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

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

February 7, 2005

PRELIMINARY STATEMENTS

WITNESS INTRODUCTION AND BACKGROUND

NuVox/NewSouth: Hamilton ("Bo") Russell

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

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

Q. IN YOUR DIRECT TESTIMONY, YOU WERE ASKED A SERIES OF QUESTIONS REGARDING YOUR POSITION AT NUVOX/NEWSOUTH, 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, 64/3-5, 66/3-7, 67/3-8, 68/3-9, 69/3-10, 70/3-11, 71/3-12, 72/3-13, 73/3-14, 74/4-1, 75/4-2, 76/4-3, 77/4-4, 78/4-5, 79/ 4-6, 80/4-7, 81/4-8, 82/4-9, 83/4-10, 84/6-1, 85/6-2, 86/6-3(A), 87/6-4, 89/6-6, 90/6-7, 91/6-8, 92/6-9, 93/6-10, 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/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	26/2-8, 36/2-18, 43/2-25, 46/2-28, 51/2-33(B) & (C)
Attachment 3: Interconnection	63/3-4
Attachment 6: Ordering	86/6-3(B), 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.

GENERAL TERMS AND CONDITIONS[2]

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

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

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

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

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

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

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

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

[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.

provided or to be provided pursuant to the Agreement as of the day on which the claim arose.

Q. PLEASE EXPLAIN WHY JOINT PETITIONERS' PROPOSED LIMITATION OF LIABILITY LANGUAGE IS APPROPRIATE.

A. Joint Petitioners have proposed language that would impose financial liability, under a clear formula based on the percentage of the aggregate fees, charges or other amounts paid or payable for any and all services provided or to be provided pursuant to the Agreement, on the Party whose negligence caused harm to the other. Liability would be assessed up to a percentage cap on this aggregate amount as of the day the claim arose. This provision is reasonable and appropriate in order to ensure that the aggrieved Party is compensated for the true value of the loss it incurred when service is disrupted or impaired.

Q. BELLSOUTH WITNESS BLAKE CLAIMS THAT JOINT PETITIONERS' PROPOSAL "MAKES NO SENSE" AND THAT THE JOINT PETITIONERS' POSITION IS ABSURD. [BLAKE AT 7:3, N.3] DO YOU AGREE?

A. No, obviously not. If Ms. Blake does not understand the proposal, perhaps it is because she had not participated in the negotiation sessions where it was discussed at length. If BellSouth chooses to present a witness that does not understand the issue or claims not to understand the issue, that is its prerogative. However, BellSouth's gambit does not make the Joint Petitioners' proposal incomprehensible or absurd. As explained at length in our direct testimony, Joint Petitioners' proposal is hybrid proposal that is based upon what is typically found in commercial contracts. It makes an incremental move away from the "elimination of liability" language that

BellSouth has enjoyed for far too long and toward what is more typically found in commercial contracts absent overwhelming market dominance by one party.

Q. ARE JOINT PETITIONERS SEEKING "TO HAVE BELLSOUTH INCUR THE PETITIONERS' COST OF DOING BUSINESS"? [BLAKE AT 9:3-4]

A. No. Ms. Blake's claim that the costs associated with *BellSouth's* negligence or "failures by BellSouth to perform exactly as the contract requires" (BellSouth's own words) can fairly be considered part of the "Petitioners' cost of doing business" is patently untenable. *See* Blake at 9:1-4. BellSouth should be fully responsible for its negligent actions and for any failure on its part to perform as the contract requires. In short, BellSouth's negligence and other non-performance should be part of *BellSouth's* cost of doing business and not that of the Joint Petitioners. Thus, it is BellSouth that seeks to engage in inappropriate cost shifting here. To properly allocate responsibility for negligence or non-performance, Joint Petitioners' proposed language for this issue should be adopted and BellSouth's proposed language should be rejected.

Q. MS. BLAKE SUGGESTS THAT BELLSOUTH NEGLIGENCE OR NON-PERFORMANCE IS A RISK PROPERLY ALLOCATED TO JOINT PETITIONERS AS A RESULT OF SOME BUSINESS DECISION YOU MAKE. IS THAT CORRECT? [BLAKE AT 9:1-4]

A. No, not at all. Indeed, we are here today to tell the Commission that we do not voluntarily make a business decision to accept risks associated with BellSouth's negligence or non-performance. With our proposed language, Joint Petitioners are simply seeking to ensure that BellSouth incurs a meaningful level of liability for its

own negligence/non-performance. We also are attempting to limit BellSouth's ability to improperly shift those risks and associated costs to the Joint Petitioners. Notably, Joint Petitioners' proposal applies equally to themselves as it does to BellSouth – each Party must take some measure of responsibility for its negligent actions and other non-performance.

Q. PLEASE EXPLAIN YOUR RECENT CHANGE IN CONTRACT LANGUAGE TO STATE THAT THE PROPOSED LIABILITY FORMULA WOULD BEGIN AS OF THE DAY THE CLAIM AROSE AS OPPOSED TO THE DAY PRECEDING THE DATE OF FILING THE APPLICABLE CLAIM OR SUIT. [BLAKE AT 7:N.2, 7:2-8:17]

A. In an effort to appease BellSouth's concern that the Joint Petitioners' proposed language could provide incentive to Joint Petitioners to wait to file claims until several months after the harm occurred in order to increase BellSouth's exposure, Joint Petitioners revised their language. Accordingly, as now proposed, BellSouth's liability exposure would begin the day on which the claim arose. Therefore, there could be no "gaming" of the system, whereby the Joint Petitioners could hold-off filing of a negligence claim for several months to increase the amount of potential liability under the "rolling" 7.5% cap. Despite BellSouth's claim that the Joint Petitioners' revised proposal "does nothing to cure the absurdity of the Joint Petitioners' position", *see* Blake at 7:n.3, this is a significant concession on the part of the Joint Petitioners to address BellSouth's concern.

Despite the concession offered by Joint Petitioners, BellSouth now claims that the Joint Petitioners could "inappropriately argue that the 'day the claim arose' was at the end of the Agreement." *See* Blake at 7:16-18. BellSouth appears to be intent on creating problems where there likely will be none. To be sure, either Party could inappropriately argue a position in almost any given context. It is difficult to contract around all contingencies – especially with respect to behavior that would not be considered to be commercially reasonable. The true test, however, should not be what is possible to argue but instead should be what is probably likely to succeed when argued. In that sense, it appears that Ms. Blake's manufactured concern regarding Joint Petitioners' ability to disguise the day upon which a claim arose is both misplaced and overwrought.

Let us provide an example or two to illustrate. If one of the Joint Petitioners incurred harm due to a BellSouth negligent act, say, for example, a BellSouth truck hit one of the Petitioner's facilities, under the proposed language, there would be no question as to the day the claim arose. Similarly if a BellSouth employee negligently damaged one of the Petitioner's collocation sites, and that caused Petitioner's customers to lose service, again, there would be no question as to the day the claim arose. Under both scenarios, there is only one day on which that claim arose. BellSouth is simply searching for any means to avoid a new limitation of liability clause that provides Joint Petitioners with adequate protection from BellSouth negligent acts. It is simply time to hold BellSouth accountable for its own negligence and to stop BellSouth from shifting those costs to its competitors.

Q. BELLSOUTH APPEARS TO ASSERT THAT "TELRIC" PRICING NECESSITATES ITS ELIMINATION OF LIABILITY PROPOSAL. IS THAT POSITION WELL FOUNDED? [BLAKE AT 9:6-13]

A. No. BellSouth no doubt already carries insurance which is factored into its TELRIC pricing. Thus, Ms. Blake's apparent claim that BellSouth's TELRIC prices were premised on a no-insurance/no-liability scenario seems fundamentally off-base. In case there is any doubt, let us make clear that Joint Petitioners are not in the business of insuring BellSouth against any and all liability attributable to BellSouth's negligence or non-performance. Moreover, Ms. Blake ignores the fact that BellSouth refuses to provide many of the elements and services offered under the Agreement at TELRIC compliant prices. In several instances, BellSouth's refusal to offer TELRIC-based pricing has evolved into an arbitration issue. Examples of this would be multiplexing (27), line conditioning (38), the TIC (65), expedite charges (88), mass migration charges (94) and LEC identifier change charges (96). In certain other circumstances, Joint Petitioners accepted non-TELRIC-based pricing as part of a settlement of an issue or a set of issues. Examples of this would include certain aspects of interconnection trunk pricing, certain BellSouth service calls, and various instances where BellSouth tariffs are referenced for rates. In the end, this Agreement will contain certain elements and services at TELRIC-based pricing and others that are not. Thus, even if BellSouth's reliance on TELRIC as an excuse to shift responsibility for BellSouth negligence and non-performance to its competitors was valid – which, as explained above, it is not – this argument provides BellSouth with

no cover whatsoever for the many aspects of the Agreement for which TELRIC pricing does not apply.

Q. MS. BLAKE ASSERTS THAT JOINT PETITIONERS' POSITION WITH RESPECT TO THIS ISSUE (AS WELL AS WITH RESPECT TO ITEMS 5, 6 AND 7) IS PART OF SOME GRAND SCHEME THAT INVOLVES PUTTING CLECS AT A COMPETITIVE ADVANTAGE OVER BELLSOUTH. IS SHE RIGHT? [BLAKE AT 9:6-10:2]

A. No, not at all. Again, BellSouth's negligence or non-performance is not a risk of our business decisions. It is BellSouth that inappropriately seeks to shift risks here – not us. And, by seeking to shift the risks associated with BellSouth negligence or non-performance to Joint Petitioners, it is BellSouth that is seeking an unfair competitive advantage over Joint Petitioners.

Q. MS. BLAKE CLAIMS THAT JOINT PETITIONERS "DESIRE TO HAVE ALL DISPUTES HANDLED BY A COURT OF LAW". IS THAT ACCURATE? [BLAKE 9:20]

A. No. In fact, that is an affirmative misrepresentation of Joint Petitioners' position – with respect to which we are greatly offended. Although Ms. Blake did not participate in most of the meetings where the Parties discussed the dispute resolution issue (9), she has no right to use her failure to participate or BellSouth's conscious decision to keep those that did participate from appearing as witnesses, as an excuse to misrepresent Joint Petitioners' position. As Joint Petitioners explained with respect to Item 9/Issue G-9, they insist on including courts of law on the list of available venues for dispute resolution because they may have particular expertise

and powers that a State Commission may not have. Moreover, courts may present an option for more efficient regional dispute resolution. Nevertheless, as Joint Petitioners repeatedly have told BellSouth during negotiations, they anticipate that most disputes under the Agreement will be taken to the Commission (and other State Commissions). Given the difficulty in achieving efficient regional dispute resolution under past agreements, however, Joint Petitioners merely want to preserve all options and foreclose none that have jurisdiction.

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

A. No. Ms. Blake's testimony is largely unfounded rhetoric designed to distract and steer attention away from the real issue. BellSouth proposes an elimination of liability provision under which it seeks to saddle Joint Petitioners with the costs and risks of BellSouth's negligent acts and non-performance. When the rhetoric is stripped away, it is quite plain that Ms. Blake provides no legal or sound policy basis for BellSouth's position. It is time for BellSouth to accept the risks of and take responsibility for its own actions. Joint Petitioners' language requires both BellSouth and the Joint Petitions to do this.

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

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

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

Q. IT APPEARS THAT MS. BLAKE THINKS THIS ISSUE IS ABOUT SERVICE GUARANTEES, IS THAT THE CASE? [BLAKE AT 10:12-17]

A. No. This issue is not about theoretical service guarantees that one Party or another could offer its customers to distinguish otherwise comparable products. Rather, this issue is simply about Joint Petitioners' unwillingness to guarantee (and assume indemnification obligations to the extent they cannot) that they will for the life of the Agreement be able to extract from their customers the same limitation of liability provisions that BellSouth is able to extract. Instead we have offered to abide by a "commercially reasonable" standard – which is eminently reasonable. The terms of our contracts with our customers really should not be controlled directly or indirectly by BellSouth but should instead be governed by what is commercially reasonable.

BellSouth's proposal is not commercially reasonable. Once again, BellSouth appears to insist that Joint Petitioners must serve as BellSouth's insurance company. We won't do that voluntarily. We are not insurance companies and we are unwilling to accept responsibility for BellSouth's non-performance. If there is a claim or valid theory of liability under which third parties can sue BellSouth for non-performance or other failure to abide by this Agreement, we have no legal obligation to ensure that BellSouth can quash such claims or to indemnify BellSouth if it cannot. Moreover, there is no other compelling public policy reason for us to do so. If BellSouth's actions cause consumers harm, BellSouth should be held accountable. In any event, there is simply no basis for trying, as BellSouth does, to shift some of the responsibility for and risks of BellSouth's failures to Joint Petitioners.

Finally, it bears noting that we can no more bind BellSouth to the terms of a service guarantee with a third party than we can bind third parties to the terms of this Agreement. The best resolution of this issue would be for the Agreement to contain no language on it.

Q. IS BELLSOUTH CORRECT THAT PETITIONERS COULD IMPOSE "SELF-CREATED LIABILITY" ON BELLSOUTH BY VIRTUE OF PROMISING PERFECTION TO THEIR CUSTOMERS? [BLAKE AT 10:22-11:9]

A. No. In refusing to agree to BellSouth's proposed language for Section 10.4.2, Joint Petitioners are not seeking to "pass on to BellSouth ... self-created liability" in the manner Ms. Blake portrays. *See* Blake at 11:3. Joint Petitioners, however, insist that they be able to conduct business in a commercially reasonable manner (which requires them to mitigate damages and not to unreasonably create liability exposure) and that BellSouth not be permitted to shirk all responsibility for its failure to abide by the Agreement and to perform as specified therein. If we make unreasonable commitments to our customers, it is not at all clear to us how we could seek to hold BellSouth accountable for such commitments. Indeed, Joint Petitioners will agree to the duty to mitigate damages, and thus BellSouth's exposure, with respect to our end users. Petitioners' willingness to take on this duty demonstrates that we are not seeking to impose unfair or unwarranted liability on BellSouth. Rather, Petitioners are simply refusing to agree that all of our tariffs and contracts contain language that BellSouth — who is not a party to any such arrangement — believes is appropriate.

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

A. No. But, Ms. Blake's testimony makes it evident to us that BellSouth's primary concern here is over instant payment service guarantees and BellSouth's potential for additional liability attributable to its own failure to abide by or perform as required by the Agreement. BellSouth's current proposed provision is a needlessly blunt instrument that does not squarely address that concern and creates others in the process. If BellSouth wanted to withdraw its current proposal and replace it with language to address its stated concern regarding potential liability for instant payment service guarantees, we would entertain the proposal and hopefully be able to reach an acceptable compromise on this issue.

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

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

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

duties of mitigation with respect to such damage should be considered direct and are not indirect, incidental or consequential.

Q. PLEASE EXPLAIN WHAT TYPE OF LOSSES FOR WHICH JOINT PETITIONERS WANT TO BE MADE WHOLE BY BELLSOUTH UNDER SECTION 10.4.4.

A. Petitioners believe that BellSouth should be responsible for reasonably foreseeable damages that are directly and proximately caused by BellSouth. As stated in the Petitioners' direct testimony, this Agreement is a contract for wholesale services and, therefore, liability to customers must be contemplated and expressly included in the contract language. In our view, these types of damages are not incidental, indirect or consequential.

Q. MS. BLAKE STATES THAT THE PARTIES HAVE AGREED THAT THE CONTRACT SHALL PROVIDE THAT THERE WILL BE NO LIABILITY FOR INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES AND ASSERTS THAT JOINT PETITIONERS ARE IN SOME MANNER ATTEMPTING TO EVISCERATE THAT AGREEMENT. IS THAT AN ACCURATE AND FAIR REPRESENTATION OF THE DISPUTE UNDERLYING THIS ISSUE? [BLAKE AT 12:1-10]

A. No. Joint Petitioners did not agree to one thing and then attempt to gut that agreement with the added language we propose. Rather our offer is (and has been) to eliminate liability for indirect, incidental, or consequential damages, provided that it is understood that such limitation is not to be construed in any way so as to eliminate the liability of a Party for claims or suits for damages by end

users/customers of the other Party or by such other Party vis-à-vis its end users/customers to the extent that such damages "result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder". We do not view such damages as indirect, incidental, or consequential and we want the Agreement to be clear that we do not voluntarily agree to do so.

Q. MS. BLAKE ASSERTS OPPOSITION TO JOINT PETITIONERS' PROPOSAL BECAUSE IT IS LENGTHY, VAGUE AND IN HER WORDS "VIRTUALLY INDECIPHERABLE". DO YOU HAVE A RESPONSE TO THESE CRITICISMS? [BLAKE AT 12:22-13:5]

A. Yes. First, if Ms. Blake has any real difficulty understanding our proposal it is likely because she chooses not to understand it. Ms. Blake did not participate in the majority of negotiations session where this issue and the Joint Petitioners' proposal were discussed and explained at great length. We did not leave those discussions with the impression that BellSouth didn't understand our proposal, but rather that they simply would not agree to it. So as not to needlessly expend the Commission's or Joint Petitioners' resources, BellSouth should in the future take better care to ensure that its witnesses are fully briefed with respect to all prior negotiations.

The language proposed by Petitioners here and that is disputed by BellSouth is notably shorter than the language proposed by BellSouth and disputed by the Joint Petitioners on the previous issue. The point is that lengthy language is not necessarily good or bad. Nor is it necessarily confusing. Sometimes, contract language becomes lengthy as a result of efforts to ensure that it is clear and fair. In

this case, Joint Petitioners took care to delineate a precise standard that is neither vague nor difficult to implement. We even took care to assure BellSouth that it was our intent to conduct ourselves in a commercially reasonable manner and to accept standard duties to mitigate damages. Nevertheless, if BellSouth wants a shorter proposal, we are willing to strike the final three or so lines of it so that the disputed language would end with the clause "to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder". The remaining part of the disputed language proposed by Joint Petitioners can be stricken: "and were not and are not directly and proximately caused by or the result of such Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage". That language was intended to provide BellSouth with assurances that the proposal is fair and reasonable – we will not insist on it. At bottom, Ms. Blake does not explain why she thinks this provision would be difficult or confusing to implement or whether it is simply BellSouth's intention to make this provision difficult or confusing to implement. Neither case presents a valid reason for rejecting Joint Petitioners' proposal.

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

A. No.

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

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

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

Q. PLEASE EXPLAIN THE INDEMNIFICATION LANGUAGE THAT JOINT PETITIONERS HAVE PROPOSED.

A. Joint Petitioners seek to be indemnified for claims of libel, slander, or invasion of privacy. On that, the Parties agree. Petitioners also seek to be indemnified for claims arising from (1) BellSouth's failure to comply with the law, or (2) damages or injuries arising from BellSouth's negligence, gross negligence, or willful misconduct. This level of indemnification is not unreasonable. Moreover, Joint Petitioners, as the Parties receiving/purchasing most services under the Agreement, refuse to indemnify BellSouth against all end user claims that could potentially arise as a result of our reliance on BellSouth's commitment to abide by and perform as required under this Agreement. A Party that fails to abide by its legal obligations

should incur the damages arising from such conduct. A Party that is negligent should bear the cost of its own mistakes. BellSouth should not be permitted to shift those costs to the Joint Petitioners.

Q. IS BELLSOUTH CORRECT IN ASSERTING THAT THE JOINT PETITIONERS' PROPOSED LANGUAGE IS INAPPROPRIATE BECAUSE THIS IS NOT A COMMERCIAL AGREEMENT? [BLAKE AT 14:4]

A. No. This Agreement, although it contains terms that are the subject of federal and state statutes and regulations, is clearly a commercial agreement. BellSouth's efforts to impart magical meaning into the words "commercial agreement" are unavailing. Indeed, we are not aware of any State Commission that has bought into BellSouth's argument that there is a body of agreements called interconnection agreements and another body of agreements called commercial agreements and that the two are mutually exclusive. Notably, there are no regulations of which we are aware governing what the indemnification provisions of interconnection agreements must be. Thus, the language in Section 10.5 should reflect and comport with general commercial practice. It is generally accepted commercial practice to ensure that one Party does not pay for or otherwise suffer as a result of the other's mistakes or misconduct. That principle is embodied in Joint Petitioners' proposed language and not in the commercially unreasonable language proposed by BellSouth.

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

A. No. BellSouth once again seeks to shift to Joint Petitioners the risks and costs associated with its own non-compliance and misconduct. Joint Petitioners' proposal

rejects that approach, reflects commercially reasonable practice and should be accepted.

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

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

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

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

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

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

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

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

has been resolved.

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

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

A. Nothing in the Agreement should be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, as defined in the Agreement, except in such cases where the Parties have explicitly agreed to a limitation or exemption. Moreover, silence with respect to any issue, no matter how discrete, should not construed to be such a limitation or exception. This is a basic legal tenet and is consistent with both federal and Georgia law (agreed to by the parties), and it should be explicitly stated in the Agreement in order to avoid unnecessary disputes and litigation that has plagued the Parties in the past.

Q. BELLSOUTH CLAIMS JOINT PETITIONERS SEEK "TWO OPPORTUNITIES TO NEGOTIATE AND/OR ARBITRATE THE TERMS OF THE CONTRACT". HOW DO YOU RESPOND TO THIS ACCUSATION? [BLAKE AT 19:19-20]

A. Our first response is that it isn't true. The Parties have agreed to abide by Georgia law, and Georgia law – just like any other that we know of – holds that applicable law existing at the time of contracting becomes part of the contract as though expressly stated therein, unless the parties voluntarily and expressly agree to adhere to other standards that effectuate an exception to or displacement of applicable legal requirements. As explained at length in our direct testimony, BellSouth seeks to turn

principles of contracting on their head by insisting on a contract where exceptions to and the displacement of applicable legal requirements is implied as a matter of course. As our counsel will surely explain in briefing, Georgia law requires exceptions, or other displacements of applicable legal requirements, to be express. They cannot be implied. In short, exceptions are not the rule.

Moreover, as we have said repeatedly, we did not conduct negotiations or engage in this arbitration so that we could give away something for nothing. If BellSouth wants to be exempt from or to displace an applicable legal requirement, it should have proposed explicit language regarding the specific aspects of any federal or state statute, rule or order to which they did not want to have to comply and they should have been prepared to offer an appropriate concession to us in exchange for the right or rights they seek to have us give up.

Instead, BellSouth's latest proposal seeks to contractualize a gambit wherein BellSouth can claim that it is not obligated to comply with Applicable Law if it is not copied into or otherwise sufficiently referenced in the Agreement (we are not clear as to what would pass muster). Petitioners' language already references all Applicable Law and it underscores their intent not to deviate from already agreed-upon Georgia law on this point. There are thousands of pages of applicable federal and state statutes, rules and orders that have not been copied into or regurgitated in some manner in the Agreement. We are not interested in providing BellSouth with the opportunity to say that the requirements contained therein apply only prospectively – after we detect and notify BellSouth of its non-compliance therewith.

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

A. No. We are not prepared to trade tried and true principles of contracting for BellSouth's "catch me and we'll fix it going forward" proposal. Our agreement to abide by Georgia law did not contemplate and does not include such a perverse exception to that body of law.

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?*

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

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

Item No. 25, Issue No. 2-7 [Section 1.6.1]: ***This 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. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

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

Item No. 27, Issue No. 2-9 [Section 1.8.3]: ***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. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 36(A)/ISSUE 2-18(A).

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

Q. DOES BELLSOUTH'S PROPOSED LINE CONDITIONING DEFINITION COMPORT WITH THE GOVERNING FCC RULE? [FOGLE AT 3:24-4:9]

A. No. BellSouth ignores the FCC's line conditioning rule and instead attempts to replace it with selected language from the TRO. The FCC, however, did not choose to replace the language of its rule with the "definition" that BellSouth claims to embrace. As explained in our direct testimony, BellSouth inappropriately seeks to conflate line conditioning obligations with routine network modification

requirements. The FCC's rules, however, do not support BellSouth's position, as the line conditioning rule was not replaced with the routine network modification rules and BellSouth's line conditioning obligations are not limited to those routine network modifications it undertakes to provide DSL services to its own customers.

Q. DOES THE JOINT PETITIONERS' POSITION REQUIRE BELLSOUTH TO CREATE A "SUPERIOR NETWORK", AS MR. FOGLE CLAIMS? [FOGLE AT 5:25]

A. No. The FCC's line conditioning rules require BellSouth to modify its existing network rather than develop a superior one.

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

A. No. BellSouth's attempt to limit its line conditioning obligations to routine network modifications it undertakes to provide DSL to its own customers is inconsistent with the FCC's line conditioning rule and it should be rejected. Mr. Fogle claims that "the *TRO* clarifies the definition of line conditioning set forth in Rule 51.319(a)(1)(iii) by limiting its application to line conditioning 'that incumbent LECs regularly perform in order to provide xDSL services to their own customers.'" *See* Fogle at 6:13-17. In other words, Mr. Fogle claims that the FCC's definition of line conditioning has no meaning, as the ILECs (according to his novel theory) are not obligated to perform line conditioning. **That cannot be right.** BellSouth acknowledges that FCC Rule 51.319(a) sets forth the definition for line conditioning, but argues that the TRO itself only requires BellSouth to perform line conditioning that it regularly performs for its own customers. *See* Fogle at 6:10-13. Although the

FCC, in the TRO, opines that line conditioning can be seen as a routine network modification that ILECs perform for their own DSL customers, the FCC does not say that the line conditioning obligation is limited to such routine network modifications that ILECs perform for their own DSL customers. Nor does it say that if an ILEC refuses to provide such line conditioning to its own customers, it is relieved of its obligation to provide line conditioning to requesting CLECs. BellSouth must adhere to the definition of line conditioning in 51.319(a). The FCC in paragraph 172 of the *UNE Remand Order* held that ILECs "are required to condition loops so as to allow ***requesting carriers*** to offer advanced services." Subsequently, in paragraph 83 of the *Line Sharing Order*, the FCC expanded this obligation to apply to loops regardless of the loop length. If the FCC meant to curtail the obligation set forth therein with the TRO language Mr. Fogle quotes, it would certainly have modified the actual definition of line conditioning. The FCC did no such thing. By attempting to unilaterally limit its line conditioning obligations, BellSouth is trying to ensure that CLECs can do no more with the network than BellSouth is willing to do. As explained in our direct testimony, there are no compelling legal or policy rationales for tying us down in that manner and keeping us and our customers in that box.

Joint Petitioners also note a change in Mr. Fogle's testimony from that which has appeared in other jurisdictions. Mr. Fogle states that "[c]onsistent with the FCC's definition in the *TRO*, BelSouth has proposed this additional language because it routinely removes similar devices from its network in the process of provisioning it [sic] own DSL services, and therefore, falls within the FCC's definition of a routine

network modification to effect line conditioning." *See* Fogle at 6:5-9. This statement differs dramatically from what has previously been filed in other states, where Mr. Fogle ends this sentence with "...falls within the FCC's definition of Line Conditioning." Essentially, what Mr. Fogel does with this change is to demonstrate Joint Petitioners' position – *i.e.* that routine network modifications are a subset of line conditioning and that line conditioning is not limited to only those routine network modifications which BellSouth does for itself.

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

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

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT IT SHOULD ONLY PERFORM LINE CONDITIONING FUNCTIONS IN ACCORDANCE WITH FCC RULES TO THE EXTENT IT REGULARLY UNDERTAKES SUCH MODIFICATIONS FOR ITS OWN XDSL CUSTOMERS? [FOGLE AT 6:10-20]

A. No. Mr. Fogle plainly indicates that BellSouth is only willing to comply with the FCC's line conditioning rule to a certain extent. We insist on full compliance. As reiterated throughout our testimony on this issue, line conditioning is not synonymous with or limited to the routine network modifications BellSouth undertakes to provide xDSL to its own customers. Rather, BellSouth must provide line conditioning in accordance with FCC's Rule 51.319(a)(1)(iii), which does not contain the limiting caveat Mr. Fogle adds.

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

A. No. BellSouth is attempting to unilaterally limit its obligation to provide line conditioning as required by the FCC's line conditioning rule. Since Joint Petitioners are unwilling to accept it, the Commission should reject BellSouth's proposed language that would eliminate certain aspects of BellSouth's obligation to provide and Joint Petitioners' right to obtain line conditioning at TELRIC-compliant rates.

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

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

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

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

Item No. 39, Issue No. 2-21 [Section 2.12.6]: ***This issue, 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. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 51(B)/ISSUE 2-33(B).

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

Q. AS AN INITIAL MATTER, PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT IT IS NOT OBLIGATED TO PROVIDE HIGH CAPACITY EELS AFTER THE INTERIM PERIOD AND THEREFORE THIS ISSUE IS ONLY RELEVANT DURING THE 12-MONTH INTERIM/TRANSITION PERIOD? [BLAKE AT 32:13-19]

A. The current state of the law requires BellSouth to provide the Joint Petitioners access to high-capacity EELs. We do not agree that there is a 12 month cap on BellSouth's

obligation to provide high capacity EELs to us. However, if BellSouth wants to include in the Agreement an express 12 month sunset on all EEL audit provisions we will not object (unless the FCC releases an order eliminating them sooner). We cannot assess the impact of the FCC's Final Unbundling Rules prior to their being released.

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

A. No. BellSouth's audit notice must identify the particular circuits for which BellSouth alleges non-compliance and demonstrate the cause upon which BellSouth rests its allegations. The notice should include all supporting documentation upon which BellSouth establishes the cause that forms the basis of BellSouth's allegations of noncompliance. These requirements -- which BellSouth provides no sound reason for rejecting – will contribute dramatically to curtailing EEL audit litigation that currently is consuming too many of the Parties' and the Commission's resources.

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

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

Q. BELLSOUTH CLAIMS THAT A THIRD PARTY INDEPENDENT AUDITOR MUTUALLY AGREED TO BY THE PARTIES IS A "POINTLESS STEP DESIGNED ONLY AS A DELAYING TACTIC." PLEASE RESPOND. [BLAKE AT 34:10]

A. The Petitioners do not believe that their agreement as to the independence of the auditor is pointless, considering the Petitioners are the subject of the audit. While BellSouth argues that this proposal is simply a delay tactic, the Petitioners submit that BellSouth's refusal to agree to such a reasonable position is a tactic to keep CLECs out of the decision-making process, perhaps to their detriment. As BellSouth is aware, the CLECs are subject to payment of the audit as well as circuit conversion under certain conditions. With this much at stake, the Commission should not find the Petitioners' proposal to agree to the auditor pointless, but rather essential to equality of the audit process.

Q. DO THE PARTIES HAVE OTHER OUTSTANDING DISPUTES WITH RESPECT TO ITEM 51(C)/ISSUE 2-33(C)? [BLAKE AT 33:22-25]

A. No. It appears that Ms. Blake is misinformed. The only issue that remains is whether the Agreement will include a requirement that the independent auditor must be mutually agreed-upon. BellSouth has already agreed to language that provides that "[t]he audit shall commence at a mutually agreeable location (or locations)". BellSouth also has agreed to Joint Petitioners' proposal for the reimbursement provision (Section 5.2.6.2.3). We have no idea about (and neither address nor accept) the "other requirements" and "materiality" disputes Ms. Blake claims exists.

Certainly such disputes are not evident from the contract language thus far agreed to by the Parties.

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

A. No. However, we are pleased to note that our position has been adjusted to reflect that there is no longer a disagreement with respect to when a CLEC must reimburse BellSouth and when BellSouth must reimburse a CLEC. BellSouth has accepted Joint Petitioners' language on that issue.

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 10.12.41: ***This issue has been resolved.***

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

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

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

Item No. 64, Issue No. 3-5 [Section 10.5.5.2, 10.5.6.2 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?*

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

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

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

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

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

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

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

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

been resolved.

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

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

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

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

(B) If so, what rates should apply?

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

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

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

BILLING (ATTACHMENT 7)

Item No. 95, Issue No. 7-1 [Section 1.1.3]: ***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. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 97/ISSUE 7-3.

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

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE WITH REGARD TO PAYMENT DUE DATE IS APPROPRIATE?

A. Joint Petitioners' language is appropriate given that the Petitioners agreed to BellSouth's proposal for a 30-day payment deadline (one billing cycle). We had initially sought 45 days. Under this tight deadline it is imperative that CLECs be given the full 30 days to review and pay those bills. **As Joint Petitioners** demonstrated in their direct testimony, Petitioners typically have far less than 30 days to pay invoices due to a long lag time that is experienced between BellSouth's "bill date" and the date on which Joint Petitioners actually receive bills. Accordingly, the Petitioners' language provides that the Petitioners will be given 30-

days to pay once a Petitioner receives a complete and fully readable bill via mail or website posting.

Q. PLEASE RESPOND TO BELLSOUTH'S SYSTEMS ARGUMENTS WHY IT CANNOT ALLOW THE JOINT PETITIONERS 30 DAYS UPON RECEIPT TO PAY A BILL. [MORILLO AT 6:12-21]

A. The Joint Petitioners should not be subject to unfair payment terms based on BellSouth's alleged systems limitations. BellSouth makes two blanket statements with no justification: (1) due date requirements listed in its access tariffs and contracts cannot be differentiated; (2) all customer due dates and treatments are the same for all customers and cannot be differentiated. *See* Morillo at 6:13-16. Neither assertion seems to be a valid reason for not providing Joint Petitioners (or any other CLECs) with reasonable payment terms. Joint Petitioners should not have to endure inconsistent and unfair payment terms because BellSouth would have to fix its systems to allow CLECs adequate time to pay invoices. It is unreasonable for BellSouth to assert that its systems cannot be modified and improved or that it won't modify or improve them.

As stated in the Joint Petitioners direct testimony, NuVox and its NewSouth affiliate tracked the average time for BellSouth to deliver electronic invoices. It took NuVox on average 7 days after the issue date to receive BellSouth bills and it has been NewSouth's experience that once it receives a bill from BellSouth, NewSouth only has between 19-22 days to process the bill for payment. *See* Russell at 41:20-21. Moreover, it takes on average 6.45 days for Xspedius to receive bills from

BellSouth. *See* Russell at 42:7. These timeframes are far from commercially reasonable and BellSouth should not be able to get away with its standard our-current-systems-don't-allow-it-SO-it-cannot-be-done argument. Joint Petitioners' request is reasonable and BellSouth should not be able to hide behind its convenient systems limitations arguments to avoid agreement on reasonable and fair payment terms.

Q. BELLSOUTH ASSERTS THAT IT "HAS NO WAY TO KNOW WHEN THE CUSTOMER ACTUALLY RECEIVES THE BILL; THUS, IT IS NOT REASONABLE TO EXPECT THAT TREATMENT COULD BE BASED ON THE DATE THE CUSTOMER RECEIVES THE BILL". PLEASE RESPOND. [MORILLO AT 6:16-19]

A. As with BellSouth's systems argument, BellSouth's argument here is not persuasive. Indeed, Mr. Morillo's assertion that "BellSouth has no way to know when the customer actually receives the bill" is embarrassing. *See* Morillo at 6:16-18. There is no reason why BellSouth should not be aware when it sends and a customer receives an electronic or paper bill. It is easy to track on-line posting and receipt of mail – electronic or traditional. Such posting and "return receipt" functions are basic components of Internet-posting and electronic mail programs. Courier services, such as UPS and FedEx, and the United States Postal Service have long provided "return receipt" or delivery confirmation services to their customers. It is surprising to us that Mr. Morillo is unaware of such things and that nobody at BellSouth who reviewed his testimony bothered to point them out to him. Because posting and

receipt are easily tracked, it is certainly reasonable to tie payment due dates to the posting or receipt of bills.

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

A. No. The Commission should allow 30 days from posting or receipt of a bill to remit payment.

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

Item No. 99, Issue No. 7-5 [Section 1.7.1]: ***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. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 100/ISSUE 7-6.

A. CLECs should not be required to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination. Rather, if a Petitioner receives a notice of suspension or termination from BellSouth, with a limited time to pay non-disputed past due amounts, Petitioner should be required to pay only those amounts past due as of the date of the notice and as expressly and plainly indicated on the notice, in order to avoid suspension or termination. Otherwise, CLEC will risk suspension or termination due to possible calculation and timing errors.

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE IS APPROPRIATE.

A. Joint Petitioners' language is appropriate because there is a substantial risk of calculation errors or disputes and customer impacting service outages inherent in BellSouth's proposal. Payment and dispute posting are all exclusively under BellSouth's control. The Joint Petitioners, however, could do their very best to calculate the precise amount that will become past due as of the pending suspension

or termination action, but any such calculation would necessarily have to include a prediction about how timely and accurately BellSouth will post payments and disputes (which can be legitimately withheld). Thus, BellSouth's proposal is tantamount to a shell game that could easily be rigged or abused by BellSouth. Too much is on the line for Joint Petitioners (and our customers) to be subject to such uncertainty. Joint Petitioners -- and our customers -- could be shut down based on a simple calculation error, a bad prediction about BellSouth posting performance, or by bad actions on the part of BellSouth. Suspension and termination of access to ordering systems and services are very serious events with very significant impacts that stretch well beyond the Parties. When such actions may be taken should not be determined by a shell game exclusively in control of a Party who likely would not mind if it put one or all of the Joint Petitioners out of business.

Q. BELLSOUTH ARGUES THAT ITS PROPOSAL IS NECESSARY FOR "INSURING THAT CUSTOMERS ARE NOT ALLOWED TO CONTINUE TO STRETCH THE TERMS OF THE CONTRACT AND INCREASE THE LIKELIHOOD OF BAD DEBT". PLEASE RESPOND. [MORILLO AT 9:22-25]

A. BellSouth's proposal is too dangerous to be necessary and it seems intentionally designed to be that way. BellSouth can adequately protect itself by diligently issuing notices indicating precise amounts due and by diligently pursuing collections. The shell game proposed by BellSouth is open to abuse tantamount to extortion. Joint Petitioners' proposal represents a reasonable and fair alternative that protects the

interests of all Parties, is not subject to abuse, and does not unduly threaten Florida consumers' services.

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

A. No. BellSouth's proposal to force the Petitioners to calculate and pay past due amounts in addition to those specified in a BellSouth notice when facing possible suspension or disconnection is patently unfair and potentially abusive. As mentioned in the Joint Petitioners direct testimony, if a CLEC receives a past due notice with the threat of suspension or termination, that CLEC's billing personnel will work as fast as possible to pay any past due amounts listed in the notice. Under BellSouth's proposal, however, the CLEC would also have to pay some "magic number" that BellSouth has calculated to avoid suspension and termination. Such risk allocation on Joint Petitioners is unreasonable and potentially harmful to Florida consumers.

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

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

A. The maximum amount of a deposit should not exceed two month's estimated billing for new CLECs or one and one-half month's actual billing for existing CLECs (based on average monthly billings for the most recent six (6) month period). The one and one-half month's actual billing deposit limit for existing CLECs is

reasonable given that balances can be predicted with reasonable accuracy and that significant portions of services are billed in advance.

Q. PLEASE EXPLAIN WHY IS PETITIONERS' LANGUAGE IS APPROPRIATE.

A. The Petitioners' language strikes a reasonable balance, whereby BellSouth's risk exposure is covered by a security deposit and existing CLECs such as Petitioners are not required to tie-up substantial capital in deposits. As stated in our initial testimony, Petitioners maintain that deposit terms should reflect that each Petitioner, directly and through its predecessors, has already had a long and substantial business relationship with BellSouth.

Q. BELLSOUTH CLAIMS THAT A MAXIMUM DEPOSIT BASED ON TWO MONTHS BILLING IS CONSISTENT WITH STANDARD PRACTICE IN THE TELECOMMUNICATIONS INDUSTRY. PLEASE RESPOND. [MORILLO AT 10:9-11]

A. Whether or not a two month maximum is standard BellSouth practice, we do not agree that it is appropriate or justified. In almost any other contracting scenario where one party is <u>not</u> attempting to leverage their monopoly legacy and overwhelming market dominance, it would not be standard practice for one side (BellSouth) to continually try to extract deposits from the other. Moreover, BellSouth has agreed to lesser maximums with at least one other CLEC (*See e.g,* ITC^DeltaCom Georgia Interconnection Agreement).

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

A. No. BellSouth's two month maximum deposit proposal is unreasonable, discriminatory and more than could possibly be justified.

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

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

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

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

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

A. BellSouth should have a right to terminate services to CLEC for failure to remit a deposit requested by BellSouth **only** in cases where: (a) CLEC agrees that such a deposit is required by the Agreement, or (b) the Commission has ordered payment of such deposit. A dispute over a requested deposit should be addressed via the Agreement's Dispute Resolution provisions and not through "self-help".

Q. PLEASE EXPLAIN WHY JOINT PETITIONERS' LANGUAGE IS APPROPRIATE.

A. Joint Petitioners' proposal allows BellSouth to terminate service to CLECs for failure to remit a deposit amount that has been agreed to or ordered. It does not, however, allow BellSouth to engage in self-help in those circumstances where the Parties do not agree on the amount of deposit required (if any). In those circumstances, BellSouth's proper line of recourse is to the Dispute Resolution provisions of the Agreement. In short, the Commission should decide and resolve the dispute – not BellSouth. This language is reasonable and more equitable than BellSouth's proposal, which would allow BellSouth to terminate service to CLEC under any circumstance in which CLEC has not remitted a deposit requested by BellSouth within thirty (30) calendar days. Joint Petitioners' proposal prohibits BellSouth from engaging in unacceptable self-help actions where BellSouth seeks to disregard the Dispute Resolution provisions of the Agreement (and likely the deposit criteria) and instead leverage its monopoly legacy by pulling the plug on a Joint Petitioner and all of its customers.

Q. MR. MORILLO ASSERTS THAT "THIRTY CALENDAR DAYS IS A REASONABLE TIME PERIOD WITHIN WHICH A CLEC SHOULD MEET ITS FISCAL RESPONSIBILITIES". PLEASE RESPOND. [MORILLO AT 12:6-7]

A. Mr. Morillo's statement does not address the issue. As stated in the Petitioners' proposal, if a Joint Petitioner has agreed to a BellSouth deposit request or the Commission has ordered posting of a specified deposit, then BellSouth may

terminate service if such deposit is not remitted by the CLEC within 30 days. However, should there be a dispute as to BellSouth's deposit request, then, under no circumstances, should BellSouth be able to "pull-the-plug" if a Joint Petitioner does not cede to BellSouth's demands (however unreasonable) within 30 days. Once again, BellSouth is trying to use its monopoly legacy to engage in self-help, without regard to the dispute resolution provisions included in this Agreement. "Pull the plug" provisions such as this one proposed by BellSouth are an inappropriate means of dispute resolution that unnecessarily threaten do disproportionate harm to Joint Petitioners and their Florida customers.

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

A. No. The Commission should reject this and every other Machiavellian self-help/pull-the-plug provision proposed by BellSouth.

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

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

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

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE IS APPROPRIATE?

A. The Petitioners' language is appropriate as it reasonably defers to the dispute resolution provisions of the Agreement. If BellSouth is aggrieved by a Joint Petitioner's response to a deposit request it should file a complaint with the Commission for dispute resolution. BellSouth's proposal, on the other hand, seeks to force the Petitioners to file a complaint – even though we have no right to seek a deposit, and would not be the aggrieved party if a dispute arose with respect to a deposit request. (The complaint filing burden would shift to us, if a dispute arose as to whether we were entitled to the return of various deposit amounts – our position is not one-sided.) Compounding that over-reaching, BellSouth then insists that a Petitioner post a bond while the dispute is pending, and to post a payment bond, which is essentially the same as paying BellSouth the deposit outright. Reasonable and fair dispute resolution provisions do not enable one side to pronounce itself the winner at the outset. Moreover, the dispute resolution provisions agreed to by the parties (notwithstanding their dispute over the availability of courts as a venue) simply do not contemplate bond posting requirements.

Q. HAS MR. MORILLO PROVIDED ANY JUSTIFICATION FOR BELLSOUTH'S POSITION?

A. No. Mr. Morillo restates BellSouth's position, and essentially complains that in the event of a dispute as to whether BellSouth is entitled to a deposit or a certain level of a deposit under the Agreement, BellSouth should not have to seek and prevail in dispute resolution prior to obtaining the relief it seeks. *See* Morillo at 13:4-21. This

is likely the case because there simply is no justification for the heavy-handed and one-sided provision proposed by BellSouth.

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

A. No.

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

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

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

(ATTACHMENT 11)

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

SUPPLEMENTAL ISSUES

(ATTACHMENT 2)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[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

Q. DOES BELLSOUTH PROVIDE ANY JUSTIFICATION FOR ITS POSITION, INCLUDING ITS PROPOSED MODIFICATIONS OF THE DEFINITIONS OF ENTERPRISE MARKET LOOPS AND DEDICATED TRANSPORT?

A. No. As with many issues, BellSouth merely restates its position on this issue and provides no justification or rationale in support of it.

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

A. No.

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

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

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENTS THAT THE RATES, TERMS AND CONDITIONS FOR MASS MARKET SWITCHING, ENTERPRISE MARKET LOOPS AND DEDICATED TRANSPORT SHOULD BE FROZEN SUBJECT TO THE CONDITIONS AND REQUIREMENTS SET FORTH IN FCC 04-179. [BLAKE AT 56:11-57:12]

A. BellSouth is attempting to use the caveat that the rates, terms and conditions of the Parties' June 15, 2004 agreements are subject to the conditions and requirements set forth in FCC 04-179 as a means to modify the definitions of enterprise market loops and dedicated transport that were **not** modified by FCC 04-170. Therefore, the Commission must clearly rule that the rates, terms and conditions for these elements must be incorporated into the Agreement as they existed in the Parties' June 15, 2004 agreements *in their entirety.* The Joint Petitioners do recognize the FCC's modification of the definition of mass market switching and agree that the switching provisions frozen are limited to mass market switching. However, any attempt that BellSouth makes to modify the rates, terms and conditions for enterprise market loops and especially dedicated transport as they existed in the Parties' June 15, 2004 agreements should be disregarded by the Commission.

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

A. No.

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

A. BellSouth is obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport. *USTA II* did not eliminate section 251, CLEC impairment, section 271 or the Commission's jurisdiction under federal or state law to require BellSouth to provide unbundled access to DS1, DS3 and dark fiber transport.

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENT THAT THE "JOINT PETITIONERS' ARE IMPROPERLY EXPANDING THE SCOPE OF THIS ISSUE TO INCLUDE CONSIDERATION OF AN INTERVENING, POTENTIALLY CONFLICTING STATE COMMISSION ORDER." [BLAKE TESTIMONY AT 59:19-22].

A. The Joint Petitioners are not "improperly expanding the scope of this issue". Contrary to BellSouth's contention, *USTA II* did not eliminate BellSouth's obligation to provide high capacity and dark fiber transport. *See* Blake at 60:10-11. Therefore, as there is obviously a dispute among the Parties as to the impact of *USTA II* on BellSouth's obligation to continue to provide access to high capacity and dark fiber transport, the Joint Petitioners properly have identified this issue for arbitration by the Commission. BellSouth goes on to complain that the Joint Petitioners are improperly requesting the Commission to issue a "potentially conflicting state commission order" that may involve invoking state law or interpreting federal law. *See* Blake at 59:19-22, n. 12. BellSouth is incorrect again. First, there is no federal law requiring BellSouth to refuse to provide high capacity transport UNEs. Moreover, there are no FCC high capacity transport unbundling rules presently to conflict with. And, as stated above in regards to Item 113/Issue S-6, neither the FCC nor the Commission has made a finding of non-impairment with respect to DS1, DS3 and dark fiber transport, therefore, the Joint Petitioners are not requesting the Commission to issue any "conflicting state commission order." Finally, BellSouth makes no case for why the Commission cannot interpret federal law or invoke state law as part of its arbitration process. Section 252 not only permits, but mandates a

State Commission to resolve issues raised by a party in arbitration and the Florida statutes allow the Commission to invoke state law as part of its plenary jurisdiction over telecommunications and to promote competition for Florida consumers. Accordingly, the Commission is well within its purview to consider and resolve this issue and it is BellSouth that is improperly attempting to limit the Commission's scope of jurisdiction in this arbitration in an effort to stave off any unfavorable decision.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT ITEM 114/ISSUE S-7 "EXCEEDS THE PARTIES' AGREEMENT REGARDING THE TYPE OF ISSUES THAT COULD BE RAISED AFTER THE 90-DAY ABATEMENT PERIOD"? [BLAKE TESTIMONY AT 59:22-60:1]

A. No. BellSouth's assertion is ridiculous considering that the reason for the abatement was to consider the post-*USTA II* regulatory framework and in light of the supplemental issues that have been raised in this arbitration at the request of BellSouth. The abatement agreement was to allow the Parties to consider and identify issues relating to the post-*USTA II* regulatory framework. How BellSouth can argue that an issue addressing how DS1, DS3 and dark fiber transport should be provisioned in the post-*USTA II* regulatory framework is beyond the scope of the abatement is beyond us.

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENT THAT "THE JOINT PETITIONERS' ARGUMENTS REGARDING ALTERNATIVE SOURCES OF UNBUNDLING OBLIGATIONS CANNOT BE SUPPORTED BY A CURSORY REVIEW OF THE AUTHORITY THEY CITE." [BLAKE AT 60:13-15].

A. We are not sure what BellSouth means by a "cursory review of the authority they cite". Perhaps it is time for BellSouth to do more than a cursory review, as there is ample authority under sections 251, 271 of the Act and relevant Florida state law for the Commission to require BellSouth to continue unbundling DS1, DS3 and dark fiber transport. As stated in the Joint Petitioners direct testimony, section 251 is a statute that imposes a "duty" on BellSouth to provide CLECs access to network elements, which include DS1, DS3 and dark fiber transport. Moreover, pursuant to section 271, BellSouth is under an independent obligation to provide access to local transport under Competitive Checklist Item No. 5, which requires BellSouth to provide local transport transmission from the trunk side of a wireline local exchange carries switch unbundled from switching and other services. Finally, with respect to state law, as discussed in Petitioners direct testimony and as discussed above with respect to Item 113/Issue S-6, the Commission has plenary authority over telecommunications services in the state of Florida and may require BellSouth to provision of DS1, DS3 and dark fiber transport UNEs.

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

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

Q. DOES BELLSOUTH PROVIDE ANY JUSTIFICATION FOR WHY IT IS NOT OBLIGATED TO PROVIDE DS1, DS3 AND DARK FIBER TRANSPORT UNES AT TELRIC-COMPLAINT RATES?

A. No. Although BellSouth repeatedly attempts to intimidate the Commission by claiming that the Commission is ***prohibited*** from making any determinations for high capacity loops and transport, *see* Blake at 49:11-13, 19-21; 59:9-11; 61:22-62:1, it has provided no justification why the Commission cannot apply federal law or state law (consistent with federal law) in this arbitration. It is the Petitioners' understanding that the Commission has already established TELRIC-complaint rates for high capacity and dark fiber transport. The Petitioners are not attempting to challenge these rates or attempt to turn this proceeding into a UNE cost proceeding.

Additionally, BellSouth asserts that *USTA II* vacated the FCC's rules relating to high-capacity transport, and that there is no longer an impairment finding. *See* Blake

at 60:10-11 and 60:23. As a result, BellSouth asserts that there is no current Section 251 unbundling obligation for high-capacity transport. However, *USTA II* did not vacate the FCC's presumption of nationwide impairment; *USTA II* only vacated transport because of an illegal delegation of the impairment analysis to the states. Joint Petitioners note that, even if the FCC's impairment finding was vacated, nothing on record precludes a state from requiring unbundling independent of Section 251. More specifically, § 364.161(1) of the Florida Code provides that local carriers such as BellSouth "unbundle all of its network features, functionalities and capabilities." Joint Petitioners believe that this Florida statute, in addition to § 364.01 of the Florida Code, gives the Commission the authority to require BellSouth to unbundle DS1, DS3, and dark fiber transport, regardless of whether an impairment finding has been made. Moreover, BellSouth's section 271 obligations also do not turn on an impairment finding. No such requirement appears in section 271.

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

A. No. As stated in the Joint Petitioners direct testimony, and despite BellSouth's assertions to the contrary, *USTA II* did not eliminate BellSouth's section 251 statutory obligation to provide unbundled access to DS1, DS3 and dark fiber transport. Additionally, BellSouth is obligated to provide such unbundled access pursuant to section 271 of the Act as well as Florida state law. High-capacity and dark fiber transport should be provided at TELRIC-complaint rates until such time as it is determined that another standard applies. It is the Petitioners' understanding

that TELRIC-complaint rates already exist for these UNEs and therefore, there is no reason why the Parties presently need to deviate from these rates.

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.