ORIGINAL

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Subject: Docket Nos. 050119-TP and 050125-TP - FCTA Post-Hearing Brief and Statement of Issues and Positions

Attachments: 050119 - Brief 6-9-06.doc

A. The person responsible for this electronic filing is:

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B. The docket numbers and titles are:

In Re: Docket No. 050119-TP - 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

In Re: Docket No. 050125-TP - Petition and Complaint of AT&T Communication of the Southern States, LLC for suspension and cancellation of Transit Traffic Service Tariff of FL2004-284 filed by BellSouth Telecommunications, Inc.

C. This document is filed on behalf of the Florida Cable Telecommunications Association, Inc.

D. The Post-Hearing Brief is 39 pages, and the Certificate of Service is 3 pages. Accordingly, the entire attached document has a total of 42 pages.

E. Attached is the Florida Cable Telecommunications Association's Post-Hearing Brief and Statement of Issues and Positions, and the Certificate of Service.

Thank you,

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CMP | COM 5 | CTR | ECR | GCL | OPC | RCA | SCR | SGA | SEC 1 | OTH

6/9/2006

ORIGINAL

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 Communication 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 THE FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC.

The Florida Cable Telecommunications Association, Inc. (FCTA), submits the following Post-Hearing Brief and Statement of Issues and Positions in this proceeding.

INTRODUCTION

Background

On February 11, 2005, a coalition of Small LECs filed a joint petition that objects to and requests suspension and cancellation of BellSouth's General Subscriber Services Tariff A16.1, Transit Traffic Service. Docket No. 050119-TP was established in response to the petition filed by the Joint Petitioners. On February 17, 2005, AT&T also filed a petition and complaint for a suspension and cancellation of Transit Ttraffic Tariff number FL 2004-284 filed by BellSouth. Docket No. 050125-TP was

subsequently established in response to AT&T petition. Both dockets have been consolidated.

Transit traffic is traffic that originates on the network of one carrier, transits over BellSouth's network, then terminates on the network of a third carrier. BellSouth has filed a new tariff, General Subscriber Services Tariff section A.16.1, Transit Traffic Service, which sets forth certain rates, terms and conditions that apply when carriers receive transit service from BellSouth, but have not entered into an agreement with BellSouth setting forth rates, terms and conditions for the provision of transit services. Docket Nos. 050119-TP and 050125-TP involve a dispute over the appropriate rates, terms and conditions applicable to transit traffic.

The FCTA has significant concern about BellSouth's transit service tariff, since BellSouth should pursue compensation for transit service through the negotiation (and if necessary, arbitration) of an interconnection agreement, and the transit service tariff is an inappropriate mechanism to address transit service. Although the tariff would not apply to parties who have negotiated rates with BellSouth, it would serve as the benchmark for any negotiations at the time of renewal of interconnection agreements. Moreover, the tariff rate is far in excess of a cost-based rate as is required by law.

Summary of FCTA's Position

It is FCTA's position that the rates, terms, and conditions that govern the interconnection of two carriers, including but not limited to the rates, terms, and conditions for transit service, are properly addressed in an interconnection agreement negotiated by the carriers. If the carriers are unable to reach a resolution of any

disputed issues, the issues should be brought to the Commission in the context of a section 252 arbitration.

The history of the immediate dispute suggests that it began as BellSouth and certain Small LECs attempted to negotiate such rates and terms. In the context of those negotiations, BellSouth sought compensation for a network functionality – transit – that it is providing to Small LECs when the customer of the Small LEC originates a call that is ultimately terminated on the network of another carrier (one with which the Small LEC is not directly interconnected). In response to BellSouth's demand for compensation, the Small LECs took unsupportable positions regarding their interconnection obligations pursuant to section 251 and refused to compensate BellSouth for the functionality being provided. Rather than initiate the process that would have brought the issue to the Commission for arbitration, BellSouth chose to file a tariff for the transit functionality that would apply in the absence of an interconnection agreement.

While it appears that the refusal of the Small LECs to compensate BellSouth is unreasonable and unlawful, the "presumptively valid, mandatory tariff" is not a remedy that is available to BellSouth. The potential impact of BellSouth's attempt to take a shortcut through the section 252 negotiation/arbitration process is compounded by the fact that the transit tariff includes a rate for an essential network function that is well above cost and duplicative of the cost recovery already being accomplished via other rates. This tariff has the potential to impact numerous other carriers and to disrupt how those carriers interconnect, exchange traffic, and compensate each other for doing so. Such a disruption would not only have business implications for a large number of

carriers, but would have an adverse impact on end user customers in terms of higher rates, blocked calls, and competitive choice.

The Commission should not intervene substantively in the dispute between BellSouth and the Small LECs at this time, because the issues have not been brought before it in the form of a section 252 arbitration. While the Commission has no direct role in the section 252 negotiation process, it should encourage BellSouth and the Small LECs to negotiate interconnection agreements that include the rates and terms for the transit services provided by BellSouth. An interconnection agreement, rather than a tariff, is the proper place for interconnection rates and terms.

If the negotiations between BellSouth and the Small LECs fail to result in a resolution of the issue, and the Commission is ultimately called upon to arbitrate this dispute pursuant to the section 252 process, then it should apply the following principles: (1) the industry standard of cost causation and intercarrier compensation, created by the Act and subsequent FCC rules, requires that the originating carrier – as the cost causer – be responsible for compensating another carrier that performs transport and termination functions in order to complete a call; (2) the Small LECs cannot be excused from their section 251 obligations; and (3) the rates for transit service functions, as other interconnection rates, must be cost-based.

In order to avoid a disruption in the way that carriers interconnect today and in the future, the Commission should conclude that BellSouth's tariff for transit services seeks to preempt rates and conditions that are properly contained within an interconnection agreement, and therefore the tariff is both unnecessary and an inappropriate intrusion on the negotiation process, and the tariff should be cancelled. If

BellSouth's tariff is not rejected by the Commission, the Commission should require that the language be changed to make it clear (1) that the application of the tariff is strictly limited to those instances in which the originating carrier *elects* not to seek an interconnection agreement with BellSouth, (2) that the transit element must be provided at cost-based rates, and BellSouth must provide a cost basis or support for its tariffed rate for transit traffic service, and (3) that the existence of the tariff cannot interfere in any way with the negotiation of the rates or terms of future interconnection agreements. If BellSouth has in place a "transit traffic tariff" that contains a rate that is well above cost and that will apply if no agreement is reached by the parties, BellSouth will have no incentive to meet its section 251(c)(1) obligation to "negotiate in good faith." The existence of the tariff would give BellSouth the leverage to insist on a higher rate or even to try to remove the rates and terms for transit functionalities from the interconnection agreement negotiation entirely.

ARGUMENT

A TARIFF IS NOT AN APPROPRIATE MECHANISM TO ADDRESS TRANSIT SERVICE PROVIDED BY BELLSOUTH

ISSUE 1

IS BELLSOUTH'S TRANSIT SERVICE TARIFF AN APPROPRIATE MECHANISM TO ADDRESS TRANSIT SERVICE PROVIDED BY BELLSOUTH?

FCTA's Position: No. BellSouth should pursue compensation for transit service through the negotiation (and if necessary, arbitration) of an interconnection agreement.

According to the FCC, "transiting occurs when two carriers that are not directly interconnected exchange non-access traffic by routing the traffic through an intermediary carrier's network. Typically, the intermediary carrier is an incumbent

LEC and the transited traffic is routed from the originating carrier through the incumbent LEC's tandem switch to the terminating carrier. The intermediary (transiting) carrier then charges a fee for use of its facilities."[1] (Tr. 707). The Small LECs contend that the "originating carrier pays" regime currently in place in the industry does not apply to them. (Tr. 401, 519). With the exception of the Small LECs, all parties to this proceeding agree that the originating carrier is responsible for paying transit service for the traffic it originates. In reality, for as long as Small LEC customers have originated local calls that terminated on the network of another carrier via a BellSouth tandem, the Small LECs have *caused* the costs at issue to occur. (Tr. 730). Several witnesses have testified that the "originator pays" concept is a well-established telecommunications policy based on sound principles of cost causation. (Tr. 105, 143, 273, 282, 555, 629, 703).

The following events appear to have been the genesis of the dispute at the center of this proceeding:

1. BellSouth sought compensation for transit service that it is providing to the Small LECs.

2. In response, the Small LECs took untenable positions regarding their interconnection obligations pursuant to section 251 and sought to turn cost causation on its head in order to avoid paying any such compensation.

3. In an apparent attempt to gain negotiating leverage (Tr. 742), BellSouth filed a tariff for the transit service at issue that includes a rate for an essential network

[1] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking, Federal Communications Commission, released March 3, 2005, 20 FCC Rcd 4685, ("*2005 FNPRM*").

function that is well above cost and duplicative of the cost recovery already being accomplished by via other rates. (Tr. 506-507). This tariff has the potential to impact numerous other carriers and to disrupt how those carriers interconnect, exchange traffic, and compensate each other for doing so. (Tr. 701, 742).

The rate for transit functions, like the rates for other elements of intercarrier compensation, should be established in the context of a negotiated, or if necessary, arbitrated interconnection agreement. (Tr. 708). BellSouth's "transit traffic service" tariff is not the right way to establish the rates and terms for intercarrier compensation. (Tr. 709). BellSouth's tariff, as filed, not only removes the issue of this component of intercarrier compensation from its proper place within an interconnection agreement, but gives BellSouth a significant amount of negotiating leverage and has the potential to distort the prices and terms of the transit function in future interconnection agreements. (Tr. 709). BellSouth contends that its tariff will not apply to carriers that already have an interconnection agreement. The exposure for carriers that already have an interconnection agreement is that all of those interconnection agreements expire, and prior to their expiration they have to be renegotiated each time, usually on a three year cycle. If BellSouth has a tariff with a high rate that it says was created for leverage purposes, it has the ability to insist that this tariff shall apply if an agreement is not reached. In that case, BellSouth's incentive to meet its duty to negotiate under section 251 for a reasonable rate has been eliminated. (Tr. 742-743). Accordingly, a tariff is not a proper mechanism to establish terms, conditions, and rates for BellSouth's provision of transit service. Rather, an interconnection agreement is the proper place for interconnection rates and terms. (Tr. 710).

In the *T Mobile Order*, the FCC found that:

> Going forward . . . we amend our rules to make clear our preference for contractual arrangements by *prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff.* In addition, we amend our rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act.[2]

FCC also concluded:

> [P]recedent suggests that the Commission intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between the carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act. Accordingly, we have amend section 20.11 of the Commission's rules to prohibit LECs from imposing compensation obligations for non-access traffic pursuant to tariffs.[3]

BellSouth has previously cited the Wireline Competition Bureau's *Virginia Arbitration Order*[4] and to footnote 1640 to the FCC's *Triennial Review Order* in support of the conclusion that BellSouth is not required to provide transit service.[5] However, the *Virginia Arbitration Order* does not support a position that BellSouth is not required to provide transit service. As an initial matter, the Wireline Competition Bureau, hearing the case on delegated authority, did *not* conclude that BellSouth had no obligation to provide transit service, but simply noted that "the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit

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[2] In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Declaratory Ruling and Report and Order* (*T Mobile Order*), ¶ 9 (Feb. 24, 2005), footnote omitted, emphasis added (Exhibit 2). While the rule changes referred to by the FCC apply specifically to the termination of traffic from CMRS carriers, the same fundamental principle is completely valid in the context of this case.

[3] Id. at ¶ 14.

[4] *Memorandum Opinion and Order*, CC Docket 00-251, released July 17, 2002 ("*Virginia Arbitration Order*").

[5] *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36, released August 21, 2003 ("*Triennial Review Order*").

service under [§251(c)(2)]" and declined to determine on delegated authority that a LEC has "a section 251(c)(2) duty to provide transit service at TELRIC rates."[6] In other words, the FCC has not concluded that BellSouth is *not* required to provide transit at TELRIC rates, but simply has not yet issued language that gave the Wireline Competition Bureau sufficient comfort to conclude that it has done so (or at least it had not prior to July 2002). (Tr. 711-712).

Of equal importance, the *Virginia Arbitration Order* does not suggest that a LEC has no section 251(a)(1) to provide transit at cost-based rates. At best, the *Virginia Arbitration Order* indicates that the FCC had not, as of July 2002, required that a LEC's cost-based rates for transit functions be consistent with the TELRIC methodology. (Tr. 712).[7]

BellSouth has historically failed to cite the next paragraph of the *Virginia Arbitration Order* that *rejects* a Verizon proposal that would have allowed it to discontinue providing transit service in some circumstances. The Wireline Competition Bureau concluded that:

> Verizon's proposal, which gives it unilateral authority to cease providing transit services to WorldCom, creates too great a risk that WorldCom's end users might be rendered unable to communicate through the public switched network. The Commission has held, in another context, that a 'fundamental purpose' of section 251 is to 'promote the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to connect efficiently with other carriers ... such a result would put new entrants at a severe competitive disadvantage in Virginia, and would undermine the interest of all end users in connectivity to the public switched network.[8]

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[6] *Virginia Arbitration Order* at ¶ 117.

[7] Footnote 1640 to the *Triennial Review Order* similarly states that "to date" [in that case, August 2003] the FCC has not required transit to be provided and priced as a UNE.

[8] *Virginia Arbitration Order* at ¶ 118.

Transit services are no less important to the fundamental purposes of section 251 in Florida than they are in Virginia. (Tr. 713).

The FCC issued a more recent decision in which it reached a conclusion that LECs, at least as a policy matter, should be required to provide transit functions. (Tr. 713). After receiving comments on the issue, the FCC concluded in March 2005 that:

> 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 (*See* 47 U.S.C § 251(a)(1)). 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.[9]

Having made the public policy determination, the FCC is now taking comment on its legal authority to require transit obligations pursuant to section 251(a)(1) and section 251(c)(2)(B). (Tr. 714).

Other state regulators have reached the conclusion that LECs are obligated to provide transit functions. For example, the North Carolina Utilities Commission, in its role as arbitrator, recently concluded – as it had done previously – that not only must BellSouth provide transit functionality at cost-based rates, but must do so at TELRIC rates.[10] The Commissioner arbitrators noted that "BellSouth initially contended that it was not required to provide a transit traffic function because it is not a section 251

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[9] *2005 FNPRM*, ¶¶ 125-126.

[10] *In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.* Docket No. P-772, SUB 8; Docket No. P-913, Sub 5; Docket No. P-989, Sub 3; Docket No. P-824, SUB 6; Docket No. P-1202, SUB 4, North Carolina Utilities Commission Order, July 26, 2005, at 44 – 45.

obligation under the Act," but that "witness Blake modified her position concerning BellSouth's Section 251 obligations by agreeing that BellSouth had an obligation to provide a tandem transit function based upon the FCC's Virginia arbitration orders and the Commission's [NCUC's] September 22, 2003 Order in Docket No. P-19, Sub 454 that found LECs have an obligation to provide transit service." The arbitrators also noted the position of the Public Staff that "there appears to be no dispute that BellSouth is obligated to provide transit service. Witness Blake acknowledged that the Commission has previously found LECs have an obligation to provide transit service and that the FCC has found the tandem transit function is a Section 251 obligation ... Although BellSouth has conceded that the tandem transit function is a Section 251 obligation, it is unclear why BellSouth still maintains that this function is not subject to the pricing requirements set forth in Section 252." The arbitrators then reached the conclusion that "the transit function is a Section 251 obligation, and BellSouth must charge TELRIC rates for it."[11]

The Public Utility Commission of Texas also has recently affirmed its prior decisions "that SBC Texas shall provide transit services at TELRIC rates," and noted that "there has been no change in law or FCC policy to warrant a departure from prior Commission decisions on transit service.[12] Furthermore, a federal court found that a state commission may require an LEC to provide transiting to CLECs under state law. *Michigan Bell Te. Co. v. Chapelle*, 222 F. Supp. 2d 905, 918 (E.D. Mich. 2002). The PUCT based its decision on an observation that transit services are necessary for carriers to efficiently interconnect: "given SBC Texas' ubiquitous network in Texas and

[11] *Id.*

[12] Arbitration Award, Public Utility Commission of Texas, Docket No. 28821, issued February 22, 2005.

the evidence regarding absence of alternative competitive transit providers in Texas, the Commission concludes that requiring SBC Texas to provide transit services at cost-based rates will promote interconnection of all telecommunications networks." The PUCT also explicitly rejected an attempt by the LEC to remove transit issues from the section 252 negotiation and arbitration process: "the Commission finds that SBC Texas' proposal to negotiate transit services separately outside the scope of an FTA §251/252 negotiation may result in cost-prohibitive rates for transit service." BellSouth's attempt to remove transit issues from the §252 process by filing a tariff with inflated rates will have the same effect of creating "cost-prohibitive rates for transit service."

As stated above, a federal court found that a state Commission may require a LEC to provide transiting to CLECs under state law.[13] Further, this Commission has previously determined that section 364.01, Florida Statutes, gives it general authority to promote competition.[14] Just as the PUCT based its decision on an observation that transit services are necessary for carriers to efficiently interconnect, the Florida Commission has independent authority under section 364.16, Florida Statutes, to require carriers to interconnect if such connections "can be reasonably made and efficient service obtained." Accordingly, the Commission is authorized to conclude that transit services are necessary for carriers to efficiently interconnect. The

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[13] *Michigan Bell Te. Co.* at 918.

[14] *In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc.*, Docket No. 020119-TP; *In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs by Florida Competitive Carriers Association,* Docket No. 020578-TP; *In re: Petition for expedited review and cancellation or suspension of BellSouth Telecommunications, Inc.'s Key Customer tariff filed 12/16/02, by Florida Digital Network, Inc.,* Docket No. 021252-TP, Order No. PSC-03-0726-FOF-TP, issued June 19, 2003, at page 8 (Key Customer Promotional Tariff Order).

Commission is also vested with jurisdiction over this matter pursuant to the provisions of sections 364.01(4) and 364.051(5), Florida Statutes, as stated on page 2 of Order No. PSC-05-0517-PAA-TP, issued May 11, 2005 in this docket.

The State Corporation Commission of Kansas recently reached a similar decision.[15] The Kansas Commission affirmed the decision of the arbitrators that transit issues are properly addressed in an interconnection agreement and are subject to section 252 arbitration, even though the LEC (SWBT) had argued that it is not. The Kansas Commission reached its decision in part because of the previous treatment of transit service: "transit traffic was included in the parties' existing ICA and SWBT has not cited any change in law since that time to justify excluding these issues." The Kansas Commission acknowledged that the FCC is in the process of considering the issue, but concluded that sound public policy required that it reach its decision: "As stated in the award, the proper treatment of transit traffic is before the FCC. Without the benefit of that decision, the Commission concludes that it is necessary to ensure that all traffic is exchanged by including these issues in the final ICA." While treating transit issues within the scope of section 252 negotiations and arbitrations will, according to the Kansas Commission, "ensure that all traffic is exchanged," BellSouth's "transit traffic tariff" would have the opposite effect, creating significant potential to disrupt the way that traffic is exchanged and compensated. (Tr. 717).

As stated above, this Commission has previously determined that under section 364.01, Florida Statutes, the Florida Legislature granted it exclusive authority to

[15] *Order 11: Commission Order on Arbitrator's Award*, State Corporation Commission of the State of Kansas, Docket No. 05-ABIT-507-ARB, July 21, 2005, pp. 15-16.

regulate telecommunications companies.[16] The Commission reasoned further that this authority provided it with the basis upon which it could regulate BellSouth's promotional tariffs in the docket at issue.[17] In concluding its discussion of its jurisdiction, the Commission stated, "[a]s such, we interpret section 364.01, Florida Statutes, as providing us with the authority to promote competition by preventing any conduct or practice which contravenes the goal of promoting competition as set forth in section 364.01, Florida Statutes."[18]

This same grant of jurisdiction confers upon this Commission the authority to promote competition by preventing any conduct or practice associated with the BellSouth transit service tariff which contravenes the goal of promoting competition as set forth in section 364.01, Florida Statutes. That fact that BellSouth's transit tariff is "presumptively valid," pursuant to section 364.051(5)(a), Florida Statutes, does not affect the Commission's authority to review this matter. The presumption of validity is for the purpose of permitting a LEC to implement a tariff upon its effective date without review and approval by the Commission. However, the burden of sustaining the validity of the tariff shifts to BellSouth once the tariff has been challenged. To the extent that the meaning of presumptively valid raises an issue as to which party has the burden of proof, that burden remains on BellSouth as the party seeking permanent approval of its tariffs.[19]

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[16] *Key Customer Promotional Tariff Order* at p. 8.

[17] *Id.*

[18] *Id.*

[19] *See, i.e., National Industries, Inc. v. Commission on Human Relations*, 527 So.2d 894, 896 (Fla. 5th DCA 1988) ("It is well established that the burden of proof is upon the party asserting the affirmative of an issue before an administrative tribunal.")

Additionally, the presumptively valid standard is related to whether the Commission should suspend a tariff. Non-basic tariffs are presumptively valid and will only be suspended if the "tariff will cause significant harm that cannot be adequately addressed as the tariff is ultimately determined to be invalid."[20] Accordingly, the term presumptively valid relates to the criteria for suspension and does not limit the Commission's authority to review and evaluate the substantive merits of the tariff, and cancel the tariff if it is found to be invalid. Although the Commission did not suspend the tariff, it had serious enough concerns with the tariff to require that money collected under the tariff be held subject to refund.

In this proceeding BellSouth has relied on a decision of the Commission in a previous arbitration case for the proposition that transit is not a section 251 element.[21] However, the tenor of what the Commission actually said was that, since the FCC had not determined yet whether transit is subject to TELRIC pricing under section 251(c)(2), it was not going to require a TELRIC rate. (Tr. 764). The Commission's ultimate decision in the *Joint Artibtration Order* stated as follows:

> Upon consideration and review of the record and arguments in the parties' briefs, BellSouth shall be allowed to charge the CLEC a Tandem Intermediary Charge (TIC) for transport of transit traffic when CLECs are not directly interconnected to third parties. Parties are strongly encouraged to continue negotiations beginning at a rate of $.0015 per minute of use.[22]

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[20] Order No. PSC-05-0517-PAA-TP at 3.

[21] *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 at 53 (*Joint Arbitration Order*).

[22] *Joint Arbitration Order* at 53

Significantly, the Commission directed the parties to go and negotiate the rate starting at $.0015, substantially less than the transit tariff rate in this docket. (Tr. 743). As stated by witness Wood, "I think that's what BellSouth and the Small LECs ought to be doing right now is negotiating that transit rate." (Tr. 743).

The Commission stated in its analysis that the TIC, "is not required to be TELRIC-based and is more appropriately, ***in this instant proceeding***, a negotiated rate between the parties." [emphasis supplied]. In support of that conclusion, the Commission understood the reasoning of the FCC Wireline Competition Bureau in rendering the *Virginia Arbitration Order* to the effect that the Bureau found no precedent to require the transiting function to be priced at TELRIC.[23] The Commission noted further that the FCC, in footnote 1640 of the TRO, stated "***[t]o date*** the Commission's rules have not required incumbent LECs to provide transiting..." [emphasis supplied]. The Commission also took notice that the cited footnote contained a comment that the FCC will address transiting service issues at a later date in the *FCC's Further Notice of Proposed Rulemaking in the matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, when transiting service issues are to be addressed.[24]

As stated earlier in this brief, the Wireline Competition Bureau hearing the case on delegated authority, did not conclude that BellSouth had no obligation to provide transit service, but simply noted that "the Commission had not had occasion to determine whether incumbent LECs have a duty to provide transit service under [§ 251(c)(2)]" and declined to determine on delegated authority that an LEC has "a section

[23] *Virginia Arbitration Order.*

[24] *Triennial Review Order.*

251(c)(2) duty to provide transit service at TELRIC rates."[25] (Tr. 711-712). In other words, the FCC has not concluded that BellSouth is *not* required to provide transit at TELRIC rates, but has simply not yet issued language that gave the Wireline Competition Bureau sufficient comfort to conclude that it has done so (or at least it had not prior to July 2002). (Tr. 711-712). More recently, the FCC concluded in March 2005 that, "transit service is increasingly critical to establishing indirect connection – a form of interconnection explicitly recognized and supported by the Act (*See* 47 U.S.C. § 251(a)(1))."[26] Further, the FCC has been consistently clear regarding the LECs' section 251(c)(2)(a), obligation to the effect that facilities needed for "the transmission and routing" of "exchange access service" must be provided at ***cost-based rates***.[27] (Tr. 705). Essentially, the FCC noted that cost-based requirements apply to section 251 interconnection elements, even if TELRIC does not apply. (Tr. 764-765).

There are several other reasons why the *Joint Arbitration Order* is not controlling and/or is not inconsistent with the relief the FCTA is requesting in this docket. The Joint arbitration proceeding was a bilateral arbitration, (Tr. 539), involving only certain carriers and was not a generic policy docket, as is the current proceeding. Moreover, the Commission does not permit non-arbitrating parties to intervene in arbitration dockets, (Tr. 243), so the parties who would be affected by the Joint Arbitration Decision, if it were to be used as precedent here, will have had no opportunity to participate or provide information for the Commission's consideration.

[25] *Virginia Arbitration Order* at ¶117.

[26] *2005 FNPRM* at ¶¶ 125-126.

[27] *Triennial Review Remand Order* at ¶140.

The issues raised in this docket should be decided based on the factual and legal record of this proceeding.

THE TRANSIT RATE IS THE RATE NEGOTIATED BY THE PARTIES TO AN INTERCONNECTION AGREEMENT AND, FAILING AN AGREEMENT, IS A COST-BASED RATE AS DETERMINED BY THE COMMISSION

ISSUE 11

HOW SHOULD CHARGES FOR BELLSOUTH'S TRANSIT SERVICE BE DETERMINED?

(a) WHAT IS THE APPROPRIATE RATE FOR TRANSIT SERVICE?

(b) WHAT TYPE OF TRAFFIC DO THE RATES IDENTIFIED IN (A) APPLY?

FCTA's Position: The appropriate rate for transit service is the rate negotiated by the parties to an interconnection agreement. If no agreement is reached and the issue is submitted for arbitration, the appropriate rate is a cost-based rate as determined by the Commission. This rate would apply whenever a carrier that is not the originating or terminating carrier delivers a local call to the terminating carrier so that the call can be completed.

Transit Service Must Be Provided at Cost-Based Rates

Rates for transit service functions, as are other interconnection rates, must be cost-based. (Tr. 703). The FCC has been consistently clear regarding the LECs' section 251(c)(2)(a) obligation in holding that facilities needed for "the transmission and routing" of "exchange excess service" must be provided at ***cost-based rates.***[28] Cost-based rates are based upon economic costs using accepted economic theory and methodology. TELRIC is but one good example of cost-based rates consistent with economic costs. As explained by several experts at hearing, the TELRIC prices already set by this Commission in its UNE Pricing Docket allow BellSouth to not only recover the costs of providing the transit service, but also include an allocation of joint

[28] *Triennial Review Remand Order* at ¶140. See also previous discussion on pp. 16-17 on Issue I.

and common costs. Accordingly, these rates contain a fair level of profit for BellSouth. (Tr. 571, 686, 769). As witness Wood testified: "...when we talk about TELRIC, it's not simply just the basic direct cost of the nuts and bolts, if you will, to provide this. It includes the fair profit, the shared cost, the overheads, all of those kinds of things are all in the rate." (Tr. 769).

After receiving comments on the issue, the FCC concluded in March 2005 that "the availability of transit service is increasingly critical to establishing indirect interconnection – a form of interconnection explicitly recognized and supported by the Act (*See* 47 U.S.C. § 251(a)(1))."[29] (Tr. 713). As the FCC has stated: "[w]ithout the continued availability of transit service, carriers that are indirectly interconnected have no efficient means by which to route traffic between their respective networks."[30] Having made the public policy determination, the FCC is now taking comments on its legal authority to require transit obligations pursuant to sections 251(a)(1) and 251(c)(2)(B).

The FCC also held in the *T Mobile Order* 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.[31]

Several other state regulators have reached the conclusion that LECs are obligated to provide transit functions. (Tr. 714). The North Carolina Utilities Commission, in its role as arbitrator, recently concluded – as it had done previously –

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[29] 2005 FNPRM, ¶¶ 25-126. (Tr. 713). See also pp. 9-10 in the discussion on Issue I, providing more detailed discussion of this issue.

[30] ID. at ¶ 120.

[31] *T Mobile Order*¶ 14.

that not only must BellSouth provide transit functionality at cost-based rates, it must do so at TELRIC rates.[32] (Tr. 714). The Public Utility Commission of Texas also recently affirmed its prior decisions "that SBC Texas shall provide transit services at TELRIC rates," and noted that "there has been no change in law or FCC policy to warrant a departure from prior Commission decisions on transit service."[33] (Tr. 715). The State Corporation Commission of Kansas recently reached a similar decision that transit issues are properly addressed in an interconnection agreement and are subject to section 252 arbitration.[34] The Tennessee regulatory authority found TELRIC pricing to be the correct pricing for transit service.[35] The Kentucky Public Service Commission also rejected BellSouth's non-TELRIC charge and required BellSouth to assess only TELRIC-based tandem switching and common transport rates for transit.[36] The Michigan Public Service Commission reached a similar result, and it was upheld on appeal.[37]

Although the FCC has not yet ruled affirmatively that transit service should be priced at TELRIC rates, in the *Triennial Review Remand Order*, the FCC notes "our

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[32] *Recommended Arbitration Order* at pp. 44-45. (Tr. 741).

[33] *Arbitration Award*, Public Utility Commission of Texas, Docket No. 28821, issued February 22, 2005. (Tr. 715).

[34] *Order 11: Commission Order on Arbitrator's Award*, State Corporation Commission of the State of Kansas, Docket No. 05-ABIT-507-ARB, July 21, 2005, pp. 15-16.

[35] *In re: Petition for Arbitration of CELLCO Partnership d/b/a Verizon Wireless*, Docket No. 03-00585, Tennessee Regulatory Authority, Order of Arbitration Award (*CELLCO Arbitration*) at 40.

[36] *In the Matter of Joint Petition for Arbitration of NewSouth Communications Corp., Nuvox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xsepdius 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.* Kentucky Public Service Commission Order in Case No. 2004 – 00044, September 26, 2005 (*Kentucky Order*) at 15.

[37] *Michigan Bell Telephone Co., d/b/a Ameritech Michigan v. Laura Chappelle, et al.*, 222 F. Supp. 2d 905 (E.D. MI 2002) (2002 *Michigan Bell Te. Co.*).

finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at ***cost-based*** rates to the extent that they require them to interconnect with the incumbent LEC's network."[38] (emphasis supplied). Therefore, although TELRIC is a good example of a cost-based rate, and it would make sense to use TELRIC, since the Commission has already determined TELRIC prices in its UNE Pricing Docket, the FCC has only ruled to date that interconnection elements must be provided at cost-based rates. Accordingly, the Commission should determine that transit service should be priced at either TELRIC rates (a good example of cost-based rates) or some other cost-based rate.

The BellSouth transit service tariff issued in this docket is clearly not set at a cost-based rate. BellSouth has provided no cost information in this docket to support its transit rate and claims it may charge "what the market will bear." (Exhibit 6, McCallen Deposition at 37, 71). Mr. McCallen firmly testified that the BellSouth filing is "not a cost-supported tariff." (Tr. 203-204).

The only basis for BellSouth's rates provided by witness McCallen is that BellSouth's tariffed transit rate is comparable to rates in recently negotiated agreements between BellSouth and CLECs and between BellSouth and CMRS carriers for transit services." (Tr. 717) As support for this statement, Mr. McCallen has produced Exhibit 39 (KRM-2nd revised) – that he claims are listings of such agreements and associated

[38] *Triennial Review Remand Order* at ¶ 140.

transit rates in effect in Florida. (Tr. 717). There are several problems with this "basis" for BellSouth's tariffed rate. First and foremost, BellSouth has produced no cost support at all for the proposed rate. Whether or not transit functions are subject to the TELRIC pricing requirements of section 252, as interconnection elements they still must be cost-based. (Tr. 717). For this reason, Mr. McCallen's Exhibits, even if accurate, are simply irrelevant.

Second, Mr. McCallen's Exhibits are not accurate. Mr. McCallen's Exhibit has a different rate listed for AT&T than AT&T originally included in its petition in this case. (Tr. 773-774). For example, AT&T, whose current interconnection agreement with BellSouth reflects a transit rate of only $0.0005767 per MOU (significantly less than the tariffed rate of $0.003) did not appear in the early version of Exhibit KRM-2, and even the Second Revised KRM-2 lists a higher rate for AT&T than listed in AT&T initial petition.[39] (Tr. 718, 774).

Further, the total transit charge for Comcast that is set forth in Mr. McCallen's Exhibit KRM-2, Second Revised is incorrect. (Tr. 713, 756). The effective transit rate due BellSouth from Comcast is not $0.0025 as Mr. McCallen's Exhibit KRM-2, Second Revised, indicates, but is instead only $0.0015, one half of BellSouth's tariffed rate of $0.003. (Tr. 718, 763).

Mr. McCallen's Exhibit reflects carriers that have a high rate, which is explained by the fact that most of those carriers are not paying that rate, because they are not using the transit service. (Tr. 779). It is easy to agree to pay a high rate if you know you are never going to buy whatever it is you are agreeing to. (Tr. 779). For

[39] *See Petition and Complaint of AT&T Communications of the Southern States, LLC*, filed February 17, 2005; (Tr. 718, 774).

some of the carriers that are using the transit service, one does not see the much higher rates. (Tr. 780). As Mr. Gates, testified, to the extent that many of the carriers listed on Exhibit 39 have no transit traffic, the listed rates are not meaningful. In fact, Exhibit 9, BellSouth's Supplemental Response to MetroPCS Interrogatory No. 3, illustrates the point. The discovery response shows the number of transit minutes originated by every Florida CLEC for November 2005. It contains 279 carriers. Of those 279 carriers, 240 originated no transit traffic. (Tr. 186). Accordingly, very few of the carriers that BellSouth claims pay a "comparable" rate for transit service, purchase any transit service at all. Therefore, the only rates listed on the Exhibit that have any meaning are those that apply to 39 that might conceivably pay the rate. (Tr. 774). The rest of the entities agreed to whatever they needed to in order to get the agreement done, but they are not going to pay it, so it really does not have any relevance as far as determining any kind of market or cost-based rate. (Tr. 774).

UNE rates previously set by the Commission present cost-based rates that include a fair profit to BellSouth. (Tr. 571, 686, 769, 778). According to witness Gates, anything above the TELRIC rate simply provides BellSouth with a windfall. Mr. Gates estimated that the windfall could be as much as $45 million a year, for CLEC lines alone. (Tr. 571). At the hearing, Commissioner Carter queried witness Wood about the $45 million a year figure. (Tr. 770). Mr. Wood, after acknowledging that it was Mr. Gates' calculation, indicated that his understanding is that it represented the difference between the $0.003 that is in the BellSouth transit tariff and the sum of the TELRIC rates for the underlying network pieces that one would have to put together to provide transit. (Tr. 770). Mr. Wood testified further that, using Mr. Gates' numbers

for discussion purposes, the $45 million over and above the TELRIC rate would ultimately be paid by the consumers. (Tr. 770, 772). Commissioner Deason asked Mr. Wood at the hearing whether or not, in his opinion the $0.003, BellSouth's tariffed transit service rate, is cost-based or not, and Mr. Wood responded that he could not craft internally a scenario, given his understanding of the costs established in Florida, that would permit one to characterize $0.003 being cost-based. (Tr. 774). Mr. Wood concluded his answer by stating, "[i]f you're three times the level of cost including profit and overhead, you're outside that realm." (Tr. 774)

BellSouth entered the post-1996 competitive market with a legacy "central network role" that makes it uniquely positioned to provide the transit functions that make indirect interconnection possible. (Tr. 709). Other carriers must and do rely on BellSouth to provide the transit function in those situations in which direct connection is not economic (typically due to the small volume of traffic being exchanged) and in which no other transit provider is available. (Tr. 709-710). Significantly, BellSouth presented no competent evidence of the existence of any such alternative transit provider. (Tr. 710). Although there was reference to a website for a putative alternate provider, there was no evidence that there is an alternate provider that is actually providing service. (Tr. 746, 747, 756).

OBLIGATIONS OF ORIGINATING CARRIERS

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?

FCTA's Position: The responsibilities of the originating carrier, if a request is made by BellSouth, are to (1) negotiate in good faith with BellSouth to develop an interconnection agreement that sets forth the rates and terms for the transit functions performed by BellSouth, and (2) to compensate BellSouth, pursuant to a negotiated or arbitrated cost-based rate, for providing this function.

ISSUE 3

WHICH CARRIER SHOULD BE RESPONSIBLE FOR PROVIDING COMPENSATION TO BELLSOUTH FOR THE PROVISION OF THE TRANSIT TRANSPORT AND SWITCHING SERVICES?

FCTA's Position: The originating carrier is responsible for compensating the transit provider.

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?

FCTA's Position: It is FCTA's position that any questions regarding the recovery of costs by the Small LECs are separate and distinct from questions regarding the appropriate method of compensation for transit services. Any action regarding Small LEC cost recovery is properly addressed within the context of the Commission's regulation of each individual LEC.

With the exception of the Small LECs[40], all the parties to this proceeding agree that the originating carrier is responsible for paying for transit service for the traffic it originates. Inexplicably, the Small LECs claim there should be no compensation impact on them when they originate traffic. (Tr. 519). However, as several witnesses testified, the "originator pays" concept is a well-established telecommunications policy, (Tr. 105, 143, 273, 282, 555, 629, 703), based on sound principles of cost causation.

[40] Mr. Watkins, testifying on behalf of the Small LECs, admitted that they are the only party that has taken this position. (Tr. 401).

Small LECs have taken a creative interpretation of section 251 and turned an obligation of all carriers under section 251(a) to interconnect directly or indirectly and turned it into a requirement that has an exclusion for Small LECs. (Tr. 741). Section 251(a) is completely symmetrical. It does not distinguish between types of carriers in terms of the obligation.

The Small LECs proposed the same notion (that they escape financial responsibility for calls they originate) to the Georgia Public Service Commission, which soundly rejected it. The Georgia Commission adopted the CLECs' position on this issue and found: "...the decision to find that calling party pays is consistent with policy rationale of the *Texcom Orders* as well as the traditional principles of holding the cost causer accountable."[41] The Georgia Commission reaffirmed this ruling on a request for reconsideration filed by the Georgia Telephone Association (GTA) (an organization of Small LECs).[42] Likewise, the Tennessee Regulatory Authority found that, "if a call originates in a switch on one party's network then that party is responsible for the transiting costs" and that if the originating carrier is a Small LEC, the Small LEC is obligated "to pay the appropriate transport and termination charges associated with getting that call to the POI ... which is located at the BellSouth tandem."[43]

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[41] *In Re: BellSouth Telecommunications Inc.'s Petition for Declaratory Ruling Regarding Transit Traffic,* Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies, Georgia Public Service Commission, Docket No. 16772-U, March 24, 2005 at 8.

[42] *In re: BellSouth Telecommunications, Inc's Petition for Declaratory Ruling Regarding Transit Traffic, Order on Clarification and Reconsideration* at 3. Georgia Public Service Commission, Docket No. 16772-U, May 2, 2005 (Exhibit 30, BHP-5).

[43] *CELLCO Arbitration* at 30.

In addition, two federal court rulings have made it clear that the originating carrier is responsible for transit costs. *See, Atlas Telephone Co. v. Oklahoma Corporation Commission*, 400 F.3d 1256 (10th Cir. 2005); *Mountain Communications, Inc. v. FCC*, 355 F.3d 644 (D.C. Cir. 2004). These court cases are consistent with 47 CFR § 51.703(b), which states: "A LEC may not assess charges on any telecommunications carrier for telecommunications traffic that originates on the LEC network." (Tr. 585-586).

While the FCTA does not agree that the tariffed rate of $0.003 per MOU is reasonable or that BellSouth's tariff is the appropriate mechanism for such a rate to be established or assessed, the FCTA does agree that (1) BellSouth should be compensated for the use of its network, (2) such compensation should come from the carrier that originates a call that "transits" BellSouth's network, and (3) Small LECs should not be exempt from paying for services received from other carriers.

Witness Watkins argues that the Small LECs have no obligation to interconnect with other carriers unless those carriers establish a point of interconnection on the Small LEC network. (Tr. 324). Section 251(a)(1) creates a duty for all telecommunications carriers "to interconnect *directly or indirectly* with the facilities and equipment of other telecommunications carriers" (emphasis added). Any claim by Mr. Watkins that other carriers must establish a form of direct interconnection with the Small LECs appears to be directly at odds with the "directly or indirectly" phrase, and any suggestion that the Small LECs have engaged in such interconnection only on a "voluntary" basis certainly appears to be at odds with the phrase "every telecommunications carrier has the duty." (Tr. 29).

As incumbent local exchange carriers, and subject only to the exemptions contained in subsections 251(f)(1) and (2), the Small LECs have additional duties pursuant to section 251(c), including a duty to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network at any technically feasible point within the carrier's network." §251(c)(2)(B). In other words, the Small LECs have a duty to provide for interconnection "at any technically feasible point" on their network *if* such a request is made by another telecommunications carrier. Mr. Watkins is trying to turn this LEC duty around 180 degrees to create a requirement for the interconnecting carrier to come to the Small LEC and interconnect at the point of the Small LEC's choosing. (Tr. 725). He complains that BellSouth – by providing a transit function – has allowed CLECs and CMRS carriers "to exchange traffic with the Small LECs without establishing an interconnection point at a technically feasible point on the incumbent networks of the Small LECs as required under the Act." (Tr. 334). It is clear that section 251 does not do what Mr. Watkins claims. While it creates a duty for LECs to accept interconnection upon request at any technically feasible point, it does not create an obligation for all carriers who have a need to interconnect with the LEC to do so directly rather than indirectly. (Tr. 725).

Further, Mr. Watkins argues: "In lieu of establishing their own EAS facility arrangements with the Small LECs at the typical border location, the CLECs simply chose to utilize the services of BellSouth to have their EAS traffic switched and trunked in tandem." (Tr. 328). There is of course no requirement for all carriers to directly interconnect with all other carriers (including but not limited to the Small LECs), nor

would such universal "direct interconnection" be efficient or desirable. His reference to direct interconnection as 'typical" is demonstrably false. Far more carriers are indirectly connected than are directly connected. (Tr. 726). In direct contrast to Mr. Watkins' requirement that all carriers must come forth and directly interconnect with the Small LECs, the FCC has recently concluded that indirect interconnection accomplished through the use of transit service is "a form of interconnection explicitly recognized and supported by the Act," and that such interconnection may represent the only "efficient means by which to route traffic" between carrier networks, particularly "when carriers do not exchange significant amounts of traffic."[44] [45]

Mr. Watkin argues that BellSouth should not have the right to dictate the Small LECs' network arrangements. (Tr. 331). . In reality, Mr. Watkins' "one carrier should not be allowed to thwart another carrier's network and service options" dictum is consistent with the requirements of the Act, while his assertion that all carriers have an obligation to establish, at their expense, a direct connection with the Small LECs is not. (Tr. 727). Throughout his testimony he claims that "CLECs and CMRS providers have been the direct beneficiaries" of the indirect interconnection arrangements, and that "by virtue of the convenient and beneficial transit arrangement," CLECs and CMRS providers have been allowed, in a presumably efficient fashion, to engage in what Mr. Watkins apparently believes is the highly questionable activity of

[44] *2005 FNPRM*, ¶¶125-126.

[45] On January 12, 2006, the Tennessee Regulatory Authority ("TRA") issued an *Order of Arbitration Award* in Docket No. 03-00585, in which Mr. Watkins presented virtually identical arguments on behalf of the Small LECs. In its order, the TRA rejects Mr. Watkins' arguments and concludes that Small LECs do indeed have §251 interconnection and compensation obligations consistent with those that I describe in my testimony.

"transmitting to, and receiving traffic from, other carriers (such as the Small LECs)." There are two primary problems with Mr. Watkins' view. First, the "convenient and beneficial transit arrangement" that permits indirect connection among carriers that he derides is in reality "a form of interconnection explicitly recognized and supported by the Act," that may represent the only "efficient means by which to route traffic" between carrier networks. (Tr. 728). Mr. Watkins complains that BellSouth did not "involve the Small LECs" when negotiating interconnection agreements with other carriers, but of course BellSouth is not required to do so. (Tr. 329). More importantly, the Small LECs' duty to interconnect was *not* created, as Mr. Watkins suggests, by the act of BellSouth entering into an interconnection agreement with another carrier, but instead was created the act of Congress that created section 251. (Tr. 728-729).

Second, Mr. Watkins sees only half of the story in terms of the benefits that are created by indirect interconnection. He consistently points out that the indirect interconnection made possible when BellSouth acts as a transit provider provides benefits to other carriers (and the customers of those carriers), but he fails to recognize that these benefits are reciprocal. (Tr. 729). As Mr. McCallen correctly points out, "the ability to place calls to the networks of these additional TSPs is valuable to ICOs – it allows ICO end users to place calls ubiquitously to friends, family members, and businesses that have opted to use wireless phones or that have switched their telephone service to a CLEC. It also allows the ICO to avoid the expense of building facilities to interconnect directly with each of these TSPs. *The transit service functionalities and value to an ICO as an originating TSP are inherently the same as those for CLEC and CMRS originated traffic.*" (emphasis added). (Tr. 60-61). Mr. Watkins' characterization

of indirect interconnection as an arrangement beneficial to other carriers and their customers is only half right: the Small LECs and their customers equally benefit. (Tr. 729).

Mr. Watkins claims a requirement to compensate BellSouth for the use of its network will cause Small LECs to incur additional costs. (Tr. 331). Mr. Watkins refers throughout his testimony to what he calls "new and extraordinary costs foisted upon the Small LECs and their customers." (Tr. 331). In reality, for as long as Small LEC customers have originated local calls that terminated on the network of another carrier via a BellSouth tandem, the Small LECs have *caused* the costs at issue to occur. The FCTA understands that for some period of time the cost-causers (the Small LECs) did not contribute to the recovery of those costs. What is new in this dispute is not the cost, but the intercarrier compensation that would permit its recovery. (Tr. 730).

Mr. Watkins goes on to point out that BellSouth now "wants to charge the Small LECs for the transiting service" that it has been providing them, and argues that "this new treatment by BellSouth will impose a new cost to be imposed on the Small LECs that the Small LECs and the Commission never contemplated when the CLECs and CMRS providers established their arrangements with BellSouth." (Tr. 328). Given the requirements of the 1996 Act, it is difficult to imagine how the Small LECs could have "never contemplated" that they would be required to interconnect, exchange traffic, and compensate other carriers when doing so. To the extent that any "new cost" was "imposed" on the Small LECs, it happened when the 1996 Act went into effect, not when other carriers entered into interconnection agreements with BellSouth. (Tr. 730).

Mr. Watkins' characterization of the Small LECs as victims with "no options" gets premised on an example that is factually backward. (Tr. 334-335, 731). He states that "for traffic originating from a CLEC or from a CMRS provider that is destined to a Small LEC end user, the Small LEC has no real choice now but to accept the tandem-switched, commingled delivery of this traffic by BellSouth." This is wrong for two reasons. First, the Small LECs certainly *do* have a choice: they can take the initiative to establish a direct connection with the CLEC or CMRS carrier rather than sitting back and demanding that the other carrier come to them. Second, in the example Mr. Watkins uses (presumably to make it appear that it is customers of other carriers that are creating a "new and extraordinary cost"), the Small LECs are the terminating, not the originating carrier. It would be the CLEC or CMRS provider in Mr. Watkins' example that would be required to compensate BellSouth for performing a transit function, *not* the Small LEC. In fact, if the Small LEC has availed itself of its ability pursuant to 47 CFR §20.11(f) to request an interconnection agreement and "invoke the negotiation and arbitration procedures contained section 252 of the Act" *it will be the carrier that is receiving compensation* for completing the call. (Tr. 731).

Mr. Watkins' testimony has failed to provide the Commission with any valid reason to change the "originating carrier pays" regime currently in place in the industry. 47 CFR 51.703(b) directly and clearly states that "a LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network."

THE COMMISSION SHOULD NOT ESTABLISH TERMS AND CONDITIONS[46] [47]

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?

FCTA's Position: No. The terms and conditions that govern interconnection and intercarrier compensation should be negotiated by the carriers. It is not necessary for an originating carrier to have an interconnection agreement with the terminating carrier in order for the originating carrier to properly compensate BellSouth. If the terminating carrier elects to pursue compensation for this traffic, it should initiate negotiations with the originating carrier for the development of an interconnection agreement.

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?

FCTA's Position: No. The terms and conditions that govern interconnection and intercarrier compensation should be negotiated by the carriers. It is not necessary for an originating carrier to have an

[46] See discussion on Issue I in support of the FCTA's positions on Issues 5, 8 and 9, and which are incorporated herein by reference.

[47] Since transit is a section 251 service, the process for negotiating and arbitrating terms and conditions is set out in the Act and must be followed. Accordingly, the Commission is not authorized to impose terms and conditions on carriers under Issues 5, 8 and 9.

interconnection agreement with the terminating carrier in order for the originating carrier to properly compensate BellSouth.

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?

FCTA's Position: No. These terms and conditions should be negotiated by the carriers. The Commission's involvement should be limited to those occasions in which the parties are unable to reach an agreement and have submitted the dispute to the Commission for arbitration.

The Commission should refrain from establishing any terms and conditions with respect to Issues 5, 8 and 9, since those are properly the subject of interconnection agreement negotiations and would reflect many facts that are specific to those carriers. Accordingly, it is the FCTA's position that the Commission should not adopt or establish terms and conditions as suggested in Issues 5, 8 and 9.[48]

THE COMMISSION SHOULD NOT IMPOSE A DIRECT INTERCONNECTION REQUIREMENT BASED ON A TRAFFIC THRESHOLD

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?

FCTA's Position: No. Carriers should be permitted to determine how best to efficiently interconnect their networks.

[48] Deposition of Don J. Wood, March 14, 2006; Exhibit 15, at pp. 46-47.

The Commission should not determine a traffic threshold level at which an originating carrier should be required to obtain direct interconnection with the terminating carrier. This is a matter between carriers to determine how best to efficiently interconnect their network.[49] (Tr. 746). On a carrier-specific basis, each carrier would perform its own analysis and will have its own crossover point where it would determine that it would be economically feasible to directly interconnect, but there is no set level that would apply generally to all carriers and all traffic patterns.[50] The determination would be based on a carrier-specific analysis with due consideration of a given carrier's traffic patterns, volume of originating traffic, and geographic relationship to the terminating carrier. (Tr. 746).

MISCELLANEOUS ISSUES

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?

FCTA's Position: FCTA believes that BellSouth is in the best position to provide information regarding its network arrangements.

ISSUE 15

SHOULD BELLSOUTH ISSUE AN INVOICE FOR TRANSIT SERVICES AND IF SO, IN WHAT DETAIL AND TO WHOM?

FCTA's Position: BellSouth should seek payment from the originating carrier according to the terms set forth in its interconnection agreement with that carrier.

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[49] Deposition of Don J. Wood, March 14, 2006; Exhibit 15, at p. 16.

[50] *Id.*at p. 16.

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?

FCTA's Position: Yes. The scope and form of this information should be pursuant to the terminating carrier's interconnection agreement with BellSouth.

ISSUE 17

HOW SHOULD BILLING DISPUTES CONCERNING TRANSIT SERVICE BE ADDRESSED?

FCTA's Position: Billing disputes for transit services, like other interconnection services, should be handled according to the dispute resolution language in each carrier's interconnection agreement with BellSouth.

ISSUES FOR WHICH THE FCTA DOES NOT HAVE A POSITION

ISSUE 7

HOW SHOULD TRANSIT TRAFFIC BE DELIVERED TO THE SMALL LEC'S NETWORKS?

FCTA's Position: The FCTA does not have a position on this issue.

ISSUE 10

WHAT EFFECT DOES TRANSIT SERVICE HAVE ON ISP BOUND TRAFFIC?

FCTA Position: The FCTA does not have a position on this issue.

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?

FCTA Position: The FCTA does not have a position on this issue.

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 BEORE FEBRUARY 11, 2005?

FCTA Position: The FCTA does not have a position on this issue

RELIEF REQUESTED

The FCTA requests that the Commission enter an Order granting the following relief:

1. The Commission should once again encourage BellSouth and the Small LECs to negotiate interconnection agreements that include the rates and terms for the transit service provided by BellSouth. An interconnection agreement, rather than a tariff, is the proper place for interconnection rates and terms, and BellSouth's tariff for transit service should be cancelled and voided.

2. The Commission should confirm that the Act and subsequent FCC rules (consistent with industry practice) require that the originating carrier, as the cost causer, is responsible for compensating another carrier that performs transport and termination functions in order to complete a call.

3. A Small LEC should not be excused from its section 251 obligations, and should not be permitted to avoid its interconnection obligations while seeking the

ability to dictate network design and interconnection arrangements of other carriers.

4. Rates for transit service functions, like other interconnection rates, must be cost-based.

5. The Commission should conclude that BellSouth's tariff for transit services seeks to preempt rates and conditions that are properly contained within an interconnection agreement, and therefore the tariff is both unnecessary and an inappropriate intrusion on the negotiation process, and should be cancelled and voided.

6. If BellSouth's tariff is not rejected by the Commission, the Commission should require that the language be changed to make it clear that application of the tariff is strictly limited to those instances in which the originating carrier *elects* not to seek an interconnection agreement with BellSouth.

7. If BellSouth's tariff is not rejected by the Commission, the Commission should require that the rate for this interconnection element is cost-based.

8. If BellSouth 's tariff is not rejected by the Commission, the Commission should require that the language be changed to make it clear that existence of the tariff cannot interfere in any way with the negotiation of the rates or terms of future interconnection agreements.

CONCLUSION

In summary, the present proceeding has evolved from a specific dispute between carriers, and its focus should remain on that dispute while avoiding a disruption of how other carriers interconnect, exchange traffic, and compensate each other. BellSouth is performing a service for the Small LECs for which it should be fairly compensated at a rate that will permit cost recovery, but the proper remedy for

BellSouth is negotiation and if necessary arbitration, not an end-run around the negotiation process with a tariff filing.

Respectfully submitted this 9th day of June 2006.

s/ Michael A. Gross

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CERTIFICATE OF SERVICE
Docket Nos. 050119-TP and 050125-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing Post-Hearing Brief and Statement of Issues and Positions of the Florida Cable Telecommunications Association, Inc. was served via electronic mail and first class United States mail this 9th day of June, 2006, to the following:

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