellSouth may continue to have notwithstanding the above, Petitioners would agree to include terms that more expressly require each Party to mitigate any damages vis-à-vis third parties, for example a promise to operate prudently and perform routine system maintenance. These terms should make abundantly clear that, even without a rigid tariff-based standard, adequate protection will exist for BellSouth with respect to claims by a third-party customer of a Petitioner.

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

A. BellSouth has proposed language that would require Petitioners to ensure that their tariffs and contracts include the same limitation of liability terms that BellSouth achieves in its own agreements. This language is unreasonable, anti-competitive and anti-consumer. As mentioned previously, Petitioners should not be required to offer the same tariff liability terms and conditions as BellSouth. Moreover, it is possible that CLECs in certain instances would not be able to obtain the same liability provisions from a customer due to the fact that a CLEC generally has to concede, where it can do so prudently in weighing its business-generation needs against the corresponding liability concerns, on certain terms to attract customers in markets dominated by incumbent providers. Given the vast disparity between BellSouth and

the Petitioners in overall bargaining power and their relative leverage in the communications market it is patently unfair for BellSouth to attempt to dictate tariff terms that would limit the Petitioners' recourse and subject it to indemnity obligations by holding it to limitation of liability terms that, in certain instances, may be uniquely obtainable by BellSouth. Such a provision is clearly a one-sided provision for the benefit of BellSouth and should not be adopted.

***Item No. 6, Issue No. G-6*** *[Section 10.4.4]: How should indirect, incidental or consequential damages be defined for purposes of the Agreement?*

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

A. The limitation of liability terms in the Agreement should not preclude damages that CLECs' End Users incur as a foreseeable result of BellSouth's performance of its obligations, including its provisioning of UNEs and other services. Damages to End Users that result directly, proximately, and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance of obligations set forth in the Agreement that were not otherwise caused by or are the result of BellSouth's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage should be considered direct and are not indirect, incidental or consequential.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. In any contract, including the Agreement, each Party should be liable for damages that are the direct and foreseeable result of its actions. Where the injured person is a customer of one Party, providing relief is no less proper where, as in the case of the Agreement, a contract expressly contemplates that services provided are being

directed to such customers. Such liability is an appropriate risk to be borne by any service provider in a contract such as the Agreement that clearly envisions that the effect of performance or nonperformance of such services will be passed through to ascertainable third parties related to the other Party to the contract. In this Agreement, being a contract for wholesale services, liability to injured End Users must be contemplated and covered by express language, subject, in any event, to the forseeability and legal and proximate cause limitation as Petitioners have proposed for express inclusion in the Agreement in this particular instance as well as in addition to those found in the Agreement's general liability provisions.

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

A. BellSouth's position on liability vis-à-vis end users is somewhat ambiguous insofar as its language merely states that "[e]xcept in cases of gross negligence or willful or intentional misconduct, under no circumstances shall a Party be responsible or liable for indirect, incidental, or consequential damages" while, in other provisions of the Agreement there are disclaimers of liability to End Users that are predicated on specified circumstances (for example, non-negligent damage to End User premises, among others). It is BellSouth's stated position that "[w]hat damages constitute indirect, incidental or consequential damages is a matter of state law at the time of the claim and should not be dictated by a party to an agreement." BellSouth is mistaken. At the onset, liability, limitation of liability, indemnification and damages are all matters of state law, nonetheless BellSouth includes provisions for all of these matters in its template agreement (the starting-point for this Agreement and other BellSouth

interconnection agreements). Therefore, BellSouth contradicts itself in claiming the terms of the Agreement cannot address the substance of the Parties' negotiated agreement as to what will constitute, as between such Parties only, indirect, incidental, and/or consequential damages for purposes of their respective liabilities. This is simply a matter of risk allocation among the Parties expressly bound by the terms of this Agreement and, as such, there is no issue of "dictating" the Parties' agreed understanding on these damages to any third parties as to whom they may arise. Petitioners merely seek a reasonable contractual standard for purposes of allocating these third-party risks as between BellSouth and Petitioners exclusively. If any claim or loss would fail to meet the standards Petitioners propose for inclusion in the Agreement, the Party seeking compensation would simply be forced to bear these risks with respect to its own third parties, regardless of what state law had to say on the particular issue. As such, Petitioners believe that BellSouth miscasts these issues in terms of ambiguous state-law concerns, whereas all that Petitioners are proposing here is a contractual allocation, binding on the Agreement Parties only, of the third-party risks already provided for throughout the Agreement by inserting a fair and reasonable standard that will offer a uniform and definitive statement as to each Party's potential exposure to these third-party risks.

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

A. Petitioners disagree with BellSouth's proposed restatement of the issue. BellSouth's statement of the issue misses the Parties' core dispute. Petitioners are not disputing the definition of indirect, incidental or consequential damages, but rather seek to

establish with certainty that damages incurred by CLEC's (or BellSouth's) End Users to the extent such damages result directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance obligations set forth in the Agreement are not included in that definition.

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

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

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

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. The Party receiving services under this Agreement is, at a minimum, equally entitled to indemnification as the Party providing services. As is more universally the case in virtually all other commercial-services contexts, the service provider, not the receiving party, bears the more extensive burden on indemnities given the relative disparity among the risk levels posed by the performance of each. In other words, the

higher level of risks inherent in service-related activities as compared to the mere payment and similar obligations of the receiving party typically results in a far heavier indemnity undertaking on the provider side. As such, the Party receiving services under this Agreement should, at a minimum, be indemnified for reasonable and proximate losses to the extent it becomes liable due to the other Party's negligence, gross negligence and/or willful misconduct, or failure to abide by Applicable Law. With regard to Applicable Law, the Parties agree in section 32.1 of the General Terms and Conditions that "[e]ach Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, injunctions, judgments and binding decisions, awards and decrees that relate to its obligations under this Agreement ('Applicable Law')". With this provision expressly set forth in the General Terms and Conditions, it is logical that, a Party should be indemnified to a third-party due to the other Party's failure to comply with Applicable Law, regardless of whether that Party is the providing or receiving Party. The Parties are in an equal contractual position under the Agreement to ensure compliance with Applicable Law as well as the terms and conditions of the Agreement and are, in any event, entitled to the benefit of Agreement provisions limiting any resulting liability or indemnity obligation to a reasonable and foreseeable scope; it is entirely equitable and appropriate for the noncomplying Party to indemnify the other for losses resulting from any such breach of Applicable Law.

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

A. BellSouth's proposal provides that only the Party providing services is indemnified under this Agreement. Not to mention the extent of its deviation from generally-accepted contract norms providing precisely to the contrary, BellSouth's proposal is completely one-sided in that BellSouth, as the predominate provider of services under this Agreement, will be the only Party indemnified and the CLECs as the Parties predominately taking services under the Agreement will be the ones indemnifying BellSouth.

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

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

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

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. The rationale for Petitioners' position is that intellectual property law is a highly specialized area of the law where the bounds of what is and is not lawful are hashed

out in case law that can vary among jurisdictions. Petitioners are fully prepared to ensure that their marketing efforts comport with those varying standards and will consult with experts in the field of intellectual property law when appropriate. Petitioners are not however willing to hamstring their marketing departments so that they are at a disadvantage and cannot do what other CLEC marketing departments can do (or, for that matter, what BellSouth's marketing department can do) when engaging in comparative advertising and other sales and marketing initiatives. Since Petitioners believe that the services they provide often compare favorably with those provided by BellSouth, we intend to preserve our right to engage in comparative advertising to the fullest extent permitted under the law.

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

**A.** The language proposed by BellSouth is inadequate because it proposes to restrict Petitioners' rights to engage in comparative advertising or use BellSouth's name, marks, logo and trademarks in ways that are permitted by Applicable Law. Joint Petitioners are not prepared to give up those rights and we do not believe that it would be appropriate for the Commission to order us to do so by adopting BellSouth's proposed language. If BellSouth wants Petitioners to sacrifice rights, particularly those which could put Petitioners at a disadvantage relative to other competitors, it should be prepared to agree to an offsetting concession. It hasn't – and Joint Petitioners refuse to bow to yet another BellSouth demand to give up something for nothing.

***Item No. 9, Issue No. G-9*** *[Section 13.1]: Under what circumstances should a party be allowed to take a dispute concerning the interconnection agreement to a Court of law for resolution first?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

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

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

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

A. The answer to the question posed in the issue statement is "YES". Nothing in the Agreement should be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, as defined in the Agreement, except in such cases where the Parties have explicitly agreed to a limitation or exemption. Moreover, silence with respect to any issue, no matter how discrete, should not construed to be

such a limitation or exception. This is a basic legal tenet and is consistent with both federal and Georgia law (agreed to by the Parties), and it should be explicitly stated in the Agreement in order to avoid unnecessary disputes and litigation that has plagued the Parties in the past.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. Petitioners' position is intended to be a restatement of Georgia law, which the Parties have agreed is the body of contract law applicable to the Agreement. Because several of the Joint Petitioners have been confronted with BellSouth-initiated litigation in which BellSouth seeks to upend this fundamental principle of Georgia law on contract interpretation, all of the Joint Petitioners believe it is important that the Agreement be explicit on this point. Joint Petitioners will not voluntarily agree to the scheme proposed by BellSouth which is essentially the opposite of applicable Georgia law (agreed to by the Parties) on contract interpretation.

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

A. BellSouth's language is inadequate because it purports to adopt principles that differ from Georgia contract law (already agreed to by the Parties as being the governing contract law) – and, for that matter, black-letter contract law. Joint Petitioners will not voluntarily agree to BellSouth's novel proposal to supplant applicable Georgia law (the choice of the Parties) governing contract interpretation, with a cumbersome scheme that gives BellSouth unknown rights and countless opportunities to limit is obligations under state and federal law. Where the Parties intend for standards to supplant those found in Applicable Law, they must say so expressly or do so by

agreeing to terms that conflict with and thereby displace the requirements of Applicable Law. Such an intent cannot be implied and silence with respect to a particular requirement of Applicable Law cannot be read to conflict with or displace that requirement. This is a fundamental principle of Georgia law, to which the Joint Petitioners decline Bellsouth's request to displace with either BellSouth's original language or the more novel, but still unacceptable, recent replacement terms offered by BellSouth.

Moreover, BellSouth's recently revised contract language proposes not only that the Agreement memorializes all of the Parties' obligations under Applicable law, (a faulty premise discussed below), but also that a Party has the burden of having to petition the FCC or Commission should that Party believe that an obligation, right or other requirement, not expressly memorialized in other provisions of the Agreement (Joint Petitioners submit that the choice of Georgia law and their proposed language expressly memorialize Joint Petitioners' intent that this Agreement not adopt the deviation from applicable Georgia law on contract interpretation proposed by BellSouth), is applicable under Applicable Law and that obligation is disputed by the other Party. Essentially, BellSouth is adding an administrative layer, a potential proceeding to determine whether a Party is or is not bound by Applicable Law. Such a proposal contravenes fundamental principles of contracting and is wasteful for the Parties as well as the Commission.

Although the specifics of this contract law argument might best be left to briefing by counsel, it is important to emphasize that BellSouth's proposal attempts to turn

universally accepted principles of contracting on their head. The case of interconnection agreements presents no exception to the rule. Parties to a contract may agree to rights and obligations different than those imposed by Applicable Law. When they do so, however, they need to do it explicitly. It is far easier to set forth negotiated exceptions to rules than it is to set forth all the rules for which no exceptions were negotiated. Moreover, Petitioners must stress that in the context of their negotiations with BellSouth, they have refused to negotiate away rights for nothing in return. The Act and the FCC and Commission rules and orders do not exist for the purpose of seeing how CLECs and the Commission can detect and overcome attempts by BellSouth to evade obligations that are contained therein with contract language that skirts certain obligations. If BellSouth wants to free itself from an obligation under section 251, or any other provision of Applicable Law (including FCC and Commission rules and orders) it needs to identify that obligation and offer a concession acceptable to Petitioners in exchange – otherwise, consistent with Georgia law, all obligations under Applicable Law are incorporated into this Agreement.

Joint Petitioners request that the Commission reject BellSouth's attempt to impose upon Joint Petitioners an exception that essentially guts the Parties' agreement to have Georgia law govern the interpretation of this Agreement. Indeed, it is fundamental to the Joint Petitioners that the Agreement not deviate from the basic legal tenet that it should not be construed to limit a Party's rights (or obligations) under Applicable Law (except in such cases where the Parties have explicitly agreed to an exception from or other standards that displace Applicable Law), but should encompass all Applicable Law in existence at the time of contracting (on this point,

we note that if there is a new FCC order that is released prior to execution but after the Parties have had an opportunity to arbitrate or negotiate appropriate terms, that order should be treated as a change in law which should be addressed in a subsequent amendment to the Agreement).

*Item No.13, Issue No. G-13 [Section 32.3]:* ***This issue has been resolved.***

*Item No. 14, Issue No. G-14 [Section 34.2]:* ***This issue has been resolved.***

*Item No. 15, Issue No. G-15 [Section 45.2]:* ***This issue has been resolved.***

*Item No. 16, Issue No. G-16 [Section 45.3]:* ***This issue has been resolved.***

**RESALE (ATTACHMENT 1)**

*Item No. 17, Issue No. 1-1 [Section 3.19]:* ***This issue has been resolved.***

*Item No. 18, Issue No. 1-2 [Section 11.6.6]:* ***This issue has been resolved.***

**NETWORK ELEMENTS (ATTACHMENT 2)**

*Item No. 19, Issue No. 2-1 [Section 1.1]:* ***This issue has been resolved.***

*Item No. 20, Issue No. 2-2 [Section 1.2]:* ***This issue has been resolved.***

*Item No. 21, Issue No. 2-3 [Section 1.4.2]:* ***This issue has been resolved.***

*Item No. 22, Issue No. 2-4 [Section 1.4.3]:* ***This issue has been resolved.***

***Item No. 23, Issue No. 2-5*** *[Section 1.5]: What rates, terms, and conditions should govern the CLECs' transition of existing network elements that BellSouth is no longer obligated to provide as UNEs to other services?*

**PLEASE NOTE THAT JERRY WILLIS IS THE NUVOX/NEWSOUTH REPRESENTATIVE OFFERING TESTIMONY ON THIS ISSUE**

*Item No. 24, Issue No. 2-6 [Section 1.5.1]:* ***This issue has been resolved.***

*Item No. 25, Issue No. 2-7 [Section 1.6.1]:* ***This issues has been resolved.***

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

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Marva Brown Johnson on this issue, as though it were reprinted here.

***Item No. 27, Issue No. 2-9*** *[Section 1.8.3]: When multiplexing equipment is attached to a commingled circuit, should the multiplexing equipment be billed per the jurisdictional authorization (Agreement or tariff) of the lower or higher bandwidth service?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

*Item No. 28, Issue No. 2-10 [Section 1.9.4]:* ***This issue has been resolved.***

*Item No. 29, Issue No. 2-11 [Section 2.1.1]:* ***This issue has been resolved.***

*Item No. 30, Issue No. 2-12 [Section 2.1.1.1]:* ***This issue has been resolved.***

*Item No. 31, Issue No. 2-13 [Section 2.1.1.2]:* ***This issue has been resolved.***

*Item No. 32, Issue No. 2-14 [Sections 2.1.2, 2.1.2.1, 2.1.2.2]:* ***This issue has been resolved.***

*Item No. 33, Issue No. 2-15 [Section 2.2.3]:* ***This issue has been resolved.***

*Item No. 34, Issue No. 2-16 [Section 2.3.3]:* ***This issue has been resolved.***

*Item No. 35, Issue No. 2-17 [Sections 2.4.3, 2.4.4]:* ***This issue has been resolved.***

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

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 36(A)/ISSUE 2-18(A).**

A. Line Conditioning should be defined in the Agreement as set forth in FCC Rule 47 CFR 51.319 (a)(1)(iii)(A).

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. Petitioners' language incorporates by reference FCC Rules 51.319(a)(1)(iii) — the Line Conditioning rule — and 51.319(a)(1)(iii)(A) — the definition of Line

Conditioning — to describe BellSouth's obligations. This language sets forth, in a simple yet precise way, what BellSouth should be able and willing to provide to Petitioners within the Agreement. This language does not provide Petitioners with anything more than what the FCC rules prescribe.

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

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

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

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 36(B)/ISSUE 2-18(B).**

A. BellSouth should perform Line Conditioning in accordance with FCC Rule 47 CFR 51.319 (a)(1)(iii).

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. Petitioners request only that the Agreement and BellSouth's obligations there under comport with federal law. Petitioners are unwilling to accept BellSouth's attempt to dilute its obligations by effectively eliminating Line Conditioning obligations that the FCC left in place.

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

A. BellSouth's language is inadequate for the same reasons discussed previously with respect to issue 2-18(A). BellSouth's proposed language inappropriately attempts to limit its Line Conditioning obligations. For its position statement, BellSouth essentially re-states the same position it provided for Issue 2-18(A). That is, BellSouth will only perform Line Conditioning as a "routine network modification", in accordance with Rule 51.319(a)(1)(iii), to the extent that BellSouth would do so for its own xDSL customers. For the reasons I have explained, this position is without merit. First, to discuss "routine network modification" as occurring under Rule 51.319(a)(1)(iii) is simply wrong: that term does not appear anywhere in Rule 51.319(a)(1)(iii). Second, it is not permissible under the rules for BellSouth to perform Line Conditioning only when it would do so for itself. The FCC has placed no such limitation on Line Conditioning. Third, BellSouth's repeated insistence that

Line Conditioning is only for xDSL services contravenes Rule 51.319(a)(1)(iii), which is absolutely neutral as to the services that can be provided over conditioned loops. The Agreement should accurately reflect BellSouth's obligations as to Line Conditioning, and therefore should include Petitioners' language on that matter, which references the FCC's governing rule.

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

**PLEASE NOTE THAT JERRY WILLIS IS THE NUVOX/NEWSOUTH REPRESENTATIVE OFFERING TESTIMONY ON THIS ISSUE**

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

**PLEASE NOTE THAT JERRY WILLIS IS THE NUVOX/NEWSOUTH REPRESENTATIVE OFFERING TESTIMONY ON THIS ISSUE**

*Item No. 39, Issue No. 2-21 [Section 2.12.6]:* ***This issue has been resolved.***

*Item No. 40, Issue No. 2-22 [Section 2.14.3.1.1]:* ***This issue has been resolved.***

*Item No. 41, Issue No. 2-23 2.16.2.3.2****This issue has been resolved.***

*Item No. 42, Issue No. 2-24 [Section 2.17.3.5]:* ***This issue has been resolved***

***Item No. 43, Issue No. 2-25** [Section 2.18.1.4]: Under what circumstances should BellSouth be required to provide CLEC with Loop Makeup information on a facility used or controlled by a carrier other than BellSouth?*

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 43/ISSUE 2-25.**

A. BellSouth should provide CLEC Loop Makeup information on a particular loop upon request by a Petitioner. Such access should not be contingent upon receipt of an LOA from a third party carrier.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

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

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

A. BellSouth's proposed language would deny Petitioners Loop Makeup if a carrier other than BellSouth "controls" the loop. More specifically, BellSouth's language

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

If customer privacy is BellSouth's true concern, that issue is not addressed in its proposed language. For BellSouth to require an LOA from a CLEC as a means of securing privacy would therefore be misplaced. Because it serves no lawful purpose, and would instead impose significant competitive harm, BellSouth's proposed language should be rejected.

*Item No. 44, Issue No. 2-26 [Section 3.6.5]:* ***This issue has been resolved.***

*Item No. 45, Issue No. 2-27 [Section 3.10.3]:* ***This issue has been resolved.***

***Item No. 46, Issue No. 2-28*** *[Section 3.10.4]: Should the CLEC be permitted to incorporate the Fast Access language from the FDN and/or Supra interconnection agreements, respectively docket numbers 010098-TP and 001305-TP, for the term of this Agreement?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

**A.** Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Jim Falvey on this issue, as though it were reprinted here.

*Item No. 47, Issue No. 2-29 [Section 4.2.2]: (A)* ***This issue has been resolved****; (B)* ***This issue has been resolved.***

*Item No. 48, Issue No. 2-30 [Section 4.5.5]:* ***This issue has been resolved.***

*Item No. 49, Issue No. 2-31 [Section 5.2.4]:* ***This issue has been resolved.***

***Item No. 50, Issue No. 2-32*** *[Sections 5.2.5.2.1, 5.2.5.2.3, 5.2.5.2.4, 5.2.5.2.5, 5.2.5.2.7]: How should the term "customer" as used in the FCC's EEL eligibility criteria rule be defined?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

**A.** Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Marva Brown Johnson on this issue, as though it were reprinted here.

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

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

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

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 51(B)/ISSUE 2-33(B).**

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

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. In order for the CLECs to be adequately prepared to respond to a BellSouth EEL audit request, BellSouth should provide the CLECs with proper notification. CLECs are entitled to know the basis for the audit and need sufficient time, *i.e.*, 30 days, to evaluate BellSouth's audit request and to prepare to for an audit. Since the original

filing of testimony, BellSouth has agreed that audits may be conducted only based upon cause; therefore, it should not resist providing documentation that identifies the particular circuits for which Bellsouth alleges non-compliance and the documentation upon which BellSouth establishes the cause that forms the basis of BellSouth's allegations of noncompliance.

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

A. Since filing the original testimony, BellSouth agreed to language requiring it to provide 30 days notice, however, the Parties disagree on whether that 30 days should be 30 days prior to the date upon which BellSouth seeks to have an audit commence (as Joint Petitioners maintain) or whether the notice will affirmatively establish that the audit will commence 30 days after notice is given. BellSouth's position is unnecessarily inflexible. The Parties simply cannot know whether 30 days after the notice will be a date upon which the necessary personnel and resources will be available and can begin to be devoted to an audit engagement or whether the CLEC can gather the appropriate records and make certain the necessary logistical arrangements. In some cases, it may be possible and, in others, it may not. BellSouth's language also does not accept the Joint Petitioners' proposals that the notice identify the circuits for which BellSouth alleges non-compliance and include all documentation used to establish the cause upon which BellSouth rests its allegations. Joint Petitioners' proposal is designed to bring any potential dispute up front and center with relevant documentation available to both Parties so that unnecessary disputes over whether BellSouth may or may not proceed with an audit

can be avoided and so that real ones can be resolved efficiently. Disputes of this nature have consumed too many resources in the past. By requiring BellSouth to establish the scope and the basis for its claimed right to audit up front, the Joint Petitioners have created a better proposal for eliminating, narrowing and more quickly resolving disputes over whether or not BellSouth has the right to proceed with an EEL audit. In this regard, it is important to note that, although the TRO does not include a specific notice requirement, the Commission may order such a requirement. The TRO only includes "basic principles for EEL audits" and should not be construed as a comprehensive overview of all EEL audit requirements. In fact, the FCC specifically stated, "...we set forth basic principles regarding carriers' rights to undertake and defend against audits. However, we recognize that the details surrounding the implementation of these audits may be specific to related provisions of interconnection agreements or to the facts of a particular audit, and the states are in a better position to address that implementation".

If a Petitioner is going to have to endure the time and expense necessary to comply with a BellSouth audit request, at the very least, BellSouth can provide adequate notice to CLECs setting forth the scope of and cause upon which the audit request is based along with supporting documentation. Such a requirement should place no additional burden on BellSouth, as BellSouth has agreed that it may conduct audits only based upon cause. Moreover, as clearly stated in the FCC's TRO, the Commission is well within its prerogative to order such a notice requirement be included in the Parties' Agreement.

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 51(C)/ISSUE 2-33(C).**

A. The audit should be conducted by a third party independent auditor mutually agreed-upon by the Parties.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. Since the original testimony was filed, the Parties have managed to agree on additional language and to reduce this sub-issue to a single specific audit implementation disagreement. The Agreement should eliminate opportunities for dispute over who is entitled to conduct an EEL audit. Joint Petitioners propose that the parties agree on an independent auditor, just as the parties agreed to with respect to PIU and PLU audits conducted pursuant to Attachment 3 of the Agreement. Far too many resources have been consumed in the past over disputes about whether a proposed auditor was independent or not. Joint Petitioners' proposal will address this problem by requiring the parties to do what they have traditionally agreed to do for PIU and PLU audits: mutually agree on an independent auditor.

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

A. BellSouth's proposed language for EEL audits does not require the parties to agree on an independent auditor. BellSouth's language simply sets the stage for additional disputes regarding whether or not an auditor it proposes to use is independent. Joint Petitioners are unwilling to subject themselves to audits by entities whose independence is doubtful and reasonably challenged. Because there are many auditing entities whose independence cannot easily be questioned or challenged, it

seems nonsensical not to address this issue now in order to prevent recurring disputes later. With respect to the audit reimbursement provisions, BellSouth language is deficient because it seeks to upend the balanced requirement established in the TRO.

*Item No. 52, Issue No. 2-34 [Section 5.2.6.2.3]:* ***This issue has been resolved.***

*Item No. 53, Issue No. 2-35 [Section 6.1.1]:* ***This issue has been resolved.***

*Item No. 54, Issue No. 2-36 [Section 6.1.1.1]:* ***This issue has been resolved.***

*Item No. 55, Issue No. 2-37 [Section 6.4.2]:* ***This issue has been resolved.***

*Item No. 56, Issue No. 2-38 [Sections 7.2, 7.3]:* ***This issue has been resolved.***

*Item No. 57, Issue No. 2-39 [Sections 7.4]: (A)* ***This issue has been resolved.*** *(B)* ***This issue has been resolved.***

*Item No. 58, Issue No. 2-40 [Sections 9.3.5]:* ***This issue has been resolved.***

*Item No. 59, Issue No. 2-41 [Sections 14.1]:* ***This issue has been resolved.***

**INTERCONNECTION (ATTACHMENT 3)**

*Item No. 60, Issue No. 3-1 [Section 3.3.4 (KMC, NSC, NVX), 3.3.3 XSP]:* ***This issue has been resolved.***

*Item No. 61, Issue No. 3-2 [Section 9.6 and 9.7]:* ***This issue has been resolved.***

*Item No. 62, Issue No. 3-3 [Section 10.7.4, 10.9.5, and 10.12.4]:* ***This issue has been resolved.***

***Item No. 63, Issue No. 3-4*** *[Section 10.8.6, 10.10.6 and, 10.13.5]: Under what terms should CLEC be obligated to reimburse BellSouth for amounts BellSouth pays to third party carriers that terminate BellSouth transited/CLEC originated traffic?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

*Item No. 64, Issue No. 3-5 [Section 10.5.5.2, 10.5.6.2, 10.7.4.2 and 10.10.6]:* ***This issue has been resolved.***

***Item No. 65, Issue No. 3-6*** *[Section 10.8.1, 10.10. 1, and 10.13]: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?*

**PLEASE NOTE THAT JERRY WILLIS IS THE NUVOX/NEWSOUTH REPRESENTATIVE OFFERING TESTIMONY ON THIS ISSUE**

*Item No. 66, Issue No. 3-7 [Section 10.1]:* ***This issue has been resolved.***

*Item No. 67, Issue No. 3-8 [Section 10.2, 10.2.1, 10.3]:* ***This issue has been resolved.***

*Item No. 68, Issue No. 3-9 [Section 2.1.12]:* ***This issue has been resolved.***

*Item No. 69, Issue No. 3-10 [Section 3.2, Ex. A]:* ***This issue has been resolved***

*Item No. 70, Issue No. 3-11 [Sections 3.3.1, 3.3.2, 3.4.5, 10.10.2]:* ***This issue has been resolved.***

*Item No. 71, Issue No. 3-12 [Section 4.5]:* ***This issue has been resolved.***

*Item No. 72, Issue No. 3-13 [Section 4.6]:* ***This issue has been resolved.***

*Item No. 73, Issue No. 3-14 [Sections 10.10.4, 10.10.5, 10.10.6,10.10.7]:* ***This issue has been resolved.***

## COLLOCATION (ATTACHMENT 4)

*Item No. 74, Issue No. 4-1 [Section 3.9]:* ***This issue has been resolved.***

*Item No. 75, Issue No. 4-2 [Sections 5.21.1, 5.21.2]:* ***This issue has been resolved.***

*Item No. 76, Issue No. 4-3 [Section 8.1, 8.6]:* ***This issue has been resolved.***

*Item No. 77, Issue No. 4-4 [Section 8.4]:* ***This issue has been resolved.***

*Item No. 78, Issue No. 4-5 [Section 8.6]:* ***This issue has been resolved.***

*Item No. 79, Issue No. 4-6 [Sections 8.11, 8.11.1, 8.12.2]:* ***This issue has been resolved.***

*Item No. 80, Issue No. 4-7 [Section 9.1.1]:* ***This issue has been resolved.***

*Item No. 81, Issue No. 4-8 [Sections 9.1.2, 9.1.3]:* ***This issue has been resolved.***

*Item No. 82, Issue No. 4-9 [Sections 9.3]:* ***This issue has been resolved.***

*Item No. 83, Issue No. 4-10 [Sections 13.6]:* ***This issue has been resolved.***

## ORDERING (ATTACHMENT 6)

*Item No. 84, Issue No. 6-1 [Section 2.5.1]:* ***This issue has been resolved.***

*Item No. 85, Issue No. 6-2 [Section 2.5.5]:* ***This issue has been resolved.***

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

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

*Item No. 87, Issue No. 6-4 [Section 2.6]:* ***This issue has been resolved.***

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

**PLEASE NOTE THAT JERRY WILLIS IS THE NUVOX/NEWSOUTH REPRESENTATIVE OFFERING TESTIMONY ON THIS ISSUE**

*Item No. 89, Issue No. 6-6 [Section 2.6.25]:* ***This issue has been resolved.***

*Item No. 90, Issue No. 6-7 [Section 2.6.26]:* ***This issue has been resolved.***

*Item No. 91, Issue No. 6-8 [Section 2.7.10.4]:* ***This issue has been resolved.***

*Item No. 92, Issue No. 6-9 [Section 2.9.1]:* ***This issue has been resolved.***

*Item No. 93, Issue No. 6-10 [Section 3.1.1]:* ***This issue has been resolved.***

***Item No. 94, Issue No. 6-11*** *[Sections 3.1.2, 3.1.2.1]: (A) Should the mass migration of customer service arrangements resulting from mergers, acquisitions and asset transfers be accomplished by the submission of an electronic LSR or spreadsheet?*

*(B) If so, what rates should apply?*

*(C) What should be the interval for such mass migrations of services?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

## BILLING (ATTACHMENT 7)

***Item No. 95, Issue No. 7-1*** *[Section 1.1.3]: What time limits should apply to backbilling, over-billing, and under-billing issues?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Marva Brown Johnson on this issue, as though it were reprinted here.

***Item No. 96, Issue No. 7-2** [Section 1.2.2]: (A) What charges, if any, should be imposed for records changes made by the Parties to reflect changes in corporate names or other LEC identifiers such as OCN, CC, CIC and ACNA? (B) What intervals should apply to such changes?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 97/ISSUE 7-3.**

A. Payment of charges for services rendered should be due thirty (30) calendar days from receipt or website posting of a complete and fully readable bill or within thirty (30) calendar days from receipt or website posting of a corrected or retransmitted bill, in those cases where correction or retransmission is necessary for processing.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. Petitioners need at least 30 days to review and pay invoices. In other commercial settings in which parties have established business relationships, the payor may be afforded 45 days or more to pay an invoice. Furthermore, it is not uncommon for parties to a contract to develop a course of dealings in which a party is not strictly held to a certain payment date. Nevertheless, in order to try to settle as many billing issues as possible, Petitioners agreed to BellSouth's proposal for a thirty (30)-day

payment deadline (one billing cycle). Under such a strict deadline, it is imperative that CLECs be given the full thirty (30) days to review and pay those bills. It is Petitioners' experience, however, that BellSouth is consistently untimely in posting or delivering its bills and those bills are often incomplete and sometimes incomprehensible. Therefore, in effect BellSouth is actually giving Petitioners far fewer than thirty (30) days to pay invoices, which is neither typical nor acceptable in a commercial setting, especially in this case, where the bills are numerous, voluminous and complex. Thus, the Commission should find that the thirty (30)-day payment due date must be established from the time a Petitioner receives a complete and fully readable bill via mail or website posting.

**Q. HAVE YOU TRACKED HOW LONG IT TAKES BELLSOUTH TO POST OF DELIVER ITS BILLS?**

A. Yes. We have found that it takes on average 7 days after the issue date for NuVox to receive a bill from BellSouth. NuVox conducted a study of how long it takes NuVox to receive an electronic invoice from BellSouth. NuVox conducted this study from July 2002 through July 2003. Although the times recorded by NuVox varied from 3 days to over 30 days the average time it takes BellSouth to deliver its electronic bills to NuVox is 7 days. NuVox tracked the issue separately for its NewSouth operating entity, as BellSouth has billed and for the time being will continue to bill NewSouth separately. NewSouth's experience has been that, by the time it receives its bills from BellSouth, it has anywhere from 19-22 days to process bills for payment. This amount of time is inadequate as it does not allow NewSouth to effectively and completely review and audit the bills it receives from BellSouth.

**Q. HAVE YOU TRACKED THE DIFFERENCE BETWEEN THE DATE BELLSOUTH POSTS ON THE BILL AND THE DATE THE BILL IS RECEIVED BY XSPEDIUS?**

A. Yes. My company has tracked the difference between the date posted on the BellSouth bill and the date the bill is actually received by Xspedius. We began tracking this data in December, 2003. Our results demonstrate that it takes on an average 6.45 days for Xspedius to receive a bill from BellSouth. Although the average time is 6.45 days, we have tracked bills that Xspedius has received from BellSouth in as little as 2 days and as long as 22 days.

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

A. BellSouth's proposed language provides that payment of charges for services rendered must be made on or before the next bill date. This language is inadequate in that it does not account for the fact that there is typically a long gap between the time a bill is "issued" and the date upon which it is made available to or delivered to a Petitioner. BellSouth's language also makes no attempt to mitigate the problems caused in circumstances when its invoices are incomplete and/or incomprehensible. When this occurs, the CLEC already has a late start in paying the invoice and then may also need to spend extraordinary amounts of time attempting to reconciling an such invoices. Therefore, under BellSouth's proposal Petitioners are not getting thirty (30) days to remit payment.

The Commission should take note that not only is less than thirty (30) days to remit payment for services rendered unacceptable in most commercial settings, but CLECs

have the added burden of extraordinary pressure from BellSouth to pay on time. The alterative to paying on time is that Petitioners' capital will be tied up in security deposits and/or late payments. By proposing the next bill date as the payment due date as opposed to thirty (30) days after receipt of a complete and readable bill, BellSouth does not afford Petitioners adequate time to review and pay invoices and unfairly raises the likelihood that a Petitioner would be forced to tie-up much needed capital in a deposit. BellSouth is, in essence, using its monopoly legacy and bargaining position to force CLECs to either remit payment faster than almost any other business or in the alternative face substantial late payment penalties and increased security deposits.

*Item No. 98, Issue No. 7-4 [Section 1.6]:* ***This issue has been resolved.***

***Item No. 99, Issue No. 7-5*** *[Section 1.7.1]: What recourse should a Party have if it believes the other Party is engaging in prohibited, unlawful or improper use of its facilities or services, abuse of the facilities or noncompliance with the Agreement or applicable tariffs?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 100/ISSUE 7-6.**

A. The answer to the question posed in the issue statement is "NO". CLECs should not be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination. Rather, if a Petitioner receives a notice of suspension or termination from BellSouth, with a limited time to pay non-disputed past due amounts, Petitioner should be required to pay only those amount past due as of the date of the notice and as expressly and plainly indicated on the notice, in order to avoid suspension or termination. Otherwise, CLEC will risk suspension or termination due to possible calculation and timing errors.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. If a Petitioner receives a notice of suspension or termination from BellSouth, it will be Petitioner's immediate goal to pay the past due amounts included in the notice to avoid suspension and termination. If the Petitioner must attempt to calculate and pay past due amounts in addition to those specified in BellSouth's notice, the Petitioner unfairly will risk suspension or termination due to possible calculation and timing errors.

**Q. COULD YOU PLEASE EXPLAIN WHAT WOULD LIKELY HAPPEN AT YOUR COMPANY UPON RECEIPT OF A NOTICE OF SUSPENSION OR TERMINATION DUE TO NONPAYMENT?**

A. Yes, if we or someone at our companies received a notice of suspension or termination from BellSouth, it would create nothing less than a "fire drill". Whoever received the notice would immediately work to determine whether such payments were missing, not posted, disputed, or simply due and, in the latter case would arrange to deliver payment to BellSouth as fast as possible. Access to BellSouth's OSS is essential to the daily operation of our companies – we take the threat of suspension of such access very seriously. Obviously, another reason why the threat of termination is taken very seriously, is that suspension would create service disruption and termination would result in massive service outages across our Florida customer base.

**Q. UNDER SUCH A SCENARIO, HOW WOULD YOU BE HINDERED IF YOU WERE REQUIRED TO CALCULATE OTHER POSSIBLE PAST DUE AMOUNTS?**

A. Under the threat of suspension or termination, our billing personnel would be working as fast as possible to track and pay the amount specified as past due on the suspension or termination notice. Obviously, there is time pressure to perform an investigation into the circumstances and to resolve the matter by identifying any discrepancies and securing payment of the amount specified. Any time or resources that we would have to expend in trying to calculate any possible additional past due amounts that may become past due in the time period between the date on which

BellSouth calculated the past due amount (which may or may not be known) and the date on which BellSouth would receive and post payment (which, with respect to posting only, will not be known) would be taken away from time needed to investigate and secure payment of the amount specified on the suspension or termination notice. But, the more significant hindrance is the "shell game" that would ensue if Petitioner had to guess the precise amount that BellSouth calculated upon receipt and posting of payment that was needed to satisfy the payment of all amounts past due requirement BellSouth seeks to impose. Under that circumstance, only BellSouth can know (and control) the answer to that calculation, as it knows the date upon which it first calculated the past due amount included in the notice and the date upon which it posts receipt of payment. Indeed, under BellSouth's proposal, it could simply delay posting of payment by a day if it was determined to suspend or terminate service. Like many others, this BellSouth proposal seeks unfairly to leverage its monopoly legacy and overwhelming dominance by putting Petitioners in a position that would not be acceptable in a typical commercial setting. The worst part of it, however, is that BellSouth once again proposes to use the specter of consumer affecting service outages as a means of putting CLECs at the mercy of a reluctant seller.

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

A. BellSouth proposes that in response to a notice of suspension or termination, a CLEC must pay not only the amount included in the notice, but all other amounts not in dispute that become past due. BellSouth's proposed language places too much

burden and risk on CLECs who are forced to calculate possible past due amounts in addition to those included in the BellSouth notice to avoid suspension or termination of service. As just explained, BellSouth's proposal amounts to a high stakes shell game that could result in massive service outages for our Florida customers, if we fail to properly track, time, trace and predict BellSouth behavior (which can be manipulative) in a manner that allows us to arrive at a "magic number" needed to avoid suspension or termination. Obviously, such terms and conditions are unreasonable in any setting and especially in this one where consumers' service hangs in the balance. *[Sponsored by: M. Johnson (KMC), H. Russell (NVX), J. Falvey (XSP)]*

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

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 101/ISSUE 7-7.**

A. The maximum amount of a deposit should not exceed two month's estimated billing for new CLECs or one and one-half month's actual billing for existing CLECs (based on average monthly billings for the most recent six (6) month period). The one and one-half month's actual billing deposit limit for existing CLECs is reasonable given that balances can be predicted with reasonable accuracy and that significant portions of services are billed in advance.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. Petitioners have engaged in tremendous compromise with BellSouth in an attempt to settle deposit issues and limit the issues for arbitration. It is not typical in commercial relationships for one side to continually try to extract deposits from the other. Nevertheless, in trying to settle deposit issues, Petitioners agreed to language that expands BellSouth's right to collect deposits well beyond what is found in its typical tariffs. In addition to attempting to resolve an issue that has long vexed the Parties (a protracted battle over these issues was played out before the FCC about two years ago), the Parties tried, through negotiations, to develop new contract language for deposits uniformly applicable across the nine state BellSouth region. The primary goals of this exercise were to draft deposit provisions that address BellSouth's asserted need for security deposits with Petitioners' need to limit tying-up capital in such deposits and to be able to clearly ascertain the circumstances when deposits would be required and returned.

In particular, Petitioners believe that the deposit terms should reflect that each, directly and through its predecessors, has already had a long and substantial business relationship with BellSouth. Accordingly, it is reasonable to treat Petitioners differently from other entities that have no established business relationship with BellSouth. The one and one-half month's actual billing deposit limit for existing CLECs proposed by Petitioners is reasonable given that balances can be predicted with reasonable accuracy and that significant portions of services are billed in advance. Moreover, Petitioners believe that it is more generous to BellSouth than terms to which BellSouth has previously agreed. Additionally, the calculations for

existing CLECs, which include all the CLECs in this arbitration, should be based on average monthly billings for the most recent six (6) month period. This way, any deposit required by BellSouth will reflect the most recent billing patterns and will eliminate any potential to skew a deposit requirement by using a base timeframe that may not accurately reflect the CLECs' current billing.

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

A. BellSouth's proposed language establishes a deposit based on an estimated two month's actual billing for existing customers and two month's estimated billing for new customers. BellSouth's language fails to take into account that the CLECs involved in this arbitration have established business relationships with BellSouth with significant billing history. For these reasons, they should not be subject to the same deposit requirements as new CLEC customers with no established business relationship with BellSouth. Through these negotiations, BellSouth has argued that the Agreement must include deposit provisions that not only work for Petitioners, but that will also work for other carriers that may adopt the Agreement. To accommodate BellSouth's position in that this Agreement will likely be adopted by other carriers, Petitioners' proposed language includes a separate deposit requirement for existing CLEC customers (one and one-half month's actual billing) as well as new CLEC customers (two month's estimated billing). This dual approach can apply in a reasonable and non-discriminatory manner to both the CLECs involved in the instant case as well as any new carriers that may adopt the final Agreement.

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

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 103/ISSUE 7-9.**

A. The answer to the question posed in the issue statement is "NO". BellSouth should have a right to terminate services to CLEC for failure to remit a deposit requested by BellSouth **only** in cases where: (a) CLEC agrees that such a deposit is required by the Agreement, or (b) the Commission has ordered payment of such deposit. A dispute over a requested deposit should be addressed via the Agreement's Dispute Resolution provisions and not through "self-help".

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. As with numerous other provisions in this Attachment, Petitioners' proposed language counters BellSouth's proposal to "pull the plug" on CLEC service without following the Dispute Resolution provisions of the Agreement. Such self-help actions must be limited to those circumstances where the CLEC agrees that a deposit

is required by the Agreement, or the Commission has ordered payment for the deposit. If there is a dispute as to the need or amount of a security deposit, BellSouth must not be able to terminate service to CLEC without following the Dispute Resolution provisions of the Agreement.

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

A. BellSouth's proposed language would allow BellSouth to terminate service to CLEC under any circumstance in which CLEC has not remitted a deposit requested by BellSouth within thirty (30) calendar days. Such broad and sweeping language would allow BellSouth to circumvent the Dispute Resolution provisions of the Agreement and simply "pull the plug" on CLEC services even in the event of a valid dispute regarding the required amount of a requested security deposit. BellSouth must be required to follow the Dispute Resolution provisions and the Commission must prevent BellSouth from taking any unilateral self-help action that will ultimately harm or terminate consumers' service.

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

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 104/ISSUE 7-10.**

A. If the Parties are unable to agree on the need for or amount of a reasonable deposit, either Party should be able to file a petition for resolution of the dispute and both parties should cooperatively seek expedited resolution of such dispute.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. It is reasonable to assume that the Parties may disagree as to the need for or required amount of a security deposit (there has been disagreement in the past). In the event of such a dispute that the Parties are unable to reach a negotiated settlement on (which typically has happened in the past), either Party may file a petition for dispute resolution in accordance with the Dispute Resolution provisions set forth in the Agreement. Such action is consistent with how disputes are handled throughout the Agreement and is the purpose of the Dispute Resolution provisions.

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

A. BellSouth's proposed language acknowledges that a Party can file a petition for dispute resolution in the event there is a dispute as to the need and amount of deposit, but BellSouth proposes that the CLECs must post a payment bond for the amount of the requested deposit during the pendency of the dispute resolution proceeding. According to BellSouth's language, posting a bond is a condition to avoid suspension or termination of service during the pendency of the dispute proceeding. This BellSouth bond requirement completely negates the purpose of the Dispute Resolution provisions. If a CLEC is forced to post its funds during the pendency of the dispute resolution proceeding, that unfairly puts the CLEC in the position of losing the dispute (and BellSouth in the position of winning the dispute) before it has been properly adjudicated and resolved. Thus, BellSouth's proposed language would effectively allow BellSouth to override the Dispute Resolution provisions of the Agreement by terminating service to CLEC if CLEC does not post a payment bond

for the amount of the requested deposit that CLEC, in that instance, already would have asserted is not required under the Agreement. Finally, BellSouth's insistence that it be the CLEC that has to file for Dispute Resolution is untenable. As BellSouth would be seeking relief (in the form of deposit), it is BellSouth that should have the burden of filing any complaint that it deems necessary.

*Item No. 105, Issue No. 7-11 [Section 1.8.9]:* ***This issue has been resolved.***

*Item No. 106, Issue No. 7-12 [Section 1.9.1]:* ***This issue has been resolved.***

**BONA FIDE REQUEST/NEW BUSINESS REQUEST (BFR/NBR)**

**(ATTACHMENT 11)**

*Item No. 107, Issue No. 11-1 [Sections 1.5, 1.8.1, 1.9, 1.10]:* ***This issue has been resolved.***

**SUPPLEMENTAL ISSUES**

**(ATTACHMENT 2)**

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

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Marva Brown Johnson on this issue, as though it were reprinted here.

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

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Marva Brown Johnson on this issue, as though it were reprinted here.

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

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Marva Brown Johnson on this issue, as though it were reprinted here.

***Item No. 111, Issue No. S-4:*** *At the end of the Interim Period, assuming that the Transition Period set forth in FCC 04-179 is neither vacated, modified, nor superceded, should the Agreement automatically incorporate the Transition Period set forth in the Interim Order? If not, what post Interim Period[3] transition plan should be incorporated into the Agreement?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

**A.** Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 112(A)/ISSUE S-5(A).**

**A.** Given that we have not had sufficient time to respond to BellSouth's newly proposed language on this and related Attachment 2 issues with BellSouth and to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

[3] INTERIM PERIOD – as set forth in ¶29 of the FCC 04-179, is defined as the period that ends on the earlier of (1) March 12, 2005 or (2) the effective date of the final unbundling rules adopted by the FCC pursuant to the Notice of Proposed Rulemaking described in the FCC 04-179

The rates, terms and conditions relating to switching, enterprise market loops and dedicated transport from each CLEC's interconnection agreement that was in effect as of June 15, 2004 were "frozen" by FCC 04-179.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

**A.** FCC 04-179 was clear that ILECs, including BellSouth, must continue to provide unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that are applied under their interconnection agreements with Joint Petitioners as of June 15, 2004. Accordingly, the rates, terms and conditions, including the definition, for those elements as stated in the Joint Petitioners' June 15, 2004 agreements should apply, unless the FCC clarified otherwise. BellSouth, however, is acting in contravention of FCC 04-179 by attempting to unilaterally modify the definitions of dedicated transport and enterprise market loops. The Joint Petitioners' rationale with regard to each class of UNEs frozen by FCC 04-179 is discussed below:

**Dedicated Transport**

With regard to dedicated transport, the Joint Petitioners' current interconnection agreements define this UNE as follows:

KMC/NewSouth/ NuVox/Xspedius:

> Dedicated transport, defined as BellSouth's transmission facilities, including all technically feasible capacity-related services including, but not limited to, DS1, DS3 and OCN levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers or switches owned by BellSouth, or between wire centers and switches owned by BellSouth and [KMC Telecom/ NewSouth/ NuVox/Xspedius].

The definition that BellSouth has proposed for dedicated transport (the transmission facilities connecting ILEC switches and wire centers in a LATA at a DS1 or higher level capacity, including dark fiber transport) does not appear in any of the Joint Petitioners' interconnection agreements that were in effect as of June 15, 2004, and, in fact represents an attempt to impose a significant change from the terms that actually were frozen by the FCC in FCC 04-179. The FCC, in FCC 04-179, did not make, nor direct any carrier to make, any modifications to the definition of dedicated transport included in the interconnection agreements in effect as of June 15, 2004. Notably, this is different from the FCC's treatment of unbundled switching, for which the FCC specifically limited the impact of its order by defining unbundled switching as mass market switching in footnote three of FCC 04-179 (this will be discussed in more detail later).

The key distinction between the frozen definitions from the existing interconnection agreements and the new definition proposed by BellSouth is that the frozen terms are based on pre-TRO FCC rules and orders and allow Joint Petitioners access to a class of dedicated transport facilities commonly known as "entrance facilities". These facilities, which run to points other than solely between BellSouth wire centers, were excluded from the dedicated transport definition adopted by the FCC in the TRO. Joint Petitioners traditionally have used these UNEs to backhaul traffic from their collocations in BellSouth end offices back to their own end office/switching centers. Joint Petitioners challenged the FCC's definitional gambit and the DC Circuit agreed that the FCC failed to justify how what had been clearly considered to be dedicated

transport since the beginning of unbundling under the Act could one day simply not be considered to be dedicated transport. The definitional issue was remanded to the FCC.

As the Commission is undoubtedly aware, the FCC, in FCC 04-179, intended to preserve the "status quo" with respect to the provision of dedicated transport while it addressed the *USTA II* remand issues. The FCC did not intend to modify the definition of dedicated transport in the Joint Petitioners' current interconnection agreements and, therefore, the Commission must reject BellSouth's attempt to modify the definition of dedicated transport and restrict Joint Petitioners' access to dedicated transport as a UNE for the period during which Joint Petitioners operate under these new Agreements prior to expiration of the Interim Period.

**Enterprise Market Loops**

With regard to enterprise market loops, the Joint Petitioners do not generally disagree with BellSouth's proposed definition, but again, in accordance with FCC 04-179, BellSouth cannot modify the definitions in the Joint Petitioners' current interconnection agreements in any way. The Joint Petitioners' current agreements define local loop as follows:

KMC/NuVox/Xspedius:

> The loop is the physical medium or functional path on which a subscriber's traffic is carried from the MDF or similar terminating device in central office up to the termination at the NID at the customer's premise. Each loop will be provisioned with NID.

NewSouth:

> The local loop network element ("Loop(s)") is defined as a transmission facility between a distribution frame (or its equivalent) in BellSouth's central office and the loop demarcation point at an end-user customer premises, including inside wire owned by BellSouth. The local loop network element includes all features, functions, and capabilities of the transmission facilities, including dark fiber and attached electronics (except those used for the provision of advanced services, such Digital Subscriber Line Access Multiplexers) and line conditioning. The loop shall include the use of all test access functionality, including without limitation, smart jacks, for both voice and data. NewSouth shall be entitled to order all loops set forth in Exhibit C of this Attachment. Unless otherwise requested, all loops will be provisioned with the appropriate Network Interface Device (NID).

As with dedicated transport, the FCC did not alter, nor grant BellSouth the authority to alter, the definition of enterprise market loops. In fact, in footnote four of FCC 04-179, the FCC reiterates that the D.C. Circuit in *USTA II* did not make any formal pronouncement of the FCC's findings with regard to enterprise market loops. BellSouth's proposed definition of enterprise market loops states that these loops consist of DS1 or higher level capacity, including dark fiber loops. Joint Petitioners do not disagree with BellSouth that these are the loop capacities that are at issue. However, BellSouth may not rewrite the FCC's order and develop a new definition for enterprise market loops. Despite the fact that the practical impact of BellSouth's revised definition appears to be minimal, if indeed there is any, the Commission must not allow BellSouth to defy FCC orders and become the sole-arbiter of what is and is not frozen in the Joint Petitioners' current interconnection agreements. The FCC did not grant BellSouth editorial privileges in this regard (or in any other).

**Switching**

Of the three UNEs discussed in this issue S-5(A), switching is the one in which the FCC did provide a specific definition so as to limit the impact of its order to freeze

certain terms in the Joint Petitioners' current interconnection agreements. Specifically, in footnote three of FCC 04-179, the FCC defined switching as mass market local circuit switching and all elements that must be made available when such switching is made available. As defined in the TRO, mass market switching serves customers that could not economically be served by competitors via DS1 or above capacity loops. The FCC made this modifications because, pursuant to the TRO, the FCC determined that there was no impairment with regard to enterprise market switching and no state commission in the BellSouth region found otherwise. Moreover, the FCC's national finding of non-impairment for enterprise switching (switching for customers at the DS1 and above capacity) was neither vacated nor remanded by *USTA II*.

The Joint Petitioners do not disagree with BellSouth's proposed definition of switching. The Joint Petitioners believe that the exception to switching for a requesting carrier that serves an End User with four (4) or more voice-grade (DSO) equivalents or lines served by the ILEC in Density Zone 1 of the top 50 MSAs is consistent with the FCC's *UNE Remand Order,* which is incorporated into the Joint Petitioners' current interconnection agreements. The Joint Petitioners also agree with the exception to the definition for switching to carriers that serve an End User with a DS1 or higher capacity service or UNE loop.

At this point, it bears reemphasizing that the FCC explicitly provided this definition of switching to effectuate its TRO finding of non-impairment for enterprise market switching. It provided no similar limitation with respect to dedicated transport or

enterprise market loops. This fact underscores the FCC's intent that the definitions for loop and dedicated transport UNEs should remain as currently defined in the Joint Petitioners' current interconnection agreements. With respect to switching, it was the FCC that took care to note that not all components of switching from the June 15, 2004 interconnection agreements would be frozen. With respect to loops and dedicated transport, the FCC adopted no similar caveat.

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

A. Joint Petitioners have not had adequate time to respond to BellSouth's newly proposed contract language related to this issue.[4] Joint Petitioners will submit language to counter BellSouth's proposal as time permits (in this regard, we note that BellSouth was to have provided its language during the abatement period, so as to allow adequate time for Joint Petitioners to review, analyze and counter – and to allow the parties to meaningfully negotiate – Joint Petitioners received BellSouth's proposed language more than a month after the abatement period ended and more than four months after BellSouth agreed that it would start the process by providing a new redline of Attachment 2).

[4] Earlier, Joint Petitioners had been presented with Interim Order Amendments, but such amendments are not applicable to the Joint Petitioners, as, by agreement with BellSouth, Joint Petitioners are not amending their existing agreements' UNE provisions, but will instead operate under the existing agreements until they are able to move into the new agreements that result from this arbitration. This agreement between the Parties was memorialized in their July 20, 2004 Joint Motion to Hold Proceeding in Abeyance, which was granted (in part) by the Commission on August 19, 2004. It is anticipated that these new agreements will encompass the resolution of issues related to *USTA II* and its progeny (*i.e.,* the post-*USTA II* regulatory framework).

With respect the language BellSouth has stated it would propose to effectuate the freeze adopted by FCC 04-179, Joint Petitioners understand that it contains a provision establishing the freeze and attaching as an exhibit to the new Agreements the frozen terms from the old agreements (again, Joint Petitioners simply have not had adequate time to determine whether BellSouth actually did this in its proposed language). Conceptually, this approach is acceptable. However, we have not had the opportunity to assess whether the proposed provision incorporating the freeze is worded in an acceptable manner and we anticipate that there will be disputes over whether BellSouth can modify some of the frozen terms with the definitions set forth in its position statements (available to us at this date via the most recent issues matrix filing). For the reasons set forth above, Joint Petitioners submit that the FCC did not intend for frozen terms to be modified. With respect to switching, the FCC carefully set forth which aspects of that UNE were being frozen (mass market switching) – therefore, if language is needed to make clear that enterprise switching was not frozen, it is unlikely that the Parties will have any disagreement with respect to making that point clear. With respect to loops, the Parties agree that frozen rates, terms and conditions are frozen only with respect to enterprise market loops which constitute DS1 and higher capacity level loops, including dark fiber.

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 112(B)/ISSUE S-5(B).**

**A.** Given that we have not had sufficient time to respond to BellSouth's newly proposed language on this and related Attachment 2 issues with BellSouth and to make our own

counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

The frozen rates, terms and conditions should be incorporated into the Agreement as they appeared in each Joint Petitioner's interconnection agreement that was in effect as of June 15, 2004. In so doing, it should be made clear that the switching rates, terms and conditions that were frozen apply only with respect to mass market switching and not with respect to enterprise market switching. It also should be made clear that the loop provisions are frozen with respect to DS1 and higher capacity level loop facilities, including dark fiber. The Parties agree that these constitute "enterprise market loops". The modified definitions proposed by BellSouth should be rejected. The frozen provisions should not be modified to reflect BellSouth's proposed more restrictive definition of dedicated transport.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. As stated above, the FCC, in FCC 04-179, was clear in requiring that ILECs must continue to provide unbundled access to mass market switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements with Joint Petitioners that were in effect as of June 15, 2004. Accordingly, the rates, terms and conditions for these UNEs as they existed in the Parties' June 15, 2004 agreements should be incorporated ***in their entirety*** into the Agreement. BellSouth should not be allowed make any modifications to the language containing the definition for dedicated transport. It is evident from the definition proposed by BellSouth for dedicated transport that BellSouth is seeking to do less than that is required by FCC 04-179. In that order, the

FCC did not indicate that it intended to freeze only the remanded TRO definition of dedicated transport (which appears in none of the Joint Petitioners' existing agreements). Instead, the FCC froze the definitions in place as of June 14, 2004, regardless of whether they were based on the TRO, earlier FCC rules and orders or some other construct. Through its proposed definition of dedicated transport, BellSouth is attempting to limit Joint Petitioners' access to dedicated transport UNEs by eliminating access to entrance facilities that are available as UNEs under each Joint Petitioner's June 15, 2004 agreement. BellSouth's gambit is inconsistent with the FCC's mandate in FCC 041-79 and is otherwise unacceptable to the Joint Petitioners (who have consistently refused in negotiations with BellSouth to give away something for nothing). Accordingly, the Commission must reject BellSouth's ploy.

As explained above, Joint Petitioners have yet to detect a practical impact of the definition BellSouth offers with respect to enterprise market loops. However, in the absence of assurances that the proposed definition will not work to eliminate unbundling of enterprise market loops pursuant to the frozen rates, terms and conditions of the June 14, 2004 interconnection agreements, Joint Petitioners submit that there is no need to tinker with the definitions included in the frozen terms. Joint Petitioners agree with BellSouth that enterprise market loops include DS1 and higher level capacity loops, including dark fiber and anticipate that they will be able to agree with BellSouth on contract language that makes clear that the loop rates, terms and conditions are frozen only with respect to those enterprise market loops.

With respect to switching, Joint Petitioners also can agree that the switching provisions frozen are frozen only with respect to mass market switching and that there appear to be no conceptual differences between the Parties as to what constitutes mass market switching (and associated elements unbundled with switching). Again, when BellSouth proposes language, Joint Petitioners anticipate that they will be able to confirm these points and hopefully narrow this issue.

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

A. Joint Petitioners have not had adequate time to respond to BellSouth's newly proposed contract language related to this issue. Joint Petitioners will submit language to counter BellSouth's proposal as time permits (in this regard, we note that BellSouth was to have provided its language during the abatement period, so as to allow adequate time for Joint Petitioners to review, analyze and counter – and to allow the parties to meaningfully negotiate – Joint Petitioners received BellSouth's proposed language more than a month after the abatement period ended and more than four months after BellSouth agreed that it would start the process by providing a new redline of Attachment 2).

As addressed above, BellSouth has discussed with the Joint Petitioners its intention to attach to the Agreement frozen provisions from each Joint Petitioner's current interconnection agreement. The Joint Petitioners agree in concept to this approach, but maintain that BellSouth should not be permitted to modify any of the rates, terms

and conditions affecting these UNEs. The Parties can incorporate language into the Agreement making it clear that the frozen switching terms apply only to mass market switching and that the frozen loop terms apply only to enterprise market loops (loops of DS1 and higher capacity).

***Item No. 113, Issue No. S-6**: (A) Is BellSouth obligated to provide unbundled access to DS1 loops, DS3 loops and dark fiber loops? (B) If so, under what rates, terms and conditions?*

**Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?**

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Jim Falvey on this issue, as though it were reprinted here.

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

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 114(A)/ISSUE S-7(A).**

A. Given that we have not had sufficient time to respond to BellSouth's newly proposed language on this and related Attachment 2 issues with BellSouth and to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own. BellSouth is obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport. *USTA II* did not eliminate section 251, CLEC impairment, section 271 or the Commission's jurisdiction under federal or

state law to require BellSouth to provide unbundled access to DS1, DS3 and dark fiber transport.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

A. *USTA II* did not eliminate BellSouth's statutory obligation to provide unbundled access to DS1, DS3 and dark fiber transport. Moreover, aside from BellSouth's section 251 obligation to provide access to these UNEs, BellSouth is under an obligation to provide unbundled access to transport pursuant to section 271 of the Act and can be independently required to unbundle DS1, DS3 and dark fiber transport pursuant to Florida law.

The FCC, in the TRO, made findings of **nationwide impairment** for DS1, DS3 and dark fiber transport. With respect to DS1 transport, the FCC made its nationwide impairment finding based on "the high entry barriers associated with deploying or obtaining transport used to serve relatively few end-user customers and the lack of route-specific evidence showing sufficient alternative deployment." In particular, the FCC found that deployment of DS1 transport cannot be justified as an economic or practical matter. The FCC also found that "competing carriers generally cannot self-provision DS1 transport." The FCC found that a carrier providing DS1 transport incurs the same fixed and sunk costs as a carrier deploying a higher capacity circuit or dark fiber but also incurs "higher incremental costs across its customer base than a carrier requesting higher capacity transport." The FCC also found that "DS1 transport is not generally made available on a wholesale basis" and that "unbundled

DS1 transport is often used by competing carriers in a loop/transport combination when collocation at the customer's end-office is uneconomic."

With respect to DS3 transport, the FCC concluded that, although this level of capacity indicates that a carrier is aggregating a significant amount of traffic, a carrier seeking to deploy a DS3 facility faces the same fixed and sunk costs, such as trenching and attaching to poles, that are involved in deploying any fiber facilities. Thus, the FCC made a nationwide impairment finding based on the high fixed and sunk costs associated with self-providing transport and the lack of route-specific evidence showing alternative facilities, as well as the difficulties of overcoming those obstacles at the DS3 transmission level. Citing scale economies, the FCC capped the number of DS-3 dedicated transport circuits available as UNEs to twelve per CLEC per route. Finally, with respect to dark fiber transport, the FCC found impairment on a nationwide basis based on record evidence showing that the high sunk costs associated with deploying fiber and the lack of evidence showing on a route specific basis alternative fiber facilities.

The D.C. Circuit, in *USTA II*, vacated the FCC's dedicated transport unbundling rules and remanded back to the FCC for further findings. Although the Court of Appeals' vacatur of the FCC's dedicated transport rules had overwhelmingly to do with the Court's non-delegation holding, rather than a fundamental critique of the FCC's impairment analysis, the Court expressed doubt that there was in fact nationwide impairment for all capacities of dedicated transport on every available route. At the

same time, however, the Court in no way eliminated the statutory section 251 unbundling obligation or the FCC's underlying finding that there was, in general, impairment present with respect to dedicated transport UNEs, despite the potential that non-impairment could be proven with respect to specific routes. The fact of the matter is, however, that ILECs, including BellSouth, were unable to assemble reliable evidence to counter CLEC claims of impairment in the FCC's *Triennial Review* proceeding. When given a second chance to establish exceptions to the dedicated transport unbundling rules and the FCC's finding of nationwide impairment in proceedings before the Commission, BellSouth again failed to present a compelling case. Indeed, even if BellSouth had prevailed in establishing non-impairment exceptions to the FCC's unbundling rules before the Commission, the vast majority of its unbundling obligations would have remained in place.

Thus, regardless of the D.C. Circuit's vacatur and remand of the FCC's DS1, DS3 and dark fiber transport rules, the D.C. Circuit did not eliminate BellSouth's statutory section 251 unbundling obligations and, although it offered wide-ranging dicta on the topic, it left in tact the FCC's impairment standard.

Section 251 is a statute. It has free-standing meaning and it was in no way struck-down by the D.C. Circuit. As discussed above with regard to DS1, DS3 and dark fiber loops, BellSouth still has the "duty" to provide network elements pursuant to section 251(c) as well as a "duty to negotiate in good faith" regarding fulfillment of its duty to provide network elements under section 251(c)(1). The nationwide

impairment findings made by the FCC with respect to DS1, DS3 and dark fiber transport remain fundamentally sound. Indeed, there has never been an FCC or Commission finding of non-impairment with respect to these elements (up to the twelve DS-3 cap). As a result of *USTA II's* adoption of BellSouth arguments regarding the limits of state commission authority, it appears that the Commission is now without the power to make finding of non-impairment for purposes of section 251. In the absence of such a finding, Joint Petitioners request that the Commission require unbundling of dedicated transport UNEs pursuant to section 251 (and, perhaps as importantly, state law) until such time as the FCC makes such a finding and adopts effective FCC rules and orders holding that there is non-impairment with respect to dedicated transport UNEs in certain circumstances. This result is based on the preponderance of evidence offered to date by CLECs and BellSouth in the FCC's and the Commission's own related proceeding regarding unbundling. It also is the most reasonable approach. To replace eight years of unbundling with a flash-cut to no unbundling serves nobody other than BellSouth and it threatens the very existence of the Joint Petitioners and the benefits Florida residents and businesses now enjoy as a result of competition.

In addition to BellSouth's obligations under section 251 of the Act, BellSouth has an obligation under section 271 of the Act to provide access to DS1, DS3 and dark fiber transport at rates, terms and conditions that are just, reasonable and nondiscriminatory consistent with the standards articulated under sections 201 and 202 of the Act. As the FCC has found, section 271 imposes unbundling obligations independent of those

in section 251(c)(3), obligations that are *not* conditioned on the presence of impairment. The FCC's interpretation of the BOCs' section 271 unbundling obligations was upheld by the *USTA II* court, which described the Commission's decision with respect to section 271 to mean that "even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases in order to enter the interLATA market." Specifically, section 271 Competitive Checklist Item No. 5 requires ILECs to provide local transport transmission from the trunk side of a wireline local exchange carrier switch unbundled from switching and other services. In the TRO, the FCC held that BOCs are under an independent statutory obligation contained in section 271 of the Act to provide competitors with unbundled access to network elements, which would include DS1, DS3 and dark fiber dedicated transport under Competitive Checklist Item No. 5. BellSouth has not been relieved from its section 271 obligations in Florida. BellSouth is required to meet Competitive Checklist Item No. 5 during the application process ***and remain in compliance*** with these requirements after the approval has been granted. In particular, section 271(d)(6) requires the BOCs to continue to satisfy the conditions required for approval of its section 271 application. The FCC has held that that in order to provide transport in compliance with Competitive Checklist Item No. 5, a BOC must provide dedicated transport to requesting carriers. In Florida, the FCC granted BellSouth's section 271 application based on BellSouth's compliance with this Competitive Checklist item.

The Commission has ample authority to enforce section 271 Competitive Checklist obligations, with regard to CLEC access to DS1, DS3 and dark fiber transport. The FCC has recognized the ongoing role of state commissions in its section 271 approval orders. In approving BellSouth's section 271 application for Florida, the FCC held that the Commission has a vital role in conducting section 271 proceedings and state and federal enforcement can address any backsliding that may arise in Florida. Moreover, the fact that BellSouth sought and obtained section 271 approval, based on the existence of interconnection agreements that specify the terms and conditions under which BellSouth is providing the checklist items, (known as section 271 "Track A") means that the Commission has jurisdiction over the provision of Competitive Checklist elements by virtue of its jurisdiction over interconnection agreements. Furthermore, since state commissions have jurisdiction over all issues included in interconnection agreements, and the Applicable Law definition in the General Terms and Conditions includes all "applicable federal, state, and local statutes, laws, rules regulations, codes, effective orders, injunctions, judgments and binding decisions, awards and decrees that relate to the obligations under this Agreement" within its scope, the Commission has, *ipso facto*, jurisdiction over section 271 and BellSouth's compliance therewith.

Aside from any federal statutes, the Commission arguably has independent state law authority to order BellSouth to continue to provide access to DS1, DS3 and dark fiber transport UNEs. Specifically, § 364.161(1) of the Florida Code provides that local carriers such as BellSouth "unbundle all of its network features, functionalities and

capabilities." We believe that this Florida statute, in addition to § 364.01 of the Florida Code, gives the Commission the authority, in an effort to promote competition and the availability of good telecommunications services to Florida consumers, to require BellSouth to unbundle DS1, DS3, and dark fiber transport.

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

A. Joint Petitioners have not had adequate time to respond to BellSouth's newly proposed contract language related to this issue. Joint Petitioners will submit language to counter BellSouth's proposal as time permits (in this regard, we note that BellSouth was to have provided its language during the abatement period, so as to allow adequate time for Joint Petitioners to review, analyze and counter – and to allow the parties to meaningfully negotiate – Joint Petitioners received BellSouth's proposed language more than a month after the abatement period ended and more than four months after BellSouth agreed that it would start the process by providing a new redline of Attachment 2).

**Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 114(B)/ISSUE S-7(B).**

A. Given that we have not had sufficient time to respond to BellSouth's newly proposed language on this and related Attachment 2 issues with BellSouth and to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

Pursuant to section 251, BellSouth is obligated to provide access to DS1, DS3 and dark fiber transport UNEs at TELRIC-compliant rates approved by the Commission. DS1, DS3 and dark fiber transport unbundled on other than a section 251 statutory basis should be made available at TELRIC-compliant rates approved by the Commission until such time as it is determined that another pricing standard applies and the Commission establishes rates pursuant to that standard.

**Q. WHAT IS THE RATIONALE FOR YOUR POSITION?**

**A.** As stated above, BellSouth is obligated to provision unbundled access to DS1, DS3 and dark fiber transport UNEs pursuant to section 251 and section 271. In addition, the Commission may order such unbundling pursuant to Florida state law. The Commission may also enforce unbundling requirements under section 271. Joint Petitioners maintain that their currently negotiated Attachment 2 adequately incorporates the rates, terms and conditions for DS1, DS3 and dark fiber transport that should remain in the Agreement. Notably, the rates incorporated are intended to be the TELRIC-compliant rates approved by the Commission. These rates should apply to DS1, DS3 and dark fiber UNE transport, in all instances where unbundling is required pursuant to section 251. In cases where section 271 is the source of the unbundling mandate, the FCC articulated that the just, reasonable and nondiscriminatory pricing standard under sections 201 and 202 would apply. Accordingly, the Commission should require BellSouth to continue providing section 271 checklist items at cost-based TELRIC-compliant rates, at least until such time as it is determined that another pricing methodology comports with the just, reasonable

and nondiscriminatory pricing standard and the Commission establishes rates pursuant thereto.

In FCC 04-179, the FCC recognized that the ILEC obligation to provide section 251 switching, loop and dedicated transport UNEs has been in place for several years and the precipitous elimination of these UNEs could destabilize the market. BellSouth's proposed alternative to TELRIC – phantom-market-based rates and tariffed special access rates – would not only harm competitive carriers, but also the consumers who rely on them to provide competitively-priced services. BellSouth's phantom-market-based rates and special access rates are generally exorbitant, bear no discernable relationship to costs (or to a cost-based pricing standard found to comport with the just and reasonable pricing standard), and are largely unconstrained by market forces. Consequently, neither phantom-market-based rates nor special access rates are "just and reasonable" for section 271 elements and they should not be allowed by the Commission. By maintaining TELRIC-compliant rates, the Commission will shield consumers from sharp and sudden rate increases as a result of carriers' increased costs for network elements and decrease the likelihood that consumers will be forced to incur steep price hikes from Joint Petitioners (to the extent that Joint Petitioners were able to impose such price hikes and remain competitive with BellSouth) or to return to BellSouth (which, in the absence of competition could impose its own steep price hikes on consumers).

Finally, with respect to UNEs for which state law independent of section 251 is the basis of unbundling, Joint Petitioners submit that the Commission should continue to require unbundling at its TELRIC-compliant UNE rates, at least until such time as it determines another pricing methodology is appropriate and establishes rates pursuant thereto.

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

A. Joint Petitioners have not had adequate time to respond to BellSouth's newly proposed contract language related to this issue. Joint Petitioners will submit language to counter BellSouth's proposal as time permits (in this regard, we note that BellSouth was to have provided its language during the abatement period, so as to allow adequate time for Joint Petitioners to review, analyze and counter – and to allow the parties to meaningfully negotiate – Joint Petitioners received BellSouth's proposed language more than a month after the abatement period ended and more than four months after BellSouth agreed that it would start the process by providing a new redline of Attachment 2).

As explained with respect to supplemental issue S-5, the Parties have adequate rates, terms and conditions in their current interconnection agreements addressing DS1, DS3 and dark fiber transport, which should be incorporated into this Agreement. Those "frozen" provisions should remain in the Agreement until such time as the FCC issues an order addressing existing DS1, DS3 and dark fiber transport unbundling obligations and there is negotiated or arbitrated language to incorporate

into the Agreement regarding those new requirements (or another set of standards mutually agreed upon by the parties). With respect to the rates, the Commission's TELRIC-compliant dedicated transport rates should remain in the Agreement and apply to dedicated transport regardless of the source of the unbundling requirement until the Commission establishes different rates (if necessary and appropriate) for network elements unbundled on a different statutory basis.

**Q. BELLSOUTH ASSERTS THAT THIS ISSUE IS NOT APPROPRIATE FOR ARBITRATION. DO YOU AGREE?**

A. No. There is no basis for BellSouth's contention that this issue (including both its subparts) is inappropriate for arbitration. As part of their abeyance agreement, which was memorialized in a joint motion for abeyance granted by the Commission, the Parties agreed that they would raise in this arbitration supplemental issues relating to the post-*USTA II* regulatory framework. Given *USTA II's* vacatur of the FCC's dedicated transport unbundling rules, BellSouth has expressed to Joint Petitioners its view that it does not have to unbundle dedicated transport. For the reasons expressed herein and which will be set forth in additional submissions of testimony and briefing, Joint Petitioners emphatically disagree. Frankly, it is difficult to see how BellSouth can plausibly argue that this issue is somehow beyond the scope of the Parties' abeyance agreement. BellSouth has no right to declare certain things inside or outside the scope of this proceeding. Furthermore, by virtue of the joint motion for abeyance approved by the Commission, the Commission unquestionably has jurisdiction over all Supplemental Issues raised herein.

*Item No. 115, Issue No. S-8:* ***This issue has been resolved.***

**Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

**A.** Yes, for now, it does. Thank you.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following parties by Hand Delivery (*), and/or U. S. Mail this 10th day of January, 2005.

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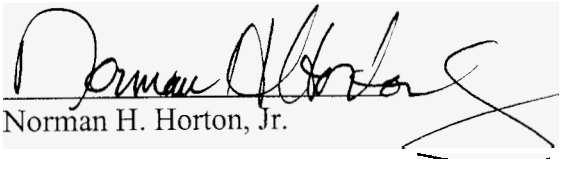

Norman H. Horton, Jr.

# JOINT PETITIONERS' EXHIBIT

## DISPUTED CONTRACT LANGUAGE BY ISSUE

## GENERAL TERMS AND CONDITIONS

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

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

[BellSouth Version] **End User** means the **ultimate user of the Telecommunications Service**.

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

10.4.1 [CLEC Version] Except for any indemnification obligations of the Parties hereunder, **with respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by either Party, any End User of either Party, or by any other person or entity, for damages associated with any of the services provided pursuant to or in connection with this Agreement, including but not limited to the installation, provision, preemption, termination, maintenance, repair or restoration of service, and, in any event, subject to the provisions of the remainder of this Section, each Party's liability shall be limited to and shall not exceed in aggregate amount over the entire term hereof an amount equal to seven-and-one half percent (7.5%) of the aggregate fees, charges or other amounts paid or payable to such Party for any and all services provided or to be provided by such Party pursuant to this Agreement as of the Day on which the claim arose; provided that the foregoing provisions shall not be deemed or construed as (A) imposing or allowing for any liability of either Party for (x) indirect, special or consequential damages as otherwise excluded pursuant to Section 10.4.4 below or (y) any other amount or nature of damages to the extent resulting directly and proximately from the claiming Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to all applicable damages or (B) limiting either Party's right to recover appropriate refund(s) of or rebate(s) or credit(s) for fees, charges or other amounts paid at Agreement rates for**

**services not performed or provided or otherwise failing to comply (with applicable refund, rebate or credit amounts measured by the diminution in value of services reasonably resulting from such noncompliance) with the applicable terms and conditions of this Agreement. Notwithstanding the foregoing, claims or suits for damages by either Party, any End User of either Party, or by any other person or entity, to the extent resulting from the gross negligence or willful misconduct of the other Party, shall not be subject to the foregoing limitation of liability.**

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

*Item No. 5, Issue No. G-5 [Section 10.4.2]: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks?*

10.4.2 CLEC Version] **No Section.**

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

*Item No. 6, Issue No. G-6 [Section 10.4.4]: How should indirect, incidental or consequential damages be defined for purposes of the Agreement?*

10.4.4 [CLEC Version] Nothing in this Section 10 shall limit a Party's obligation to **indemnify or hold** harmless the other Party set forth elsewhere in this Agreement. Except in cases of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages **provided that neither the foregoing nor any other provision of this Section 10 shall be deemed or construed as imposing any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder and were not and are not directly and proximately caused by or the result of such Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage.** In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the services or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

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

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

10.5 [CLEC Version] Indemnification for Certain Claims. The Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim **for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications. The Party receiving services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party providing services hereunder against any claim, loss or damage to the extent arising from (1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent caused by the providing Party's negligence, gross negligence or willful misconduct**.

[BellSouth Version] Indemnification for Certain Claims. The Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim**, loss or damage arising from the receiving Party's use of the services provided under this Agreement pertaining to (1) claims** for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications**, or (2)** any claim, loss or damage **claimed by the End User of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations** arising out of this Agreement.

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

11.1 [CLEC Version] No License. No patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by this Agreement. **A Party's use of the other Party's name, service marks and trademarks shall be in accordance with Applicable Law.**

[BellSouth Version] No License. No patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by this Agreement. **The Parties are strictly prohibited from any use, including but not limited to, in the selling, marketing, promoting or advertising of telecommunications**

**services, of any name, service mark, logo or trademark (collectively, the "Marks") of the Other Party. The Marks include those Marks owned directly by a Party or its Affiliate(s) and those Marks that a Party has a legal and valid license to use. Notwithstanding the foregoing, <<customer_short_name>> may make factual references to the BellSouth name as necessary to respond to direct inquiries from customers or potential customers regarding the source of the underlying services or the identity of repair technicians. The Parties acknowledge that they are separate and distinct and that each provides a separate and distinct service and agree that neither Party may, expressly or impliedly, state, advertise or market that it is or offers the same service as the other Party or engage in any other activity that may result in a likelihood of confusion between its own service and the service of the Other Party.**

*Item No. 9, Issue No. G-9 [Section 13.1]: Under what circumstances should a party be allowed to take a dispute concerning the interconnection agreement to a Court of law for resolution first?*

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

13. [BellSouth Version] **Resolution of Disputes**

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

13.2 **Except as otherwise stated in this Agreement, or for such matters which lie outside the jurisdiction or expertise of the Commission or FCC, if any dispute arises as to the enforcement of terms and conditions of this Agreement, and/or as to the interpretation of any provision of this Agreement, the aggrieved party, to the extent seeking resolution of such dispute, must seek such resolution before the Commission or the FCC in accordance with the Act. Each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Either Party may seek expedited resolution by the Commission. During the Commission proceeding each Party shall continue to perform its obligations under this Agreement; provided, however, that neither Party shall be required to act in an unlawful fashion.**

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

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

*Item No. 12, Issue No. G-12 [Section 32.2]: Should the Agreement explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless*

*otherwise specifically agreed to by the Parties?*

32.2 [CLEC Version] **Nothing in this Agreement shall be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, except in such cases where the Parties have explicitly agreed to a limitation or exemption. Silence shall not be construed to be such a limitation or exemption with respect to any aspect, no matter how discrete, of Applicable Law.**

[BellSouth Version] **This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right or other requirement, not expressly memorialized herein, is applicable under this Agreement by virtue of a reference to an FCC or Commission rule or order or Applicable Law, and such obligation, right or other requirement is disputed by the other Party, the Party asserting that such obligation, right or other requirement is applicable shall petition the Commission for resolution of the dispute and the Parties agree that any finding by the Commission that such obligation, right or other requirement exists shall be applied prospectively by the Parties upon amendment of the Agreement to include such obligation, right or other requirement and any necessary rates, terms and conditions, and the Party that failed to perform such obligation, right or other requirement shall be held harmless from any liability for such failure until the obligation, right or other requirement is expressly included in this Agreement by amendment hereto.**

## ATTACHMENT 2

## NETWORK ELEMENTS AND OTHER SERVICES

*Item No. 23, Issue No. 2-5 [Section 1.5]: What rates, terms, and conditions should govern the CLECs' transition of existing network elements that BellSouth is no longer obligated to provide as UNEs to other services?*

**Language to be provided by the Parties.**

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

1.7 [CLEC Version] Notwithstanding any other provision of this Agreement, BellSouth will not combine UNEs or Combinations with any service, Network Element or other offering that it is obligated to make available only pursuant to Section 271 of the Act.

[BellSouth Version] Notwithstanding any other provision of this Agreement, BellSouth will not **commingle or** combine UNEs or Combinations with any service, Network Element or other offering that it is obligated to make available only pursuant to Section 271 of the Act.

*Item No. 27, Issue No. 2-9 [Section 1.8.3]: When multiplexing equipment is attached to a commingled circuit, should the multiplexing equipment be billed per the jurisdictional authorization (Agreement or tariff) of the lower or higher bandwidth service?*

1.8.3 [CLEC Version] When multiplexing equipment is attached to a commingled circuit, the **multiplexing equipment** and Central Office Channel Interfaces will be billed from the same jurisdictional authorization (Agreement or tariff) as the lower bandwidth service.

[BellSouth Version] When multiplexing equipment is attached to a commingled circuit, the **multiplexing equipment** will be billed from the same jurisdictional authorization (agreement or tariff) as the **higher bandwidth service**. The Central Office Channel Interface will be billed from the same jurisdictional authorization (tariff or agreement) as the lower **bandwidth service.**

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

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

[BellSouth Version] **Line Conditioning is defined as routine network modification that BellSouth regularly undertakes to provide xDSL services to**

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

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

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

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

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

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

[BellSouth Version] For any copper loop being ordered by <<customer_short_name>> which has over 6,000 feet of combined bridged tap will be modified, upon request from <<customer_short_name>>, so that the loop

will have a maximum of 6,000 feet of bridged tap. This modification will be performed at no additional charge to <<customer_short_name>>. Line conditioning orders that require the removal of bridged tap **that serves no network design purpose on a copper loop that will result in a combined level of bridged tap between 2,500 and 6,000 feet** will be performed at the rates set forth in Exhibit A of this Attachment.

2.12.4 [CLEC Version] **No Section**

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

*Item No. 43, Issue No. 2-25 [Section 2.18.1.4]: Under what circumstances should BellSouth be required to provide CLEC with Loop Makeup information on a facility used or controlled by a carrier other than BellSouth?*

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

[BellSouth Version] **BellSouth's provisioning of LMU information to the requesting CLEC for facilities is contingent upon either BellSouth or the requesting CLEC controlling the Loop(s) that serve the service location for which LMU information has been requested by the CLEC. The requesting CLEC is not authorized to receive LMU information on a facility used or controlled by another CLEC unless BellSouth receives a Letter of Authorization (LOA) from the voice CLEC (owner) or its authorized agent on the LMUSI submitted by the requesting CLEC.**

*Item No. 46, Issue No. 2-28 [Section 3.10.4]: Should the CLEC be permitted to incorporate the Fast Access language from the FDN and/or Supra interconnection agreements, respectively docket numbers 010098-TP and 001305-TP, for the term of this Agreement?*

3.10.4 [CLEC Version] To the extent required by **and consistent with** Applicable Law, BellSouth shall provide its retail DSL offering (e.g., Fast Access Service) to <<customer_short_name>> for use with UNE-P or Loops provisioned pursuant to

this Agreement pursuant to separately negotiated rates, terms and conditions in a non-discriminatory manner. **To the extent BellSouth provides a DSL offering to another CLEC pursuant to the rates, terms and conditions of an interconnection agreement or Commission order, BellSouth will provide <<customer_short_name>> with the same DSL offering at the same rates, terms and conditions.**

[BellSouth Version] To the extent required by Applicable Law, BellSouth shall provide its DSL service and Fast Access services to <<customer_short_name>>, for use with UNE-P as Loops provisioned pursuant to this Agreement, pursuant to separately negotiated rates, terms and conditions in a non-discriminatory manner.

*Item No. 50, Issue No. 2-32 [Sections 5.2.5.2.1, 5.2.5.2.3, 5.2.5.2.4, 5.2.5.2.5and 5.2.5.2.7]: How should the term "customer" as used in the FCC's EEL eligibility criteria rule be defined?*

5.2.5.2.1 [CLEC Version] 1) Each circuit to be provided to each **customer** will be assigned a local number prior to the provision of service over that circuit;

[BellSouth Version] 1) Each circuit to be provided to each **End User** will be assigned a local number prior to the provision of service over that circuit;

5.2.5.2.3 [CLEC Version] 3) Each circuit to be provided to each **customer** will have 911 or E911 capability prior to provision of service over that circuit;

[BellSouth Version 3) Each circuit to be provided to each **End User** will have 911 or E911 capability prior to provision of service over that circuit;

5.2.5.2.4 [CLEC Version] 4) Each circuit to be provided to each **customer** will terminate in a collocation arrangement that meets the requirements of FCC 47 C.F.R. 51.318(c);

[BellSouth Version 4) Each circuit to be provided to each **End User** will terminate in a collocation arrangement that meets the requirements of FCC 47 C.F.R. 51.318(c);

5.2.5.2.5 [CLEC Version] 5) Each circuit to be provided to each **customer** will be served by an interconnection trunk in the same LATA as the customer premises served by the EEL over which <<customer_short_name>> will transmit the calling party's number in connection with calls exchanged over the trunk;

[BellSouth Version 5) Each circuit to be provided to each **End User** will be served by an interconnection trunk in the same LATA as the customer premises served by the EEL over which <<customer_short_name>> will transmit the calling party's number in connection with calls exchanged over the trunk;

5.2.5.2.7 [CLEC Version] 7) Each circuit to be provided to each **customer** will be served by a switch capable of switching local voice traffic.

[BellSouth Version] 7) Each circuit to be provided to each **End User** will be served by a switch capable of switching local voice traffic.

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

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

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

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

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

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

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

5.2.6.2.3 [<<customer_short_name>> Version] To the extent the independent auditor's report concludes that <<customer_short_name>> failed to comply **in all material respects** with the service eligibility criteria, <<customer_short_name>> shall reimburse BellSouth for the cost of the independent auditor. Similarly, to the extent the independent auditor's report concludes that <<customer_short_name>> did comply in all material respects with the service eligibility criteria, BellSouth will reimburse <<customer_short_name>> for its reasonable and demonstrable costs associated with the audit, including, among other things, staff time. The

Parties shall provide such reimbursement within thirty (30) calendar days of receipt from <<customer_short_name>> of a statement of such costs.

[BellSouth Version] To the extent the independent auditor's report concludes that <<customer_short_name>> failed to comply with the service eligibility criteria, <<customer_short_name>> shall reimburse BellSouth for the cost of the independent auditor. Similarly, to the extent the independent auditor's report concludes that <<customer_short_name>> did comply in all material respects with the service eligibility criteria, BellSouth will reimburse <<customer_short_name>> for its reasonable and demonstrable costs associated with the audit, including, among other things, staff time. The Parties shall provide such reimbursement within thirty (30) calendar days of receipt from <<customer_short_name>> of a statement of such costs.

## ATTACHMENT 3

## INTERCONNECTION

*Item No. 63, Issue No. 3-4 [Section 10.10.6 (KMC), 10.8.6 (NSC), 10.8.6 (NVX), 10.13.5 (XSP)]: **Under what terms** should CLEC be obligated to reimburse BellSouth for amounts BellSouth pays to third party carriers that terminate BellSouth transited/CLEC originated traffic?*

10.8.6 [CLEC Version] BellSouth agrees to deliver Transit Traffic originated by <<customer_short_name>> to the terminating carrier; provided, however, that <<customer_short_name>> is solely responsible for negotiating and executing any appropriate contractual agreements with the terminating carrier for the exchange of Transit Traffic through the BellSouth network. BellSouth will not be liable for any compensation to the terminating carrier or to <<customer_short_name>> for transiting <<customer_short_name>>-originated or terminated Transit Traffic. **Notwithstanding any other provision of this Attachment**, in the event that the terminating third party carrier imposes on BellSouth any charges or costs for the delivery of Transit Traffic originated by <<customer_short_name>>, <<customer_short_name>> shall reimburse BellSouth for all charges paid by BellSouth, **which BellSouth is obligated to pay pursuant to contract or Commission order**, provided that BellSouth notifies and, upon request, provides <<customer_short_name>> with a copy of such an invoice, if available, or other equivalent supporting documentation (if an invoice is not available), and proof of payment and other applicable supporting documentation. BellSouth will provide such notice and information in a timely, reasonable and nondiscriminatory manner. BellSouth shall diligently review, dispute and pay such third party invoices (or equivalent) in a manner that is at parity with its own practices for reviewing, disputing and paying such invoices (or

equivalent) **when no similar reimbursement provision applies. Notwithstanding the foregoing, <<customer_short_name>> will not be obligated to reimburse BellSouth for any charges or costs related to Transit Traffic for which BellSouth has assumed responsibility through a settlement agreement with a third party.** Additionally, the Parties agree that any billing to a third party or other telecommunications carrier under this section shall be pursuant to MECAB procedures.

[BellSouth Version] BellSouth agrees to deliver Transit Traffic originated by <<customer_short_name>> to the terminating carrier; provided, however, that <<customer_short_name>> is solely responsible for negotiating and executing any appropriate contractual agreements with the terminating carrier for the exchange of Transit Traffic through the BellSouth network. BellSouth will not be liable for any compensation to the terminating carrier or to <<customer_short_name>> for transiting <<customer_short_name>>-originated or terminated Transit Traffic. In the event that the terminating third party carrier imposes on BellSouth any charges or costs for the delivery of Transit Traffic originated by <<customer_short_name>>, <<customer_short_name>> shall reimburse BellSouth for all charges paid by BellSouth, provided that BellSouth notifies <<customer_short_name>> and, upon request, provides <<customer_short_name>> with a copy of such an invoice, if available, or other equivalent supporting documentation (if an invoice is not available), and proof of payment and other applicable supporting documentation. BellSouth will **use commercially reasonable efforts to** provide such notice and information in a timely, reasonable and nondiscriminatory manner. BellSouth shall diligently review, dispute and pay such third party invoices (or equivalent) in a manner that is at parity with its own practices for reviewing, disputing and paying such invoices (or equivalent) **under the same circumstances. Once <<customer_short_name>> reimburses BellSouth for any such payments, any disputes with respect to such charges shall be between <<customer_short_name>> and the terminating third party carrier.** Additionally, the Parties agree that any billing to a third party or other telecommunications carrier under this section shall be pursuant to MECAB procedures.

*Item No. 65, Issue No. 3-6 [Section 10.10. 1 (KMC), 10.8.1 (NSC/NVX), 10.13 (XSP)]: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?*

10.10.1 [CLEC Version] Each Party shall provide tandem switching and transport services for the other Party's Transit Traffic. Rates for Local Transit Traffic and ISP-

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

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

## ATTACHMENT 6

## ORDERING

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

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

Confidential Information Section in the General Terms and Conditions of this Agreement.

[BellSouth Version] Disputes over Alleged Noncompliance. In it's **written notice to the other Party** the alleging Party will state **that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such use is not corrected or ceased by the fifth (5th) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice to the person designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision of access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10th) calendar day following the date of the initial notice. If the other Party disagrees with the alleging Party's allegations of unauthorized use, the other** Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

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

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

*Item No. 94, Issue No. 6-11 [Sections 3.1.2, 3.1.2.1]: (A) Should the mass migration of customer service arrangements*

*resulting from mergers, acquisitions and asset transfers be accomplished by the submission of an electronic LSR or spreadsheet?*

*(B) If so, what rates should apply?*

*(C) What should be the interval for such mass migrations of services?*

3.1.2 [CLEC Version] Mass Migration of Customers. BellSouth will cooperate with <<customer_short_name>> to accomplish mass migration of customers expeditiously and on terms that are reasonable and non-discriminatory. **Mass migration of customer service arrangements (e.g., UNEs, Combinations, resale) will be accomplished pursuant to submission of electronic LSR or, if mutually agreed to by the Parties, by submission of a spreadsheet in a mutually agreed-upon format. Until such time as an electronic LSR process is available, a spreadsheet containing all relevant information shall be used. An electronic OSS charge shall be assessed per service arrangement migrated. This Section shall not govern bulk migration from one service arrangement to another for the same carrier or migration of a collocation space from one carrier to another.**

[BellSouth Version] Mass Migration of Customers. BellSouth will cooperate with <<customer_short_name>> to accomplish mass migration of customers expeditiously and on terms that are reasonable and non-discriminatory.

3.1.2.1 [CLEC Version] **BellSouth shall only charge <<customer_short_name>> a TELRIC-based records change charge for the migration of customers for which no physical re-termination of circuits must be performed. The TELRIC-based records change charge is as set forth in Exhibit A of Attachment 2 of this Agreement. Such migrations shall be completed within ten (10) calendar days of an LSR or spreadsheet submission. The TELRIC-based charge for physical re-termination of circuits (including appropriate record changes (a single charge will apply)) is as set forth in Exhibit A of Attachment 2 of this Agreement. Such physical re-terminations shall be completed within ten (10) calendar days of electronic LSR or spreadsheet submission.**

[BellSouth Version] **No Section**.

**ATTACHMENT 7**

## BILLING

*Item No. 95, Issue No. 7-1 [Section 1.1.3]: What time limits should apply to backbilling, over-billing, and under-billing issues?*

1.1.3 [CLEC Version] The Bill Date, as defined herein, must be present on each bill transmitted by one Party to the other Party and must be a valid calendar date. **Bills should not be rendered for any charges which are incurred under this agreement when more than ninety (90) days have passed since the bill date on which those charges ordinarily would have been billed. Billed amounts for services rendered more than one (1) billing period prior to the Bill Date shall be invalid unless the billing Party identifies such billing as "back-billing" on a line-item basis. However, both Parties recognize that situations exist which would necessitate billing beyond ninety (90) days and up to a limit of six (6) months after the date upon which the bill ordinarily would have been issued. These exceptions are:**

**Charges connected with jointly provided services whereby meet point billing guidelines require either party to rely on records provided by a third party and such records have not been provided in a timely manner;**

**Charges incorrectly billed due to erroneous information supplied by the non-billing Party.**

[BellSouth Version] The Bill Date, as defined herein, must be present on each bill transmitted by one Party to the other Party and must be a valid calendar date. **Charges incurred under this Agreement are subject to applicable Commission rules and state statutes of limitations.**

*Item No. 96, Issue No. 7-2 [Section 1.2.2]: (A) What charges, if any, should be imposed for records changes made by the Parties to reflect changes in corporate names or other LEC identifiers such as OCN, CC, CIC and ACNA? (B) What intervals should apply to such changes?*

1.2.2 [CLEC Version] OCN, CC, CIC, ACNA and BAN Changes. **In the event that either Party makes any corporate name change (including addition or deletion of a d/b/a), or a change in OCN, CC, CIC, ACNA or any other LEC identifier (collectively, a "LEC Change"), the changing Party shall submit written notice to the other Party. A Party may make one (1) LEC Change**

**per state in any twelve (12) month period without charge by the other Party for updating its databases, systems, and records solely to reflect such LEC Change. In the event of any other LEC Change, such charge shall be at the cost-based, TELRIC compliant rate set forth in Exhibit A to this Attachment 7. LEC Changes shall be accomplished in thirty (30) calendar days and shall result in no delay or suspension of ordering or provisioning of any element or service provided pursuant to this Agreement, or access to any pre-order, order or maintenance interfaces made available by BellSouth pursuant to Attachment 6 of this Agreement. At the request of a Party, the other Party shall process and implement all system and record changes necessary to effectuate a new OCN/CC within thirty (30) calendar days. At the request of a Party, the other Party shall establish a new BAN within ten (10) calendar days.**

[BellSouth Version] OCN, CC, CIC, ACNA and BAN Changes. **If <<customer_short_name>> needs to change its ACNA(s)/BAN(s)/CC(s)/CIC(s)/OCN(s) under which it operates when <<customer_short_name>> has already been conducting business utilizing that ACNA(s)/BAN(s)/CC(s)/CIC(s)/OCN(s), <<customer_short_name>> shall bear all costs incurred by BellSouth to convert <<customer_short_name>> to the new ACNA(s)/BAN(s)/CC(s)/CIC(s)/OCN(s). ACNA/BAN/CC/CIC/OCN conversion charges include the time required to make system updates to all of <<customer_short_name>>'s End User customer records and will be handled by the BFR/NBR process.**

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

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

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

*Item No. 99, Issue No. 7-5 [Section 1.7.1]: What recourse should a Party have if it believes the other Party is engaging in prohibited, unlawful or improper use of its facilities or services, abuse of the facilities or noncompliance with the Agreement or applicable tariffs?*

1.7.1 [CLEC Version] Each Party reserves the right to suspend or terminate service in the event of prohibited, unlawful or, in the case of resold services, improper use of the other Party's facilities or service (e.g. making calls in a manner reasonably to be expected to frighten, abuse, torment or harass another, etc.) as described under the providing Party's tariff, abuse of the other Party's facilities, or any other violation or noncompliance with this Agreement and/or each Party's tariffs where applicable. Upon detection of such use, the detecting Party will provide written notice to the other Party that additional applications for **such** service may be refused, that any pending orders for **such** service may not be completed, and/or that access to ordering systems **for such service** may be suspended if such use is not corrected or ceased by the fifteenth (15th) calendar day following the date of the notice. In addition, the detecting Party may, at the same time, provide written notice to the person designated by the other Party to receive notices of noncompliance that the detecting Party may terminate the provision of **such** existing services to the other Party if such use is not corrected or ceased by the thirtieth (30th) calendar day following the date of the initial notice. **Notwithstanding the foregoing, if the Party that receives the notice disagrees with the issuing Party's allegations of prohibited, unlawful or improper use, it shall provide written notice to the issuing Party stating the reasons therefor. Upon delivery of such notice of dispute, the foregoing provisions regarding suspension and termination will be stayed, and the Parties shall work in good faith to resolve any dispute over allegations of prohibited, unlawful or improper use. If the Parties are unable to resolve such dispute amicably, the issuing Party shall proceed, if at all, pursuant to the dispute resolution provisions set forth in the General Terms and Conditions.**

[BellSouth Version] Each Party reserves the right to suspend or terminate service in the event of prohibited, unlawful or, in the case of resold services, improper use of the other Party's facilities or service (e.g. making calls in a manner reasonably to be expected to frighten, abuse, torment or harass another, etc.) as described under the providing Party's tariff, abuse of the other Party's facilities, or any other violation or noncompliance with this Agreement and/or each Party's tariffs where applicable. Upon detection of such use, the detecting Party will 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 such use is not corrected or ceased by the fifteenth (15th) calendar day following the date of the notice. In addition, the detecting Party may, at the same time, provide written notice to the person

designated by the other Party to receive notices of noncompliance that the detecting Party may terminate the provision of **all** existing services to the other Party if such use is not corrected or ceased by the thirtieth (30th) calendar day following the date of the initial notice.

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

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

[BellSouth Version] **BellSouth** reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the **bill date in the month after the original bill date, BellSouth** will provide written notice to **<<customer_short_name>>** that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, **and all other amounts not in dispute that become past due before refusal, incompletion or suspension**, is not received by the fifteenth (15th) calendar day following the date of the notice. In addition, **BellSouth** may, at the same time, provide written notice **to the person designated by <<customer_short_name>> to receive notices of noncompliance** that **BellSouth** may discontinue the provision of existing services to **<<customer_short_name>>** if payment of such amounts**, and all other amounts not in dispute that become past due before discontinuance**, is not received by the thirtieth (30th) calendar day following the date of the initial notice.

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

*amount of the deposit?*

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

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

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

1.8.3.1 [CLEC Version] **The amount of security due from an existing CLEC shall be reduced by amounts due <<customer_short_name>> by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in Section 1.8.5.1, and subject to the standard set forth in Section 1.8.5.**

[BellSouth Version] **No Section.**

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

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

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

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

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

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

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

**Language to be provided by the Parties.**

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

**Language to be provided by the Parties.**

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

**Language to be provided by the Parties.**

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

**Language to be provided by the Parties.**

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

**Language to be provided by the Parties.**

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

**Language to be provided by the Parties.**

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

**Language to be provided by the Parties.**