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June 9, 2006

BY ELECTRONIC FILING
Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

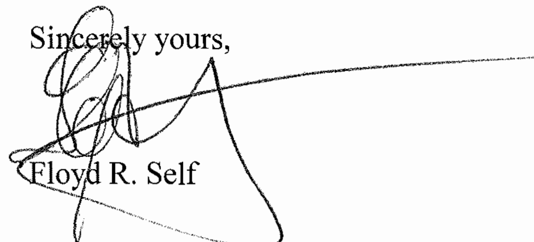
Re: Docket Nos. 050119-TP and 050125-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint Spectrum Limited Partnership, Nextel South Corporation, Sprint Communications Company Limited Partnership (collectively, "Sprint Nextel), T-Mobile USA, Inc. ('T-Mobile"), and MetroPCS Florida, LLC ("MetroPCS") (collectively "Joint CMRS Carriers") is an electronic version of the Post-Hearing Brief and Statement of Issues and Positions of T-Mobile USA, Inc., Sprint Nextel, and MetroPCS Florida, LLC, Inc. in the above referenced dockets.

Thank you for your assistance with this filing.

Sincerely yours,



Floyd R. Self

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Enclosure
cc: Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition of TDS Telecom d/b/a TDS Telecom/Quincy Telephone, ALLTEL Florida, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom, ITS Telecommunications Systems, Inc. and Frontier Communications Of the South, LLC, concerning BellSouth Telecommunications, Inc.'s Transit Service Tariff	)	Docket No. 050119-TP
Petition and Complaint of AT&T Communications Of the Southern States, LLC for suspension and Cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth Telecommunications, Inc.	)	Docket No. 050125-TP Filed June 9, 2006

**POST-HEARING BRIEF AND STATEMENT OF ISSUES AND POSITIONS
OF
T-MOBILE USA, INC.
SPRINT NEXTEL
AND
METROPCS FLORIDA, LLC**

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PRELIMINARY STATEMENT

Pursuant to Rule 28-106.307, Florida Administrative Code, T-Mobile USA, Inc. ("T-Mobile"), Sprint Spectrum Limited Partnership, Nextel South Corporation, Sprint Communications Company Limited Partnership (hereinafter, collectively, "Sprint Nextel") and MetroPCS Florida, LLC ("MetroPCS") (hereinafter, T-Mobile, Sprint Nextel, and MetroPCS shall be collectively referred to as "Joint CMRS Carriers") file their Joint Post-Hearing Brief and Statement of Issues and Positions.[1]

INTRODUCTION

The obligations and rights of interconnecting telecommunications carriers with respect to the compensation due for termination and transiting of telecommunications traffic are set forth in sections 251 and 252 of the Telecommunications Act of 1996 ("the Act"), the rules and orders of the Federal Communications Commission ("FCC"), and applicable case law. The Joint CMRS Carriers make the following four points in this brief. First, the *T-Mobile Order* and other applicable FCC rules and federal court decisions establish that intercarrier compensation tariffs are prohibited for CMRS providers and that tariffs for other intercarrier compensation relationships are inappropriate. Second, except for the Small LEC parties, all the other carrier parties to this docket agree regarding the basic obligations of section 251 of the Act and the right of carriers to interconnect and exchange traffic indirectly, including the obligation of the originating carrier to pay for traffic termination and any intermediary transit services. Third, BellSouth is obligated to provide transit service under the Act, and as a section 251(c)(2) interconnection service it must be priced at TELRIC. Finally, the billing and recording issues in this case can be resolved through existing industry standards and practices, and to the extent a

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[1] For purposes of this brief, references to the hearing transcript shall be noted as "Tr. ___" and references to hearing exhibits shall be noted as "Exh. ___."

carrier has an issue regarding billing and recording, it should be handled via negotiations between the parties.

In the final analysis, the combination of Congressional policy, FCC decisions, and the actions of this Commission under Florida law have fostered the exchange of telecommunications traffic in a cost efficient manner resulting in the deployment of efficient and ubiquitous networks throughout the state for the benefit of consumers. The BellSouth Transit Service Tariff ("Tariff") should be cancelled as it is entirely inconsistent with applicable law and the competitive marketplace. Allowing the Tariff to remain in effect will increase the cost of business and adversely impact the rates and services that are available to consumers.

ISSUES, POSITIONS AND ARGUMENT

I. THE *T-MOBILE ORDER* AND OTHER APPLICABLE FCC RULES AND FEDERAL COURT DECISIONS ESTABLISH THAT INTERCARRIER COMPENSATION TARIFFS ARE NOT APPROPRIATE AND THAT NO COMPENSATION, BUT FOR BILL AND KEEP, IS DUE UNLESS AN INTERCONNECTION AGREEMENT HAS BEEN NEGOTIATED OR ARBITRATED BETWEEN TWO PARTIES.

Issue 1: Is BellSouth's Transit Service Tariff an appropriate mechanism to address transit service provided by BellSouth?

Joint CMRS Carriers' Summary: ** No. The *T-Mobile Order* and recent FCC rule amendments prohibit tariffs for CMRS transit traffic, and, as an interconnection service, federal law establishes a clear preference that transit services to other carriers are to be provided by negotiated or arbitrated interconnection agreements or pursuant to an SGAT. **

Joint CMRS Carriers' Position: In response to the evolving effects of a competitive telecommunications marketplace, the FCC recently issued its *T-Mobile Order*[2] which held that a unilateral tariff, such as the BellSouth Tariff at issue in this proceeding, is *not* an appropriate mechanism to impose compensation obligations upon commercial mobile service providers. Cases prior to and since the *T-Mobile Order* have similarly concluded that the procedure of filing tariffs is inconsistent with and undermines the pro-competitive provisions of the Act. As further evidenced by the testimony in this proceeding, the filing of a tariff is unnecessary since hundreds of carriers operating in Florida have negotiated interconnection agreements with BellSouth under the Act's procedures. Simply stated, there is no legal basis or practical reason for BellSouth's Tariff to be permitted by the Commission – any decision to the contrary would be in conflict with the procedures under the Act and negatively impact all future commercial negotiations between a carrier and BellSouth.

By filing its Tariff, BellSouth has ignored the mandate now contained in FCC Rule 20.11(d)[3] which clearly prohibits such local exchange carrier ("LEC") tariffs from imposing compensation obligations for non-access traffic. This Rule provides that "local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs."[4]

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[2] Declaratory Ruling and Report and Order, *In the Matter of Developing a Unified Intercarrier Compensation Regime,* 20 FCC Rcd. 4855 (rel. February 24, 2005) ("*T-Mobile Order*"). The original declaratory ruling request was filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications, and Nextel Partners. *Id.* at ¶ 8.

[3] 47 C.F.R. § 20.11(d). This Rule took effect on April 29, 2005. *See Intercarrier Compensation,* 70 Fed. Reg. 16141 (March 30, 2005).

[4] 47 C.F.R. § 20.11(d).

While adopting Rule 20.11(d), the FCC explained that it had adopted the rule to make "clear our preference for contractual arrangements for non-access CMRS traffic." [5] As a basis for the codification of the new rule, the FCC opined that "[p]recedent suggests that the Commission intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act."[6]

BellSouth is a local exchange carrier. The intraMTA traffic that the Joint CMRS Carriers exchange with other carriers and that transits over BellSouth's network is not subject to access charges.[7] Accordingly, BellSouth's transit services fall within the scope of FCC Rule 20.11(d), and BellSouth's proposal to unilaterally tariff its transit services is flatly incompatible with this Rule's requirements.

The heart of the Act is the negotiation and arbitration process established by sections 251 and 252. In conjunction with the Act, the *T-Mobile Order* makes clear that the appropriate mechanism for establishing compensation arrangements for interconnection services under the Act is through the negotiation and arbitration process, not by tariff. Once a carrier (including ILECs such as the Rural ILECs) requests negotiations under the Act, interim compensation arrangements under the FCC's rules can be triggered.[8] In the absence of such a request, however, no monetary compensation is due and traffic is exchanged on the basis of bill and

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[5] *T-Mobile Order,* at ¶ 9.

[6] *Id.* at ¶ 14.

[7] *See, e.g.,* 47 C.F.R. § 51.701(b)(2); *Local Competition Order,* 11 FCC Rcd 15499, 16014 ¶ 1036 (1996)("[T]raffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges."); *id.* at 16016 ¶ 1043 (same).

[8] 47 C.F.R. § 51.715.

keep.[9] The *T-Mobile Order* is consistent with the numerous earlier and subsequent decisions by state commissions, the FCC, and federal courts which interpreted sections 251 and 252 of the Act.

Specifically, federal courts have held that state tariffs for intercarrier compensation are incompatible with the Act and, thereby, void under federal law.[10] The Sixth Circuit has observed that state tariffs "evade[] the exclusive process required by the 1996 Act, and effectively eliminate[] any incentive to engage in private negotiation, which is the centerpiece of the Act."[11] Two years later, the Court further elaborated on this point:

> One of the primary purposes of the Act is to increase competition in the telephony marketplace. The Act is labeled as "An Act to *promote competition and reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Part of this statutory imperative is manifested in the section 252 process, which encourages private and voluntary negotiation, backed by the threat of state-commission intervention, to achieve interconnection. [State tariffs] frustrate[] Congress's intent by eviscerating its chosen mechanism for increasing competition in the local telephony market and by upsetting the intricate balance between competitors and incumbents.[12]

The Seventh Circuit has similarly ruled that the use of state tariffs "*has* to interfere with the procedures established by the federal act"[13] because the tariff and negotiation procedures do not have the same effect:

> [T]he results of a negotiation between the local phone company and a prospective entrant are not preordained – and if it were, the federal law would not have made recourse to the [state] commission a last resort if negotiations fail. The tariff procedure short-circuits negotiations, making hash of the statutory requirement

[9] *T-Mobile Order*, ¶ 14, n. 57.

[10] *See, e.g., Verizon* v. *Strand,* 367 F.3d 577 (6th Cir. 2004) ("*Verizon II*"); *Wisconsin Bell* v. *Bie,* 340 F.3d 441 (7th Cir. 2003); *Verizon* v. *Strand,* 309 F.3d 935 (6th Cir. 2002) ("*Verizon I*").

[11] *Verizon I,* 309 F.3d at 940.

[12] *Verizon II,* 367 F.3d at 585-86 (emphasis in original).

[13] *Bie,* 340 F.3d at 444 (emphasis in original).

that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement.[14]

The Sixth Circuit has also recognized this important distinction: "Additionally, future challenges to the specific terms of the [state] tariff would have to be settled in state court, short-circuiting the statutory grant of federal jurisdiction over negotiated/arbitrated interconnection agreements."[15]

Transit tariffs are, moreover, completely unnecessary. As a practical matter, no carrier in Florida can provide its telecommunications services without connecting to BellSouth's network – and, in particular, its access tandem switches because of the ubiquity such interconnection provides – and the Act and case law clearly prefer that such interconnection be effectuated via an agreement with BellSouth.[16] Indeed, BellSouth's argument for needing the Tariff is undermined by the very evidence BellSouth proferred of nearly 300 approved interconnections agreements it has negotiated which included transit traffic terms. Exhs. 8 and 39 (KRM-3 and KRM-2).[17] BellSouth has effectively conceded that the only reason it filed its Tariff is because its negotiations with certain rural ILECs (referred to collectively throughout this docket as the "Small LECs") have not been successful to date. Tr. 106. But Congress has provided a statutory remedy where voluntary negotiations are not successful – namely, either party can ask this

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[14] *Id.* at 445.

[15] *Verizon II,* 367 F.3d at 585 n.3. *See also Bie,* 340 F.3d at 445 ("An appeal from the commission's resolution of an entrant's challenge to a tariff could go to state court, rather than a federal court, a difference that cannot be assumed to be inconsequential."); *Verizon I,* 309 F.3d at 941-42 ("One strong sign that the interconnection agreement process is central to the Act, and is therefore not to be evaded by state rule-making is the requirement of federal judicial review of state commission determinations. . . . Emphasizing the importance to Congress of this federal review, section 252(e)(4) states that 'no state court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.' However, there is no provision for federal court review of state tariff orders.").

[16] If BellSouth believes that the process of negotiating a transit agreement may be too burdensome for some interconnecting carriers, it always has the option of preparing an SGAT. *See* 47 U.S.C. § 252(f).

[17] *See also* Tr. 114-15. This demonstrates the suitability and ability to handle transit issues via these agreements and undercuts any need to impose unilateral terms via tariff.

Commission to arbitrate the dispute. A state transit tariff, prepared unilaterally by only one party, cannot be justified where BellSouth's "problem" is limited to a handful of carriers and where the "problem" exists only because BellSouth has declined to invoke the statutory remedy – arbitration – that Congress has provided for such circumstances.

BellSouth's argument that the Tariff would only apply when a commercial arrangement has not been negotiated also demonstrates another reason why the Tariff must fail. As several witnesses testified, BellSouth has little incentive to engage in meaningful rate negotiations if it has a tariff on file for, say, $0.003 per minute – or if it plans to later increase its rate to $0.006 per minute, as it has done in Tennessee. Tr. 165, 210. With a state approved tariff "default" rate, BellSouth can easily refuse to negotiate any lower rate without any adverse consequences – thereby making a mockery of the very give-and-take process that Congress has specified should be utilized for intercarrier compensation. Tr. 34-35, 236, 239.

Experience over the past decade has shown that negotiating transit agreements works: BellSouth currently has nearly 300 such agreements and few, if any, have resulted in arbitration.[18] If BellSouth is now permitted to tariff its transit rates, the Commission will effectively authorize BellSouth to place "a thumb on the negotiating scales" that will prevent meaningful give-and-take negotiations and result in endless disputes that eventually will be submitted to the Commission for resolution.[19]

In this context, it is also necessary to address the legal status of BellSouth Tariff. Under section 364.051(5)(a), as a price regulated ILEC BellSouth's tariff filings are "presumptively

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[18] As discussed further below and in the Testimony of Dena J. Bishop (Tr. 251), the overwhelming majority of CLECs and some of the CMRS carriers who are parties to these agreements have little or no incentive to arbitrate transit rates, or even to negotiate them aggressively, because they originate little or no transit traffic. This does not alter the fact that BellSouth has been able to reach agreement on transit rates with most carriers without the need for a tariff.

[19] *Bie,* 340 F.3d at 444.

valid." Florida courts have not construed or interpreted this specific statutory language, but a presumptively valid tariff should operate similarly to other legal presumptions – the tariff at issue is assumed to be legal until such time as it is found to be illegal.[20] While the Commission declined to suspend the Tariff, it has now conducted an evidentiary hearing on the substantive provisions of the Tariff – putting at issue all the Tariff's contested terms. The evidence discussed above (the *T-Mobile Order*, the FCC rules, and the associated court case decisions), as well as the testimony of numerous expert witnesses, have clearly demonstrated the impermissibility of this Tariff. Any presumption originally attached to the Tariff has ended and BellSouth must demonstrate that its Tariff complies with all applicable law.[21] It has failed to do so in this case.

BellSouth's use of a tariff for its transit service conflicts with federal policy and, more importantly, is unlawful under the Act. The Small LECs agree that a tariff is not the proper mechanism to establish terms, conditions and rates for BellSouth's provision of transit service. Tr. 324, 336-338, 394-95. Accordingly, the tariff should be cancelled.[22] If, however, the Commission finds that the Tariff does not violate federal law, then the Joint CMRS Carriers urge

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[20] *See generally*, Ehrhardt, Florida Evidence § 301.1, Presumptions-Generally.

[21] *Straughn v. K & K Land Management, Inc.* 326 So.2d 421, 424-25 (Fla. 1976) ("(W)hen substantial evidence contrary to a presumption is introduced, the underlying facts that originally raised the presumption may or may not retain some degree of probative force as evidence, but they no longer have any artificial or technical force. In other words, the presumption falls out of the case, and cannot acquire the attribute of evidence in the claimant's favor.")

[22] Section 354.051, Florida Statutes; *BellSouth Telecommunications, Inc. v. Jacobs*, 834 So.2d 855 (Fla. 2002) (affirming Commission Order PSC-01-1769-FOF-TL, which found that BellSouth's tariff filing T-991139 to violate section 364.051(5)(a)).

the Commission to prohibit the Tariff under sections 364.16, 364.161, and 364.162, Florida Statutes.[23]

In the final analysis, BellSouth is entitled to be paid for the transit service that it provides. However, the mechanism for BellSouth and the Small LECs to address any compensation issues they may be having with each other or with other interconnecting carriers is to request negotiation, and, if necessary, arbitration, pursuant to sections 251 and 252 of the Act or to file a Statement of Generally Available Terms ("SGAT"). If BellSouth and the Small LECs choose not to seek negotiation/arbitration, then the originating and terminating carrier relationship should be treated as a de facto bill and keep agreement, with the transit carrier electing to receive no compensation.[24]

II. ALL CARRIERS BUT THE SMALL LECS AGREE ON THE STATUS OF SECTION 251 AS IT RELATES TO THE RIGHT TO INTERCONNECT INDIRECTLY AND THE OBLIGATIONS OF CARRIERS AS THEY RELATE TO TRANSIT TRAFFIC.

Issue 2: If an originating carrier utilizes the services of BellSouth as a tandem provider to switch and transport traffic to a third party not affiliated with BellSouth, what are the responsibilities of the originating carrier?

Joint CMRS Carriers' Position: ** Originating carriers using BellSouth as a tandem provider to transit traffic are obligated to: deliver traffic to BellSouth in an industry standard format; negotiate and arbitrate an agreement with BellSouth that includes terms and conditions regarding transit service; and, when necessary, negotiate an interconnection agreement with the terminating carrier. **

Joint CMRS Carriers' Position: As Mr. Pruitt testified, an originating carrier that plans to utilize BellSouth as the tandem provider to transit traffic to a third party must do the following:

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[23] Congress has specified that a state commission may enforce state law so long as the law does "not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3). Requiring a carrier to utilize the negotiation/arbitration process specifically provided in the Act can hardly be considered inconsistent with the Act and its purposes.

[24] *T-Mobile Order*, ¶ 14, n. 57.

1) deliver its traffic to BellSouth in an industry standard format that will allow both BellSouth and the terminating carrier to identify the originating carrier and the originating carrier's minutes of traffic; 2) upon request of BellSouth or the terminating carrier, to negotiate and if necessary arbitrate an interconnection agreement with BellSouth that includes, among other things, terms and conditions for BellSouth's provision of transit service; and 3) upon the terminating carrier's request, to negotiate and arbitrate an interconnection agreement with the terminating carrier regarding the mutual exchange of traffic. Tr. 629; *see also* Tr. 351. As discussed below, the originating carrier must also bear all costs of delivering its originated traffic to the terminating carrier.

Issue 3: Which carrier should be responsible for providing compensation to BellSouth for the provision of the transit transport and switching services?

Joint CMRS Carriers' Position: ** The FCC's Calling Party Network Pays ("CPNP") regime, pursuant to 47 C.F.R. Subpart H - Reciprocal Compensation Rule 51.703(b), requires the carrier on whose network reciprocal compensation traffic originates, to pay BellSouth for transit services BellSouth provides to deliver such traffic to a terminating carrier's network. **

Joint CMRS Carriers' Position: The traffic exchanged between a LEC network and a CMRS provider network that is subject to the FCC's reciprocal compensation rules is defined in the FCC's rules as traffic "that, at the beginning of the call, originates and terminates within the same Major Trading Area" ("MTA").[25] This is generally referred to as the intra-MTA rule. Under the FCC's CPNP regime, the originating network party is responsible for the payment of reciprocal compensation associated with the use of a terminating party's network, as well as all costs associated with the delivery of the originating party's intra-MTA traffic to the terminating party's network. Tr. 521, 537, 590, 630, 673. This principle is stated within the FCC's Subpart H Reciprocal Compensation Rule 51.703(b) as follows:

[25] 47 C.F.R. § 51.701(b)(2).

A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

When read in conjunction with Rule 51.701(b)(2), Rule 51.703(b) requires LECs to deliver traffic, without charge, to a CMRS provider's switch anywhere within the MTA in which the call originated.[26]

The Small LECs represented at hearing that "the FCC has previously stated . . . , in fact, it's the terminating carrier and not the originating carrier that is required to pay a transit traffic charge" and pursued cross-examination based upon *TSR Wireless* in an apparent effort to support the Small LECs' representation.[27] Aside from being an incorrect statement of the law, as explained below, the fallacy of the Small LECs' interpretation of *TSR Wireless* is demonstrated by the adverse economic impact that *would be imposed upon the Small LECs* if such an interpretation of *TSR Wireless* were in fact accurate.

TSR Wireless involved a dispute between a one-way paging carrier and Qwest (f/k/a US West). The essence of the dispute was that Qwest was charging the paging carrier for 100% of the interconnection facilities between the paging carrier's network and Qwest's network, even though none of the traffic sent over the facilities was originated by the paging carrier. All of the traffic was one-way inbound traffic from Qwest and non-Qwest landline callers to the paging carrier's assigned telephone numbers, resulting in all of the traffic at issue terminating on the paging carrier's network. In the context of the case, the only logical reading of the FCC's reference to the terminating carrier paying for "transit traffic" is that the terminating paging carrier was found to be responsible for that portion of the interconnection facilities between the

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[26] Exh. 35, *In the matter of TSR Wireless, LLC, et al. v. U.S. West Communications, Inc.*, Memorandum and Order, 15 FCC Rcd 11166 at paragraph 31, FCC 00-194 (Rel. June 21, 2000) ("*TSR Wireless*"). To the extent that the transit carrier charges for switching and transport to the terminating carrier's switch, that is the responsibility of the originating carrier.

[27] *See* Mr. Hoffman, Small LEC counsel statements and questioning of BellSouth witness McCallen, Tr. 147 line 5 through page 149, line 15.

paging carrier and Qwest that was used to deliver third-party transit traffic, as well as what was commonly, previously referred to as reverse toll billing charges.[28]

There is no language in *TSR Wireless* that would provide for calls originated to or terminated by the Small LECs via the BellSouth network to be treated any differently in this case than calls originated to or terminated by the CMRS providers or CLECs via the BellSouth network. Therefore, if the Small LECs' representation of *TSR Wireless* were accurate, in the context of the *two-way* traffic in this case that is originated by CMRS providers and CLECs (as the terminating carriers under the Small LECs' interpretation of *TSR Wireless*), ***the Small LECs would be responsible for paying BellSouth for transiting traffic originated by CLECs and CMRS carriers***. Such an incredible result is not only unsupported by *TSR Wireless*, it is directly contrary to the line of federal court and state commission cases holding that the originating network carrier is responsible for the payment of transit charges to deliver its originated traffic.

Grounded squarely upon Rule 51.703(b), case law clearly establishes that an originating party is responsible for the cost associated with the delivery of traffic originated on its network to the terminating carrier's network – courts and regulatory commissions throughout the country

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[28] The originating carrier is nonetheless still responsible for the transport from the transit switch to the terminating switch. *TSR Wireless* only stands for the proposition that the *transit* carrier is not responsible for these facilities and does not address the originating carrier's responsibility. *TSR Wireless*, at 11166

have consistently and uniformly followed this rule.[29] The Small LECs ignore these numerous and unanimous authorities as if they do not exist. The reality is, however, that exactly the same arguments the Small LECs asserted in this case – that a LEC is never responsible for any cost to deliver its traffic outside its borders in the context of an indirect interconnection – have been raised by the same Small LEC witness, fully considered, and flatly rejected.[30]

For the foregoing reasons, the Commission should enter an order that, as to Issue 3, holds that under the FCC's Calling Party Network Pays rule, the party that originates transit traffic is responsible for compensating the transiting party for providing the transit service.

Issue 4: What is BellSouth's network arrangement for transit traffic and how is it typically routed from an originating party to a terminating third party?

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[29] *See, Atlas Telephone Company v. Oklahoma Corporation Commission,* 400 F.3d 1256 (10th Cir. 2005) (CMRS providers should not have to bear the costs of transporting calls that originated on the networks of rural telephone companies across an incumbent LEC's network); *BellSouth Telecommunications, Inc.'s Petition for a Declaratory Ruling Regarding Transit Traffic,* Docket No. 16772-U, "Order on Clarification and Reconsideration' (Georgia Public Service Commission, May 2, 2005), citing *Atlas Telephone Company v. Oklahoma Corporation Commission,* 400 F.3d 1256 (10th Cir. 2005), in reaffirming initial decision that rural telephone companies, as originating parties, are required to pay transit costs to transport traffic originated on their network; and, *Texcom Inc d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications,* File No. EB-00-MD-14, Memorandum and Order released November 28, 2001 (Order), Order on Reconsideration released March 27, 2002 (Reconsideration Order) ("the *Texcom Reconsideration Order* is consistent as well with the principle that the calling party pays") (Exh. 30); and *In re: Petition of Arbitration Award of CELLCO Partnership d/b/a Verizon Wireless,* "Order of Arbitration Award," at p. 30, Docket No. 03-000585 (January 5, 2006) ("each party to an indirect interconnection arrangement is obligated to pay for the transit costs associated with the delivery of intraMTA traffic originated on its network to the terminating party's network") (hereinafter "*CELLCO Arbitration Order*") (Exh. 31).

[30] *See* Exh. 31 (*CELLCO Arbitration Order*, at page 17), which rejected Mr. Watkins' assertion that the definition of transport does not contemplate an indirect network architecture that is subject to reciprocal compensation, and disagreeing with the Small LECs' specific interpretation of 47 C.F.R. § 51.701(c) by finding "'from the interconnection point between the two carriers' ... just as easily applies to the present situation where the parties interconnect through BellSouth and the interconnection point between the two carriers is BellSouth"; page 29 – rejecting argument that an incumbent LEC has no responsibility to deliver local traffic to an interconnection point that is neither on its network or to a point where the incumbent LEC is not an incumbent, finding that by opting to utilize BellSouth's tandem as opposed to its own tandem to handle the exchange of traffic between a LEC and a CMRS provider, the LEC *has in fact extended its network past the existing POI to the tandem switch.* "Thus, the Coalition's assertion that the Authority cannot require an ICO to take financial responsibility for transport of CMRS traffic to the tandem switch must be rejected. As the networks exist, utilizing BellSouth's tandem, the ICO members have an obligation for the cost associated with utilizing the trunking facilities.")

Joint CMRS Carriers' Summary: ** BellSouth typically receives traffic delivered to its tandem by an originating carrier over the originating carrier's interconnection facility with BellSouth, and the tandem then routes the traffic to the terminating carrier. The terminating carrier receives the traffic at the point where its network is interconnected with BellSouth's network. **

Joint CMRS Carriers' Position: Transit service is generally provided by incumbent LECs that own a tandem switch or switches to which numerous carriers are connected. By connecting to a BellSouth tandem switch, an interconnecting carrier is able to send its traffic to any other carrier that is interconnected with the BellSouth network in the same LATA. When BellSouth provides transit service, it is providing tandem switching and transport functions in the middle of the call path in order to deliver the interconnected originating carrier's traffic to the interconnected terminating carrier's network.[31] The traffic transited by BellSouth is either exchange service traffic, *i.e.*, either local exchange traffic or Extended Area Service traffic, or intrastate and interstate exchange access traffic. Tr. 617-18 and 623.

Mr. Pruitt testified as to his understanding of BellSouth's network arrangement for transit traffic: when two carriers are both connected to the BellSouth network, BellSouth receives traffic delivered to its tandem switch by an originating carrier over the originating carrier's interconnection facility with BellSouth. The traffic is subsequently translated at BellSouth's tandem and routed to wherever the terminating carrier is interconnected with BellSouth in the same LATA. The terminating carrier receives the traffic at its interconnection point with BellSouth, and the call continues on the terminating carrier's transport facilities to its end office or CMRS Mobile Switching Center, where it is switched to the facilities connected to its end-

[31] *See also* Tr. 95: "[W]hen BellSouth provides a transit service, it is basically stuck in the middle between the originating and terminating carrier."

user. Tr. 631-632. This analysis was not disputed by any other party and is consistent with the way BellSouth described its network routing. Tr. 70-71, 84-86.

Issue 5: Should the FPSC establish the terms and conditions that govern the relationship between an originating carrier and the terminating carrier, where BellSouth is providing transit service and the originating carrier is not interconnected with, and has no interconnection agreement with, the terminating carrier? If so, what are the appropriate terms and conditions that should be established?

Joint CMRS Carriers' Summary: ** No. Interconnecting carriers should follow the Act and FCC rules for the negotiation of agreements. If the most efficient network architecture for Small LECs to deliver their originated intraLATA traffic to CMRS providers is by sending it indirectly via BellSouth's transit service, then the Small LECs should negotiate appropriate agreements with BellSouth. **

Joint CMRS Carriers' Position: As Mr. Pruitt thoroughly discussed in his testimony, the FCC was clear in its *T-Mobile Order* that interconnecting carriers such as CMRS providers, CLECs and the Small LECs must comply with the Act and corresponding FCC rules for the negotiation and, if necessary, arbitration of interconnection agreements. Tr. 632-34. During the hearing in this proceeding, the BellSouth witness agreed that this Commission should not attempt to establish transit terms and conditions between the originating carrier and terminating carrier. Tr. 106. BellSouth's witness further agreed that both originating and terminating carriers are obligated to negotiate interconnection agreements for the delivery of traffic to each other. Tr. 158.

Regarding the Small LECs' relationship with BellSouth as originators of transit traffic, under section 251(a) of the Act, any telecommunications carrier is required to interconnect on a direct or indirect basis. BellSouth is not required as part of its transiting obligation to provide transit unless it is "requested" by an interconnecting carrier, but an originating carrier effectively requests such transit by delivering traffic to BellSouth that is directed to a carrier that is interconnected with BellSouth, rather than to BellSouth itself. If the most efficient network

alternative for Small LECs to deliver their customer-originated intraLATA traffic to CMRS providers is by sending the traffic to a CMRS provider indirectly through BellSouth's transit service, then the Small LEC should be required to request and enter into an interconnection agreement with BellSouth.

The FCC clearly anticipated that interconnection agreements may well exist between two incumbent LECs, such as BellSouth and the Small LECs. Tr. 633. In the First Report and Order, the FCC determined that the plain meaning of section 252(i) of the Act is that "any interconnection agreement approved by a state commission, *including one between adjacent LECs,* must be made available to requesting carriers pursuant to section 252(i)."[32] Accordingly, to the extent that a Small LEC is using BellSouth's transit service for originated traffic without compensating BellSouth, BellSouth is free to request an interconnection agreement with the Small LEC, including terms and conditions under which BellSouth will provide transit service. Tr. 632-634.

Issue 6: Should the FPSC determine whether and at what traffic threshold level an originating carrier should be required to forego use of BellSouth's transit service and obtain direct interconnection with a terminating carrier? If so, at what traffic level should an originating carrier be required to obtain direct interconnection with a terminating carrier?

Joint CMRS Carriers' Summary: ** No. Each originating carrier is solely responsible for the methods it uses to deliver its traffic to the terminating carrier's network. As a practical matter, only the originating carrier is in a position to determine how best to route its traffic and meet the needs of its business. **

Joint CMRS Carriers' Position: The Small LECs contend that if traffic between a Small LEC and any single CLEC or single CMRS provider reaches a threshold of one DS1 capacity of traffic, then a dedicated trunk group should be established for that carrier to exchange traffic with

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[32] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 at ¶ 1323 (1996) ("First Report and Order") (emphasis added).

the Small LEC.[33] No legal authority is cited to support this contention. The only stated basis for even requesting such action is a vague assertion that a threshold requirement will ensure that unspecified, speculative "potential anticompetitive concerns about reliance on BellSouth and the Small LECs ability to properly apply their intercarrier compensation terms will be limited to moderate levels" – whatever that means. Tr. 397.

The issue of requiring an originating carrier to establish a direct connection when traffic reaches a predefined threshold has been addressed and rejected by the FCC. In the *Virginia Arbitrations Order*,[34] the FCC rejected the establishment of a Direct End Office Trunk ("DEOT") threshold in an interconnection arbitration order, stating:

> [w]e reject Verizon's proposed language to AT&T and Cox requiring the establishment of direct end office trunks when traffic to a particular Verizon end office exceeds a DS-1 level. It appears that competitive LECs already have an incentive to move traffic off of tandem interconnection trunks onto direct end office trunks, as their traffic to a particular end office increases. Indeed, it would appear that, just like Verizon does, competitive LECs have the incentive to move their traffic onto direct end office trunks when it will be more cost-effective than routing traffic through the Verizon tandems. The record indicates that competitive LECS already move their traffic onto direct end office trunks as their traffic volumes increase.[35]

Not only is a threshold contrary to FCC precedent, there is no reason to require one. If, for example, a Small LEC is originating a volume of traffic that it believes warrants a direct interconnection, notwithstanding a CMRS provider's differing view, under the *T-Mobile Order* the Small LEC can always request negotiation of a one-way direct facility at its expense for the delivery of the Small LEC's traffic. The reality is that a Small LEC is not likely to ever initiate the installation of a one-way direct interconnection because, as long as the CMRS provider is the

[33] Tr. 397, lines 8-13; *see also* Tr. 340, 360-61.

[34] Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration, CC Docket Nos. 00-218, 00-249, and 00-251, Memorandum Opinion and Order, 17 FCC Rcd 27039 (2002) ("Virginia Arbitrations Order").

[35] *Id.* at ¶ 88.

party that originates the greater volume of traffic, it will always be in the CMRS provider's best interest to initiate a direct connection when such a connection is economically justifiable.

To impose a mandatory threshold to force a CMRS provider to install a direct connection that it otherwise would not consider economically feasible is analogous to dictating where and when a Small LEC must subtend BellSouth. As Mr. Watkins testified, "BellSouth has no more right to dictate to the Small LECs end office/tandem subtending arrangements than the Small LECS have such right to dictate such network decisions to BellSouth." Tr. 331. The same is equally applicable with respect to dictating network arrangements between a Small LEC and a CMRS provider or a CLEC. The Commission should not establish a mandatory direct connection threshold. Originating carriers should be permitted to determine when DEOTs are justified based on the economics of route-specific distance and usage characteristics. The determination of what is the best business decision for the originating carrier should be solely left to the originating carrier.

From a practical perspective, because the distance between a tandem and end office varies and transport costs are mileage sensitive, a fixed usage threshold, as proposed by Mr. Watkins, would require telecommunications carriers routing traffic on an indirect basis to establish DEOTs without regard to the specific cost variations associated with distance-sensitive transport costs. Further, since transit charges will increase with increases in traffic, originating carriers have an economic incentive to move to direct trunks when their particular network architecture demands it. Carriers should be permitted to make efficient, economic trunk decisions on a route-by-route basis. Tr. 634, 669, 746.

Issue 7: How should transit traffic be delivered to the Small LEC's networks?

Joint CMRS Carriers' Summary: ** As a practical matter, transit traffic should be delivered to the Small LECs' networks in the most economically and technically feasible manner possible.

It is incumbent upon the transit service provider and the Small LEC to determine how best their respective networks should be interconnected to deliver transit traffic. **

Joint CMRS Carriers' Position: As stated previously, the sole method consistent with the Act for setting the rates, terms and conditions for interconnecting and transmitting traffic (transit or otherwise) between the originating carrier, any transit carrier and the terminating carrier is through bilateral negotiation and arbitration. As such, the Small LECs, CMRS providers, and CLECs each should determine and pursue the most efficient method to interconnect to exchange transit traffic pursuant to their interconnection agreements with BellSouth. As a practical matter, at the present time BellSouth is the primary feasible option for providing transit service. While a market for alternative transit providers is in the very early stages of development, BellSouth's legacy architecture and ubiquitous connections to the Small LECs' territories have not been significantly replicated to provide widespread transit options for interconnecting carriers. Tr. 635, 710 at n. 7.

The Commission should note that all of the parties to this proceeding, including the Small LECs, have interconnection arrangements in place with BellSouth and today exchange transit traffic with BellSouth pursuant to those interconnection arrangements. Thus, such arrangements are demonstrated to be economically and technically feasible. However, the parties should be free to make their own determinations as to the best interconnection arrangements for the exchange of transit traffic and to pursue them through the negotiation and arbitration process contemplated by the Act. The Commission should not seek to legislate how transit traffic should be delivered to the Small LECs' networks.

Issue 8: Should the FPSC establish the terms and conditions that govern the relationship between BellSouth and a terminating carrier, where BellSouth is providing transit service and the originating carrier is not interconnected with, and has no interconnection agreement with, the terminating carrier? If so, what are the appropriate terms and conditions that should be established?

Joint CMRS Carriers' Summary: ** No. Section 251(a) of the Act imposes a duty upon all telecommunications carriers to interconnect directly or indirectly with other telecommunications carriers. Each carrier should establish interconnection agreements with BellSouth for the exchange of traffic using BellSouth's transit service. Originating and terminating carriers may use a bill-and-keep arrangement. **

Joint CMRS Carriers' Position: The Commission should not establish the terms and conditions that govern the relationship between BellSouth and the terminating carrier where BellSouth is providing transit service for the same reasons it should not determine how transit traffic should be delivered to a Small LEC's network: interconnection terms should be determined subject to bilateral agreement through negotiation and arbitration as provided under the Act. Section 251(a) of the Act imposes a duty upon all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. CMRS providers have established interconnection agreements with BellSouth that include terms and conditions for the exchange of traffic with BellSouth, including the use of BellSouth's transit service. The relationship between a Small LEC, as a terminator of transited traffic, and BellSouth, as a transit provider, should also be pursuant to an interconnection agreement between BellSouth and the Small LEC. Any disagreements between them related to BellSouth's provisioning of this traffic should be resolved through the dispute resolution language of the agreement or, for disputes associated with negotiation of a new agreement, through a state Commission's arbitration procedures. The only interconnection agreements contemplated by the Act are bilateral. Tr. 404, 654-655; Exh. 31 at 25-27. BellSouth's proposed tariff is not an appropriate means for establishing the terms and conditions for traffic termination of transit traffic.

An interconnection agreement may include all the terms and conditions necessary for the parties to bill each other, including provisions for communicating industry standard call-related

information to allow billing of third parties for traffic received via BellSouth's transit service. The feasibility of such arrangements is demonstrated by present practices. BellSouth presently routes CMRS traffic along with intraLATA and interLATA toll traffic and other traffic bound for the Small LEC on the same trunk group as an efficient method for terminating third-party originated traffic. Tr. 636. By aggregating traffic, all traffic can be carried at a lower cost over fewer trunks. Small LECs may use the industry standard 11-01-01 records presently received from BellSouth, which identify the originating carrier, to bill reciprocal compensation to the CMRS Providers. These are the same records BellSouth presumably provides and the Small LECs use to bill switched access to IXCs. Tr. 636. The Commission should not mandate the implementation of more costly and inefficient network arrangements, such as separate trunk groups, but should instead reiterate that the terms and conditions for termination of transit traffic are to be governed by a bilateral interconnection agreement between the terminating party and BellSouth. BellSouth and the Small LECs have demonstrated through present practices with respect to interconnection and exchange of information that termination of transit traffic and associated billing may be accomplished without the Commission stepping in to establish terms and conditions.

Issue 9: Should the FPSC establish the terms and conditions of transit traffic between the transit service provider and the Small LECs that originate and terminate transit traffic? If so, what are the terms and conditions?

Joint CMRS Carriers' Summary: ** No. The obligation to negotiate transiting terms already exists under the Act and the negotiation and arbitration provisions exist to decide differences between the parties. There is no need or legal authority for this Commission to impose blanket or arbitrary terms contrary to the Act. **

Joint CMRS Carriers' Position: For the reasons stated in the discussion of Issues 7 and 8 above, the Commission should not establish terms and conditions for exchange of transit traffic between BellSouth and the Small LECs. The Commission need only clarify that both of these

parties have obligations under the Act with respect to interconnection and transit traffic and that the terms and conditions for exchange of transit traffic are appropriately set by negotiation and arbitration of interconnection terms. As discussed more fully below, BellSouth is obligated to provide transit service at TELRIC rates as an interconnection service pursuant to section 251(c) of the Act. The Small LECs must arrange both to receive traffic originated on another carrier's network and transited through BellSouth's transit service and to pay the costs associated with transporting and terminating traffic that originates on their own networks, whether or not they use BellSouth's transit service. The Joint CMRS Carriers understand that BellSouth and the Small LECs have disagreements about compensation for Small LEC-originated traffic that the Small LECs send through a BellSouth tandem for termination by a third party carrier. But no new rules setting forth terms and conditions regarding this traffic are necessary to sort out these differences; only a clarification of existing rules and bilateral negotiation and arbitration are needed. CMRS Providers have established interconnection agreements with BellSouth that include terms and conditions under which they will receive traffic originated on Small LEC networks and transited by BellSouth and pay BellSouth for transit of CMRS-originated traffic to Small LEC networks. The Commission need only order BellSouth and the Small LECs to negotiate and arbitrate suitable arrangements between themselves for transit traffic.

The Small LECs characterize transit costs as "extraordinary costs" placed on them by CMRS providers and CLECs as the "cost causers." Tr. 396. To the contrary, transit costs are an ordinary cost of doing business and one that CMRS providers and CLECs have incurred for years. Tr. 537. To the extent that a Small LEC uses BellSouth's tandem switches to deliver its traffic to other telecommunications carriers, it is a matter of competitive fairness that the Small LEC should incur the same cost that any other local carrier does to use the same function. The

Commission must reject the Small LECs' attempts to carve out special rules for themselves that would allow them (and only them) to use BellSouth's transit service free of charge and place the costs of interconnection and traffic exchange with third party providers squarely on the shoulders of BellSouth and those third party providers.

Further, if the Small LECs fail to pay their share for using BellSouth's network, CMRS providers and CLECs likely will have to absorb those costs as well. As the Tennessee Regulatory Authority concluded, and as summarized in Mr. Pruitt's testimony, the Small LECs have chosen to use the BellSouth tandem to exchange traffic with CMRS providers and therefore have an obligation to bear the costs associated with utilizing this method for delivering their originating traffic. Tr. 656-58. Similarly, the Commission should reject the arguments of the Small LECs that they are not responsible for transit charges on their originating traffic because their interconnection obligations are limited to direct interconnection at a point of interconnection on the Small LEC network and that they have no obligation to pay for transit of their traffic beyond an interconnection point on their network.

The Tennessee Regulatory Authority rejected this very contention and this Commission should reject it as well. Exh. 31. The Small LECs themselves choose to use the BellSouth tandem to handle the exchange of traffic with CMRS providers and thus they have extended their networks to the BellSouth tandem. As a result, they have an obligation for the cost associated with transport and termination with respect to the network architecture they have chosen. Tr. 656-658.

III. BELLSOUTH'S TRANSIT SERVICE IS A SECTION 251(c)(2) INTERCONNECTION SERVICE THAT MUST BE PRICED AT TELRIC.

Issue 11: How should charges for BellSouth's transit service be determined?

Joint CMRS Carriers' Summary: **Pursuant to section 251(c)(2) of the Act, interconnection obligations are required to be provided through rates, terms and conditions that are just, reasonable and nondiscriminatory. Section 252(d) provides the methodology that ILEC must use in developing costs for transporting or terminating calls. The prescribed methodology is TELRIC. **

Issue 11(a): What is the appropriate rate for transit service?

Joint CMRS Carriers' Summary: ** A TELRIC-based rate for BellSouth's interconnection transit service should be no higher than $0.0009441 per minute of use. **

Issue 11(b): What type of traffic do the rates identified in (a) apply?

Joint CMRS Carriers' Summary: ** The rate applies to any non-access traffic that is to be transited to third party. **

Joint CMRS Carriers' Position: BellSouth erroneously contends that it has no obligation to offer a transit service at all and that it thus may price the service at whatever level it wants. Tr. 89. BellSouth is wrong on both counts. The transit service at issue is an interconnection service that, pursuant to section 251(c)(2), BellSouth is obligated to provide at TELRIC rates. Moreover, even if section 251(c)(2) did not require BellSouth to provide a transit service, BellSouth nonetheless would be required by sections 201 and 202 to provide the service at just and reasonable, non-discriminatory rates. There are similar provisions under Florida law.[36]

Section 251(c)(2) requires ILECs such as BellSouth[37] "to provide . . . interconnection with the [ILEC's] network – (A) for the transmission and routing of telephone exchange service and exchange access." There is no limiting language in the statute that allows BellSouth to only provide interconnection for the transmission and routing of traffic between a requesting interconnecting carrier's network and a BellSouth end office. To the contrary, the statute is unlimited with respect to the scope of the routing and transmission that BellSouth must provide

[36] §§ 364.161-364.162, Florida Statutes.

[37] Rural ILECs are exempted from the requirements of section 251(c) by section 251(f)(1), and other small ILECs may obtain such an exemption under certain circumstances pursuant to section 251(f)(2). These provisions have no relevance to BellSouth's provision of transit service.

an interconnected carrier and, therefore, is clearly broad enough to include the routing and transmission of traffic between an interconnecting carrier's network and any end office (or equivalent facility), including those associated with the networks of other carriers that are interconnected with the BellSouth network, *i.e.,* other CMRS, CLEC, and ILEC networks.

Further, section 251(c)(2)(C) requires BellSouth to provide interconnection "that is at least equal in quality to that provided by the [ILEC] to itself." When serving retail customers, BellSouth uses its network to transmit and route its customers' traffic to the networks of other carriers with which it is interconnected. If BellSouth refused to provide interconnection that permitted other carriers likewise to transmit and route their customers' traffic to those other networks, it would violate this requirement: the interconnection that BellSouth provided to other carriers would be inferior to what BellSouth provides to itself.

BellSouth's transit service is clearly encompassed within the statutory obligation to interconnect. The Act creates strict obligations and the FCC's rules impose strict regulations on ILECs such as BellSouth to assure nondiscriminatory interconnection because of their dominant market power. The large urban ILECs like BellSouth control the historical, legacy network architecture, paid for by their previously captive ratepayers, that serves vast populations of consumers and that other carriers must interconnect with to provide competing service to such consumers. Such ILECs clearly have the incentive and ability to abuse this control to harm competitors and, ultimately, negatively impact consumers because of their dominant market power obtained through years of government-protected monopoly. Section 251(c)(2)(D) unambiguously requires that the rates, terms and conditions under which interconnection is provided must be "just, reasonable, and nondiscriminatory, in accordance with . . . the requirements of . . . section 252."

BellSouth contends that the FCC has not ruled that transit service is subject to section 251(c), and to an extent, BellSouth is correct. The FCC has never explicitly discussed transit service and concluded that it is governed by that provision, nor has the FCC explicitly ruled that ILECs must provide transit service at TELRIC rates. BellSouth emphasizes that the issue of transit rates was squarely presented in the *Virginia Arbitrations Order* and the FCC declined to require Verizon to provide transit service at TELRIC rates. Notwithstanding the FCC's failure explicitly to decide this issue, however, the FCC has implicitly ruled that transit is an interconnection service under section 251(c).

In the *Virginia Arbitrations Order*, the FCC's Wireline Competition Bureau ("WCB") declined to require Verizon to provide transit service at TELRIC rates because the FCC had not specifically imposed such a requirement. BellSouth seeks to characterize this as a determination that ILEC transit services are not subject to TELRIC rates, but the WCB made no such determination. Under the authority delegated to the WCB by the FCC, the WCB is not authorized to decide any issue that has not previously been decided by the FCC,[38] and the WCB considered itself bound by that limitation in deciding section 252 arbitrations.[39] As emphasized in its order denying AT&T's Petition for Reconsideration on this issue, the WCB simply had no authority to rule on the matter.[40] Under FCC procedures, AT&T could have sought FCC review

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[38] 47 CFR § 0.291(a)(2): "The Chief, Wireline Competition Bureau shall not have authority to act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines."

[39] See Virginia Arbitrations Order, 17 FCC Rcd. at 27101, ¶ 117.

[40] *Virginia Arbitrations Order*, 19 FCC Rcd. at 27042-27043, ¶¶ 2-3: "AT&T seeks reconsideration of the Bureau's conclusion that, absent clear Commission precedent, it could not determine that incumbent LECs have a duty, under section 251(c)(2) of the Act, to provide transit service at TELRIC rates. AT&T asserts that the Bureau erred in deferring to the Commission on the question whether incumbent LECs are required to provide transit service at TELRIC rates. . . . We disagree. By preempting the authority of the Virginia Commission, under section 252(e)(5), the Commission undertook to arbitrate the parties' dispute in accordance with the Act and the Commission's rules, and the Commission delegated that role to the Bureau." (footnotes omitted.)

of the WCB's decision, in which case the FCC would have been required to decide the issue, but AT&T, for whatever reason, chose not to do so.

While the FCC has never explicitly ruled on this issue, it has implicitly ruled that transit is subject to section 251(c). In the *Qwest Declaratory Ruling*,[41] the FCC considered the issue of what agreements between ILECs and other carriers must be filed with state commissions pursuant to section 252(a)(1).[42] The FCC concluded that any agreement entered into by an incumbent LEC "that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed."[43] The FCC specifically ruled, moreover, that "*only* those agreements that contain an ongoing obligation *relating to section 251(b) or (c)* must be filed under 252(a)(1)."[44] Other agreements are not required to be filed.

Subsequently, after the WCB decided the *Virginia Arbitrations Order*, the FCC issued a Notice of Apparent Liability in which it proposed to fine Qwest $9,000,000 for failing to file in a timely fashion thirty-four agreements with the Minnesota Public Utilities Commission and twelve agreements with the Arizona Corporation Commission pursuant to section 251(a)(1).[45] In

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[41] Memorandum Opinion and Order, Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), 17 FCC Rcd. 19337 (FCC 02-276) (released October 4, 2002) ("Qwest Declaratory Ruling").

[42] Although the requirement of state commission approval is set forth in section 252(e)(1), section 252(a)(1) expressly requires that all voluntary interconnection agreements with ILECs be filed for such approval.

[43] *Qwest Declaratory Ruling,* 17 FCC Rcd. at ¶ 8 (emphasis omitted).

[44] *Id.* n. 26 (emphasis added). *See also,* id. at ¶ 12 ("[A] settlement agreement that contains an ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1).")

[45] Notice of Apparent Liability for Forfeiture, *In the Matter of Qwest Corporation Apparent Liability for Forfeiture,* File No. EB-03-IH-0263, 19 FCC Rcd. 5169 (FCC 04-57) (released March 12, 2004) ("*Qwest NAL*").

Minnesota, Qwest had previously been investigated by the Department of Commerce, a separate agency from the PUC, for failure to file a number of agreements. Qwest then filed thirty-four agreements with the Minnesota PUC on March 25 and 26, 2003.[46] Two of the agreements that Qwest filed with the Minnesota PUC on March 25, 2003 are contained in Hearing Ex. 24 (Exhibit DJB-1 to the prefiled testimony of Dena J. Bishop).[47] In the cover letter accompanying the filing of those agreements, Qwest stated that it had "bracketed those terms and provisions in the Agreements which Qwest believe[d] relate[d] to Section 251(b) or (c) services" but did not bracket any provisions in the agreements, indicating its belief that they were not interconnection agreements. Exh. 24, at 2. The Minnesota PUC found, however, that ***all of the agreements filed by Qwest on those dates were interconnection agreements*** in whole or in part that should have been filed previously pursuant to section 251(a)(1).[48] The FCC agreed, rejecting Qwest's arguments that some or all of the filed agreements were not interconnection agreements covered by the *Qwest Declaratory Ruling*.[49]

In holding that ***all*** of the agreements that Qwest filed at the Minnesota PUC on March 25 and 26, 2003 were interconnection agreements subject to the section 251(a)(1) filing requirement, the FCC necessarily held that the agreements in Hearing Ex. 24 are "agreements that contain an ongoing obligation relating to section 251(b) or (c)."[50] These agreements relate solely to Qwest's exchange of "network usage data" relating to traffic transited by Qwest. If the exchange of transit usage data is "an ongoing obligation relating to section 251(b) or (c)," then

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[46] *Id.* at ¶ 15.

[47] As noted in the cover letter which is part of that exhibit, this agreement was also one of the agreements that Qwest provided to the Minnesota Department of Commerce as part of that agency's investigation of Qwest's compliance with section 251(a)(1).

[48] *Qwest NAL* at ¶ 15.

[49] *See generally,* Qwest NAL at ¶¶ 25-41.

[50] *Qwest Declaratory Ruling,* 17 FCC Rcd. at ¶ 8 n.26.

the underlying transit service perforce must also relate to either section 251(b) or (c). Section 251(b) includes the obligations of all LECs to (1) permit resale of their services, (2) provide number portability, (3) provide dialing parity, (4) afford access to poles, ducts, conduits and rights-of-way and (5) establish reciprocal compensation arrangements. As none of these includes transit service, transit service must fall under section 251(c).

Except for the WCB's denial of AT&T's Petition for Reconsideration in the *Virginia Arbitrations Order*,[51] the only time that the FCC has discussed transit service since the *Qwest NAL* is in a Further Notice of Proposed Rulemaking in its effort to develop a unified intercarrier compensation regime,[52] The FCC expressly recognized the importance of transit service to the development of competition and the efficient exchange of traffic:

> The record suggests that the availability of transit service is increasingly critical to establishing indirect interconnection – a form of interconnection explicitly recognized and supported by the Act. It is evident that competitive LECs, CMRS carriers, and rural LECs often rely upon transit service from the incumbent LECs to facilitate indirect interconnection with each other. Without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks.
>
> Moreover, it appears that indirect interconnection via a transit service provider is an efficient way to interconnect when carriers do not exchange significant amounts of traffic.[53]

Notably, the FCC said nothing in the *Intercarrier Compensation FNPRM* to suggest that an ILEC's transit service is *not* a section 251(c) interconnection service.

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[51] Although the WCB denied AT&T's Petition after the FCC issued the *Qwest NAL* without citing that order, AT&T's Petition itself was filed on August 16, 2002 (*Virginia Arbitrations*, Order on Reconsideration, 19 FCC Rcd. at ¶ 1 n.1), over eighteen months prior to the *Qwest NAL* and thus could not have relied on the FCC's implicit determination in the *Qwest NAL* that an ILEC's transit service is governed by section 251(c).

[52] Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685 (released March 3, 2005), at ¶¶ 120-133 ("*Intercarrier Compensation FNPRM*").

[53] *Id.* at ¶¶ 125-126.

BellSouth can find no support in the FCC's decisions for its argument that transit service is not subject to section 251(c). Although the FCC has not expressly held that transit must be provided at TELRIC, the more salient point is that it has never suggested otherwise.[54] By including the agreements in Hearing Ex. 24 among those for which it proposed to fine Qwest, the FCC implicitly found that the provision of transit traffic records, and thus transit service, is an "ongoing obligation relating to Section [251(c)]." Under the plain language of section 251(c)(2), because BellSouth provides interconnection for the transmission and routing of its own traffic to the networks of other carriers, it must do so for other carriers as well, and it must do so at TELRIC rates as required by section 252.

Section 252(d)(1) establishes the "Pricing Standards" that apply to interconnection services provided pursuant to section 251(c)(2). The price for such services "shall be . . . (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection . . . , and (ii) nondiscriminatory, and . . . may include a reasonable profit." The FCC has determined that TELRIC is the proper pricing standard for ILECs' section 251(c)(2) interconnection services,[55] and the United States Supreme Court has upheld that determination.[56] This Commission has established TELRIC rates for the switching and transport functions that BellSouth provides when transiting traffic between two

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[54] The *Virginia Arbitrations Order* is not to the contrary because the WCB simply had no authority to decide the matter.

[55] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 (1996), rev'd in pertinent part on jurisdictional grounds sub nom. Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd in pertinent part sub nom. AT&T Corp. v. Iowa Utilites Bd., 525 U.S. 366 (1999), rev'd in pertinent part on remand, 219 F.3d 774 (8th Cir. 2000), rev'd sub nom. Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002).

[56] Verizon Communications, Inc. v. FCC, 535 U.S. 467, 523 (2002).

carriers with which it is interconnected,[57] and those are the appropriate rates for its transit service.[58]

Costs related to transit traffic were included in the cost information used to develop the TELRIC-based rates previously established by this Commission. This is evidenced by BellSouth's own description of these rate elements, which shows that costs of traffic routed to BellSouth's end offices as well as transit traffic was captured in the rate development for these rates. BellSouth described the tandem switching rate element as: "'a call coming to a tandem from a CLEC switching will be terminated with that tandem's serving area either to a BellSouth end office ***or to another network provider.***'"[59] Likewise, BellSouth's description of interoffice common transport explains that it includes the "'transmission path and the associated electronics between switching locations that enable a call to be transported from one location to another. These facilities/trunk groups are ***shared among all network providers who require calls to be transported between particular switching locations***.'"[60] Thus even if the cost of transiting traffic were somehow different from the cost of delivering traffic to BellSouth's own end offices, those costs are already included in the TELRIC rates that BellSouth charges for the elemental switching and transport functions.

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[57] *In re: Investigation Into Pricing of Unbundled Network Elements.* Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP (Florida PSC May 25, 2001).

[58] Section 252(d)(1) permits BellSouth to include a "reasonable profit" in its transit and other interconnection rates. However, the TELRIC rates that the Commission has established for BellSouth's interconnection facilities and functions already include what the Commission has determined to be a reasonable profit. Tr. 768-69.

[59] Tr. 505-506 (quoting from the Direct Testimony of D. Daonne Caldwell filed on behalf of BellSouth Telecommunications, Inc., Florida Docket No. 990649-TP, Exhibit DDC-1 (CD ROM), Revised Cost Study Filing, file "Narrative.doc", section 6, page 45, August 16, 2000, emphasis added) ("*Gates Rebuttal*").

[60] Tr. 506 (quoting from the Direct Testimony of D. Daonne Caldwell filed on behalf of BellSouth Telecommunications, Inc., Florida Docket No. 990649-TP, Exhibit DDC-1 (CD ROM), Revised Cost Study Filing, file "Narrative.doc", section 6, page 45, August 16, 2000, emphasis added).

BellSouth will undoubtedly remind the Commission that it permitted BellSouth to charge a Transit Intermediary Charge ("TIC") in the *Joint CLEC Arbitration*.[61] In that case, this Commission ruled that, based upon testimony in that docket, BellSouth incurred costs for providing transit service that were not recovered through the TELRIC rates for the switching and transport functions it performs.[62] ***But there was no such testimony in this docket.*** The BellSouth witnesses had ample opportunity to identify any such unrecovered costs, but they did not do so. BellSouth witness Blake, who testified to such alleged costs in the Joint CLEC arbitration, did not address BellSouth's purported justification for its proposed transit rate in this docket; she discussed only BellSouth's contention that it is not required to provide a transit service. Tr. 218. BellSouth witness McCallen stated repeatedly in his deposition that BellSouth set its proposed transit rate at what BellSouth believes "the market will bear"[63] and specifically confirmed that BellSouth does not incur any costs providing transit service that are not recovered through the TELRIC rates for the elemental functions it performs.[64] The Commission cannot use testimony concerning unquantified alleged costs in another docket[65] as a basis for BellSouth's proposed rate in this docket.[66]

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[61] In re: Joint petition by NewSouth Communications Corp., NuVox Communications, Inc., and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecommunications. Inc., Docket No. 040130-TP, Order No. PSC-05-0975-FOF-TP, (October 11, 2005) ("Joint CLEC Arbitration").

[62] *Id.* at 52-53.

[63] Ex. 6, McCallen Deposition at 37, 63, 64 and 71.

[64] *Id.* at 66.

[65] Ms. Blake admitted in the *Joint CLEC Arbitration* docket that BellSouth had not performed a cost study to quantify the alleged additional costs that she asserted BellSouth incurs. *Joint CLEC Arbitration,* Order No. PSC--05--0975--FOF--TP, at 51.

[66] § 120.57(1)(f), Florida Statutes.

Moreover, even if BellSouth incurs the costs to which Ms. Blake testified in the *Joint CLEC Arbitration*, and even if BellSouth does not otherwise recover them in its TELRIC rates, BellSouth has presented no justification for imposing those costs on all carriers who originate transit traffic, rather than the carriers who cause those costs. In the *Joint CLEC Arbitration*, the Commission referred to two sources of such costs: (1) cost of providing billing records and (2) cost of billing reconciliation when third party carriers improperly bill BellSouth.[67] Such costs are not properly included in the rate for BellSouth's transit service but should be recovered through other charges imposed on the cost-causers.

First, many terminating carriers do not require the billing records provided by BellSouth, whether because they have deployed switching and signaling networks that avoid the need for BellSouth to provide them such billing records or because they generally do not bill for terminating traffic. BellSouth should provide such billing records only to terminating carriers who request them and should recover the cost of doing so from those carriers, not from originating carriers who have no use whatsoever for the billing records. Second, with respect to the cost of billing reconciliation, while the EMI 11-01-01 records that BellSouth provides to terminating carriers generally should provide adequate information for billing purposes, the Small LECs have presented evidence that BellSouth's billing records contain errors or omissions that appear to be the cause of such billing disputes.[68] To the extent that any such errors result from BellSouth's failure accurately to pass information it has received from originating carriers or that is otherwise in BellSouth's possession concerning the identity of the originating carrier or the jurisdictional nature of the traffic, BellSouth should not be permitted to shift the cost of

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[67] *Joint CLEC Arbitration,* Order No. PSC–05–0975–FOF–TP, at 53.

[68] Ex. 9, Exhibit A to Small LECs' Response to BellSouth Telecommunications, Inc.'s First Set of Interrogatories (Nos. 1-17).

resolving such errors to other carriers. If such errors occur because some originating carriers do not provide complete and accurate traffic data to BellSouth, BellSouth should recover the cost of billing resolution from those carriers alone, giving them an incentive to provide complete and correct data, and should not be permitted to impose such costs upon originating carriers who do provide accurate traffic data.

Second, the transit rate that BellSouth seeks to collect is $0.003 per minute of use ("MOU"). By comparison, an appropriate transit rate would include the TELRIC cost for each of the network components or functions required to complete a transit call, which generally include tandem switching and common transport elements. There is no reason to believe, nor any evidence to support, the notion that BellSouth's tandem switching and transport costs have increased since this Commission established TELRIC rates for those network components and functions, which generally would result in a rate less than $0.001 per MOU.[69] BellSouth's proposed mark-up of approximately 200% above TELRIC demonstrates exactly why Congress placed constraints on ILECs' pricing of interconnection services.

When a CLEC or CMRS provider utilizes the BellSouth provided transit service to originate traffic to a Small LEC, BellSouth should charge the CLEC or CMRS provider a rate consisting of BellSouth's TELRIC tandem switching element plus its TELRIC transport element for the distance from the BellSouth tandem to BellSouth's meet-point with the network of the terminating Small LEC carrier. If BellSouth must route the call between multiple tandems because the originating and terminating carrier are not interconnected at the same tandem, then an additional tandem switch and mileage sensitive transport charges may apply.

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[69] *See* Tr. 627 ("[I]t is reasonable to expect that a TELRIC-based rate for BellSouth's transit service should be in the range of $0.0009441."); Tr. 505 (The Commission "should require a per-minute of use rate of $0.0009368."). As noted below, an additional tandem switching charge and additional transit charges should apply when the originating and terminating carriers are not interconnected to the same BellSouth tandem.

Conversely, when the Small LEC originates a transit call to a CLEC or CMRS provider, BellSouth should also charge the Small LEC a rate consisting of BellSouth's TELRIC transport element for the distance from its meet-point with the network of the Small LEC to the BellSouth tandem plus its TELRIC tandem switching element. BellSouth generally cannot charge a Small LEC for transport to any meet-point with a CLEC or CMRS provider because typically the CLEC or CMRS Provider has already paid for the facilities to directly connect at the BellSouth tandem. However, as previously indicated, if BellSouth must route the call between tandems before delivering the call to the CLEC or CMRS provider, then additional tandem switching and mileage sensitive transport charges may apply.

When a CLEC/CMRS provider utilizes the BellSouth provided transit service to originate traffic to another CLEC/CMRS provider, assuming each carrier is connected in the same building to the same BellSouth tandem, BellSouth should only be charging the originating carrier its TELRIC tandem switching element. No transport should be incurred to hand off a call between two carriers interconnected to BellSouth in the same BellSouth location.

BellSouth's witness's testimony actually illustrates the reason that transiting is a section 251(c)(2) obligation that must be provided at TELRIC rates. Mr. McCallen asserts that "BellSouth is willing to provide transit services to [telecommunications service providers] because BellSouth has a ubiquitous network that is interconnected with most TSPs in its region." Tr. 62. What Mr. McCallen is describing is BellSouth's incumbent local network that it amassed during years of monopoly-provided local exchange services. Given the incumbent advantages derived from possession of this incumbent local network (and the interconnected nature of this network), Congress, in order to promote local competition, imposed additional obligations on ILECs (beyond those obligations assigned to non-incumbent LECs and other carriers). Congress

required ILECs to open up their incumbent local networks through, among other things, additional interconnection obligations. Each of these additional obligations that Congress imposed on ILECs, such as BellSouth, derives from the ubiquitous, interconnected local network the ILEC possesses, paid for through years of government-protected monopoly.

BellSouth recognizes that transit is a valuable service to other carriers and seeks to leverage the incumbent advantage that it possesses through its ubiquitous and interconnected network to capture that value for itself, in violation of the fundamental principles underlying the Act. Left unchecked, incumbent LECs, such as BellSouth, have no incentive to provide a service at an economically efficient rate. The very same waste of economic resources and ultimate inability to service consumers that results when competitors are required to install inefficient, redundant direct interconnection facilities likewise flows from competitors having to pay for an overpriced ILEC transit service.

Even if transit service were not a section 251(c)(2) interconnection service (which it is), BellSouth's rates nonetheless would be required to be just and reasonable pursuant to sections 201 and 202 of the Act. The FCC has squarely ruled that

> the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are [*sic*] reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements."[70]

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[70] Report and Order and Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd. 16978 (2003), at ¶ 663 (subsequent history omitted) ("*Triennial Review Order*"). Although transit service *per se* is an interconnection service, not an unbundled element, the Wireless Competition Bureau expressly recognized in the *Virginia Arbitrations Orders* that telecommunications carriers may obtain transit functionality by purchasing unbundled elements:

The FCC further stated that a carrier might demonstrate that a proposed rate for an element that is not subject to section 251(c) complies with sections 201 and 202 by showing

> that the rate for a . . . network element is at or below the rate at which the [carrier] offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a [carrier] might demonstrate that the rate at which it offers a . . . network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.[71]

Even if transit were not a section 251(c)(2) interconnection service, BellSouth's access rates for the same functions demonstrate that its proposed transit rate is unlawful under sections 201 and 202. BellSouth's interstate access rates for the functions it performs when transiting traffic are set forth in BellSouth's response to Verizon Wireless's First Set of Interrogatories. Exh. 9. If a carrier purchased the transiting function with 40 miles of transport from BellSouth's interstate access tariff, it would pay $0.002294 per minute for transit service.[72] Hence, BellSouth's tariff transit rate is roughly 25% more than the total charge it assesses on customers purchasing the transit function from the interstate access tariff, which further illustrates the unreasonableness of BellSouth's transit rate.

BellSouth seeks to justify its proposed transit rate as "market-based," contending that it is within the range of rates that Florida CLECs and CMRS carriers have agreed to for transit

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> We note, however, that Verizon has not argued that competitive LECs should be prevented from using UNEs to exchange transit traffic with third-party carriers. To avoid such a result, we remind the parties of the petitioners' rights to access UNEs independent of Verizon's terms for transit service. Furthermore, we caution Verizon not to apply its terms for transit service as a restriction on the petitioners' rights to access UNEs for the provision of telecommunications services, including local exchange service involving the exchange of traffic with third-party carriers.

Virginia Arbitrations Order, 17 FCC Rcd. at ¶ 121.

[71] *Triennial Review Order,* 18 FCC Rcd. at ¶ 664.

[72] According to its discovery response in Exh. 9, BellSouth Florida's interstate switched access tandem switching per MOU rate is $0.001198, common transport fixed termination per MOU rate is $0.000176 and common transport per mile per MOU rate is $0.000023, for a composite rate (assuming 40 miles of transport) of $0.002294 [0.001198 + 0.000176 + (40 * 0.000023)]. *See also* Tr. 503.

services. No state commission has endorsed BellSouth's so-called "market-based" transit rate argument, however, nor should this Commission do so. In consolidated arbitrations involving the CLECs who were parties to the *Joint CLEC Arbitration* at this Commission (the "Joint CLECs"), both the Kentucky Public Service Commission[73] and the North Carolina Utilities Commission[74] prohibited BellSouth from charging a Transit Intermediary Charge ("TIC") in addition to the TELRIC rates for the functions that BellSouth performs in transiting traffic. Although an arbitration panel in the Mississippi Joint CLEC arbitration recommended that BellSouth be allowed to charge the Joint CLECs its proposed TIC,[75] to date the Mississippi Public Service Commission has not endorsed that decision.[76] Moreover, the Mississippi arbitration panel did not accept BellSouth's purported justification for the TIC but erroneously concluded that it had no jurisdiction to require BellSouth to provide transit service.[77] While this Commission permitted BellSouth to charge the Joint CLECs a TIC, it did so based not upon BellSouth's "market"

[73] Order, *Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom Ill LLC, And Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(B) of the Communications Act of 1934, as amended*, Case No. 2004-00044 (March 14, 2006).

[74] Order Ruling on Objections and Requiring the Filing of the Composite Agreement, *In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.*, Docket No. P-778, Sub 8, et al. (Feb 8, 2006).

[75] Recommendation of the Arbitration Panel to the Mississippi Public Service Commission, *Joint Petition for Arbitration by NewSouth Communications Corp., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on Behalf of its Operating Subsidiaries Xspedius Management CO. Switched Services, LLC and Xspedius Management Co. of Jackson, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 2004-AD-094 (December 13, 2005) ("*Mississippi Arbitration Recommendation*").

[76] It should also be noted that in Mississippi section 252 arbitrations are conducted before a private arbitration panel, not the commission or its staff. Because private arbitrations generally have no precedential value, little weight should be given to the Mississippi arbitration panel's recommended decision.

[77] *Mississippi Arbitration Recommendation* at 29.

rationale, but upon the belief that BellSouth incurred costs associated with transit service that were not covered by its TELRIC rates.[78]

The Louisiana PSC has also rejected BellSouth's proposed transit rate. Although its rationale is unclear, that commission required BellSouth to provide transit service to small ILECs at rates beginning at $0.001 per MOU in the first year, increasing to $.002 in the third year,[79] significantly less than the $0.003 per MOU for the first year in BellSouth's Florida transit tariff and the $0.006 initially proposed by BellSouth beginning in the second year. Although BellSouth is fond of characterizing the Georgia PSC's order in its transit docket as holding that BellSouth is not required to provide transit at TELRIC rates, the GPSC held no such thing. While noting that the WCB had not required Verizon to provide transit at TELRIC rates, the Georgia PSC ruled that it will hold an evidentiary hearing to establish transit rates and, as this Commission did earlier in this docket, permitted BellSouth to charge its proposed rate "in the interim subject to a true-up."[80] Even the South Carolina PSC, which dismissed challenges to BellSouth's transit tariff, did not accept BellSouth's "market-based" argument, concluding simply that the only party other than BellSouth who presented any evidence had not borne its burden of proof.[81]

BellSouth asserts that some 279 CLECs and 17 CMRS carriers have agreed to pay it transit rates ranging from $0.000576 to $0.006 per MOU and that this fact alone demonstrates that its proposed transit rate of $0.003 per MOU is reasonable. "[I]t is a rate that we feel is very

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[78] As discussed above, any such costs are not properly included in the transit rate but should be recovered from the cost-causers through other charges.

[79] *Small Company Committee of the Louisiana Telecommunications Association and BellSouth Telecommunications*, Order No. U-28042 (June 24, 2005).

[80] Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies, *BellSouth Telecommunications, Inc.'s Petition for a Declaratory Ruling Regarding Transit Traffic,* Docket No. 16772-U (March 24, 2005).

[81] Order Dismissing Complaints, *In re: BellSouth Telecommunications, Inc – Transit Traffic Tariff 2005-50,* Docket No. 2005-63-C, Order No. 2006-199 (March 28, 2006).

comparable to what the market will bear based on the agreements we have in place . . . ." Exh. 6 (McCallen Deposition, at 63, lines 18-20). BellSouth's Hearing Exhibit 39 provides the "Total Transit Charges" applicable under its interconnection agreements with CLECs in Florida and demonstrates a broad range of rates. BellSouth apparently has agreed to charge a handful of CLECs a transit rate of only $0.000576, which is just over half the appropriate TELRIC transit rate.[82] While a number of the rates cluster in a range between $0.0025 and $0.0035, it appears that one CLEC agreed to pay BellSouth $0.006 per MOU for transit service, assuming that it actually originates any transit traffic.

The transit rate in an interconnection agreement merely represents a single term of the multitude of terms that comprise an entire negotiated interconnection agreement. Interconnection negotiation and, if necessary, arbitration involves "gives" and "takes" based on the business needs of individual carriers. In these negotiations and arbitrations, carriers generally rank issues by importance based on business needs and then expend resources to pursue these issues based on their individual priorities and budgets. Tr. 259, 646-47. Since carriers' business plans are not identical, these priorities and budgets will vary by carrier. Thus, not only is it contrary to the Act for BellSouth to suggest that its "negotiated" rates carry some weight in this proceeding, it is inaccurate to imply that a $0.002 to $0.006 transit rate stripped of any other benefit a competing carrier may have obtained through negotiations would still be considered acceptable by that carrier on a stand-alone basis.

The fact that a number of carriers, most of whom originate little or no transit traffic, may have agreed to rates comparable to what BellSouth seeks to charge demonstrates nothing. A carrier whose business plan is such that it expects to originate little or no transit traffic faces the

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[82] Such a below cost rate is no less inappropriate than a rate that significantly exceeds TELRIC because it creates an incentive to use BellSouth's transit service even when it would be more efficient to establish a direct connection.

choice of agreeing to BellSouth's excessive rate for a service the carrier does not expect to use or incurring the cost to arbitrate an issue that is irrelevant to its business plan. Not unexpectedly, many such carriers have agreed to pay BellSouth's proposed rate for any transit traffic they originate, but that does not mean that they believe the rate is reasonable or that they would agree to it if they expected to originate substantial volumes of transit traffic.

Of the 279 CLECs whose "Total Transit Charges" are set forth in Hearing Exhibit 39, ***only 39 originated any transit traffic at all*** in November 2005.[83] Only five CLECs originated over 10,000,000 MOU of transit traffic throughout the State of Florida.[84] By comparison, as shown in the confidential portion of BellSouth's response to MetroPCS's discovery, MetroPCS's monthly transit volumes are several times the traffic volume of any one CLEC and significantly more than several CLECs combined.[85] The average for those CLECs that originated 1 to 10,000,000 transit MOUs was 1,679,808 MOU. At BellSouth's $0.003 transit rate, approximately one-third of which is justified by TELRIC, the average such CLEC would pay only about $40,000 per year in excess of TELRIC for BellSouth's transit service, which is likely to be less than the cost of arbitrating the issue or even of participating in this docket. Only a handful of CLECs with high volumes of transit traffic could justify the cost of resisting BellSouth's demand for excessive transit rates even if they were certain of success. By contrast,

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[83] Exh. 9, BellSouth Telecommunications, Inc.'s Second Supplemental Response to MetroPCS' First Set of Interrogatories, Item No. 3, Attachment. Although BellSouth argues that November 2005 represents only a single month of data and that transit volumes can vary over time, it is inherently unlikely that a carrier that originated no transit traffic in November 2005 originated a substantial volume of such traffic in October or December. MetroPCS sought more comprehensive transit traffic data from BellSouth, but BellSouth refused to provide any data, contending that doing so would be unduly burdensome. MetroPCS agreed to accept limited data in order to obtain information that it could analyze before the end of the discovery period, but BellSouth refused to provide even that data until MetroPCS filed a motion to compel a response.

[84] *Id.*

[85] Exh. 10, BellSouth Supplemental Response to MetroPCS per Motion to Compel, Confidential Attachment.

as explained in MetroPCS witness Bishop's testimony, every CMRS carrier in Florida with an incentive to do so has participated in this docket and challenged BellSouth's proposed $0.003 transit rate. Tr. 252.

BellSouth's tariff transit rate is: (i) approximately three times the total transit charge a proper forward-looking cost-based analysis would produce, (ii) greater than the total transit charges assessed on many CLECs by BellSouth under its interconnection agreements regardless of the common transport mileage assumption, and (iii) greater than the total charge a carrier would pay if it purchased the transit functionality from BellSouth's interstate access tariff. Given that each of these factors demonstrates that BellSouth's proposed transit rate of $0.003 is unreasonable and/or discriminatory, BellSouth's transit rate does not satisfy the "just, reasonable and nondiscriminatory" standard of sections 201 and 202, and it should be denied.

IV. BILLING AND BILLING RECORDS ISSUES

Issue 15: Should BellSouth issue an invoice for transit services and if so, in what detail and to whom?

Joint CMRS Carriers' Summary: ** Yes, BellSouth should issue invoices for transit service to telecommunications carriers using its transit service to deliver originating traffic to other carriers subtending BellSouth's network. BellSouth's invoice should identify the number of minutes transited, the price of each element used, and the CLLI location of the terminating carrier. **

BellSouth should issue an invoice for transit service to any telecommunications carrier that uses transit service to deliver traffic originated on its network to other carriers subtending BellSouth's network, such as the Small LECs, CMRS providers and CLECs. The invoices should be provided in an industry standard format that includes the number of minutes transited, the elements provided in transiting such minutes (*i.e.*, the number of tandem switching minutes billed, and separately, the number of transport minutes billed) and sufficient information to

permit the billed party to identify the Common Language Location Identification Code ("CLLI") of the end office of the terminating end-user. This is consistent with general industry practice, since CLLI information is commonly used by originating carriers to help verify the accuracy of bills rendered by terminating carriers. Tr. 641-642.

Issue 16: Should BellSouth provide to the terminating carrier sufficiently detailed call records to accurately bill the originating carrier for call termination? If so, what information should be provided by BellSouth?

Joint CMRS Carriers' Summary: ** Yes. At BellSouth's tandem, traffic from multiple carriers is commingled for routing to customers or to various other carriers. Standard industry routing and billing protocols have been developed for billing of commingled traffic. For transit traffic, BellSouth should continue using the protocols and provide 11-01-01 records to terminating carriers. **

Based upon the evidence of record, BellSouth already provides the industry standard Category 11-01-01 records to terminating carriers, including the Small LECs. These records commonly include the Operating Company Number ("OCN") of the originating carrier, the called and calling telephone numbers, and the call timing information required to determine the minutes of use provided by such carrier. Tr. 642 (Pruitt Direct, at 32).[86] The 11-01-01 records should provide the Small LECs with sufficient information to bill originating carriers for traffic terminating on the Small LECs' network. Tr. 679-80.[87]

Further, and contrary to the assertions included in the Small LECs' testimony in this docket, there are no restrictions or prohibitions preventing BellSouth from commingling over the

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[86] *See also* Tr. 163: "The intention of these EMI records and the other records that we also provide is to give the terminating carrier sufficient and adequate information to know who the originating carrier was, and we provide that by information in those records and the number of minutes so that they can bill the originating carrier for the traffic that they have terminated."

[87] As discussed above, to the extent that there may be errors in the 11-01-01 records that BellSouth provides to the Small LECs, the cost of resolving disputes resulting from those errors should be borne by BellSouth and by originating carriers (if any) who cause the errors. The possible existence of such errors does not justify imposing the cost of dispute resolution upon originating carriers who provide accurate call information to BellSouth.

same trunk group the transit traffic originated by multiple third-party carriers for delivery to the Small LECs. Certainly, there is no technological reason to prevent commingling. Mr. Pruitt testified that commingling is a commonly employed, efficient industry trunking scenario. Tr., 680. Historically, Feature Group C trunks, the trunks over which transit traffic is typically delivered, have facilitated the commingling of transit traffic. Assuming BellSouth can accurately time the calls in question, and BellSouth can provide industry standard 11-01-01 records that enable terminating carriers to rate and bill such calls, the proper approach would be to permit BellSouth to continue to commingle transit traffic over the same trunks. Tr. 671-672; Exh. 31, at 32-34.

Issue 17: How should billing disputes concerning transit service be addressed?

Joint CMRS Carriers' Summary: ** Transit billing disputes should be resolved by utilizing the dispute resolution provisions of a Commission-approved interconnection agreement between BellSouth and the other carrier. Blocking by an ILEC should not be a viable option. **

As Mr. Pruitt testified, transit billing disputes should be addressed pursuant to the dispute resolution provisions of a Commission-approved interconnection agreement between BellSouth and the carrier with whom a dispute may arise. For reasons of public safety, as well the conduct of commerce and other daily affairs, LEC customers should be able to reach wireless customers, and vice versa without the fear that their communications will be disrupted due to contractual disputes between carriers. Accordingly, and contrary to the possible suggestion made by some parties[88] to this docket, blocking of traffic by an ILEC should not be considered as a viable option.

[88] *See* Tr. 200-201: "Q. Is [blocking], in your opinion, a viable option? A. [by McCallen] Oh, definitely – it's not a popular option at all, I'm sure, and is definitely not what BellSouth wants, to block any traffic. But to take it one step further, as a clarification, if a particular small LEC, and this is a scenario I have run across before, if a small LEC has tried due diligence to get a particular terminating CLEC or a particular terminating wireless carrier to negotiate with them about interconnection agreements or financial arrangements, if there is not going to be any originated traffic going to that terminating CLEC, it might be one possible way to get them to the negotiations table."

V. OTHER ISSUES

Issue 10: What effect does transit service have on ISP bound traffic?

Joint CMRS Carriers' Summary: ** CMRS providers do not regularly or routinely handle this type of traffic. **

Issue 12: Consistent with Order Nos. PSC-05-0517-PAA-TP and PSC-05-0623-CO-TP, have the parties to this docket ("parties") paid BellSouth for transit service provided on or after February 11, 2005? If not, what amounts if any are owed to BellSouth for transit service provided since February 11, 2005?

Joint CMRS Carriers' Summary: ** The Joint CMRS Carriers have their own respective interconnection agreements with BellSouth, and the parties have fulfilled their obligations under those agreements. **

Issue 13: Have parties paid BellSouth for transit service provided before February 11, 2005? If not, should the parties pay BellSouth for transit service provided before February 11, 2005, and if so, what amounts, if any, are owed to BellSouth for transit service provided before February 11, 2005?

Joint CMRS Carriers' Summary: ** The Joint CMRS Carriers have their own respective interconnection agreements with BellSouth, and the parties have fulfilled their obligations under those agreements. **

Issue 14: What action, if any, should the FPSC undertake at this time to allow the Small LECs to recover the costs incurred or associated with BellSouth's provision of transit service?

Joint CMRS Carriers' Summary: ** None. This docket should only address transiting issues. If necessary, cost recovery should be considered separately. Generally, however, transit costs incurred by Small LECs to deliver originated traffic to other carriers are a normal cost of business and do not require any action by the Commission. **

Joint CMRS Carriers' Position: Only those issues pertaining to the carrier-to-carrier aspects of transiting traffic are appropriate for consideration in this docket. Tr. 641. If deemed necessary by the Commission, issues pertaining to cost recovery allocation between carriers and their customers should be considered in a rate proceeding.

Nevertheless, should the Commission wish to consider the issue of cost recovery as part of this proceeding, the evidence of record demonstrates that the transit costs incurred by a Small LEC to deliver traffic originated by its own end-users to other carriers are simply the normal costs of doing business and are borne without question by other classes of carriers. These costs are incurred so that a Small LEC may provide service to its end-users and exchange traffic with other carriers. Accordingly, for reasons of competitive fairness, these costs should be absorbed by the Small LEC and recovered, if necessary, through increases to the Small LECs' local rates. Further, as observed by Mr. Pruitt, the responsibility of all LECs, including the Small LECs participating in this docket, to bear these kinds of costs is dictated by FCC rules that prohibit LECs from assessing "charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network". Tr. 640, 641, 656, 657, 662; 47 C.F.R. § 51.703(b).

CONCLUSION

Nearly 4000 years ago, King Hammurabi of Mesopotamia decreed, "If any one hire a ferryboat, he shall pay three gerahs in money per day."[89] Hammurabi believed that he was chosen by the gods to declare the law "so the strong should not harm the weak."[90] Since one of the oldest codes of law in human history, government has regulated the prices of those with market power that provide essential services in order to preclude them from charging "what the market will bear." Unless this Commission has wholly lost its purpose, it must reject BellSouth's acknowledged effort to charge what it believes the market will bear for its essential transit service and rule that BellSouth must provide transit service at TELRIC rates.

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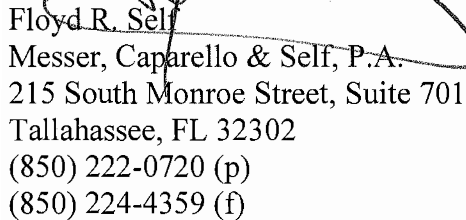
[89] *Code of Hammurabi* at ¶ 275 (Translated by L.W. King, 1910; edited by Richard Hooker) (available at http://www.wsu.edu/~dee/MESO/CODE.HTM).

[90] *Id.* at Prologue.

In light of the pro-competitive structure and purpose of the Act, favorable precedent from a variety of state and federal regulatory Commissions and judicial bodies, industry practice, and invaluable common-sense, this Commission must find that transiting is a Section 251 interconnection obligation subject to Section 252(d) TELRIC pricing, and accordingly, that BellSouth's transit traffic tariff must be rejected as a legally and practically insufficient vehicle for memorializing interconnection obligations between carriers. In recognition of the foregoing, the Joint CMRS Carriers urge the Commission to adopt all of their positions and arguments in this proceeding.

Respectfully submitted,



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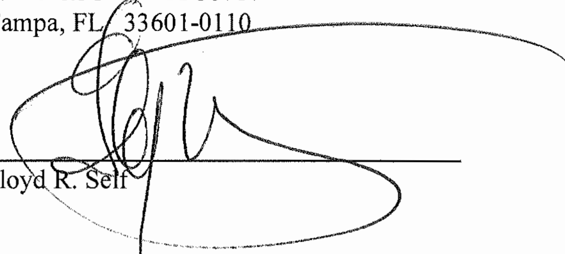

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