BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 040130-TP

In the Matter of

JOINT PETITION BY 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, FOR ARBITRATION OF CERTAIN ISSUES ARISING IN NEGOTIATION OF INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.

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PROCEEDINGS:	HEARING
BEFORE:	COMMISSIONER RUDOLPH "RUDY" BRADLEY COMMISSIONER CHARLES M. DAVIDSON COMMISSIONER LISA POLAK EDGAR
DATE:	Tuesday, April 26, 2005
TIME:	Commenced at 10:00 a.m.
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	LINDA BOLES, RPR Official FPSC Hearings Reporter (850) 576-9597

APPEARANCES:

JAMES MEZA, III, ESQUIRE, and ROBERT CULPEPPER, ESQUIRE, BellSouth Telecommunications, Inc., c/o Ms. Nancy H. Sims, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301-1556, appearing on behalf of BellSouth Telecommunications, Inc.

JOHN J. HEITMANN, ESQUIRE, and GARRETT HARGRAVE, ESQUIRE, Kelley Drye & Warren, LLP, 1200 19th Street, N.W., Suite 500, Washington, DC 20036, appearing on behalf of Joint Petitioners.

NORMAN H. HORTON, JR., ESQUIRE, and GARY EARLY, ESQUIRE, Messer, Caparello & Self, P.A 215 South Monroe Street, Suite 701, Tallahassee, Florida 32302, appearing on behalf of Joint Petitioners.

JEREMY SUSAC, ESQUIRE, and KIRA SCOTT, ESQUIRE, FPSC General Counsel's Office, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, appearing on behalf of the Commission Staff.

I N D E X

WITNESSES

EXHIBITS

NUMBER:		ID.	ADMTD.
	Comprehensive Exhibit List	6	6
	Staff Consolidated Exhibit	6	6
	(Confidential)Staff Consolidated Exhibit	6	6
4	Joint Petitioners' Consolidated Exhibit	6	6
5	(Confidential)Joint Petitioner's Consolidated Exhibit	6	6
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P R O C E E D I N G

COMMISSIONER BRADLEY: I'd like to call this hearing to order. Counsel, can I have you read the notice, please.

MR. SUSAC: Pursuant to FAW notice published March 30th, 2005, this time and place has been set for hearing in Docket Number 040130-TP.

COMMISSIONER BRADLEY: Thank you. Let's take appearances.

MR. MEZA: Jim Meza and Robert Culpepper on behalf of BellSouth.

MR. HORTON: Commissioners, I'm Norman H. Horton, Jr., of Messer, Caparello & Self on behalf of the Joint Petitioners. Also with me is Mr. John Heitmann and Mr. Garrett Hargrave of Kelly Drye & Warren in Washington on behalf of the Joint Petitioners as well. I'd like to also enter an appearance for Mr. Gary Early of, of our firm. He will be present Thursday for the hearing.

COMMISSIONER BRADLEY: Okay. Thank you.

MR. SUSAC: And Jeremy Susac and Kira Scott on behalf of commission staff.

COMMISSIONER BRADLEY: Thank you. Are there any preliminary matters?

MR. SUSAC: Yes, Commissioner. Staff would like to start off with the stipulated exhibits. The parties have been given a copy of the "Comprehensive Exhibit List-040130-TP." We

ask that this be marked as Exhibit 1 and moved into the record.

COMMISSIONER BRADLEY: Are there any objections?

MR. MEZA: No, sir.

MR. HORTON: No, sir.

COMMISSIONER BRADLEY: Let the record reflect that all exhibits listed in what is identified as Exhibit 1, the comprehensive exhibit list, be marked as reflected in Exhibit 1, and without objection Exhibit 1 is moved into the record.

(Exhibit 1 marked for identification and admitted into the record.)

Second, I see that --

MR. SUSAC: Yes. Staff proposes that -- staff has a consolidated exhibit as listed in the comprehensive exhibit list, and we ask that that be marked and entered into the record as Exhibit Number 2.

COMMISSIONER BRADLEY: Without objection, hearing Exhibit 2 through 6 are admitted into the record. I believe that takes care of the preliminary exhibits.

(Exhibits 2 through 6 marked for identification and admitted into the record.)

Counsel, are there any other preidentified exhibits that need to be addressed?

MR. SUSAC: Just for the record to reflect and without objection from the parties, if, as you stated, the exhibits as listed in Exhibit 1, if those could be identified

as they are listed in that exhibit, we're -- I think we can move on to our last preliminary matter, which is there is a request by the Joint Petitioners for an adoption of testimony and a change of witness. And we can start with the Joint Petitioners to put forth their request.

MR. HEITMANN: Good morning, Commissioners. On behalf of the Joint Petitioners again I'm John Heitmann. Due to a conflict that arose on Friday of last week, KMC's witness Marva Johnson is unable to be here today. KMC has provided Mr. James Mertz, who is prepared to adopt the testimony of Ms. Johnson. And Mr. Mertz is prepared to adopt the prefiled testimony of Ms. Johnson, as well as the deposition testimony conducted by the Florida Public Service Commission staff, as well as the deposition testimony conducted under the auspices of the North Carolina Utilities Commission that the parties have agreed to move into the record here. Mr. Mertz is also prepared to adopt Ms. Johnson's discovery responses here and elsewhere; North Carolina in particular.

In addition, Mr. Mertz is prepared to adopt the previous hearing testimony of Ms. Johnson on issues where Ms. Johnson was the lead witness and for which Mr. Mertz will be the lead witness here in Florida. As part of the Commission's procedural order, the Joint Petitioners were required to designate a lead witness for each issue. And as a result of the substitution of Mr. Mertz, Mr. Mertz will be the

lead witness on Issues 65, which Ms. Johnson was the lead witness on, as well as on 97, which Mr. Russell was the lead witness on. Ms. Johnson's other lead witness issues will go to Mr. Falvey, who's here as a witness on behalf of the Joint Petitioners, but Mr. Falvey is an employee of Xspedius. We have consulted with BellSouth and we believe there's no objection at this point to this arrangement.

COMMISSIONER BRADLEY: BellSouth.

MR. MEZA: Yes, Mr. Chairman. BellSouth does not have any objection to what Mr. Heitmann stated. And I would like to note that I would like to thank the Joint Petitioners as well as staff counsel for facilitating the resolution of this issue this morning.

COMMISSIONER BRADLEY: Thank you. Are there other preliminary matters?

MR. SUSAC: If the witnesses for the parties are here today, we can swear them in at this time or we can swear them in individually as they take the stand.

COMMISSIONER BRADLEY: Okay. Are the witnesses here?

MR. HORTON: Commissioner, before you, before you do that, just to make it clear, the order of the witnesses for the Joint Petitioners reflected in the prehearing order, Mr. Russell, Mr. Russell would actually be first, Mr. Mertz would be second, Mr. Willis would be third and Mr. Falvey would be fourth.

MR. SUSAC: That is correct, Commissioner.

COMMISSIONER BRADLEY: Okay. Are the witnesses here, all of them?

MR. HORTON: Yes, sir.

COMMISSIONER BRADLEY: Raise your right hand.

(Witnesses collectively sworn.)

COMMISSIONER BRADLEY: You may be seated. Okay. Opening statements?

MR. SUSAC: Commissioner, with respect to -- there's a general matter on the table. There is one outstanding confidentiality request. However, the parties are reminded that should information subject to a claim be entered into the record, the owner of the information must file a request for confidentiality within 20 days of the conclusion of the hearing in order to maintain confidentiality. And the materials subject to the ongoing requests should be treated as confidential until a ruling is made.

With that, I think we can go to the presentation of the Joint Petitioners; each have been afforded ten minutes.

COMMISSIONER BRADLEY: Okay. Thank you, Mr. Susac. Opening statements.

MR. HORTON: Yes, sir, Commissioner. Before I start that, these, these microphones are not turning off over here when we push them. If --

COMMISSIONER BRADLEY: They're not turning off? Is

that -- okay.

MR. HORTON: Okay. Thank you, Commissioners. This week's hearing is the sixth in a regional effort joined by three CLECs encompassing operations in the nine-state BellSouth region. These three facilities-based carriers, CLECs, KMC, NuVox and Xspedius, have pooled their resources throughout the negotiation process and its arbitration and this has produced results which have resulted in efficiencies for all involved. Now you might think after six hearings that, that everything would be taken care of and answered and resolved. And to date, in fact, the parties have engaged in some extensive negotiations which we'll certainly continue. These joint negotiations have resulted in a number of improvements to the template agreement BellSouth originally proposed to the Joint Petitioners. Notably, many of these changes included some that merely seek to preserve rights afforded the Joint Petitioners by the FCC and Commission rules and orders, and they would not have been obtained had the Joint Petitioners not sought arbitration.

There are, there are changes that are still necessary, there are still issues that we are seeking to arbitrate. But at this point 21 of the original 107 issues remain to be resolved. Of the unresolved issues you will hear about this week, some of these issues result from BellSouth's attempts to restrict our right to access and to lawfully use

unbundled network elements, UNEs.

Joint Petitioners cannot afford to give up these rights as the UNEs are essential to our business plans and ability to provide innovative and competitive services to Florida during the life of this agreement, which will probably extend into 2009.

As an example, in Issue 26 BellSouth wants to impose a restriction on the use of Section 271 UNEs that would make them useless. This is but one of several issues in which BellSouth attempts to carve out an exemption of FCC rules that simply does not exist.

Issue 36 is another example. In this issue BellSouth refuses to incorporate the FCC's line conditioning definition into the agreement. Instead, BellSouth would rewrite, insist on rewriting the FCC's definition of line conditioning so that BellSouth may effectively limit its TELRIC-rated line conditioning obligations and effectively deny the Joint Petitioners the ability to use new and evolving technologies to bring better values to the citizens and consumers in Florida.

Other examples of BellSouth's attempts to claim nonexistent exceptions to the FCC's bundling rules involve BellSouth's TELRIC pricing obligations. Two of these issues, 37 and 38, involve BellSouth's attempts to impose federal access tariff rates instead of Florida PSC-approved TELRIC rates for certain types of line conditioning. Once again, the

exceptions claimed by BellSouth are contrary to the FCC rules.

In Issue 51, BellSouth attempts to nullify the for cause auditing standard adopted by the FCC in the TRO and already agreed to by the parties in the agreement. By refusing to demonstrate cause for EEL circuits it seeks to audit, and that's E-E-L-S, instead BellSouth insists that Joint Petitioners trust that BellSouth has cause to audit all circuits annually.

In Issue 88, BellSouth attempts to impose federal access tariff and pricing on loop provisioning and OSS functionalities. Hereto BellSouth claims nonexistent exemptions to the FCC rules that require access to UNEs, including OSS functions at TELRIC rates.

In Issue 65, BellSouth attempts to impose an additive transit intermediary charge, something you'll hear called the TIC, over and above the Florida PSC-approved and already agreed upon TELRIC prices for the functionalities provided by BellSouth in delivering transit traffic.

If there are additional functionalities that BellSouth performs at Joint Petitioners' request, and to date we've not heard of any, BellSouth should file a cost study and seek Florida PSC approval of a new rate that would apply in addition to the TELRIC rates that the parties already have agreed will apply to BellSouth's transit service.

Additional issues involve BellSouth attempts to curb

Joint Petitioners' rights in a context not limited to the federal unbundling and TELRIC pricing mandates. Hereto Joint Petitioners reject BellSouth's efforts to curtail, to curtail their rights as they can ill afford to accept the competitive disadvantage that would result. One of these issues is Issue 9, wherein BellSouth asks this Commission to curtail Joint Petitioners' right to seek dispute resolution before a court of competent jurisdiction.

In Issue 12, BellSouth seeks an exemption to the Georgia contract law already agreed to by the parties, and the parties have agreed in all these proceedings to use the Georgia contract law. That was something that was insisted upon.

Joint Petitioners have the right to insist that any exceptions be expressly negotiated and set forth in the agreement. Joint Petitioners are unwilling to see (phonetic) these rights to BellSouth.

Another theme that carries across multiple issues is the Joint Petitioners' refusal to accept the substantial risks associated with a series of pull-the-plug provisions proposed by BellSouth. These provisions are threatening and dangerous. BellSouth's use of them could be coercive and destructive to not only the Joint Petitioners' businesses, but also to the Florida customers that depend on the Joint Petitioners' services. Among these issues are Issues 86, 100 and 103. In these issues, BellSouth seeks the ability to end run the

agreement's dispute resolution provisions and to instead take on the role of prosecutor, judge and jury. Moreover, the remedies BellSouth threatens to and seeks to impose could result in disproportionate, unjustified, catastrophic and irreversible harm to Joint Petitioners and their customers as they, too, would unknowingly suffer the consequences of BellSouth's cutting off access to ordering and provisioning systems or its outright termination of services provided under the contract -- under the agreement. Excuse me.

Other issues arise from the Joint Petitioners' desire to have an agreement that replaces lopsided provisions with ones that are fair and commercially reasonable. The Joint Petitioners are mature CLECs and they expect that their agreements will resolve as their business and the industry evolves.

Lopsided BellSouth limitation of liability and indemnification provisions are at stake in Issues 4, 5 and 7 where the Joint Petitioners reject BellSouth's attempts to perpetuate BellSouth template limitation of liability and indemnification provisions that shift risk associated with BellSouth negligence, nonperformance and breach to the Joint Petitioners.

In Issues 5 and 6, Joint Petitioners seek BellSouth's proposals as being anti-consumer and anti-CLEC customer in particular, so those have been rejected as well.

BellSouth's false claims that interconnection agreements are not commercial agreements provides neither an excuse nor a justification for its lopsided risk shifting proposals on these issues.

Another theme is one of practicality. Joint Petitioners seek balanced and fair provisions designed to effectuate smooth operations and to avoid disputes. Issues resulting from this initiative include the EEL audit provisions in Issue 51 and payment due date in Issue 97. Joint Petitioners' EEL audit proposals are designed to eliminate or encourage private resolution of disputes that otherwise may consume too many of this Commission's resources.

The payment due date issue already has been decided by several commissions across the region in the BellSouth/ITC^DeltaCom arbitrations, and each has found that the payment due date should be measured from the date it becomes electronically available or is received by the CLECs. These decisions guard against delayed billing and give Joint Petitioners a more reasonable amount of time to review and then pay or dispute the voluminous and complex bills they receive from BellSouth. Several deposit issues carry this theme as well.

We have witnesses here that can explain our positions and give you some real examples why our positions are correct. The issues we are asking you to arbitrate are important to us.

We wouldn't be here if they weren't.

In the five jurisdictions where this has been heard, and those would be North Carolina, Tennessee, Georgia, Louisiana and Alabama, BellSouth has said that they don't know why they must arbitrate many of these issues, as they are, in BellSouth's words, not business impacting issues. If that were true, then BellSouth should have no problem agreeing to the Joint Petitioners' proposed contract language. However, BellSouth's claim is just wrong, and witnesses on both sides repeatedly have recognized that the issues are indeed business impacting issues.

For example, if Joint Petitioners cannot get line conditioning at TELRIC rates, they may not be able to take advantage of new technologies as their businesses evolve over the next three to five years. This will inhibit our ability to compete and bring better service to Florida consumers.

I spoke of pull-the-plug issues earlier. If BellSouth is able to pull the plug and make Joint Petitioners go dark, the networks go dark, I can assure you it will affect not only the CLECs and their businesses, but it's going to affect those of many Florida consumers as well.

BellSouth will also tell you that certain, that certain provisions such as these pull-the-plug provisions and the lopsided limitation of liability and indemnification provisions have not been a problem in the past. Well, that may

be their opinion, but it certainly does not represent the view of the Joint Petitioners, who have been threatened coercively and have had to consider the very real potential that BellSouth could indeed pull the plug or saddle us with enormous costs attributable to BellSouth negligence and not ours.

BellSouth likely will tell you that Joint Petitioners do not have a single position. The Florida PSC required that the Joint Petitioners have a single position on the issues presented in the arbitration and they do. To the extent any discrepancies arise at any point during this proceeding, the Joint Petitioners will stipulate as to a single interpretation of any language or position statement proposed.

Let me close by saying again that there are issues in this docket -- all of these issues in this proceeding are important to us. These three CLECs have a significant presence in the state of Florida. Between the three of them they have 19 switches, which is a fair number of switches. They're located at various locations throughout the state. We have several hundred employees, a significant capital investment in the network and in plant, and thousands of customers. It may not seem like much when you compare it with BellSouth, but it is a significant number. And Florida is very, very important to us. This is a substantial impact to us. We are very interested in Florida. We have a significant presence here, and we look forward to presenting to you our positions and our

case during the, during this week. Thank you.

COMMISSIONER BRADLEY: Thank you. BellSouth.

MR. MEZA: Thank you, Mr. Chairman. My name is Jim Meza and, along with Robert Culpepper, we're honored to be here the next couple of days presenting our positions. And there are a couple of concepts I'd like for you to consider when you're hearing the various testimony and positions of the parties because they're quite diverse.

One is what the Joint Petitioners are really asking you to do is to grant them rights and obligations that exceed parity. They want something more than what BellSouth provides its own customers here in Florida. They want greater rights than even what they offer their customers. Their desire for special treatment is not the standard under the Act. In fact, what they want actually exceeds the act. It exceeds BellSouth's obligations under federal law. They also want rights and obligations that exceed industry standards, and they want rights and obligations that they're not even willing to provide their own customers. And I think that's quite telling, because what's good enough for their customers apparently isn't good enough for them. So I would ask that you keep in mind that concept when you hear testimony about the various issues and reject that hypocritical standard.

The second concept I'd like for you to consider is why are we arbitrating these issues? The language that they're

asking you to adopt is not necessary for their stated goal, it doesn't appear in any other interconnection agreement, deviates from industry standards, deviates from their own tariffs and at least for one issue they'll concede that it's of no force and effect as a matter of law, yet we're arbitrating it.

Finally, they're also based upon hypothetical concerns and what-ifs. And when you take all that together, it leads you to the conclusion that these issues or some of these issues are truly not business impacting for their current operations. Now that phrase, as you heard by Mr. Horton's opening, really bothers them, "currently business impacting," they don't like that, but sometimes the truth hurts. And I think you'll come to the same conclusion after you hear the evidence in this case.

Let me give you some examples of what I'm talking about. Issue 4 deals with limitation of liability language. What they're asking you to approve deviates from the standard in the industry, deviates from their own tariffs and is totally one-sided in favor of the Joint Petitioners. And, in fact, with one of the Joint Petitioners, NuVox, you'll hear testimony as soon as I finish this opening that under their proposal after three years BellSouth's liability to NuVox will be approximately $8.1 million. NuVox's liability to BellSouth, $2,700. That's pretty lopsided, but that's what they're asking you to adopt.

Now you'll also hear in relation to this issue, their canned mantra is that, yeah, our tariffs say this, our tariffs limit our liability to bill credits, which is exactly BellSouth's position in this case, but in our end user contracts we often deviate from that standard language. Well, when you hear that, remember that Florida consumers are buying services out of their tariffs and their tariffs aren't changing. And, in fact, NuVox filed a new tariff in March of this year and they limit their liability to bill credits.

The other issue, the other point that I'd like for you to consider is that unlike BellSouth, these companies can take into account whether or not to accept the risk associated with deviating from standard industry language regarding limitation of liability in determining whether to enter into a contract with a customer. BellSouth doesn't have that freedom. As a matter of federal law, BellSouth has to enter into this contract with these companies. We can't take into account the risks associated with increased limitation of liability like they can. And, in addition, whatever you order is adoptable by every other CLEC in this state. And surely that's not a risk that they face when and if they do deviate from their standard limitation of liability language in their end user contracts.

Another issue is Issue 5 dealing with what happens when one company for whatever reason decides not to limit their liability in their end user contracts or tariffs to the maximum

extent allowed by law? Well, as I've just said with Issue 4, they all have limitation of liability language in their tariffs. That language is identical to BellSouth's for the most part. They have no intentions of changing that. And, in fact, for one Joint Petitioner, KMC, they actually have language that exceeds BellSouth's language as it attempts to limit their liability for gross negligence and willful misconduct.

Issue 6 deals with what happens when there is language in a contract that a Joint Petitioner believes impacts their end user rights? Essentially what they're trying to do with Issue 6 is to preserve, protect, insulate whatever damage claims their end use may have against BellSouth. Well, two of them are lawyers, and I don't know about Mr. Mertz because we haven't figured out his background yet, but two of them are lawyers, of the witnesses. And they'll both say, and they both have said that as a matter of law we cannot impact the rights of third parties vis-a-vis this contract. They concede that as a matter of law the language that they're trying to ask you to adopt as a practical matter is of no force and effect, yet we're still arbitrating it.

Issues 36 through 38 deal with line conditioning. And really the crux of the dispute here is, is what rates do they have to pay when they order certain types of line conditioning? Now when you hear all the technology terms and,

and the different arguments of the parties, keep in mind that in 2004 not one of these companies asked BellSouth to perform a single instance of line conditioning in the entire region. So this claim about line conditioning will prevent us from deploying advanced services, that's not based on fact because they haven't ordered any line conditioning.

The other part I want you to remember when you hear the line conditioning arguments is that they rejected the same terms and conditions that the CLEC industry and the shared loop collaborative have agreed to with BellSouth. **Now do you think** CLECs would agree to something that they believe they're entitled to that actually limits their rights? **No.** Yet the Joint Petitioners have rejected it.

The list goes on and on, and it'll be quite apparent when you go through the cross-examination and you listen to the various arguments of the parties.

And in North Carolina they disclosed their philosophy throughout this entire negotiation process which is coming on two-and-a-half years: We won't give up something for nothing. That's what they said. They haven't repeated that statement in any other state, but I think their candor in North Carolina is telling because I think this philosophy permeates most of these issues. **It may be the reason why we're litigating issues that** they concede are of no force and effect as a matter of law that turn industry standards on their head and are based upon

hypothetical concerns. Thank you for your attention. I look forward to appearing before you. Thank you.

COMMISSIONER BRADLEY: Thank you.

MR. SUSAC: With that, I think we can move to the Joint Petitioners calling their first witness.

COMMISSIONER BRADLEY: You may call your first witness.

MR. HORTON: We would call Mr. Russell.

HAMILTON E. RUSSELL, III

was called as a witness on behalf of Joint Petitioners and, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HORTON:

Q Mr. Russell, are you ready?

A Yes.

Q You were, you were present and sworn, were you not?

A That's correct.

Q All right. **Could you state your name and address for** the record, please, sir.

A My full name is Hamilton E. Russell, III. I'm with NuVox Communications. The business address is 2 North Main Street, Greenville, South Carolina 29601.

Q Mr. Russell, in this proceeding have you prepared and prefiled direct and rebuttal testimony?

A Yes.

MR. HORTON: Commissioner Bradley, prior to the hearing we, we distributed a document entitled "Joint Petitioners' Florida Prefiled Testimony Errata Sheet." In lieu of asking each witness to go through any changes to their testimony, I would, I would ask that perhaps this document could be marked as an exhibit and, and entered into the record.

COMMISSIONER BRADLEY: Okay. That would be Exhibit 13.

MR. HORTON: Thank you, sir.

MR. SUSAC: Chairman, could I just bring to the parties' attention as well as the panel's that that's already marked as an exhibit within the Joint Petitioners composite exhibit and there's no need for a duplicate marking.

COMMISSIONER BRADLEY: Okay.

MR. HORTON: Well, I apologize, Commissioners. I didn't, I didn't see that. If it's already there, that's fine. I apologize to you.

BY MR. HORTON:

Q Other than those, those changes reflected in the errata sheet, you don't have any additional changes or corrections to make to your direct or rebuttal, do you, Mr. Russell?

A Other than those in the errata sheet, no.

Q And if I were to ask you the same questions today as contained in your direct and rebuttal, would your answers be

the same?

A Yes.

MR. HORTON: Commissioner, may we ask that Mr. Russell's direct and rebuttal testimony be inserted into the record as though read?

COMMISSIONER BRADLEY: Without objection, the prefiled testimony of Witness Russell is inserted into the record as read.

BY MR. HORTON:

Q Mr. Russell, was there an exhibit attached to your testimony?

A I believe so. I don't have a copy of my full testimony here, but I believe that it was.

COMMISSIONER BRADLEY: Okay. Well, I see that Exhibit HER-1 has been identified as hearing Exhibit Number 8. Is that correct?

MR. HORTON: Yes, that is correct.

BY MR. HORTON:

Q Mr. Russell, is there a, is there an update of that Exhibit A, the disputed contract language?

A I believe we have a new Exhibit A that was prepared and revised for this Florida hearing.

COMMISSIONER BRADLEY: Well, let me ask this question. Does Mr. Russell have a summary of, of his testimony?

THE WITNESS: Yes, I do.

COMMISSIONER BRADLEY: Okay. Well, you may proceed.

MR. HORTON: Commissioner, would you like for us to go ahead and identify the exhibit, and then he was going to give his summary after the exhibit.

COMMISSIONER BRADLEY: Okay. Well, I've identified it as HER-1. Is that, is that not correct?

MR. HORTON: Commissioner, there is an additional, there is an updated Exhibit A which reflects the current contract language. And we have -- I apologize to you. They were not circulated prior to the hearing. But if we could get that as part of Exhibit A as well as a consolidated exhibit, that would, that would get both of those documents in there.

COMMISSIONER BRADLEY: Does that require an additional --

MR. SUSAC: Commissioner, to facilitate matters, why don't we pass out the exhibit and move it into the record as a revised exhibit to Mr. Russell's testimony.

COMMISSIONER BRADLEY: So that would be identified as --

MR. HORTON: Both, both exhibits would be reflected.

MR. SUSAC: Excuse me. Both.

(Exhibits 8 and 13 marked for identification.)

PRELIMINARY STATEMENTS

WITNESS INTRODUCTION AND BACKGROUND

NuVox/NewSouth: Hamilton ("Bo") Russell

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

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

Q. PLEASE DESCRIBE YOUR POSITION AT NUVOX.

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

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

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

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

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

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

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

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

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

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

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

GENERAL TERMS AND CONDITIONS[2]

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

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

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

RESALE (ATTACHMENT 1)

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

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

NETWORK ELEMENTS (ATTACHMENT 2)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

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

INTERCONNECTION (ATTACHMENT 3)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COLLOCATION (ATTACHMENT 4)

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

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

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

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

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

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

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

(B) If so, what rates should apply?

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

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

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

BILLING (ATTACHMENT 7)

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

(ATTACHMENT 11)

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

SUPPLEMENTAL ISSUES

(ATTACHMENT 2)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

Dedicated Transport

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

KMC/NewSouth/ NuVox/Xspedius:

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

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

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

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

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

Enterprise Market Loops

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

KMC/NuVox/Xspedius:

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

NewSouth:

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

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

Switching

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

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

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

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

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

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

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

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

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

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

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

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

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

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

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]

[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.***

(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 10.12.4]: ***This issue has been resolved.***

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

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

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

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

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 not 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.

BY MR. HORTON:

Q Thank you. As he's doing that, Commissioner, I would ask Mr. Russell if he has a summary and ask him to present that summary.

A I do have a summary. Good morning, Commissioners, I have a number of issues to testify on today. The first of those issues is Issue 4. It is about establishing a reasonable limitation of liability provision for this agreement. This, as with the other issues that I'll testify about, is an important issue and has important business implications for NuVox Communications and the other Joint Petitioners. With Issue 4 we are seeking to replace BellSouth's standard elimination of liability provision with one that is commercially reasonable. This provision will apply to both parties under the agreement in this carrier-to-carrier agreement.

Our proposal is that liability for negligence should be limited to an amount equal to 7.5 percent of the amounts paid or payable for services provided under the agreement as of the day a specific claim arose. By amounts paid or payable, Joint Petitioners stipulate that this means amounts billed the day any claim arose. By the day the claim arose, Joint Petitioners stipulate that this means the day of the incident that gives rise to a claim.

BellSouth's negligence and other nonperformance should be part of BellSouth's cost of doing business, not the

CLECs' cost of doing business. Why should a CLEC accept risks associated with BellSouth's negligence or nonperformance? We are not BellSouth's insurance company. We should not be forced to accept financial risk in the event of BellSouth's own negligence.

Issue Number 5 is about whether BellSouth can dictate the terms of our tariffs or customer service agreements or demand indemnification if the terms of CLEC tariffs or customer agreements do not mirror those demanded by BellSouth. In a competitive marketplace, CLECs cannot ensure that it will be commercially reasonable to insist on limitation of liability provisions that mirror those BellSouth includes in its own tariffs and template agreements, and we have no obligation to ensure BellSouth that we will do so.

We will not indemnify BellSouth in any suit based on BellSouth's own negligence, gross negligence or willful misconduct or its failure to abide by applicable law. BellSouth must not be permitted to force on Joint Petitioners risks associated with BellSouth's own gross negligence, negligence or willful misconduct.

Issue 6 is about whether damages to end users that result directly and in a reasonably foreseeable manner from BellSouth's or a CLEC's performance of obligations under this agreement should be considered to be indirect, incidental or consequential. BellSouth should be responsible for reasonably

foreseeable damages directly and proximately caused by BellSouth, including those to Florida businesses and consumers. These types of damages are not incidental, indirect or consequential because this interconnection agreement is specifically designed for CLECs to use BellSouth's services to deliver telecommunications services to Florida businesses and consumers.

Issue 7 is about whether the heavy-handed one-sided indemnification provisions proposed by BellSouth should be replaced with commercially reasonable provisions. **We propose** that the party receiving services under the agreement should be indemnified by the party providing and being paid for the use of services against any loss or damage reasonably arising out of the providing parties' failure to abide by applicable law, that party's negligence, gross negligence or willful misconduct.

Joint Petitioners stipulate that their proposed 7.5 percent cap on liability for negligence, which is also our proposal for Issue 4, applies with respect to indemnification for negligence as well. Again, we refuse to indemnify BellSouth against all claims that could arise as a result of BellSouth's negligence, gross negligence or willful misconduct in providing services under this agreement. There is no obligation in the Telecommunications Act or elsewhere that suggests that we must take on this burden. Accordingly, we ask

the Commission to strike down BellSouth's attempt to shift costs for its own negligence to Joint Petitioners.

Issue 12 is the applicable law issue and it is about our rejection of BellSouth's efforts to upend fundamental principles of contracting which apply to interconnection agreements and all other contracts.

Where the parties intend for standards to replace those found in generally applicable law, they must say so expressly or agree to terms that conflict with or displace specific requirements of applicable law. Such an intent cannot be implied and silence with respect to a particular requirement of applicable law cannot be read to conflict with or replace that requirement. It is far more efficient to set forth negotiated exceptions to rules than it is to set forth all rules for which no exceptions were negotiated.

This is black letter law that is consistent with Georgia contract law, which the parties have already agreed will govern the contract throughout BellSouth's nine-state service territory.

Issue 51 deals with EEL audits, the for cause standard adopted by the FCC and agreed to by the parties must have meaning. Joint Petitioners have every right to insist that it's met before BellSouth proceeds with an intrusive and resource consuming audit of our business records. To invoke its limited right to audit CLEC records, BellSouth should send

a notice of audit to the CLEC that identifies particular circuits for which BellSouth alleges cause to believe noncompliance exists and include all supporting documentation. By requiring BellSouth to establish the scope and basis for its audit up-front, we have tried to create a better proposal for eliminating, narrowing and more quickly resolving potential disputes over whether BellSouth has a right to proceed with an audit in the first place.

To avoid disputes, the agreement also should require mutual agreement as to the independent auditor selected to conduct an audit. This mutual consent provision was proposed by and applies to PIU audits in the existing agreements, as well as the agreement we are arbitrating today. We are unaware of any litigation over the selection of an auditor that has resulted in the percentage interstate usage context.

Issue 100 is one of several provisions in which BellSouth threatens to pull the plug on CLECs and their customers here in Florida. In this instance, BellSouth seeks to contractualize a guessing game in which it can terminate services if CLECs do not properly calculate time payment and predict BellSouth's posting of payment amounts due in addition to those set forth in a late payment termination notice. 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 and also guess properly the timing of

BellSouth's processing of disputes and payments in order to avoid suspension or termination.

Issue 101 is about the maximum deposit amount which BellSouth may seek to obtain from a CLEC. The maximum amount of deposit BellSouth may request should not exceed one month for services billed in advance and two months for services billed in arrears. BellSouth recently agreed to this set of maximum amounts with ITC^DeltaCom, and the Joint Petitioner is willing to accept that result here. We also believe that our proposal is consistent with Florida regulations on the deposit subject.

Issue 103 is about circumstances under which BellSouth could terminate service for failure by a CLEC to post a deposit. Keep in mind that this is not related to failure by a CLEC to pay for services used by the CLEC. This drastic remedy is only appropriate in two contexts: When a deposit has been requested and agreed to by the CLEC and then simply not posted or when a particular deposit has been ordered by a Commission and then not posted. Otherwise, disputes over requested deposits and deposit refunds should be handled pursuant to the dispute resolution provisions set forth in the general terms and conditions of this agreement and already agreed to by the parties. A dispute over a requested deposit should not be resolved by BellSouth unilaterally pulling the plug on CLEC services and, in doing so, the services of CLEC

customers here in Florida.

The last issue that I have is Issue 104. It is about whether the agreements dispute resolution process should be modified so that in the case of deposits a Joint Petitioner must file a complaint and post half of the deposit demanded by BellSouth to avoid unilateral termination by BellSouth. The Commission must reject BellSouth's proposal to displace this standard dispute resolution process with one that is coercive and one-sided. If the parties are unable to agree on the need or, I'm sorry, the need for or amount of a reasonable deposit or a deposit refund, the agreement's standard dispute resolution provision should be invoked. This process has prevailed for years and has resulted in successful negotiation and resolution of many deposit disputes between Joint Petitioners and BellSouth. **BellSouth's unilateral attempts to** tip the scales in its favor by once again threatening the ultimate remedy of termination and forcing Joint Petitioners to seek dispute resolution and to post a deposit bond in order to avoid termination must be rejected. That concludes my summary.

MR. HORTON: Mr. Russell is available.

COMMISSIONER BRADLEY: BellSouth, cross.

MR. MEZA: Thank you, sir.

CROSS EXAMINATION

BY MR. MEZA:

Q Good morning, Mr. Russell.

A Good morning.

Q Good to see you again.

A Good to see you. Hope you had a good weekend.

Q Yes, sir. I'm seeing you more than I see my wife. That's not a good thing.

A Lucky her.

(Laughter.)

I couldn't help it. We're getting to be close over this time, Mr. Meza.

Q Yes, that's true.

Mr. Russell, I'd like to talk to you about Issue 4. Isn't it true, sir, that in Issue 4 BellSouth is asking that the parties' liability to each other for claims of negligence should be capped at bill credits?

A Yes.

Q And isn't it also true, sir, that the Joint Petitioners' position is that liability for claims of negligence should be set at 7.5 percent of amounts paid or payable on the day the claim arose?

A That's correct.

Q And you would agree with me that BellSouth bills NuVox between $3 million and $3.5 million a month?

A Yes.

Q And NuVox bills BellSouth substantially less than that?

A That's correct in the case of NuVox. However, because I'm speaking on behalf of all of the Joint Petitioners, it's important to note that KMC has in the past billed NuVox -- billed BellSouth hundreds of thousands of dollars per month historically, and also Xspedius has billed BellSouth hundreds of thousands of dollars a month historically. So because it would impact, this, this provision would impact all of the Joint Petitioners, you need to take into account the amounts that the other Joint Petitioners have billed BellSouth on an historic basis.

Q Okay. Now isn't it true, sir, that KMC is in the midst of selling its local service operations to two other entities?

A I believe that KMC has, has agreements in place that talk of an acquisition or merger. I don't believe that those transactions have been closed at this time. And I also believe that there -- a KMC subsidiary or affiliate will -- at the conclusion of the and closing of the transaction there will still be a KMC entity that will continue to use this interconnection agreement.

Q Is it your understanding, sir, that through this sale, the proposed sale, KMC will no longer offer local service to retail end users?

A I don't know if that's a fact or not.

Q Isn't it also true, sir, that with this sale,

90 percent of BellSouth's billings to KMC will be gone?

A I don't, I don't know that, so I don't know that to be true.

Q Now would you agree with me that from July 2004 to November 2004 NuVox billed BellSouth about $1,000 a month?

A I believe, I believe that's the case, and that's based on the bill-and-keep arrangement that the parties have in the current interconnection agreement.

Q And we've done this dance before, but would you agree with me that after three years, using your proposal for this language and a billed amount from BellSouth of $3 million a month, that BellSouth's liability to NuVox after three years would be about $8.1 million?

A That's correct. That, that, without having a calculator in front of me, would be 7.5 percent of the amounts billed or billable during the course of the agreement. So during that time frame, if 8.1 is 7.5 percent doing rough math, NuVox would pay to BellSouth for services provided by BellSouth around $90 million. So that is a proportion of, a 7.5 percent proportion of the amounts that NuVox would pay to BellSouth.

Our concern is that during the course of the contract, if BellSouth commits acts of negligence or fails to abide by applicable law, that NuVox could be exposed to liability well in excess of that $8.1 million amount.

Q Now, Mr. Russell, during that same three-year time

period and based upon the current billings of NuVox to BellSouth, wouldn't you agree with me, sir, that NuVox's liability to BellSouth would be approximately $2,700?

A If NuVox billed BellSouth around $25,000 over the course of the agreement, that, that's correct.

Q All right. So for the same time period of three years, if this Commission adopts your proposal, BellSouth's liability to NuVox is capped at $8.1 million and NuVox's liability to BellSouth is capped at $2,700; is that right?

A If those figures remain true, that is correct. However, keep in mind that those are proportional amounts. In other words, NuVox would have paid to BellSouth $90 million. BellSouth would have paid to NuVox about $25,000, $30,000. So that is correct. But the 7.5 percent applies equally to, to both parties to the agreement.

Q Now would you agree with me, sir, that the language that BellSouth is proposing and the concept of capping liability to bill credits is similar to what appears in BellSouth's tariffs in Florida?

A I'm not familiar with what's in BellSouth's tariffs. I would expect that they're similar to tariffs we have looked at in other states that would, pursuant to the tariff, cap liability or make liability credit -- bill credit amounts. But I don't know that without looking at it.

Q Not a problem, sir.

MR. MEZA: Mr. Chairman, I would like permission to approach the witness to hand him an exhibit that I would like to be marked as the next exhibit, and it is BellSouth's GSST tariff in Florida.

Mr. Chairman, if you would please instruct me as to which exhibit number this would be.

COMMISSIONER BRADLEY: That would be Exhibit Number 14.

MR. MEZA: 14?

COMMISSIONER BRADLEY: I'm going to give this the number of 14. And how would we title it?

MR. MEZA: BellSouth's GSST tariff.

COMMISSIONER BRADLEY: GS.

MR. MEZA: ST.

COMMISSIONER BRADLEY: GSST tariff?

MR. MEZA: Yes, sir.

COMMISSIONER BRADLEY: Thank you.

(Exhibit 14 marked for identification.)

BY MR. MEZA:

Q Mr. Russell, if I could turn your attention to Page 29 of Exhibit 14. Actually Page 27.

A You've got it front and back. Things getting tight over there at BellSouth?

(Laughter.)

You tricked me. Okay. Page 29.

Q It's actually Page 27.

A Okay. Sorry.

Q Section A2.5.1. And it bleeds over to Page 27, starts on Page 26.

Now wouldn't you agree with me, sir, that this provision of BellSouth's tariff limits BellSouth's liability for claims of negligence to its end users to bill credits?

A It appears to do that with certain exceptions.

Q Okay. And do you see any reference to 7.5 percent of the amount paid or payable on the day the claim arose?

A I don't. But I don't have any insight as to the exceptions that, for liability limitations that may apply to other parties that purchase services out of this agreement.

Q Now isn't it true, sir, that in NuVox's own tariff here in Florida NuVox limits its liability to its end users to bill credits?

A I believe that in our tariff it does include similar language. I'd like to see that, given it was -- we recently filed a new tariff. But 99 percent of our customers purchase services not out of our tariff but out of customer service arrangements. So there have been instances when we have had different limitation of liability provisions with certain of those customers.

MR. MEZA: Mr. Chairman, I would like permission to approach the witness to hand him an exhibit, which is NuVox's

March 4th, 2005, tariff, and have that marked, please.

COMMISSIONER BRADLEY: Okay. We'll mark that as Exhibit 15. And what is the title of it again?

MR. MEZA: NuVox tariff.

(Exhibit 15 marked for identification.)

BY MR. MEZA:

Q And, Mr. Russell, I think these are copied only one-sided.

A Oh, yeah. There you go.

Q So apparently things aren't all as bad as you made them out to be.

A Okay.

Q Sir, if you could please refer to Section 2.1.3(C) of Exhibit 14.

A Hold on one -- hold on one second.

Q Excuse me. Exhibit 15.

A Let me, let me get, get through here.

Okay.

Q All right. And before I ask you this question, sir, is this the most recent version of the NuVox tariff filed in Florida?

A I believe so, yes.

Q And you filed this on or about March 4th of 2005?

A Yes.

Q All right. Now isn't it true, sir, that in Section

2.1.3(C) NuVox limits its liability for its end users to bill credits?

A In that section, that's correct. However, you'll note in Section 2.2 entitled "Allowances for Interruptions in Service," at Section 2.2.1(A), the tariff also provides the company -- service interrupted -- let's see. Hold on. I'm sorry. "A credit allowance will be given when service is interrupted, except as specified in Section 2.2.2 following." It goes on to read in the last sentence, "The company reserves the right to periodically review and modify its credit allowance policy."

The reason for that -- and, yes, it's correct that the tariff limits liability in 2.1.3(C). That this flexibility is, is included in a tariff is because in instances of service outages or errors by the company in delivering services, to some degree reserve the right to provide flexibility to the people that handle our customer relationships to provide additional credits in the event of service outages, which is consistent with the company's practice of having different limitation of liability arrangements or service level agreements with customers pursuant to a, quote, unquote, custom contract.

Q Now, Mr. Russell, isn't it true in 2.1.3(B) NuVox's tariff attempts to limit its liability to gross -- for gross negligence to $10,000?

A Yes. And, again, that has to be read in conjunction with Section 2.2.

Q And isn't it also true, sir, that in 2.1.3(F) the NuVox tariff states that except for the allowance of billing credits, NuVox will not be liable to a customer for any direct, indirect, special, incidental, reliance, consequential, exemplary or punitive damages, including, but not limited to, loss of revenue, profits, business or goodwill, for any reason whatsoever?

A And that's in (F)?

Q Yes, sir.

A I believe you read that correctly. But, again, that -- my response is qualified by the fact that very few, if any, of our customers purchase services pursuant to this tariff. We have contracts with our customers that can have alternative liability limitation arrangements.

Q Now do you remember in your testimony where you stated that often times CLECs can obtain the same limitation of liability language as BellSouth in negotiating with customers and thus will often times deviate from its standard language in the tariff?

A Well, I remember testimony where I stated that in a competitive environment when you're bidding for a business's services, be it with KMC, Xspedius, NuVox, Alltell, BellSouth, in a competitive environment you may not be able to mirror

those terms and try and win the business.

Q Isn't it also true, sir, that in a discovery response the Joint Petitioners were unable to identify a specific instance where they conceded limitation of liability language in order to attract a customer?

A If you'll show me that discovery response, I'll be glad to review it.

MR. MEZA: Mr. Chairman, if we can have permission to approach the witness. We're going to show him the discovery response he has requested. I believe it's already part of the record, so I don't know if we need to mark it as a separate exhibit.

COMMISSIONER BRADLEY: Okay.

THE WITNESS: Thank you.

BY MR. MEZA:

Q So, Mr. Russell, wouldn't you agree with me that in this discovery request BellSouth is asking the Joint Petitioners to identify instances where you've had to concede limitation of liability to attract customers in markets dominated by incumbent providers? Is that true?

A Well, that's not true. You asked us, please identify -- the three companies, that is -- every instance where we have conceded limitation of liability language. In response to that we objected because there's virtually no way to identify and provide contracts for every instance where

we've provided different terms, given the fact that we would have to get permission from the customers to provide those contracts.

In our response we stated, and I'll quote it, Joint Petitioners are not able to identify with specificity any instance where they had to concede limitation of liability language to attract customers in markets dominated by incumbent providers, although Joint Petitioners recollect being forced to concede limitation of liability language in the past. Joint Petitioners expect they may have to concede limitation of liability language in the future. So qualifying that response, we did not identify any -- every instance, but described our response to BellSouth.

Q Mr. Russell, was this discovery response truthful and accurate when provided?

A As described in, in my last answer, yes.

Q All right. Now you would agree with me that BellSouth has to enter into this contract with the Joint Petitioners under the Act; is that correct?

A Yes.

Q And you would also agree with me that you can take into account in determining whether or not you want to enter into a contract with a customer the risks associated in deviating from your standard tariff limitation of liability language; correct?

A That's correct. But I believe that when you talk about a risk reward analysis, it's my understanding that BellSouth had to have interconnection agreements in place pursuant to Section 271 to get long distance approval. So apparently and obviously since we're here today BellSouth made a business decision to enter into interconnection agreements in hopes of and in exchange for getting long distance approval. So there's risk, risk reward analysis for both companies. It's just different risk reward analysis.

Q Mr. Russell, would you agree with me that in determining whether or not to deviate from your standard language the Joint Petitioners do not have to take into account the fact that whatever you agree to in that contract is applicable to every single potential customer?

A I believe that's correct.

Q Now I believe it's your testimony that interconnection agreements are not commercial -- or that interconnection agreements should be treated like a commercial contract; is that right?

A That's correct. It's a, it's a business -- it's a contract that provides the framework for how two commercial entities will transact business with each other. So, yes, I believe it is a commercial agreement.

Q Are you aware of a North Carolina Utilities Commission decision that has ruled, and I'm not quoting, that

interconnection agreements are not to be treated as commercial contracts?

A No, I'm not aware of, of that type of language.

Q Okay.

A I believe that they did discuss interconnection agreements in terms of commercial agreements, but I believe it said something to the effect of they should not be treated as typical commercial arrangements, which I think that's different than not treated as a commercial arrangement. So I don't agree with what you said.

Q Okay. So you believe that a statement by a state utilities commission that interconnection agreements are not to be treated as typical commercial contracts somehow supports your testimony that this Commission should adopt provisions that you believe exist in a commercial world?

A This is a commercial contract between the parties. It's not typical in the sense that it's an agreement between a competitor of BellSouth who is also a customer of BellSouth. In other words, we're going to purchase services from the dominant by 95 percent, owning 95 percent of the market, we're going to purchase services from our biggest competitor. Our biggest competitor is going to have a significant degree of insight into our business operations because of that agreement. So, no, it may not be considered typical in the sense that I can go buy software for billing applications from multiple

with BellSouth. So I don't disagree that that is not a typical

Q And the types of contracts that you reviewed to come up with this 7.5 percent, those weren't contracts mandated to be entered into by the federal Act, were they?

A Well, the type of agreements that I looked at to come up with alternative liability limitation language for this agreement included software agreements, agreements with other service providers. In fact, the 7.5 percent is greatly reduced from some of the terms included in those agreements. So we're purchasing a service from BellSouth. If BellSouth fails to perform that service appropriately or in a negligent fashion but charges us for that service and we pay for that service, I don't believe that BellSouth has earned the money that we've paid for that service, if it was, in fact, provided negligently.

Q Do you believe, sir, that the software contracts that you're referring to are typical commercial contracts?

A They are commercial contracts, yes.

Q I'd like to show you something else to see if it changes your testimony.

MR. MEZA: Mr. Chairman, this is a recent decision from the United States District Court for the Southern District of Mississippi, and I'd like to ask the witness to read certain paragraphs to see if it changes his testimony.

COMMISSIONER BRADLEY: Is this an additional exhibit?

MR. MEZA: Yes, sir.

COMMISSIONER BRADLEY: Is it already a part of the record?

MR. MEZA: No, sir.

COMMISSIONER BRADLEY: Okay. And what is it?

MR. MEZA: This is the Mississippi federal court decision.

COMMISSIONER BRADLEY: We'll mark it as Exhibit 16.

(Exhibit 16 marked for identification.)

BY MR. MEZA:

Q Mr. Russell, what I've handed you as BellSouth 16 or what Mr. Culpepper has handed to you is the Mississippi District Court's decision in relation to the TRRO. Do you see that?

A Yes. Uh-huh.

Q And NuVox was a defendant in that proceeding?

A Yes.

Q And this decision was issued on, on or about April 13th of this year?

A Yes. Uh-huh. That's right.

Q Now I'd like to focus your attention on, to Page 13 of that decision, the first paragraph.

A Okay.

Q Isn't it true, sir, that in its discussion of the TRRO this federal district court states that, "If the FCC's order is viewed not merely as a general regulation which bears on the proper interpretation of the interconnection agreement but as an outright abrogation of provisions of parties' interconnection agreements, consideration of its jurisdiction to act in the premises must take into account that interconnection agreements are 'not ordinary private contracts' and are 'not to be construed as traditional contracts, but as instruments arising within the context of ongoing federal and state regulation'"?

A Yeah. That's what it says. And I, I think that's consistent with that these may not be typical commercial agreements. Again, it says, "not ordinary private contracts," not traditional contracts. I don't see this as much different than the contract that my company may enter into with a governmental agency where the governmental agency has certain rights that a private individual may not. So while it's not typical or ordinary for competitors to have arrangements with each other where they're purchasing services from each other and one party is essentially the former monopolist, again, it's not a typical arrangement but it's still a commercial

agreement.

Q Sir, when you enter into these contracts with governmental agencies, the federal government doesn't force you to enter into those contracts, does it?

A I don't believe we've been forced to enter into a contract by the federal government. But, you know, interconnection agreements are a 271 checklist item. You have long distance approval. The last time I looked, I believe you had about 44 percent market share, generating about a billion dollars a year in revenue to BellSouth, an average revenue amount of $17 per customer per month, total number of customers around 600,000. So you've made a decision to enter into a long distance market. As part of 271 you have to have an interconnection agreement. So you have a choice: No interconnection agreements, no LD.

Q Well, let me see if I can sum up your position, Mr. Russell.

You agree with me that interconnection agreements should not be treated as typical commercial contracts; correct?

A I agree that that's what the North Carolina order said.

Q And you would also agree with me that a federal district court citing the 10th Circuit and other authority has determined that interconnection agreements are not ordinary private contracts; is that right?

A I believe that's what the order said.

Q And they are not to be construed as traditional contracts; is that right?

A That's right.

Q Yet you're asking this Commission to incorporate provisions that exist with typical commercial contracts; is that right?

A We're asking this Commission to, to allow limitation of liability provisions that don't shield BellSouth from being responsible for its own negligence to the tune of 7.5 percent of the amounts that the CLECs pay to BellSouth over the term of the contract. So that's all we're asking for. And we're asking BellSouth to be responsible for its own acts of negligence.

Q Thank you, Mr. Russell. I'd like to move to Issue 7. And this issue deals with indemnification rights; is that right?

A That's correct.

Q And I believe it's your testimony, sir, that indemnification is appropriate when a service provider fails to provide service and the receiving party is subject to some type of liability; is that right?

A Based on the service provider's negligence, yes.

Q And NuVox is a service provider to certain customers; is that right?

A That's correct.

Q And you don't indemnify your end users for claims brought against them; is that right?

A Are you trying to indicate that we don't, we don't indemnify our end users in the event of our own negligence?

Q What I'm asking you, sir, is that in your tariff there's no instance where NuVox agrees to indemnify its end users; isn't that correct?

A For what?

Q For anything.

A Again, I mean, this tariff, and I have it in front of me, I can't recall what exhibit number it is on file with the Commission, we have separate contractual arrangements with our customers. 99 percent of our customers purchase services out of these custom contracts and not out of this tariff. So we can negotiate for different terms with particular customers depending on the terms of the business deal.

Q Mr. Russell, I appreciate your response. I would ask that you respond to my direct question, and that is, isn't it true, sir, that there is nothing in your tariff that obligates NuVox to indemnify its end users?

A That wasn't the question you just asked me. Do you want me to go through the entire tariff or do you want me to look at a particular section or --

Q Sir, Mary Campbell is your paralegal; right?

A That's correct.

Q She issued the tariff to the Florida Commission; is that correct?

A That's correct.

Q Would she have issued the tariff without your reviewing it?

A She may have.

Q So you're not aware of what your paralegal files in the Florida Public Service Commission?

A There are other lawyers that work for NuVox: Ed Cadu (phonetic), Carol Keith, Riley Murphy. They may have reviewed this. I'm not positive, but I would say it's highly likely in the first week of March we might have been in arbitration. So somebody else may have reviewed this tariff on behalf of the company.

Q Are you aware as VP of Regulatory -- is that, is that your current position?

A That's correct.

Q Of any instance in NuVox's tariffs that require it to indemnify its end users?

A And sitting here today without reviewing the entire tariff, I'm not. However, I qualify that by saying that 99 percent of our customers purchase our services through custom contracts. The company does negotiate the terms of those customers. So we could have alternate provisions in specific

customer contracts.

Q Now your tariff does require your end users to indemnify NuVox; is that right?

A I believe in the event that they use the services in an inappropriate or illegal fashion. But I'd have to look. Again, I'd have to look. I'm going on my understanding of our old tariff.

Q I understand, sir. It's actually 2.1.3(I).

A Okay.

Q And there's some other provisions, but we can start there.

A (I)?

Q Yes, sir.

A Okay. Okay.

Q And isn't it true, sir, that in that provision NuVox's tariff requires its end users to indemnify NuVox in certain instances?

A In certain instances, that's correct.

Q Okay. Now you have not seen a similar type of indemnification provision that you're proposing here in any other interconnection agreement, have you?

A That's not correct. There's a similar indemnification provision in, in NewSouth's agreements with all telecommunications. I believe they have those agreements in -- maybe not Florida -- South Carolina, Kentucky, and those

indemnification provisions in that interconnection agreement provide that the party providing services will indemnify the party receiving and paying for services in the event of damages caused by the providing party's breach of the agreement.

Q Was this a recent revelation?

A No. We talked -- in fact, we talked about this in Alabama last week, and I believe in Louisiana also.

Q In regards to indemnification?

A I believe so.

Q So when you gave me your deposition testimony, you weren't aware of that decision?

A We -- our deposition was in December, if I recall. The NuVox/NewSouth merger was completed as of December 31st. I came into possession of these agreements upon the merger of the company and have come to know the terms of these agreements since that time. So that -- my understanding of these agreements and what's in these agreements postdated our deposition.

Q And the agreement involves NewSouth; right?

A That's correct.

Q And there's no individual in this proceeding who was an employee of NewSouth, is that right, that's currently a witness?

A That's currently a witness. That's correct.

Q Now do you have Exhibit A in front of you?

A I do. I just need to find it. Okay.

Q Would you agree with me, sir, the parties' versions of this language uses the phrases "the providing party" and "receiving party"?

A That's correct.

Q And would you also agree with me, sir, that in most cases BellSouth will be the providing party and NuVox will be the receiving party?

A That's correct.

Q Now under the Joint Petitioners' proposed language, the receiving party only indemnifies the providing party in cases of libel or slander; is that accurate?

A I think it also includes, includes invasion of privacy. So it's for erroneously using the services for those purposes.

Q So in most cases NuVox's liability to BellSouth would be in instances where NuVox is using BellSouth's services for libel, slander and invasion of privacy; is that right?

A That's correct. Or its end users were using the services in that fashion.

Q Okay. Now in contrast, the receiving party is indemnified from the providing party for any violation of applicable law; is that right?

A That's correct.

Q And your understanding of applicable law, and we'll

get to it more in Issue 12, is that applicable law means whatever law is in existence at the time of execution of the contract; is that right?

A Laws of general applicability at the time of contracting.

Q And so under your interpretation of applicable law, if the parties don't expressly exclude it, it's automatically incorporated into the contract; correct?

A Well, I mean, that's Georgia law, which the parties have already agreed is the law governing the interpretation and performance of this contract. So it's not my interpretation. That is the law.

Q And you're a lawyer; right?

A That's what Georgia law says, and I am a lawyer.

Q Okay.

A Yeah.

Q And you would agree with me, sir, that based upon that understanding of Georgia law that there is a possibility that BellSouth could be found obligated to indemnify NuVox for a violation of a law that doesn't even, is not even referenced in the agreement; is that right?

A If it's a law of general applicability and BellSouth breaks the law, it could be exposed to some indemnification requirement.

Q All right. And there's no like provision for the

providing party under your language, is there?

A I don't know if one's been proposed. If BellSouth wants to propose that in an effort to resolve this issue, I'd love to take this issue off the table.

Q Mr. Russell, is it your testimony that you don't know what the Joint Petitioners have proposed?

A No. I didn't know if BellSouth had proposed a counter to that.

Q No. I'm asking you under your language as it exists today is there any situation where the receiving party would indemnify the providing party for the receiving party's violation of applicable law?

A I don't believe so.

Q And there's also no situation where if BellSouth is sued by a NuVox end user and ultimately it is the negligence of NuVox that caused the end users to suffer damages, there is no situation where BellSouth could seek indemnification from NuVox in relation to that claim, is there?

A Can you repeat that? I got lost up in that one.

Q Yes, sir. Isn't it also true, sir, that in a situation where a NuVox end user sues BellSouth for something that NuVox did, solely the fault of NuVox, that there's no situation under the Joint Petitioners' proposed language that would obligate NuVox to indemnify BellSouth?

A I guess I'm having trouble because I don't believe

that obligation is included, but I don't know how that claim would stand. It would be NuVox's error or omission in the instance you talked about.

Q Mr. Russell, are you having trouble conceiving a concept where an end user sues a company?

A No. No, I'm not.

Q Okay. Do you find it implausible that an end user of NuVox could sue BellSouth?

A I don't believe that's happened to date, but I don't find it implausible.

Q And in that instance where in reality the damage suffered by the end users was caused by NuVox and not BellSouth, BellSouth would not have the ability to seek indemnification from NuVox; is that correct?

A Under this language I believe that's correct.

Q All right. Now in your tariffs, sir, isn't it true that you state that you're not liable for the acts of third parties, including BellSouth?

A I believe so, yes.

Q I'd like to move to Issue 5, sir.

Would you agree with me, Mr. Russell, that Issue 5 deals with each party's obligations to the other party in the event one party decides not to include limitation of liability language in its contracts or tariffs to the maximum extent allowed by law?

A To some degree. In my mind the reason we have not been able to resolve this is because BellSouth wants the CLECs to indemnify BellSouth in the event that we do not mirror BellSouth's terms in our contracts or tariffs. So it's the indemnification piece of that as opposed to an agreement between the parties that we'll both use commercially best efforts to, to include limitation of liability. It's the indemnification piece that, that is the real issue.

Q And it's triggered by the Joint Petitioners or BellSouth agreeing to some limitation of liability language that's less than what the law -- the maximum extent allowed by law; is that right?

A Yes.

Q Okay. Now you currently have limitation of liability provisions in your tariffs; correct?

A That's correct.

Q And you have no intentions of changing those limitations.

A We don't have any intention of changing the limitation of liability language that is in our tariffs and has been approved by the state commissions.

However, as I stated earlier, 99 percent of our customers buy services through customer contracts, customer service arrangements. So what we want to prevent is a situation where we, we can't come to alternative terms with a

customer that would differ from the terms in our tariff based on an obligation that we have to BellSouth in an interconnection agreement. It's really -- the provision is anti-consumer and anti-competitive as BellSouth wants to see it.

Q Now you would agree with me that having unlimited, unlimited exposure is not a prudent business move, wouldn't you?

A That's correct. This, but this, this unlimited exposure is not, not the issue either.

Q Now you also would agree with me that in March of 2005 you filed a new tariff in Florida that perpetuated the giving of bill credits for claims of negligence; is that right?

A I believe we went over that. Yes.

Q Now this exact provision that we're arbitrating about exists in your current interconnection agreement; is that correct?

A Exact -- I'm sorry. Exact provision that we're arbitrating about. Which provision?

Q Well, as far as I understand it, the Joint Petitioners have not proposed any language on this issue; is that correct?

A On Issue 5, that's correct.

Q So the, the provision that we're fighting about today currently exists in your current interconnection agreement; is

that right?

A The one that -- yeah. That's right. That's right. Yeah. Sorry.

Q And to the best of your knowledge, sir, you're not aware of any dispute between the parties over the interpretation or implementation of this provision, are you?

A I'm not aware of a current dispute about that. What we want to have the ability or flexibility to do going forward is negotiate terms with our customers without the fear that because we negotiate some terms that are different from those that BellSouth has in it tariffs, that we won't be left holding the bag for not mirroring BellSouth's terms in our agreements.

Q Now you would agree with me that the Joint Petitioner end users do not purchase service out of BellSouth's tariffs for those services that they purchase from NuVox.

A That's correct.

Q You would also agree with me that BellSouth does not have a contractual relationship with the Joint Petitioner end users for those services that they purchased from NuVox?

A I wouldn't believe they would for those services they purchased from NuVox.

Q And you would agree with me, sir, that if they were BellSouth customers and they did purchase services out of BellSouth's tariffs, that BellSouth's limitation of liability provisions would govern?

A But there's the problem. If they purchase the services out of BellSouth's tariff, the tariff provisions would govern. However, BellSouth also has contract service arrangements with its customers. We're often times competing to win those customers. If BellSouth is free to amend the terms of its customer service arrangement with its customers on the one hand and the CLEC is contractually obligated by the terms of these interconnection agreements not to have different terms than those in the BellSouth tariff, we're not playing on a level playing field with regard to trying to win those customers. That is, BellSouth can change the terms and differ the terms from what it has in its tariffs, but the CLEC would be contractually obligated, if you accept BellSouth's language as proposed for Issue 5 for which the CLECs have proposed no language, we would be contractually obligated to mirror the terms in BellSouth's tariff in attempting to bid and win that customer.

You're not going to win the customer when you have to mirror BellSouth's tariff terms in your contract and BellSouth is free to change its tariff terms in a customer service arrangement.

Q Are you ever aware of that occurring?

A I'm aware that BellSouth wins customers by offering them contract service arrangements at the expense of NuVox. Am I aware that that specific term has come into play? No, I'm

not. Could it have? Yes, it could have.

Q And it also could happen, sir, that in your contract service arrangements that you incorporate the terms of your tariff; isn't that true?

A We could. But in the event that we were bidding a customer against BellSouth and Xspedius and others and the parties had agreed or the offer on the table is BellSouth has agreed for no deposit, BellSouth has also agreed to amend its liability limitation language for the customer service agreement, and we want to win that business, we'd be foolish not to negotiate with a customer. This provision would prevent us from doing that.

Q Now -- and just to be sure I'm clear, that hypothetical you just gave was not based upon any personal knowledge; is that accurate?

A No. It was a hypothetical.

Q I'd like to move to Issue 6, please.

A But let me add, it was a hypothetical based on the competitive marketplace.

Q With Issue 6 the parties have agreed between themselves not to be liable to each other for indirect, consequential or incidental damages; is that right?

A Between each other. That's correct.

Q And if I understand your testimony correctly, the purpose of the Joint Petitioners' language is to prevent

whatever the parties say in relation to indirect, consequential or incidental damages from applying to your end users; is that right?

A Yes. But the concern is here we don't want this contractual provision as it's stated today to leave the CLEC, quote, unquote, holding the bag for any direct and reasonably foreseeable damages that may be caused by BellSouth to a, to a CLEC end user.

Q So the purpose of your language is to make sure that nothing that NuVox and BellSouth says in this agreement restricts, impairs or limits whatever rights and damage claims your end users may have; is that right?

A That's correct. So that NuVox is not left holding the bag for BellSouth's negligence.

Q Now you've already agreed with me that you're a lawyer.

A That's correct.

Q And we've already agreed in other states that as a matter of law you can't impact the rights of third parties in a contract. Is that right?

A I believe that's correct. Again, it's not the impact of the third party as much; it's being left responsible for and having financial risk associated with BellSouth's negligence. We don't want to take on that contractual obligation.

Q Wouldn't you agree with me, sir, and with your legal

training that your concern is simply implausible?

A No.

Q So you believe that notwithstanding the law, you still need this provision?

A It's not necessarily that we need this provision. It's as this provision is written -- is it inartfully drafted? Maybe so. All I believe that is needed in this provision is that the parties agree that neither party is going to be liable to the other for indirect, consequential or incidental damages, period. The additional language that comes into play attempts to force risk on the Joint Petitioners in favor of BellSouth.

Q Now do you have Exhibit A in front of you?

A Yes.

Q Can you please point to me any section in BellSouth's language that anywhere states that it is intending to limit BellSouth's exposure to the Joint Petitioner end users?

A It doesn't say that. But the way it operates, it's not simply attempting to memorialize the parties' agreement that neither party is going to be liable to the other for indirect, incidental or consequential damages. It's just not that clear.

Q So let me make sure I understand your testimony, Mr. Russell. You agree with me that as a matter of law we can't impact the rights of third parties vis-a-vis this contract; correct?

A I do agree with you there. What we're trying to prevent is being left holding the bag for BellSouth's negligence based on some contractual language in this section.

Q You also agree with me that there's nothing in BellSouth's language that says BellSouth is attempting to insulate itself from end user claims; is that correct?

A I agree with that. However, the way the language is written, it could force the Joint Petitioners to be responsible for damages related to BellSouth's own negligence.

MR. MEZA: Mr. Chairman, I'd like to move to Issue 12.

COMMISSIONER BRADLEY: 12?

THE WITNESS: Can we take a health break real quick? A health break real quick?

COMMISSIONER BRADLEY: A health break?

THE WITNESS: I'm about to wet my pants.

MR. MEZA: I move to memorialize that in a plaque.

(Laughter.)

COMMISSIONER BRADLEY: Yeah. Five minutes.

(Recess taken.)

COMMISSIONER BRADLEY: We're going to reconvene, but I need to ask Mr. Meza a question. How much more time do you need to -- with this witness?

MR. MEZA: Yes, sir. I, myself, have, I think, two issues with Mr. Russell, and then I pass it over to

Mr. Culpepper for, I believe, five issues. I think two hours should be sufficient.

COMMISSIONER BRADLEY: Okay. Well, I'll tell you what. It's, it's almost 1:00. Why don't we take a one-hour break for lunch.

MR. MEZA: Yes, sir. And I can promise you, sir, that once we get through with Mr. Russell, the issues decrease in complexity as well as number. So we're actually moving at a very good pace.

COMMISSIONER BRADLEY: Okay. Is that okay with you all?

MR. MEZA: That's fine.

COMMISSIONER BRADLEY: Okay. We will recess until 2:00.

MR. MEZA: Thank you, sir.

(Lunch recess.)

STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, LINDA BOLES, RPR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 5th day of MAY, 2005.

Linda Boles

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