BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE:

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

REBUTTAL TESTIMONY OF THE JOINT PETITIONERS

Marva Brown Johnson on behalf of KMC Telecom V, Inc. & KMC Telecom III LLC

February 7, 2005

PRELIMINARY STATEMENTS

WITNESS INTRODUCTION AND BACKGROUND

KMC: Marva Brown Johnson

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

A. My name is Marva Brown Johnson. I am Senior Regulatory Counsel for KMC Telecom Holdings, Inc., parent company of KMC Telecom V, Inc. and KMC III LLC. My business address is 1755 North Brown Road, Lawrenceville, Georgia 30043.

Q. IN YOUR DIRECT TESTIMONY, YOU WERE ASKED A SERIES OF QUESTIONS REGARDING YOUR POSITION AT KMC, YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND AND THE COMMISSIONS BEFORE WHICH YOU PREVIOUSLY HAVE TESTIFIED. IF ASKED THOSE SAME QUESTIONS TODAY, WOULD YOUR ANSWERS BE THE SAME?

A. Yes, the answers would be the same.

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

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

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[1] The following issues have been settled: 1/G-1, 3/G-3, 8/G-8, 10/G-10, 11/G-11, 13/G-13, 14/G-14, 15/G-15, 16/G-16, 17/1-1, 18/1-2, 19/2-1, 20/2-2, 21/2-3, 22/2-4, 24/2-6, 25/2-7, 27/2-9, 28/2-10, 29/2-11, 30/2-12, 31/2-13, 32/2-14, 33/2-15, 34/2-16, 35/2-17, 39/2-21, 40/2-22, 41/2-23, 42/2-24, 43/2-25, 44/2-26, 45/2-27, 47/2-29, 48/2-30, 49/2-31, 50/2-32, 51/2-33(A), 52/2-34, 53/2-35, 54/2-36, 55/2-37, 56/2-38, 57/2-39, 58/2-40, 59/2-41, 60/3-1, 61/3-2, 62/3-3, 63/3-4 (KMC only), 64/3-5, 66/3-7, 67/3-8, 68/3-9, 69/3-10, 70/3-11, 71/3-12, 72/3-13, 73/3-14, 74/4-1, 75/4-2, 76/4-3, 77/4-4, 78/4-5, 79/ 4-6, 80/4-7, 81/4-8, 82/4-9, 83/4-10, 84/6-1, 85/6-2, 86/6-3(A),

General Terms and Conditions	2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 9/G-9, 12/G-12
Attachment 2: Unbundled Network Elements	23/2-5, 26/2-8, 36/2-18, 37/2-19, 38/2-20, 46/2-28, 51/2-33(B)&(C)
Attachment 3: Interconnection	65/3-6
Attachment 6: Ordering	86/6-3(B), 88/6-5, 94/6-11
Attachment 7: Billing	96/7-2, 97/7-3, 100/7-6, 101/7-7, 102/7-8, 103/7-9. 104/7-10
Supplemental Issues	108/S-1 thru 114/S-7

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position, as set forth herein, and associated contract language on the issues indicated in the chart above by rebutting the testimony provided by various BellSouth witnesses.

87/6-4, 89/6-6, 90/6-7, 91/6-8, 92/6-9, 93/6-10, 95/7-1, 98/7-4, 99/7-5, 105/7-11, 106/7-12, 107/11-1, and 115/S-8.

GENERAL TERMS AND CONDITIONS[2]

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 2/ISSUE G-2.

A. The term "End User" should be defined as "the customer of a Party".

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT THIS ISSUE IS NOT APPROPRIATE FOR ARBITRATION. [BLAKE AT 4:17-19]

A. For all the reasons stated in our direct testimony, we cannot understand why BellSouth continues to insist that this issue is not appropriate for arbitration. This issue arose from the Parties' negotiation of EEL eligibility criteria from the TRO. During those negotiations, it became evident that BellSouth was scheming to use a restrictive definition of End User to artificially curtail its obligations and restrict Joint Petitioners' rights. Our discussions then turned to the definition in the General Terms and to various other uses of the term which is widely scattered throughout the Agreement. We would not agree to BellSouth's proposed re-wording of the FCC's EEL eligibility criteria nor would we agree to a definition of End User that was clearly going to be employed as a means to clandestinely reduce BellSouth's unbundling obligations and Joint Petitioners' rights to UNEs made available through

[2] Please note that the disputed contract language for all unresolved issues addressed in this testimony is attached to Joint Petitioners Direct Testimony filed with the Commission on January 10, 2005 as **Exhibit A**. Because this is a dynamic process wherein the Parties continue to negotiate, Joint Petitioners intend to file an updated version of Exhibit A and an updated issues matrix prior to the hearing.

the FCC's TRO. If BellSouth does not want to arbitrate the issue, it can accept our position and our proposed definition.

Q. DOES BELLSOUTH PROVIDE ANY LEGITIMATE JUSTIFICATION TO SUPPORT ITS INSISTENCE ON A RESTRICTIVE DEFINITION OF END USER?

A. No. BellSouth has no legitimate justification for insisting on a definition of End User which it has sought to use in a manner that could be construed to limit its obligations and restrict Joint Petitioners' rights. Ms. Blake's claim that ISPs are not End Users is illustrative of the problems BellSouth seeks to create with its definition. *See* Blake at 5:23-24. As explained in our direct testimony, BellSouth's claim regarding ISPs is belied by the fact that the Parties agree to treat ISPs as End Users in Attachment 3 of the Agreement and that the industry has treated them as End Users for more than 20 years. If an ISP is our customer, it is the ultimate user of the telecommunications services we provide. The same holds true if our customer is a landlord, university, doctor's office, bakery, factory or another carrier. Our negotiations with BellSouth revealed that BellSouth sought to use its definition to attempt to inappropriately curb Joint Petitioners' right to use UNEs as inputs to their own wholesale service offerings. There is no sound legal or policy foundation for BellSouth's position.

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT THE JOINT PETITIONERS' DEFINITION OF END USER CREATES UNCERTAINTY AS IT COULD REFER TO ANY CUSTOMER? [BLAKE AT 6:8-11]

A. We disagree with BellSouth's assertion that it is our proposed definition that would create uncertainly. Our definition is simple and avoids the mischief that BellSouth seeks to create with respect to who is or isn't an "ultimate" user of telecommunications. To us, that inquiry is meaningless. Our definition is intentionally designed to refer to any customer of either Party so as to permanently upend BellSouth's attempt to essentially trick us into giving up rights to use UNEs as wholesale service inputs.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, Joint Petitioners have received a commitment from BellSouth that its proposed definition will not be used to artificially limit BellSouth's obligations and Joint Petitioners' rights with respect to UNEs (*i.e.,* BellSouth will not attempt to create limitations on our ability to use UNEs as wholesale service inputs). The parties are in the process of attempting to resolve this issue by using a new End User definition and by visiting each use of the term End User and determining whether it should be used, replaced, or augmented.

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

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

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

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

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

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

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

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

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

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

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

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

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

*Item No. 8, Issue No. G-**8** [Section 11.1]: **This issue has been resolved.***

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

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

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

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

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

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

laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?

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

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

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

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

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

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

RESALE (ATTACHMENT 1)

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

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

NETWORK ELEMENTS (ATTACHMENT 2)

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

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

Item No. 21, Issue No. 2-3 [Section 1.4.1]: ***This issue has***

been resolved

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 23/ISSUE 2-5.

A. In the event UNEs or Combinations are no longer offered pursuant to, or are not in compliance with, the terms set forth in the Agreement, including any transition plan set forth therein, it should be BellSouth's obligation to identify the specific service arrangements that it insists be transitioned to other services pursuant to Attachment 2. There should be no service order, labor, disconnection or other nonrecurring charges associated with the transition of section 251 UNEs to other services.

Q. DOES BELLSOUTH PROVIDE ANY JUSTIFICATION FOR ITS POSITION THAT THE JOINT PETITIONERS SHOULD FOLLOW ITS PROPOSED CONVERSION PLAN?

A. No. Ms. Blake does not provide any justification or support for BellSouth's position on this issue, but merely restates BellSouth's position. The fact is that BellSouth cannot justify why it is that it insists that Joint Petitioners must identify service arrangements that BellSouth wants converted or disconnected or why it insists that it should be the Joint Petitioners that should pay a host of charges to implement Bellsouth's request to initiate orders for conversions and disconnections.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Joint Petitioners' proposal is a compromise that places the administrative and financial burden of implementing the conversions/disconnections on both Parties. The Joint Petitioners' proposal requires work on both sides, but places the original identification obligation on BellSouth, which is logical considering it has the resources and incentive to expeditiously identify service arrangements it believe must be converted or disconnected in order to transition to the terms of the Agreement.

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 26/ISSUE 2-8.

A. BellSouth should be required to "commingle" UNEs or Combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to Section 271 of the Act.

Q. IS BELLSOUTH'S RELIANCE ON THE FCC'S TRO ERRATA APPROPRIATE? [BLAKE AT 27:5-28:9]

A. No. In fact, BellSouth's reliance is misplaced. There is no FCC rule or order that states that BellSouth is permitted to place commingling restrictions on section 271 elements. The FCC's errata was nothing more than an attempt to clean-up stray language from a section of the TRO addressing the commingling of section 251 UNEs with services provided for resale under section 251(c)(4). BellSouth's attempt to create by implication an affirmative adoption of commingling restrictions with respect to section 271 elements cannot withstand scrutiny, as it simply cannot be squared with the FCC's commingling rules and the TRO language accompanying those rules.

Q. DOES THE D.C. CIRCUIT'S *USTA II* HOLDING REGARDING SECTION 271 PROHIBIT THE COMMINGLING OF UNES, UNE COMBINATIONS, AND SERVICES? [BLAKE AT 28:14-29:16]

A. No. The D.C. Circuit's *USTA II* holding discussed *combining*, not *commingling*. BellSouth's reliance on the D.C. Circuit as grounds to reject Petitioners' commingling language is therefore misplaced.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. As stated in the Joint Petitioners direct testimony, the TRO concluded that CLECs may commingle UNEs or UNE combinations with facilities or services it has obtained from ILECs pursuant to a method other than unbundling under 251(c)(3) of

the Act. section 271 is another method of unbundling and BellSouth's attempt to isolate and render useless section 271 elements must be squarely rejected.

Item No. 27, Issue No. 2-9 [Section 1.8.3]: ***This issue has been resolved.***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Item No. 41, Issue No. 2-23 [Sections 2.16.2.2, 2.16.2.3.1-5, 2.16.2.3.7-12]: ***This issue has been resolved.***

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

has been resolved.

Item No. 43, Issue No. 2-25 [Section 2.18.1.4]: ***This issue has been resolved.***

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

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

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

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

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

Item No. 47, Issue No. 2-29 [Section 4.2.2]: ***This issue has been resolved as to both subparts.***

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

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

Item No. 50, Issue No. 2-32 [Sections 5.2.5.2.1, 5.2.5.2.3, 5.2.5.2.4, 5.2.5.2.5, 5.2.5.2.7]: ***This issue has been resolved.***

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERCONNECTION (ATTACHMENT 3)

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

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

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

Item No. 63, Issue No. 3-4 [Section 10.8.6, 10.10.6 and, 10.13.5]: ***This issue has been resolved by KMC Telecom V, Inc. and KMC Telecom III LLC. The issue remains open for the other Joint Petitioners.***

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 65/ISSUE 3-6.

A. BellSouth should not be permitted to impose upon Joint Petitioners a Transit Intermediary Charge ("TIC") for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic. The TIC is a non-TELRIC based additive charge which exploits BellSouth's market power and is discriminatory.

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE IS APPROPRIATE WITH REGARD TO THE TIC CHARGE?

A. The Petitioners' language – which excludes the TIC – is appropriate for the obvious reason that any charges for BellSouth's transiting services should be at TELRIC-

based rates. Moreover, the Commission has never established a TELRIC-based rate for the TIC charge and BellSouth already collects Commission-approved TELRIC-compliant elemental rates for switching and common transport to recover its costs associated with providing the transiting functionality.

Q. IS BELLSOUTH CORRECT IN ITS ASSERTION THAT IT IS NOT REQUIRED TO PROVIDE A TRANSIT TRAFFIC FUNCTION BECAUSE IT IS NOT A SECTION 251 OBLIGATION UNDER THE ACT? [BLAKE AT 41:6-42:3]

A. No, BellSouth is not correct. As explained in our direct testimony, transiting is an interconnection obligation firmly ensconced in section 251 of the Act. Moreover, this transiting functionality has been included in BellSouth interconnection agreements for nearly 8 years. BellSouth already has agreed to continue providing transit services to Joint Petitioners under the Agreement – thus, once again, this issue is not about whether BellSouth will provide transit services to Joint Petitioners.

In any event, we believe that BellSouth's transiting service is certainly an obligation under section 251 of the Act and subject to the TELRIC pricing requirements that accompany those obligations. We are aware of no FCC or Commission order that finds that transiting is not a section 251 obligation. Notably, transiting functionality is something BellSouth regularly offers in Attachment 3 of its interconnection agreements, which sets forth the terms and conditions of BellSouth's obligations to interconnect with CLECs pursuant to section 251(c) of Act.

It also is worth noting that this issue has been addressed by the North Carolina Commission in response to a Verizon Petition for Declaratory Ruling that Verizon is not required to provide InterLATA EAS traffic transit between third party carriers (Docket No. P-19, Sub 454). BellSouth filed a brief in support of Verizon's position. In consideration of Verizon's Petition, the North Carolina Commission concluded that Verizon is "obligated to provide the transit service as a matter of law." The Commission agreed with the arguments set forth by the proponents of the transiting obligation, specifically that the transiting function follows directly from an ILEC's obligation to interconnect under 47 U.S.C. §§251(a)(1), 252(c)(2).

Q. BELLSOUTH CLAIMS THAT IN PROVIDING THE TRANSIT TRAFFIC FUNCTION, IT INCURS COSTS BEYOND THOSE THAT THE TELRIC-RATES RECOVERS, SUCH AS COST OF SENDING RECORDS TO CLECS IDENTIFYING THE ORIGINATING CARRIER. PLEASE RESPOND. [BLAKE AT 41:21-42:3]

A. BellSouth has provided this function as part of its interconnection agreements for nearly 8 years and has not claimed to us, prior to this negotiation/arbitration, that the elemental rates for tandem switching and common transport do not adequately provide for BellSouth's cost recovery. As is typically the case with new interconnection costs, if BellSouth now believes the current rates no longer provide for adequate cost recovery, BellSouth should conduct a TELRIC cost study and propose a rate in the Commission's next generic pricing proceeding. BellSouth, however, should not be permitted unilaterally to impose a new charge without submitting such charge to the Commission for review and approval.

Q. BELLSOUTH ARGUES THAT CLECS HAVE THE OPTION TO CONNECT DIRECTLY WITH OTHER CARRIERS AND DO NOT NEED TO USE BELLSOUTH TO PROVIDE A TRANSIT FUNCTION. PLEASE RESPOND. [BLAKE AT 41:12-17]

A. While Joint Petitioners could theoretically directly interconnect with every carrier in the state, it is neither economical nor practical to expect them to do so. The more economically rational and practical alternative is for Joint Petitioners to use BellSouth's transiting function as they have always done. As BellSouth itself states, CLECs use BellSouth transiting because it is more economical and efficient than direct trunking. *See* Blake at 41:17-19. Different CLECs have different network configurations and needs, and, therefore may choose to connect directly with other carriers or utilize BellSouth's transiting function. Regardless of a CLEC's choice, BellSouth should make its transiting function available to all CLECs on a non-discriminatory basis at TELRIC-based rates.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No.

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

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

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

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

in both subparts, has been resolved.

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

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

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

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

COLLOCATION (ATTACHMENT 4)

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

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

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

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

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

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

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

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

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

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

been resolved.

ORDERING (ATTACHMENT 6)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) If so, what rates should apply?

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

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

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

BILLING (ATTACHMENT 7)

Item No. 95, Issue No. 7-1 [Section 1.1.3]: ***This issue has been resolved.***

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

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

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

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

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

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

been resolved.

Item No. 99, Issue No. 7-5 [Section 1.7.1]: ***This issue has been resolved.***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ATTACHMENT 11)

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

SUPPLEMENTAL ISSUES

(ATTACHMENT 2)

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 108/ISSUE S-1.

A. Joint Petitioners maintain that the Agreement should not automatically incorporate the "Final FCC Unbundling Rules", which for convenience, is a term the Parties have agreed to use to refer to the rules the FCC released on Friday, February 4, 2005 in WC Docket No. 04-313. After release of the Final FCC Unbundling Rules, the Parties should endeavor to negotiate contract language that reflects an agreement to

abide by those rules, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. BEFORE BEGINNING ITS TESTIMONY ON THE SUPPLEMENTAL ISSUES, BELLSOUTH MAKES SOME PRELIMINARY COMMENTS, ONE OF WHICH IS THAT THE SUPPLEMENTAL ISSUES SHOULD BE DEFERRED TO A GENERIC PROCEEDING WHICH BELLSOUTH PETITIONED THE COMMISSION TO OPEN ON OCTOBER 29, 2004. [BLAKE AT 42:10-20] PLEASE RESPOND.

A. If BellSouth seeks to defer resolution of certain issues to another docket for subsequent incorporation in this case, it should file a motion in this docket seeking such referral to another. At this point, the Parties already have committed to negotiate and arbitrate issues arising in the post-*USTA II* regulatory framework in this proceeding. The Parties' commitment to do so was memorialized in the Parties' July 20, 2004 Joint Petition to Hold the Proceeding in Abeyance that was approved by the Commission on August 19, 2004. Pursuant to this agreement, the Parties have identified these supplemental issues to address the post-*USTA II* regulatory framework. It is our understanding from reviewing BellSouth's Petition for a Generic Proceeding, that the goal of such a proceeding is to amend existing interconnection agreements with Florida CLECs. However, as agreed to by the Parties, there will be no amendments to the Joint Petitioners' existing

interconnection agreement UNE provisions (Attachment 2). Rather, the Parties will continue to operate pursuant to those existing UNE provisions until they are able to move into new interconnection agreements (incorporating the post-*USTA II* regulatory framework) that result from the conclusion of this arbitration docket.

Should the Commission decide that it would like to resolve certain of the Parties' supplemental issues – or perhaps certain aspects of them – in a generic docket, it must carefully consider and adopt appropriate procedures for participation in that proceeding, but also for importing the results of that proceeding back into this one, so that the Agreement can be finalized and the arbitration concluded. In any event, the Commission should not do so until after the FCC has issued and released Final Unbundling Rules and BellSouth and CLECs have had a reasonable amount of time in which to attempt to negotiate relevant contract provisions and to identify arbitrations issues.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT THE *USTA II* DECISION VACATED THE FCC'S RULES WITH REGARD MASS MARKET SWITCHING, LOCAL SWITCHING, HIGH CAPACITY DEDICATED TRANSPORT, HIGH CAPACITY LOOPS AND DARK FIBER? [BLAKE AT 43:10-13]

A. No. BellSouth begins its testimony with an incorrect analysis of *USTA II*. As pointed out by BellSouth, the D.C. Circuit vacated the FCC's subdelegation to State Commissions to make impairment determinations and vacated and remanded the FCC's nationwide impairment findings with respect to mass market switching as

well as DS1, DS3 and dark fiber transport. *See* Blake at 43:16-24. As emphasized by the Joint Petitioners in their direct testimony, *USTA II* did not vacate the FCC's high capacity loop unbundling rules. *USTA II* also did not eliminate section 251, the FCC's impairment standard, section 271 or the Commission's ability under federal and state law to require BellSouth to provide access to DS1, DS3 and dark fiber loops and DS1, DS3 and dark fiber transport. *See* Falvey at 54:10-15; Russell at 66:20-67:2. Additionally, there are ample sources of federal and state law under which BellSouth is obligated to provide access to these UNEs, none of which were upended by *USTA II*.

Q. BELLSOUTH ASSERTS THAT THE FCC IN FCC 04-179 SET FORTH A COMPREHENSIVE 12-MONTH PLAN INCLUDING THE INTERIM PERIOD AND THE TRANSITION PERIOD. [BLAKE AT 44:20-45:5] PLEASE RESPOND.

A. As discussed in the Joint Petitioners direct testimony in response to Item No. 111/Issue S-4 and discussed in more detail in this rebuttal testimony on that same issue, the FCC did not adopt the "Transition Period" or plan for the six months following the Interim Period. The Transition Period was merely proposed by the FCC in FCC 04-179, as the FCC used the words "we propose" in paragraph 29. Moreover, upon release of FCC 04-179, Chairman Powell commented that the "Order only seeks comment on a transition that will not be necessary if the Commission gets its work done." Accordingly, it is the Joint Petitioners' position that the Parties should maintain the status quo and operate under their existing

agreements until a formal Transition Plan is adopted or the FCC issues Final Unbundling Rules.

Q. WHY SHOULDN'T THE FCC'S FINAL UNBUNDLING RULES BE AUTOMATICALLY INCORPORATED INTO THE AGREEMENT AS PROPOSED BY BELLSOUTH?

A. The first reason is simply because that is not the way our interconnection agreements work. BellSouth seeks to automatically incorporate future rules that are not in effect yet and for which the Parties have not considered their impact on the Agreement. The Joint Petitioners cannot deem incorporated rules that are not yet effective and that have been neither analyzed nor discussed between the parties. Such an approach is illogical. The logical and statutorily required approach is that after the FCC's Final Unbundling Rules are released, the Parties should be provided a reasonable opportunity to review and assess the new rules, negotiate proposed contract language, identify issues of disagreement and if such issues cannot be resolved through negotiation, they should be resolved by the Commission through arbitration. BellSouth points to paragraphs 22 and 23 of FCC 04-179, as support for its position that the FCC "clearly intended that its Final Unbundling Rules as well as the Transition Period would take effect without delay." *See* Blake at 45:2-4. A closer look at the quoted language, however, indicates that the FCC merely wanted to assure BellSouth and other ILECs that they could initiate change of law proceedings consistent with their governing interconnection agreements. Joint Petitioners' agreements with BellSouth simply do not contemplate or permit a "deemed amended" or "automatically incorporated" approach to changes of law. Instead they

reflect the standard and required process of negotiation and arbitration by the Commission. While that process does not happen overnight, it need not involve undue delay. Moreover, FCC 04-179 in no way upended the negotiation/arbitration process set forth in section 252 of the Act.

In addition to the Act's negotiations/arbitration mandate, there is support in numerous FCC orders and press statements regarding the important role of interconnection agreement negotiations and arbitrations. Specifically, in the TRO, the FCC specifically stated that "individual carriers should be allowed the opportunity *to negotiate specific terms and conditions* necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules." The FCC also commented in the TRO that it would refrain from "interfering with the contract process." In adopting the "All-or-Nothing-Rule" the FCC stated in paragraph 12 that "an all-or-nothing rule would better serve the goals of sections 251 and 252 to *promote negotiated interconnection agreements* because it would encourage incumbent LECs to make trade-offs in negotiations that they are reluctant to accept under the existing rule." Moreover Chairman Powell states, in support of the rule, "[t]hrough this action, the Commission advances the cause of facilities-based competition by permitting carriers to *negotiate individually tailored interconnection agreements* designed to fit their business needs more precisely." There is obviously strong support for negotiations and "meeting of the minds" in contract negotiations. BellSouth's proposed instant arbitration and automatic incorporation of the FCC

Final Unbundling Rules clearly contradicts the policy goals adopted by the FCC and is at odds with the Parties' agreements and the Act.

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENT THAT THE FCC'S FINAL UNBUNDLING RULES SHOULD NOT BE THE "SUBJECT OF LONG-DRAWN-OUT NEGOTIATIONS". [BLAKE AT 45:30]

A. The Joint Petitioners would prefer not to engage in "long-drawn-out" negotiations regarding the FCC's Final Unbundling Rules. Indeed, in the negotiations the Parties have had thus far with respect to the Agreement, Joint Petitioners have been frustrated by many delays – a good number of which are attributable to BellSouth (we do not claim perfection, either – the fact is that negotiating an interconnection agreement from scratch is a complicated and time consuming process). Indeed, BellSouth took more than 4 months to deliver its most recent redline of Attachment 2. We received it more than a month after the abatement period during which we were to spend time negotiating with respect to new Attachment 2 redlines ended.

Looking further at the Parties' current negotiations/arbitration experience as a base, it is important to note that the negotiations and arbitration schedule was mutually agreed to by the Parties, at times with some contention but ultimately without dispute. Moreover, it is BellSouth that initially proposed to abate the arbitration process for 90-days, not the Joint Petitioners. The Joint Petitioners agreed to the abatement, but the Commission should not be swayed by Ms. Blake's implication that Joint Petitioners have caused or will seek unreasonable delay.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT "FAILURE TO AUTOMATICALLY INCORPORATE THE FCC'S FINAL UNBUNDLING RULES INTO CLEC AGREEMENTS RESULTS IN DISCRIMINATION AGAINST FACILITIES-BASED CARRIERS THAT HAVE ALREADY MADE THEIR AGREEMENTS COMPLIANT WITH THE CURRENT LAW" OR THAT HAVE NEGOTIATED SO-CALLED "COMMERCIAL AGREEMENTS" WITH BELLSOUTH? [BLAKE AT 46:9-15]

A. Absolutely not. In fact, the flip side of BellSouth's argument is true. First of all, our current agreements are compliant with current law on BellSouth's unbundling obligations with respect to high capacity loops, high capacity transport and mass market switching – and the Agreement being arbitrated is fully TRO-compliant. With respect to BellSouth's so-called "commercial agreements", Joint Petitioners are unaware of any facilities-based carrier that has entered into one. Even if there were any, Joint Petitioners' rights should not be prejudiced, dictated or compromised by voluntary agreements between BellSouth and other carriers. Those carriers (if any) made their own business decisions – they are not discriminated against merely because we don't choose to make the same ones. The simple fact is that the Joint Petitioners have a right to negotiate the rates, terms and conditions of an interconnection agreement and have any disagreements resolved by the Commission. It would obviously be discriminatory to the Petitioners, if we had to agree to less than what we are entitled to under law based on a separate voluntarily agreement between BellSouth and another carrier.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. As stated in our direct testimony, the Joint Petitioners propose to incorporate the FCC's Final Unbundling Rules into the Agreement via the process established by the Act, that is, to engage in good faith negotiations and to allow the Commission to arbitrate any issues the Parties cannot resolve through negotiations. The bulk of BellSouth's testimony on this issue is used to make incorrect allegations that the Petitioners' proposal would result in "long-drawn-out" negotiations and result in discriminatory treatment for those facilities-based carriers that have already entered into commercial agreements with BellSouth. For the reasons stated above, BellSouth is in no position to complain about elongated or delayed negotiations and arbitrations. Nor can BellSouth pass the red-face test by asserting that following the negotiations and arbitrations procedures set forth in the Act will discriminate against carriers that attempt to opt-out of this process. Automatic incorporation of the FCC's Final Unbundling Rules would upend the negotiations and arbitration process established by the Act and consistently supported by the FCC. Accordingly, the Commission should maintain this process by adopting the Joint Petitioners' position.

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 109(A)/ISSUE S-2(A).

A. Joint Petitioners' position with respect to Item 109(A)/Issue S-2(A) is much the same as that described in the above testimony regarding Item 108/Issue S-1. More specifically, Joint Petitioners maintain that the Agreement should not automatically incorporate an "intervening FCC order" adopted in CC Docket 01-338 or WC Docket 04-313. By "intervening FCC order", we mean an FCC order released in CC Docket 01-338 or WC Docket 04-313 that addresses unbundling issues but does not purport to be the "final" unbundling order released as a result of the notice of proposed rulemaking ("NPRM") released as document FCC 04-179 on August 20, 2004 or an FCC order further addressing the interim rules adopted in the FCC's order also released as document FCC 04-179 on August 20, 2004. After release of an intervening FCC order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the intervening FCC order, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. WHAT IS WRONG WITH BELLSOUTH'S POSITION THAT IN ORDER TO EFFECTUATE AN INTERVENING FCC ORDER, THE INTERCONNECTION AGREEMENT MUST AUTOMATICALLY INCORPORATE THE FCC'S FINDINGS AS OF THE EFFECTIVE DATE OF THE ORDER? [BLAKE AT 47:17-19]

A. As discussed in our direct testimony on these supplemental issues and in the foregoing rebuttal testimony on Item 108/Issue S-1, the Act sets forth procedures for negotiating and arbitrating an interconnection agreement and BellSouth's automatic incorporation proposal would circumvent this process. The Parties have already agreed to contract language regarding the provision of UNEs in this Agreement. Therefore, as with the FCC's Final Unbundling Rules, should there be an intervening FCC order that alters the Parties' obligations with respect to providing UNEs, then the Parties should engage in good faith negotiations to formulate and revise contract language as needed and then allow for arbitration and resolution by the Commission of any issues that the Parties could not resolve through negotiations.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No.

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 109(B)/ISSUE S-2(B).

A. Joint Petitioners' position with regard to Item No. 109(B)/Issue No. S-2(B) is much the same as their position with regard to Item No. 108 and 109(A)/Issue No. S-1 and

S-2(A). The only difference here is that now we are dealing with the intervening order of a State Commission. Like the Final FCC Unbundling Rules, as well as any intervening FCC order, a State Commission intervening order should not be automatically incorporated into the Agreement. Upon release of an intervening State Commission order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the intervening State Commission order, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT THE COMMISSION SHOULD NOT CONSIDER ITEM 109(B)/ISSUE S-2(B) BECAUSE IT EXCEEDS THE PARTIES' AGREEMENT WITH RESPECT TO THE 90-DAY ABATEMENT PERIOD? [BLAKE AT 48:4-6].

A. Absolutely not. The Parties' abatement agreement allows for the negotiation and identification of issues related to the "post-*USTA II* regulatory framework" which is a deliberately vague and expansive term. This abatement agreement was memorialized in the Parties' Joint Petition for Abatement, that was approved by the Commission on July 23, 2004. Neither the Petition nor the Commission's order (or any of the Parties underlying communications) support Ms. Blake's contention that "the parties agreed to only add to the arbitration new issues related to *USTA II* and the *Interim Rules Order*." *See* Blake at 48:7-8. FCC 04-179 is but one aspect of the post-*USTA II* regulatory framework. As BellSouth apparently recognizes from the

issues it proposed, the FCC's final rules order, intervening FCC orders, and even another court decision could become part of the post-*USTA II* regulatory framework. An order from the Commission addressing BellSouth's unbundling obligations would be no less a part of that framework. For these reasons, BellSouth's objection to the Commission's consideration of Item 109(B)/Issue S-2(B) is groundless and simply an attempt to improperly limit the scope of this arbitration to avoid addressing any possible Commission order.

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT ITEM 109(B)/ISSUE S-2(B) IMPROPERLY EXPANDS THE SCOPE OF THIS ISSUE AND WILL POSSIBLY RESULT IN A CONFLICTING STATE ORDER. [BLAKE AT 48:2-4]

A. There is no reason why a Commission order could not be considered an intervening order in this arbitration. The Parties have identified "hypothetical" FCC orders and court decisions as intervening orders, yet BellSouth argues that a Commission order is beyond the scope of this proceeding. BellSouth states that State Commissions are prohibited from issuing any order that conflicts with FCC 04-179 and, furthermore, can only issue an order raising rates for frozen elements. *See* Blake at 48:17-19. As an initial matter, the Joint Petitioners have never stated that the Commission may issue an order that conflicts with FCC 04-179 or any other FCC order. The Joint Petitioners appreciate the concept of preemption. However, FCC 04-179 is not a complete preemption of State Commission authority; the Commission retains the ability to order unbundling under federal and state law. As stated in our direct testimony, "[t]he most anybody could reasonably argue (in our view) is that, for a

period lasting no longer than up to March 12, 2005, the State Commissions may not approve interconnection agreements based on post September 12, 2004 State Commission orders that do anything with respect to so-called 'frozen elements', other than to raise rates for them." *See* Johnson at 58:16-22. Otherwise, the Commission has power to adopt unbundling rules to the extent it does not conflict federal unbundling requirements. Notably, the FCC has never adopted rules forbidding BellSouth from unbundling high capacity loops and transport. Moreover, it is difficult to anticipate how a Commission unbundling mandate could conflict with the lack of a similar federal mandate. Accordingly, should the Commission issue an order adopting unbundling rules or modifying the Parties' unbundling obligations, such order should be treated the same as the FCC's Final Unbundling Rules, an intervening FCC order or intervening court decision. That is, the Parties should negotiate contract language to reflect the change in law and the Commission should resolve any issues that could not be resolved by negotiations.

Ms. Blake also makes the sweeping (and erroneous) statement that the TRO decision "emphasizes and reiterates that states may not use state law to impose additional unbundling requirements." *See* Blake at 49:14-16 (referring to paragraphs 194 and 195 of the TRO). BellSouth's statement is overly broad to say the least and is an attempt to intimidate the Commission from using its sate law authority to order unbundling. Paragraphs 194 and 195 of the TRO state that state commissions cannot conflict with or "substantially prevent" implementation of section 251 of the Act. As stated above, the Joint Petitioners are not seeking the Commission to issue any order that conflicts with section 251 or any other federal law. However, in paragraph 653

of the TRO, the FCC also pointed out in the TRO that "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport and signaling regardless of any unbundling under section 271." Therefore, a Commission order that BellSouth must continue to provide unbundled access with respect to high-capacity and dark fiber loops and transport would not conflict with federal law or an FCC order as BellSouth attempts to assert.

BellSouth also points to paragraph 195 of the TRO, which states that a State Commission order that requires unbundling in the face of a finding of non-impairment or vice versa would likely conflict with the limits of section 251(d)(2) of the Act. However, as the Commission is aware, neither the FCC nor this Commission has made a finding of non-impairment with respect to high-capacity and dark fiber loops and transport at issue in this proceeding. Moreover, the FCC was very cautious with its statement and contemplated that conflicts would have to be assessed on a case-by-case basis.

Therefore, a Commission order requiring continued provision of these loops and transport would, again, not conflict with current federal law.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT ITEM 109 (B)/ISSUE S-2(B) WOULD RESULT IN BELLSOUTH HAVING TO CONTEND WITH CONTRADICTORY STATE AND FCC ORDERS? [BLAKE AT 51:6-15]

A. No, I do not. BellSouth's claim that it "would be unable to comply with FCC rules and orders and any contradictory state commission rules and orders for the same

subject matter", *see* Blake at 51:6-8, is groundless. As repeated both in the Petitioners' direct testimony as well as in this rebuttal testimony, the Petitioners are not seeking the Commission to act in any way that contradicts with federal law. Despite BellSouth's emphatic assertions to the contrary, the FCC has not completely stripped State Commissions of all their authority with regard to unbundling. The Commission has the power to order unbundling pursuant to section 251 and 271 of the Act as well as under state law. And, as discussed above, the Commission is well within its purview to order unbundling without conflicting with federal law. Indeed, there is no federal law that requires BellSouth not to unbundle DS1, DS3 and dark fiber loops or DS1, DS3 and dark fiber transport. Thus, what is contemplated is not a situation where the Commission says "you must" and the FCC says "you must not".

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. As with Issue 108/S-1, above, and as discussed with respect to Issue 110/S-3 below, the Joint Petitioners have a consistent position. That is, the Petitioners will work with BellSouth to incorporate any change of law pursuant to the procedures set forth in the Act. Whether it be incorporating the FCC's Final Unbundling Rules, an intervening FCC order, State Commission order or court decision, the Joint Petitioners will engage in good faith negotiations and arbitration of any unresolved issues by the Commission. **The Joint Petitioners will not agree, however, to** circumvent the process set forth in the Act and employed by the Parties since 1996 and "automatically incorporate" any of the above orders or decisions without

negotiations and arbitration. Such is a reasonable position, which is consistent with the Act and which should be upheld by the Commission. As long as the Commission does not issue an order that conflicts with federal law, there is no reason the Commission could not issue an order that impacts the Parties' unbundling obligations and that must be incorporated into the Agreement.

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 110/ISSUE S-3.

A. In the event that FCC 04-179 is vacated or modified, the Agreement should not automatically incorporate the court order. Upon release of such a court order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the court order (to the extent the court order effectuates a change in law with practical consequences), or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. DID BELLSOUTH OFFER ANY JUSTIFICATION FOR ITS POSITION WITH RESPECT TO ITEM 110/ISSUE S-3?

A. No. BellSouth provided no justification or rationale for its position, but simply reiterated its omnipresent "automatic incorporation" position with respect to an intervening court decision.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT IN THE EVENT OF VACATUR, THE PARTIES SHOULD INVOKE THE TRANSITION PROCESS IDENTIFIED IN ITEM NO. 23 TO CONVERT VACATED ELEMENTS TO COMPARABLE, NON-UNE SERVICES? [BLAKE AT 52:10-14]

A. No, I do not. Joint Petitioners' disagree with BellSouth's proposed transition process (*see* Item 23/Issue 2-5).

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

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