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June 13, 2005

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: <u>Docket No.: 040130-TP</u>
Joint Petition of NewSouth Communications Corp., *et al.* for Arbitration with BellSouth Telecommunications, Inc.

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Unopposed Motion for Leave to File Revised Post-Hearing Brief and BellSouth's Revised Post-Hearing Brief, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

James Meza III /RN

James Meza III

Enclosures

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
DOCKET NO. 040130-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 13th day of June, 2005 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of	)	
Joint Petition for Arbitration of NewSouth		
Communications Corp., NuVox Communications Corp.	)	Docket No. 040130-TP
KMC Telecom V, Inc., KMC Telecom III LLC, and		
Xspedius Communications, LLC on Behalf of its	)	
Operating Subsidiaries Xspedius Management Co.	)	Filed: June 13, 2005
Switched Services, LLC and Xspedius Management Co.	)	
Of Jacksonville, LLC,	)	

UNOPPOSED MOTION FOR LEAVE TO FILE REVISED POST-HEARING BRIEF

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Florida Public Service Commission ("Commission") grant it leave to file the attached revised post-hearing brief so that BellSouth can include its summary position for each of the issues in dispute. In support of this unopposed Motion, BellSouth states the following:

1. On June 9, 2005, BellSouth timely filed its post-hearing brief in the above-captioned proceeding.

2. At the close of business on June 10, 2005, BellSouth discovered that it had inadvertently failed to include summary positions for each of the issues in dispute as required by Order No. PSC-05-0325-PHO-TP.

3. BellSouth seeks leave to file a revised brief that includes its summary positions. The brief will not be modified, changed, or revised in any other respect. Further, the summary positions will be based entirely on BellSouth's positions set forth in Order No. PSC-05-0325-PHO-TP and thus will not be new or previously undisclosed summary positions.

4. No party would be prejudiced by the filing of a revised brief because (1) the revised brief will be filed two business days after the original filing; (2) the only aspect of the brief that will be revised is the inclusion summary positions that are entirely based on BellSouth's previously filed summary positions; (3) BellSouth has committed to counsel for the Joint Petitioners' that it will not review the Joint Petitioners' brief prior to filing the revised brief; and (4) the revised brief will not exceed the Commission ordered limit of 75 pages.[1]

5. The Commission has previously granted a party to a Section 252 arbitration leave to file revised/supplemental briefs due to an inadvertent omission based upon a finding that no party would be prejudiced by the filing. *See* Order No. PSC-01-1095-FOF-TP (granting BellSouth's two Motions for Leave to file Supplemental Briefs in the BellSouth/Sprint arbitration, wherein BellSouth addressed two issues that it did not address in its original brief due to a misunderstanding).

6. BellSouth has contacted counsel for the undersigned and reports that the Joint Petitioners do not object to the Motion.

WHEREFORE, BellSouth requests that the Commission grant it leave to file the attached revised post-hearing brief so that it can include its summary positions for each of the issues in dispute in this Section 252 arbitration proceeding.

[1] Like the Joint Petitioners, BellSouth will begin page numbering with the first substantive page of the revised brief.

Respectfully submitted this 13th day of June, 2005

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ATTORNEYS FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of	)	
Joint Petition for Arbitration of NewSouth	)	
Communications Corp., NuVox Communications Corp.	)	Docket No. 040130-TP
KMC Telecom V, Inc., KMC Telecom III LLC, and	)	
Xspedius Communications, LLC on Behalf of its	)	
Operating Subsidiaries Xspedius Management Co.	)	Filed: June 13, 2005
Switched Services, LLC and Xspedius Management Co.	)	
Of Jacksonville, LLC,	)	

BELLSOUTH TELECOMMUNICATIONS, INC. REVISED POST-HEARING BRIEF

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I. INTRODUCTION

There are five common characteristics to the issues raised by NewSouth Communications Corp ("NewSouth"), NuVox Communications, Inc. ("NuVox"), and Xspedius Communications, LLC ("Xspedius") (collectively referred to as "Joint Petitioners")[1] in this proceeding: (1) the Joint Petitioners want greater rights than what BellSouth Telecommunications, Inc. ("BellSouth") offers its customers or even what the Joint Petitioners offer their own customers; (2) the Joint Petitioners are arbitrating issues based upon hypothetical concerns and speculation rather than actual business experience; (3) the Joint Petitioners are attempting to change established industry standards without any justification; (4) the Joint Petitioners seek to extrapolate "commercial business practices" into this interconnection agreement even though numerous tribunals have determined that interconnection agreements are not typical commercial contracts; (5) and the Joint Petitioners want rights irrespective of whether the Telecommunications Act of 1996 (the "Act") obligates BellSouth to provide them.

Tellingly, the Joint Petitioners disclosed their motivation for unnecessarily arbitrating issues in the North Carolina hearing, stating: "Throughout these negotiations the joint petitioners have held tight to the principle that they will not give up something for nothing." (Tr. At 22). The Joint Petitioners were not as transparent in the instant hearing as they conveniently failed to volunteer this information in Florida. Nevertheless, this philosophy permeates almost every issue in dispute. Consequently, the Joint Petitioners are arbitrating issues that, as admitted, are of no force and effect as a matter of law; that turn industry standards on their head for no

[1] Originally KMC Telecom V, Inc. and KMC Telecom III, LLC were parties to this arbitration proceeding. However, on May 27, 2005, the KMC entities filed a withdrawal with prejudice of their petition for arbitration. Thus, the KMC entities are no longer a party to this proceeding.

justifiable reason; and that seek terms and conditions that they are not willing to provide to their own customers.

Section 252(c) of the 1996 Act requires the Florida Public Service Commission ("Commission") ensure that its determinations in this arbitration meet the requirements of Section 251. BellSouth simply requests that the Commission apply the arbitration standards set forth in the Act and reject the Joint Petitioners arguments and proposed language.

II. PROCEDURAL BACKGROUND

The Joint Petitioners filed a Petition for Arbitration ("Petition") pursuant to the Act with the Commission on February 11, 2004. On March 8, 2004, BellSouth Telecommunications, Inc. ("BellSouth") filed its Response to the Petition. Initially, the Joint Petitioners asked the Commission to resolve 107 issues, excluding subparts. As a result of continued negotiations by the Parties there remain only 21 issues, excluding subparts, for the Commission's consideration.

On July 20, 2004, the Parties filed a Joint Motion for Abeyance with the Commission where the Parties asked for a 90-day abatement of the arbitration proceeding so that they could include and address issues relating to the D. C. Circuit's decision in *United States Telecom Ass'n v.* FCC, 359 F.3d 554 (D.C. Circuit 2004) ("*USTA II*") in this proceeding. The Commission granted the abeyance on August 19, 2004. During this 90-day abatement period, the Federal Communications Commission ("FCC") issued its *Order and Notice of Proposed Rule Making* in WC Docket No. 04-313, CC Docket No. 01-338 ("*Interim Rules Order*"). At the end of the abeyance period, on October 15, 2004, the Parties filed a revised Joint Matrix, which included Items 108-114 ("Supplemental Issues"). These Items addressed *USTA II* and the *Interim Rules Order*.

On March 11, 2005, the FCC's Final Unbundling Rules in, FCC 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*TRRO*") became effective. No issues in the arbitration substantively address the *TRRO* because that decision was not effective until March 2005 and thus after the time period for identifying issues to be arbitrated in this proceeding. Nevertheless, Issues 23, 108, 113 and 114 are similar if not identical to issues being addressed in the Commission's Generic Proceeding (Docket No. 041269-TP) relating to changes of law resulting from the *TRO* and the *TRRO*. Consequently, the Parties jointly asked and the Commission agreed to move these issues to the Generic Proceeding for consideration and resolution. *See* Order No. PSC 05-0443-PCO-TP. Similarly, because the *TRRO* also rendered several arbitration issues relating to the *Interim Rules Order* moot, the Commission found in Order No. PSC-05-0443-PCO-TP that Issues 109, 110, 111, and 112 were moot and removed them from the arbitration.[2]

The hearing in this matter was held on April 26-28, 2005. At the hearing, BellSouth submitted the pre-filed testimony of Kathy Blake, Scot Ferguson, and Eric Fogle.[3] The Joint Petitioners submitted the testimony of Hamilton Russell, James Falvey, Marva Johnson, James Mertz, John Fury, Robert Collins, and Jerry Willis. This Post-Hearing Brief is submitted as directed by the Commission at the close of the hearing.

On May 27, 2005, KMC Telecom V, Inc. and KMC Telecom III, LLC filed a Notice of Withdrawal of Arbitration Petition with Prejudice. Thus, the KMC entities are no longer parties to this proceeding as their claims and arguments have been voluntarily dismissed with prejudice.

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[2] BellSouth also asked that the Commission move Issues 26, 36, 37, 38, and 51 to the Generic Proceeding because they all related to the FCC's *Triennial Review Order*, FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("*TRO*") and were similar if not identical to *TRO* issues being addressed in the Generic Proceeding. The Commission denied BellSouth's request to move these issues to the Generic Proceeding. However, BellSouth believes that the Commission can still defer ruling on these issues until it rules on similar issues in the Generic Proceeding to avoid inconsistent results.

[3] Ms. Blake and Mr. Ferguson adopted the pre-filed Direct and Rebuttal Testimony of BellSouth witness Carlos Morillo.

III. LEGAL STANDARDS UNDER THE 1996 ACT

Sections 251 and 252 of the Act encourage negotiations between Parties to reach local interconnection agreements. Section 252(a) of the Act requires incumbent local exchange companies to negotiate the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 251(c)(2)-(6). As part of the negotiation process, the 1996 Act allows a party to petition a state Commission for arbitration of unresolved issues.[4] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[5] The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the Parties with respect to those issues; and (3) any other issues discussed and resolved by the Parties."[6] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the Commission receives the petition.[7]

The Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response.[8] Further, an ILEC can only be required to arbitrate and negotiate issues related to Section 251 of the Act, and the Commission can only arbitrate non-251 issues to the extent they are required for implementation of the interconnection agreement.[9] Issues or topics not specifically related to these areas are outside the scope of an arbitration proceeding. Importantly, Section 252 makes clear that the

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[4] 47 U.S.C. § 252(b)(2)
[5] *See generally,* 47 U.S.C. §§ 252 (b)(2)(A) and 252 (b)(4).
[6] 47 U.S.C. § 252(b)(2).
[7] 47 U.S.C. § 252(b)(3).
[8] 47 U.S.C. § 252(b)(4).
[9] *Conserve Limited Liab. Corp. v. Southwestern Bell Tel.*, 350 F.3d 482, 487 (5th Cir. 2003); *MCI Telecom., Corp. v. BellSouth Telecom., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

Arbitrators' role is to resolve the parties' open issue to "meet the ***requirements*** of Section 251, including the regulations prescribed by the [FCC]." 47 U.S.C. § 251(c)(1) (emphasis added).

IV. DISCUSSION OF INDIVIDUAL ISSUES[10]

Item 2: How should "End User" be defined? (Agreement GT&C, Section 1.7)

*****SUMMARY POSITION: End User Should not be interpreted in a way that allows for the prohibited use of UNEs.*****

The Joint Petitioners should not be permitted to interpret or apply the definition of "End User" in a way that will result in the Joint Petitioners obtaining or wholesaling unbundled network elements ("UNEs") in a prohibited manner. Nor should the definition of "End User" permit the Joint Petitioners to use other services under Section 251 for purposes that are not authorized. Accordingly, BellSouth opposed the Joint Petitioners' attempt to define "End User" as a "customer of a party", because the Joint Petitioners could use this definition to obtain UNEs in an unlawful manner, including in violation of the Enhanced Extended Link ("EEL") eligibility criteria established by the FCC in the *TRO*[11] (discussed in Item 51, *infra*). (Tr. 878).

With its definition, BellSouth is not attempting to limit the type of customers the Joint Petitioners can serve; rather, BellSouth's proposed language is designed to avoid any confusion or ambiguity that *could* lead to the Joint Petitioners interpreting the Interconnection Agreement in a manner that would permit the Joint Petitioners to obtain or wholesale UNEs in a prohibited manner or use resold services for the provision of wholesale services. For instance, if an IXC was a customer of the Joint Petitioners, their proposed definition could result in the Joint Petitioners obtaining EELs at UNE rates and then reselling those EELs to IXCs or other carriers that are not entitled to obtain EELs under federal law. Similarly, Section 1.2 of Attachment 1

[10] To facilitate the Commission's review of BellSouth's positions, BellSouth has attached as BellSouth Exhibit A BellSouth's most recent language for each of the remaining issues in dispute.
[11] Triennial Review Order, FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) (defined herein as "*TRO*")

permits resale to the Joint Petitioner "End Users". The Joint Petitioners' definition of "End User", however, would permit the Joint Petitioners to use resold services to provide services to telecommunications carriers – a use expressly prohibited by 47 C.F.R. § 51.605(a). Because of this potential area of abuse and because in other instances the use of the Joint Petitioners' definition simply did not make sense (*e.g.*, a large business customer could be eligible for Lifeline) BellSouth could not accept the Joint Petitioners' definition.

Further, BellSouth's original definition of "end user" – the ultimate user of the telecommunications service – is fully consistent with the FCC's definition of a loop (*TRO* at ¶ 197, n. 620) as well as Congress' definition of "network element" and "telecommunications service" in the Act (47 U.S.C. § 153 (29), (47)). Additionally, the Texas Public Utilities Commission rejected an attempt by a Competitive Local Exchange Carrier ("CLEC") to globally replace the term "end user" with "customer" based on the same concerns BellSouth has expressed with the Joint Petitioners' definition. *See Petition of El Paso Networks, LLC*, Docket No. 25188, *Order Approving Revised Arbitration Award and Interconnection Agreement*, P.U.C.T. (Aug. 31, 2004)).

> The Revised Award appropriately determined that the term "customer" cannot be substituted for the term "end user," particularly with respect to UNE loops, network interface devices (NID) and enhanced extended loops (EEL). The Commission finds that the term "end user" is essential in defining the network element know as the local loop (or loop), which is defined by Federal Communications Commission Rule 51.319(a)(1) as "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point, at an end user premises, including inside wire owned by the incumbent LEC." The use of the term "end user" is necessary in order to distinguish unbundled network element (UNE) loops from other UNEs and other network elements that provide transmission paths between end points not associated with end users, such as interoffice transport... EPN may continue to acquire UNEs and use them in combination with their own

> facilities to provide wholesale service to other carriers regardless of who is serving the retail, local end user. However, EPN cannot obtain a UNE loop to establish a transmission facility to any premises that are not the premises of an end user.

(*Id.* at 2-3); *see also*, *Arbitration of Non-Costing Issues For Successor Interconnection Agreements to the Texas 271 Agreement*, T.P.U.C., Docket No. 28821 at 30 (Feb. 23, 2005) (confirming decision in Docket No. 25188 and stating that "[i]n other words, a carrier is an end user when actually consuming the retail service, as opposed to using the service as an input to another communications service.") (emphasis in original).

Nevertheless, in an effort to alleviate the Joint Petitioners' concerns with respect to BellSouth's definition of "End User", BellSouth proposed three definitions to make it clear to the Joint Petitioners that BellSouth is not attempting to limit their right to obtain UNEs in a lawful manner. These definitions were necessary to address the different meanings that the term "End User" may have in an agreement and are as follows:

- ***End User****, as used in this Interconnection Agreement, means the retail customer of a Telecommunications Service, excluding ISPs/ESPs, and does not include Telecommunications carriers such as CLECs, ICOs and IXCs.* This definition is intended to distinguish between the customers that the industry typically considers to be End Users, i.e. the retail customer that picks the phone up and uses it to make or receive calls, and a carrier that is the wholesale customer of a telecommunications carrier, e.g., for transport services. An example of the appropriate use of the term End User would be where a residential retail service is discussed in the context of resale - clearly, a carrier would not fall into this definition.

- ***Customer****, as used in this Interconnection Agreement, means the wholesale customer of a Telecommunications Service that may be an ISP/ESP, CLEC, ICO or IXC.* This definition is used in situations where the provision of a service is to a carrier, such as an IXC or another CLEC. An example would be in the provision of EELs. The FCC expressly stated that the EEL eligibility criteria apply whether the CLEC is using the service for the provision of retail services (i.e., to a traditional End User) or wholesale services (e.g., where a CLEC purchases an EEL, terminating to an End User customer premises, and sells that EEL on a wholesale basis to another carrier that will then provide the service to the End User).

- **_end user_**_, as used in this Interconnection Agreement, means the End User or any other retail customer of a Telecommunications Service, including ISPs/ESPs, CLECs, ICOs and IXCs, that are provided the retail Telecommunications Service for the exclusive use of the personnel employed by ISPs/ESPs, CLECs, ICOs and IXCs, such as the administrative business lines used by the ISPs/ESPs, CLECs, ICOs and IXCs at their business locations, where such ISPs/ESPs, CLECs, ICOs and IXCs are treated as End Users._ This definition addresses circumstances where a carrier, such as an IXC, is actually an End User in the traditional sense of the word. This situation would arise where, for example, a carrier needs to purchase lines for its own communications needs, such as for its administrative business office needs. While that carrier would not be the recipient of those services on a wholesale basis, in the event that the situation presented itself, Joint Petitioners would be entitled to purchase such services pursuant to the ICA for the provision of services to the carrier for its administrative purposes.

These three definitions of "End User" combined with BellSouth's stipulation that it is not attempting to prohibit the Joint Petitioners from obtaining UNEs and resold services in compliance with federal law should address all of the Joint Petitioners' concerns. In any event, the Commission should reject the Joint Petitioners' attempt to define "End User" in such a manner that leads or could lead to the improper use of services purchased by the Joint Petitioners. If the Commission determines that the Joint Petitioners' definition is appropriate, the Parties should have the opportunity to review each use of the term in the Agreement to ensure that such definition is appropriate and consistent with federal law and makes sense in the context in which it is used.[12]

Item 4: What should be the limitation of each Party's liability in circumstances other than gross negligence or willful misconduct? (Agreement GT&C, Section 10.4.1)

*****SUMMARY POSITION: The industry standard bill credits should apply.*****

[12] If it would resolve the Issue, BellSouth would agree to the following: All references to End User, end user, Customer or customer in the Agreement shall be changed to "customer" except for the following four (4) situations which shall refer to "end user": i. Lifeline and Link-up; ii. 8xx; iii. 911 and E911; iv. Local Traffic definition. Further, the following sentence would be added to the Definition Section of the General Terms and Conditions of the Agreement: "The use of the term "end user" or "customer" throughout this Agreement shall not be construed to expand on or eliminate any rights or obligations of the Parties." With this approach, the definition for the term "End User" would be deleted.

With this Issue, the Joint Petitioners are attempting to change the standard in the telecommunications industry regarding limitation of liability by (1) obtaining greater rights against BellSouth than what BellSouth provides to its own Florida customers and greater rights than even the Joint Petitioners provide to their own customers; and (2) proposing one-sided language that results, after three years, in BellSouth's liability to NuVox being capped at ***$8,100,000*** while NuVox's liability to BellSouth would be capped at ***$2,700.*** Specifically, with convoluted and confusing language, the Joint Petitioners seek to have each Party's liability limited to 7.5 percent of amounts paid or payable at the time the claim arose, subject to several caveats and conditions.[13] Conversely, BellSouth's proposed language is quite simple and memorializes the standard in the industry as it limits each Party's liability for negligent acts to bill credits. The Commission should reject the Joint Petitioners' language and adopt BellSouth's for the following reasons.[14]

First, the Joint Petitioners' language exceeds the FCC's Wireline Competition Bureau's standard as to the scope of an Incumbent Local Exchange Company's liability ("ILEC") to a CLEC. In *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission*, CC Docket No. 00-218, 17 FCC Rcd. 27,039 (Jul. 17, 2002) ("*Virginia Arbitration Order*") at ¶ 709, the FCC determined that an ILEC should treat a CLEC in the same manner

[13] The Joint Petitioners provided conflicting testimony as to the source of their proposed language. Mr. Russell testified in his deposition that the Joint Petitioners based this 7.5 percent cap upon software and government contracts that he personally reviewed. Russell Depo. at 84. In contrast to Mr. Russell's testimony, Ms. Johnson and Mr. Falvey testified that they instructed their lawyers to research this issue and that their understanding as to what is typically found in commercial contracts was based upon representations made by their lawyer. They further testified they did not read any government or software contracts prior to developing the proposed language. Johnson Depo. at 53-54; Falvey Depo. at 55, 57, and 59. Notwithstanding this discrepancy, the contracts Mr. Russell claims to have reviewed are inapplicable to the instant arbitration. The government and software contracts that allegedly form the basis of the 7.5 percent cap are not telecommunications contracts entered under the Act and did not involve parties who were forced to enter into contracts as a matter of law. (Tr. at 193).

[14] BellSouth submits that all of the issues relating to the General Terms and Conditions (Issues 4, 5, 6, 7, 9, and 12) are necessary for implementation of the Interconnection Agreement and thus are properly before this Commission. *MCI*, 298 F.3d at 1274.

that it treats its retail customers: "Specifically, we find that, in determining the scope of Verizon's liability, it is appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers." *See also, Sprint Communications, LP*, Case No. 96-1021-TP-ARB (Ohio P.U.C. Dec. 27, 1996), 1996 WL 773809 at *32 ("The panel does not believe that GTE's proposal to limit its liability to Sprint to the same degree it limits its liability to its own retail customers is unreasonable... In accordance with the Commission's award in 96-832, it is appropriate for GTE to limit its liability in the same manner in which it limits its liability to its customers."); *In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB, Kansas Corporation Commission at 102 (Feb. 16, 2005) (refusing to adopt the Joint Petitioners' and CLEC proposal for limitation of liability language that exceeded bill credits).[15]

BellSouth's proposed language complies with this standard as it limits each Party's liability for negligence to bill credits, which is exactly the standard applied to BellSouth's retail customers and the same standard that has governed the parties' relationship for the last eight years. (Tr. at 182; 943; Exhibit 14 at § A2.5.1). The Joint Petitioners do not contest this fact

[15] Any argument by the Joint Petitioners' that their proposal is consistent with the standard articulated in the *Virginia Arbitration Order* because BellSouth allegedly deviates from its tariff limitation of liability language in its Customer Service Agreements ("CSAs") should be rejected for various reasons. First, in addressing this issue, the *Virginia Arbitration Order* was specifically referring to bill credits. For instance, in paragraph 708, the FCC stated the following in summarizing Verizon's arguments against the adoption of a non-standard limitation of liability provision: (1) "each party's liability under the interconnection agreement generally should be limited to the value of the services provided to the other party that are the subject of the claim;" and (2) "Verizon's liability to its own end user customers for less than perfect services is generally limited to the amount of the charge for which Verizon billed, and the same should be true for WorldCom as a customer of Verizon." *Virginia Arbitration Order* at ¶ 708. BellSouth is asking that this same standard apply here. That it, BellSouth's liability to the Joint Petitioners should be the same standard that generally applies to its retail customers – bill credits. Second, the Joint Petitioners have no proof to support their claim that BellSouth deviates from its tariff language regarding limitation of liability in CSAs. Indeed, although she was not aware of any specific CSAs that deviated from BellSouth's tariff language, BellSouth witness Blake did testify that CSAs differ predominantly in price only. (Tr. 947). Thus, the Joint Petitioners have no proof to support their argument.

and concede that the provision of bill credits is "probably the current practice" in the industry. *See* Russell Depo. at 82-83; Tr. at 182.[16]

In contrast, the 7.5 percent language proposed by the Joint Petitioners is not the standard in the industry. The Joint Petitioners are aware of no interconnection agreement that contain language that is identical or similar to what the Joint Petitioners propose here. *See* Joint Petitioners Supplemental Response to Request for Production No. 6; Russell Depo. at 43. In fact, KMC is arbitrating with Sprint and SBC in several other states and KMC is not proposing similar limitation of liability language in any of those proceedings. *See* Johnson Depo. at 54. Likewise, none of the Joint Petitioners have similar limitation of liability language in their tariffs or standard contracts with Florida consumers. (Tr. 182, 184; Exhibit 15 at § 2.1.3(C)). Instead, like BellSouth, the Joint Petitioners limit their liability to bill credits. *Id.* And, KMC and NuVox impose limitation of liability language on their Florida customers that actually exceeds BellSouth's language as they limit their liability even for claims resulting from gross negligence or willful misconduct. *See* Johnson Depo. at 62; KMC Tariff at § 2.1.4(h); Exhibit 15 at § 2.1.3(B). Accordingly, in violation of the standard established by the FCC's Wireline Competition Bureau and other state commissions, the Joint Petitioners want greater limitation of liability rights against BellSouth than what BellSouth provides for its own customers and what the Joint Petitioners are willing to provide to their customers. Simply stated, the Joint Petitioners' own tariff language – language that they impose on Florida consumers – is unacceptable to the Joint Petitioners. The Commission should reject this hypocritical standard.

Second, the Commission should also disregard the Joint Petitioners' attempt to argue that the NewSouth/AllTel South Carolina Interconnection Agreement excerpt (Exhibit 27), which the

[16] Reference to "Russell Depo" and similar references to the other Joint Petitioner depositions means the depositions taken by the parties as part of the North Carolina proceeding and which have been entered into the record here. When referring to depositions taken by the Florida Staff, the cite will read "Russell Staff Depo."

Joint Petitioners produced for the first time at the hearing, supports their position. As an initial matter, the Commission should give this exhibit little credence because, to the extent relied upon by the Joint Petitioners, it should have been produced in discovery. Specifically, BellSouth asked the Joint Petitioners in discovery (which was regional in nature) to provide all interconnection agreements that it believed were identical or similar to the language proposed by the Joint Petitioners. The Joint Petitioners responded on December 7, 2004 that they had no responsive documents. *See* Joint Petitioners' Supplemental Response to Request for Production No. 6. NuVox witness Russell further testified that he only became aware of the NewSouth/AllTel Interconnection agreement after the completion of the merger between NewSouth and NuVox on December 31, 2004. (Tr. 198).

Exhibit 27 makes it clear, however, that NuVox faxed the AllTel Agreement on or about September 24, 2004, which is several months prior to the Joint Petitioners' supplemental discovery responses as well as the NewSouth/NuVox merger. Thus, to the extent the Joint Petitioners contend that the NewSouth/AllTel Agreement is similar to the provision they are proposing here, it is clear that NuVox and NewSouth had the agreement in their possession and should have produced it instead of claiming that they had no responsive documents.[17]

Moreover, the Commission should further discount this exhibit because AllTel is a rural ILEC that does not have a 251(c) obligation to provide UNEs at cost-based rates. Indeed, there is no UNE section in the "Table of Contents" set forth in Exhibit 27. Thus, unlike BellSouth, AllTel is not restricted to TELRIC prices and, therefore, can charge NewSouth rates to allow it to recover the additional expenses that may be experienced by limiting its liability to something other than bill credits. (Tr. 932-33).

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[17] If the Joint Petitioners argue instead that the NewSouth/AllTel agreement is neither similar nor identical and thus not responsive to the request, the Commission should then disregard the agreement because it is not relevant to the Joint Petitioners' claims.

And, unlike the AllTel agreement which limits each party's liability to certain amounts, the Joint Petitioners' proposal results in a totally one-sided limitation of liability provision solely in favor of the Joint Petitioners. For instance, after three years and based on the current billings between BellSouth and NuVox, under the Joint Petitioners' proposed language, BellSouth's liability to NuVox would be capped at ***$8,100,000*** while NuVox's liability to BellSouth would be limited to ***$2,700***. (Tr. at 180). Such a result is inherently unfair, not the standard in the industry, and only benefits the Joint Petitioners.

Third, the Joint Petitioners' language is unnecessary. The Joint Petitioners' tariffs and standard contracts limit their exposure to bill credits and also insulate them from any liability for damages that result from the actions of service providers, including BellSouth. *See* Exhibit 15 at § 2.1.4(H); KMC Tariff at § 2.1.4(c); Xspedius Tariff at § 2.1.4(c); Hamilton Depo at 145-146. Thus, BellSouth's language would compensate the Joint Petitioners for any loss that may result from BellSouth's negligence. With their language, however, the Joint Petitioners want more; they want the ability to recover 7.5 percent of amounts paid or payable on the day the claim arose, regardless of the extent or scope of their damage, and ***in addition to*** any bill credits that they may receive. *See* Joint Petitioner Exhibit A at GT&C § 10.4.1 ("provided that the foregoing provisions shall not be deemed or construed ... or (B) limiting either Party's right to recover appropriate refund(s) of or rebate(s) or credit(s) for fees, charges, or other amounts paid at Agreement rates ...."). Cleary, the Joint Petitioners should not be entitled to bill credits and 7.5 percent of amounts paid or payable on the day the claim arose for the same damage claim, but that is exactly what they seek. Consequently, adopting the Joint Petitioners' language could result in the Joint Petitioners making claims for damages against BellSouth that exceed the scope of the ultimate damage purportedly sustained.[18]

Fourth, the Joint Petitioners' claim that their proposed language is what is typically found in commercial contracts is of no import. (Tr. at 188). The fallacy in this argument is that the instant agreement is not a commercial contract – it is an interconnection agreement negotiated and arbitrated pursuant to Section 252 of the Act. A true commercial contract would not (1) require this Commission to resolve language the parties could not agree on; (2) require, as a matter of law, that one party enter into the contract; (3) require, as a matter of law, that the providing party charge a certain cost-based rate for the services provided; and (4) be subject to adoption by all other customers. Based on this very reasoning, the North Carolina Utilities Commission ("NCUC") has already found, in a dispute between BellSouth and a Joint Petitioner, that interconnection agreements are "not to be treated as typical commercial contracts." *See In the Matter of BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp.*, Docket No. P-772, Sub at 6 (Jan. 20, 2005) ("*NewSouth Reconsideration Order*").

The United States District Court for the Southern District of Mississippi reached the same conclusion in its recent decision overturning the Mississippi Public Service Commission's interpretation of the *TRRO* relating to "no new adds". *See BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Comm'n, et al.*, Civil Action No. 3:05CV173LN at 13 (Apr. 13, 2005). As this Federal District Court found:

> If the FCC's Order is viewed not merely as a general regulation which bears on the proper interpretation of the interconnection agreements but as an outright abrogation of provisions of parties' interconnection agreements, consideration of its jurisdiction to act

[18] Additionally, the Joint Petitioners' proposal fails to take into account that they receive SEEMs penalties from BellSouth for the very actions that may give rise to a claim of negligence against BellSouth.

> in the premises must take into account that interconnection agreements are "not ... ordinary private contract[s]," and are "not to be construed as ... traditional contract[s] but as ... instrument[s] arising within the context of ongoing federal and state regulation."

Id. (quoting *E.spire Communications, Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004)(citing *Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004) ("interconnection agreements are a 'creation of federal law' and are 'the vehicles chosen by Congress to implement the duties imposed in § 251.'").

NuVox witness Russell conceded, as he must, that the NCUC held that interconnection agreements should not be treated as typical commercial contracts. He further conceded that the Mississippi Federal District Court held that interconnection agreements are not ordinary contracts and are not to be construed as traditional contracts. (Tr. at 193-194). Notwithstanding these concessions, the Joint Petitioners continue to assert that interconnection agreements are "commercial agreements" and that the terms and conditions that they believe are found in typical commercial agreements should be incorporated into this 252 agreement. (Tr. 190). The above-cited legal precedence simply does not support the Joint Petitioners' contentions and their failure to concede this point renders their credibility suspect.

Fifth, the Commission should reject the Joint Petitioners' proposed language because it imposes costs on BellSouth that were not taken into consideration when establishing BellSouth's UNE costs. (Tr. at 805-806). Rather, those rates were established using the industry standard limitation of liability language that limits BellSouth's liability to bill credits. Significantly, the Joint Petitioners have not offered to pay any increased UNE rates that may result from the adoption of their language. The Iowa Utilities Board in *In re: US West Communications, Inc.*, Docket No. INU-00-2 , 2002 WL 595093 at * 14 (Mar. 12, 2002) recognized this exact issue in rejecting AT&T's request for limitation of liability language that exceeded what an ILEC provided to its retail customers.

> AT&T's proposal for SGAT section 5.8.1 would increase Qwest's liability to amounts that are greater than what Qwest charges for wholesale service. One problem with the proposal is that it seems to ignore that a provider's rate must cover its costs of service. Presumably, Qwest's retail and wholesale rates only include amounts necessary to reimburse customers for the actual loss of service (i.e., what the customer would have paid Quest for the service not received). AT&T believes that Qwest should have greater liability when providing wholesale service, but the record does not indicate that AT&T is willing to pay higher wholesale rates to obtain it.

The Commission should reach an identical conclusion here and reject the Joint Petitioners' attempt to dramatically alter the industry standard.

Sixth, the Joint Petitioners' language is unworkable. Although the Joint Petitioners now claim that they all have the same position on the issues (Tr. at 170), they originally did not. In fact, in their depositions, the Joint Petitioners each had different interpretations of what "paid or payable" or "on the day the claim arose" meant – two key provisions in their proposal. The Joint Petitioners are now attempting to dispel their mutual misunderstanding of their own language by stipulating as to what their language means. Notwithstanding this *ex-post facto* attempt to reconcile their differences, each of the Joint Petitioners originally had a different understanding as to how their "joint" language would work and how it should be interpreted. This fact alone proves that their proposal is unworkable and subject to abuse.

Finally, the Commission should reject the Joint Petitioners' attempt to minimize the fatal affect their own tariff and contract language has on this issue. Specifically, the Commission should reject the Joint Petitioners' "canned" mantra that they often deviate from the standard limitation of liability language in their end user contracts. The Joint Petitioners have presented no credible evidence to support this claim and their testimony on this issue is inherently suspect at best. For instance, in discovery, the Joint Petitioners could not identify a single, specific instance where they had to concede limitation of liability language to attract a customer. *See* Joint Petitioners Response to Interrogatory No. 22.[19] Additionally, in their depositions, each of the Joint Petitioners stated that they were not aware of a specific instance where an end user contract deviated from standard limitation of liability language. *See* Johnson Depo. at 29-30; Falvey Depo. at 33; Russell Depo. at 46. Regarding the identification of any particular customer, Mr. Falvey even attempted to minimize his lack of knowledge for this specific factual question by stating that there was much he did not know about Xspedius.

> Q. Do you know if your contracts with your customers allow for the deviation of your standard limitation of liability language in your tariffs?
>
> A. I'm not aware of that ever. I'm not aware of any case where someone's asked for a deviation. There's a lot that I am not aware of.

(Falvey Depo. at 33). Thus, to decide this issue, the Commission must rely on the testimony of a witness who admits that there "is a lot that I'm not aware of."

In any event, whether or not the Joint Petitioners deviate from the standard limitation of liability language in negotiating with their customers – a fact they cannot prove – is irrelevant in the determining the limitation of liability between the Joint Petitioners and BellSouth. This is because the Joint Petitioners, unlike BellSouth, have a choice. The Joint Petitioners can make the business decision to "walk away from the negotiating table" rather than agree to alter their

[19] The Joint Petitioners provided this response subject to several objections. The Joint Petitioners claim that BellSouth is at fault for not filing a motion to compel better responses should be given little credence. Regardless of what they now claim or the reason for providing the discovery response provided, the Joint Petitioners responded to BellSouth's discovery by stating that they had no specific knowledge to support their allegations as to deviations from their tariff language in end user contracts. BellSouth relied on their response and considered it to be accurate and truthful. If it was not, the Joint Petitioners should have corrected it or provided responsive information.

standard limitation of liability language with an end user in. The Joint Petitioners can also seek to recover any increased liabilities that may be associated with deviating from their standard language by charging negotiated rather than TELRIC rates.

BellSouth does not have these same contractual freedoms under the Act. Unlike the Joint Petitioners, BellSouth cannot refuse to enter into an interconnection agreement with the Joint Petitioners and must charge TELRIC rates for the services received. (Tr. at 187-188, 805; Russell Depo. at 87-89). Further, whenever they do make the business decision to deviate from their standard limitation of liability language after assessing the risk of a particular customer, the Joint Petitioners do not have the threat that every other potential customer in Florida would be entitled to those same terms and conditions as a matter of law. (Tr. at 188). Thus, even if true, the Joint Petitioners' argument is irrelevant for the purposes of this arbitration and only highlights the fact that the standard limitation of liability language in the industry should govern.

Item 5: 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? (GT&C, Section 10.4.2)

*****SUMMARY POSITION: The purpose of this provision puts BellSouth in same position it would be in if CLEC end user was a BellSouth end user and the CLEC elects not to limit its liability to that end user pursuant to industry standards.*****

The purpose of this Issue is to put BellSouth in the same position that it would be in if the CLEC end user was a BellSouth end user. BellSouth should not suffer any financial hardship as a result of a Joint Petitioner business decision. Accordingly, to the extent the Joint Petitioners decide to not limit their liability in accordance with industry standards, the Joint Petitioners should indemnify BellSouth for any loss BellSouth sustains as a result of that decision.

The Joint Petitioners objection to BellSouth's language is unsupportable. The exact language BellSouth proposes for this issue is in the Joint Petitioners' current agreement and has never been the subject of any dispute. (Tr. at 204-205). Further, the Joint Petitioners currently have limitation of liability language in their tariffs and contracts; they believe that their language is the maximum limit allowed by law; they have no plans to remove this language; their tariffs are in force and in effect today; and they intend to enforce tariff provisions limiting their liability. (Tr. at 203; Russell Depo. at 87; Falvey Depo. at 61; Johnson Depo. at 81-82; Exhibit 15 at § 2.1.3; KMC Tariff at § 2.1.4; Xspedius Tariff at § 2.1.4). In fact, as conceded by NuVox witness Russell, having unlimited liability is not a prudent business-move. *See* Russell Depo. at 82.

Nevertheless, the Joint Petitioners object to BellSouth's language on the premise that the Parties cannot limit the right to third Parties via this contract. While BellSouth agrees with this legal principle, it has no application here. BellSouth is not limiting the rights of any third party or dictating the terms by which the Joint Petitioners can offer service to their customers. Rather, BellSouth's language – language that has governed the Parties' relationship for the last several years – imposes obligations upon the Joint Petitioners in the event they make a business decision to not limit their liability within industry standards.

BellSouth needs this level of protection in light of the Joint Petitioners' position regarding indemnification. Specifically, under the Joint Petitioners' indemnification proposal (discussed in detail *infra*), BellSouth could only obtain indemnification from the Joint Petitioners when sued by a Joint Petitioner end user for claims of "libel, slander or invasion of privacy arising from the content of the receiving Party's own communications." *See* Joint Petitioner Exhibit A at GT&C § 10.5. In contrast, BellSouth would have to indemnify the Joint Petitioners for any "violation of Applicable Law" or injuries or damages arising out of BellSouth's negligence, gross negligence, or willful misconduct. *Id.*

This problem is further compounded by the fact that the Joint Petitioner end users are not purchasing services out of BellSouth's tariffs and are not under contract with BellSouth. (Tr. at 205). Accordingly, if the Joint Petitioners commit to providing a customer $1,000 if they fail to provision a loop within a specific time period and BellSouth misses the due date for the loop, the Joint Petitioners could seek to recover the $1,000 guaranteed to the customer from BellSouth through its indemnification language. (Tr. at 808). If that customer was a BellSouth customer, however, BellSouth's total exposure would be for bill credits. BellSouth should not be exposed to greater liability than otherwise contemplated simply because the end user is a CLEC end user rather than a BellSouth end user. The Minnesota Public Utilities Commission addressed this exact scenario in rejecting similar indemnification language proposed by AT&T in an arbitration with Qwest:

> Generally, the Commission regards indemnity clauses as means for allocating foreseen risks, not as means to induce Parties to insure one another against unanticipated and unbounded possibilities. Quest expressed concern that AT&T could advertise that it would not limit liability for consequential damage for service interruptions, knowing that Qwest would make AT&T whole if a claim ever arose. Whether or not this is a likely scenario, the indemnity language should not be drafted in a fashion to enable such a result.

In re: Petition of AT&T Communications of the Midwest, Inc., Minn. P.U.C., Docket No. P-442, 421/IC-03-759, 2003 WL 2287903 at *18 (Nov. 18, 2003) ("*Minnesota Arbitration Order*"); *see also*, *In re: AT&T Communications of New York, Inc.*, N.Y. P.S.C., Case 01-C-0095, 2001 WL 1572958 at 12 (finding that AT&T should implement tariff and contract provisions to limit Verizon's potential liability to AT&T customers).

The Commission should avoid the same result here and adopt BellSouth's proposed language. BellSouth's language is reasonable and insures that BellSouth's ultimate exposure to a CLEC end user is the same as it would be for a BellSouth end user.[20]

Item 6: How should indirect, incidental or consequential damages be defined for purposes of the Agreement? (GT&C Section 10.4.4)

*****SUMMARY POSITION: The Joint Petitioners language is of no force and effect.*****

There is no legitimate reason for the Joint Petitioners to be arbitrating this issue. The Parties agree that they will not be liable to each other for indirect, consequential or incidental damages. However, with their confusing language, the Joint Petitioners are attempting to preserve certain damage claims their end users may have against BellSouth. (Tr. at 208). The Joint Petitioners take this position even though they (1) readily concede that neither BellSouth nor the Joint Petitioners can affect the rights of third-party end users through this interconnection agreement; and (2) there is nothing in BellSouth's proposed language that seeks to limit either party's liability to any end user. (Tr. at 209-210; *see also*, Johnson Depo. at 5, 67, and 71). On cross-examination, the futility of the Joint Petitioners' position was readily apparent:

> 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-à-vis this contract; correct?
>
> A. I 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?

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[20] The Commission should also reject any claim by the Joint Petitioners that this is a competitive issue. The language in dispute has been in the Joint Petitioners' current agreements and they have been competing with BellSouth during the term of that and previous agreements. Additionally, Mr. Russell's fear that, with this provision, BellSouth could deviate from its tariff language when bidding for a customer while the Joint Petitioners could not, is a pure hypothetical not based on any personal knowledge. (Tr. at 207).

> 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.

(Tr. at 209-210). Thus, the Joint Petitioners' position is of no force and effect as a matter of law and is based upon a concern that does not exist.

In addition to being legally unsupportable, the Joint Petitioners' language is unnecessary and guts any limitation of liability protections ultimately ordered. NuVox witness Russell testified that the purpose of their proposed language was to make certain that damages that arise directly and proximately from BellSouth's negligence, gross negligence or willful misconduct cannot be termed in this agreement as incidental or consequential. (Tr. at 208; Russell Depo. at 102, 104-105). The language proposed by the Joint Petitioners, however, does not address this nonexistent concern. It provides that no Party would be responsible for indirect, incidental, or consequential damages "provided that neither the foregoing nor any other provision of this Section 10 shall be deemed or construed as imposing any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder ...." *See* Joint Petitioner Exhibit A at GTC § 10.4.4. If damages are direct and foreseeable then they cannot also be indirect, incidental or consequential. Thus, not only is the Joint Petitioners language of no force and effect as a matter of law, it is also unnecessary.

Furthermore, notwithstanding the Parties' agreement that there should be some limitation of liability between them, the Joint Petitioners' language emasculates any such limitation by excluding the limitation of liability provision for damages "incurred by such other Party vis-à-vis its End Users." Thus, as long as the Joint Petitioners brought a damage claim for damages incurred by the Joint Petitioners "vis-à-vis its End Users" (whatever that means), BellSouth's liability to the Joint Petitioners could be unlimited.

The Commission should not tolerate such gamesmanship and should preclude the Joint Petitioners' attempt to use legally unenforceable and unnecessary language to circumvent already agreed upon concepts. BellSouth's proposed language is legally enforceable, reasonable, and accurately sets forth the Parties' mutual agreement to not be liable to each other for indirect, consequential or incidental damages.

Item 7: What should the indemnification obligations of the parties be under this Agreement (GT&C, Section 10.5)

*****SUMMARY POSITION: The party providing service should be indemnified by the receiving party when the end user of the receiving party sues the providing party.*****

The Joint Petitioners' position on this issue constitutes the epitome of hypocrisy and represents another attempt by the Joint Petitioners to change industry standards. The Joint Petitioners want this Commission to approve language that requires the Party providing service to indemnify the Party receiving service for "(1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with the Agreement to the extent caused by the providing Party's negligence, gross negligence or willful misconduct." *See* Joint Petitioner Exhibit A GT&C at § 10.5. Conversely, under their proposed language, the receiving Party would only indemnify the providing Party "against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications." *Id.*

As conceded by NuVox witness Russell, in most cases, the Joint Petitioners will be the receiving Party and BellSouth will be the providing Party. (Tr. at 199). Thus, if adopted, BellSouth will have virtually unlimited indemnification obligations to the Joint Petitioners while the Joint Petitioners will have essentially no indemnification obligations to BellSouth.

In fact, if BellSouth were sued by a third party solely as the result of the negligence of a Joint Petitioner, BellSouth would have no indemnification rights against the Joint Petitioners. (Tr. at 202).[21] The Joint Petitioners are aware of no other interconnection agreement that contains such draconian indemnification obligations. *See* Russell Depo. at 119. Clearly, such a result is unacceptable, because BellSouth, as a service provider should be indemnified by the Joint Petitioners for claims brought against BellSouth by the Joint Petitioners' end users. The Joint Petitioners expect as much from their end users as NuVox's tariffs require end users to indemnify it for "any act or omission" and do not require NuVox to indemnify the end user in any instance. *See* Tr. at 196; *see also*, NuVox Tariff at § 2.1.4.8; KMC Tariff at § 2.1.4(G).

In addition to being patently unfair and contrary to the obligations imposed on their end users, the Joint Petitioners' proposed language violates the FCC's Wireline Competition Bureau's precedent on this issue. In the *Virginia Arbitration Order*, the Wireline Competition Bureau rejected WorldCom's attempt to include similar, expansive indemnification language in an interconnection agreement with Verizon:

> Verizon has no duty to provide perfect service to its own customers; therefore, it is unreasonable to place that duty on Verizon to provide perfect service to WorldCom. In addition, we are not convinced that Verizon should indemnify WorldCom for all claims made by WorldCom's customers against WorldCom. Verizon has no contractual relationship with WorldCom's customers, and therefore lacks the ability to limit its liability in such instances, as it may with its own customers. As the carrier with the contractual relationship with its own customers, WorldCom is in the best position to limit its own liability against its customers in a manner that conforms with this provision.

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[21] Even in the situation where BellSouth is sued by a Joint Petitioner end user and BellSouth is not at fault, BellSouth would incur substantial expenses in attempting to prove that it was not at fault. BellSouth would still need to be indemnified by the Joint Petitioners for BellSouth's financial loss associated with defending itself in a lawsuit in which it ultimately was determined it had no liability.

Virginia Arbitration Order at 709. Similarly, in the *Minnesota Arbitration Order*, the Minnesota Commission rejected AT&T's attempts to make Qwest indemnify AT&T for "any breach of Applicable Law," finding that "indemnity clauses [are] means for allocating foreseen risks, not as means to induce Parties to insure one another against unanticipated and unbounded possibilities" and that AT&T's language "would make Parties potentially liable for another party's conduct far removed from the ICA." 2003 WL 22870903 at *17.

The same rationale applies here as the Joint Petitioners' language is designed to obligate BellSouth to indemnify them for essentially any type of claim. This is especially true given the Joint Petitioners' position that "Applicable Law" includes the law in existence at the time of execution of the interconnection agreement, regardless of whether that law is memorialized in the agreement. (Tr. at 200). Thus, if the Commission adopted the Joint Petitioners' language, BellSouth could be obligated to indemnify the Joint Petitioners for alleged violations of some undisclosed law. *Id.*

Moreover, the expansive and almost unlimited indemnification obligations sought by the Joint Petitioners is ultimately unnecessary because each of them have provisions in their tariffs that preclude any liability for the actions of service providers, like BellSouth. *See* Exhibit 15 at § 2.1.4(H); KMC Tariff at § 2.1.4(c); Xspedius Tariff at § 2.1.4(c); Hamilton Depo at 145-147; Johnson Depo. at 51. Thus, the Joint Petitioners already insulate themselves from the very liability they seek to have covered through their indemnification language. Additionally, the Joint Petitioners can cite to no past history or dealings between the Parties to support this substantial change in the industry standard. None of the Joint Petitioners are aware of any instance where they previously sought indemnification from BellSouth. (Russell Depo. at 154; Johnson Depo. at 50; Falvey Depo. at 92).

Further, as with Issue 4, the Joint Petitioners' reliance on what are purported common provisions in the commercial agreement context is misplaced. As previously stated and as found by the NCUC and federal courts, interconnection agreements are not typical commercial agreements and should not be construed or treated as such. *In the Matter of BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp.*, Docket No. P-772, Sub at 6; *BellSouth v. Mississippi Public Serv. Comm'n*, Civil Action No. 3:05CV173LN at 13. And, irrespective of what may or may not be commercially reasonable, BellSouth's UNE rates were not established under the premise that BellSouth would have almost unlimited exposure via indemnification language in an interconnection agreement. (Tr. at 885).

In contrast, BellSouth's proposed language for this issue complies with the standards in the industry, including the Joint Petitioners' tariffs as it requires the receiving Party to indemnify the providing Party in two limited situations: (1) claims for libel, slander, or invasion of privacy arising from the content of the receiving Party's own communications; or (2) any claim, loss, or damaged claimed by the "End User or customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties or obligations arising out of this Agreement." *See* BellSouth Exhibit A, GT&C at § 10.5. This language is considerably more narrow than the Joint Petitioners' proposal, which would require BellSouth to indemnify the Joint Petitioners for all claims, regardless of whether it was brought by an end user. Therefore, the Commission should adopt BellSouth's language on this issue because it is reasonable, is consistent with industry standards (including the Joint Petitioners' tariffs) and complies with the general concept that indemnification provisions should be limited to foreseen risks.

Item 9: Under what circumstances should a Party be allowed to take a dispute concerning the Interconnection Agreement to a Court of law for resolution first? (GT&C Section 13.1)

*****SUMMARY POSITION: The Commission or FCC should resolve disputes within their jurisdiction or expertise.*****

This issue centers on whether the Parties should be required to submit disputes that are within the expertise or jurisdiction of the Commission or FCC to the Commission or FCC for resolution. BellSouth takes the position that the Commission should order such a requirement but that, if the dispute is outside the jurisdiction or expertise of the Commission or FCC, the Parties can take the dispute to a court of law. (Tr. at 886; BellSouth Exhibit A, GT&C at § 13.1). Conversely, the Joint Petitioners want to bring a dispute to a court of law even in circumstances when the Commission has jurisdiction and/or expertise to resolve the dispute. For the following reasons, the Commission should adopt BellSouth's proposed language.

First, there can be no question that the Commission should resolve matters that are within its expertise and jurisdiction. Interconnection agreements achieved through either voluntary negotiations or through compulsory arbitration are established pursuant to Section 252 of the Act. Specifically, Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the Commission for approval. As such, unlike a court, state commissions are in the best position to resolve disputes relating to the interpretation or enforcement of agreement that it approves pursuant to the Act. (Tr. at 814).

The Eleventh Circuit used this same rationale to find that state commissions have the authority under the Act to interpret interconnection agreements. *See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003). As stated by the court: "Moreover, the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce ***in the first instance*** and to subject their determination to challenges in the federal courts." *Id.* (emphasis added). The FCC has also held that, "'due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements.'" *Id.* (quoting *In re: Starpower*, 15 FCC Rcd at 11280 (2000)).

At its core, the Joint Petitioners' language would result in this Commission standing by or seeking to intervene in a state court proceeding initiated by the Joint Petitioners in a foreign state to resolve disputes relating to provisions that this Commission arbitrated and approved. (Tr. at 598-599). Clearly, this Commission should be involved in disputes relating to agreements that it arbitrates and approves. Adoption of the Joint Petitioners' proposal could effectively prohibit the Commission from such a role.

Likewise, the FCC, having regulatory oversight over ILECs and CLECs and their obligations under the Act, also has expertise to resolve disputes relating to the interpretation and implementation of the agreement. (Tr. at 816). Accordingly, the FCC is another available forum that the Joint Petitioners could employ to resolve disputes relating to the interpretation and implementation of the agreement.

The Joint Petitioners concede that state commissions have the authority to enforce and interpret interconnection agreements that they approve pursuant to the Act. (Tr. at 594-595). The Joint Petitioners also concede that state commissions are experts with respect to a number of issues in the agreement. (Tr. at 595). Based on these concessions, the Joint Petitioners should have no dispute with BellSouth's proposed language.

The apparent motivation of the Joint Petitioners in continuing to arbitrate this issue is to obtain the ability to go to a single forum to address a region-wide dispute and to avoid bifurcated hearings. (Tr. at 278, 281). Neither of these goals, however, are likely achievable with their proposed language. For instance, the Joint Petitioners attempt to mitigate their concession that the state Commission and the FCC are experts in several matters by stating that, pursuant to the doctrine of primary jurisdiction, a court could refer these "expert" matters to the state commissions for resolution. (Tr. at 463). Invocation of this doctrine, however, leads to the same result the Joint Petitioners are attempting to avoid – bifurcated hearings. Specifically, under the doctrine of primary jurisdiction, a court would resolve matters outside the expertise of a state Commission while nine state commissions would resolve matters within their expertise. The Joint Petitioners do not dispute this fact. *See* Johnson Depo. at 81-82; Tr. at 599.

Additionally, BellSouth's proposed language gives the Joint Petitioners the ability to resolve a dispute in a single forum as it allows either Party to bring a dispute to the FCC. Ironically, by arbitrating this dispute in nine different states pursuant to the Act, the Joint Petitioners run the risk that they will not have this "one-stop shop" option with a court of law. This is because if eight states commissions reject the Joint Petitioners' language while one state Commission accepts it, the Joint Petitioners right to proceed to a court of law to resolve a dispute would be only applicable in that one state and they would have to litigate the dispute in eight other state commissions. (Falvey Depo. at 89-90; Johnson Depo. at 82). Thus, unless the Joint Petitioners are successful on this issue in all nine states, they will not even obtain the desired effect of their proposed language.

In sum, BellSouth's language preserves the ability of this Commission to resolve disputes that are within its expertise while also providing the Joint Petitioners the option of going to a court of law for matters outside such expertise. Accordingly, BellSouth's language is balanced, reasonable, and should be adopted.[22]

Issue 12: Should the Agreement explicitly state that all existing state and federal law, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties? (GT&C, Section 32.2)

SUMMARY POSITION: When one party asserts that the other party has an obligation under substantive telecommunications law that is not addressed in the agreement and that obligation is disputed, the Commission should resolve the dispute and if found applicable, the obligation should apply prospectively, only.

This issue centers on how the Parties should handle disputes when one Party asserts that an obligation, right, or other requirement relating to telecommunications law is applicable even though such obligation, right, or requirements is not expressly memorialized in the interconnection agreement. This issue is not about whether BellSouth intends to comply with Applicable Law.[23] BellSouth has agreed to do so. *See* GTC at § 32.1. This issue is about providing the Parties with certainty in the interconnection agreement as to their respective telecommunications obligations. BellSouth's proposed language is designed to do just that as it ensures that (1) no Party is penalized by the lack of clarity or silence in this agreement relating to its obligations under telecommunications law; and (2) no Party has the opportunity to renegotiate provisions of the contract based on a new reading of Applicable Law.

Specifically, BellSouth's concern is that, with their language, the Joint Petitioners will review a telecommunications rule or order, interpret it in a manner that BellSouth could not have anticipated, claim that such interpretation forms the basis of a contractual obligation (even though during the two years of negotiations the Joint Petitioners did not raise the issue), and then

[22] Contrary to any claim the Joint Petitioners may assert, BellSouth is not attempting to limit any rights the Joint Petitioners have to go to a court of law for dispute resolution. The Commission has exclusive jurisdiction over telecommunications issues under Florida law. *See* Section 364.01, Florida Statutes.

[23] Section 32.1 defines "Applicable Law" as "all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, injunctions, judgments and binding decisions and decrees that relate to its obligations under this Agreement." BellSouth has agreed to comply with Applicable Law.

seek to enforce the obligation against BellSouth.[24] BellSouth's language addresses this concern as it provides that "to the extent that either Party asserts that an obligation, right or other requirement, ***not expressly memorialized herein***, is applicable under this Agreement by virtue of a reference to an FCC or Commission rule or order, or ***with respect to substantive telecommunications law only***, Applicable Law" and the other Party disputes such right, obligation, or requirement, the Parties agree to submit the dispute to dispute resolution before the Commission and agree that any finding that such right or obligation exists prospectively only. (*See* BellSouth Exhibit A, GT&C at § 32.2) (emphasis added). Clearly, if the Commission determined that the obligation should have applied retroactively, the Commission could include such a requirement in its order.

The Joint Petitioners concede that the interconnection agreement contains the Parties' interpretation of various FCC rules and decisions. (Johnson Depo. at 87). The Joint Petitioners also agree that the Parties should be confident as to the scope of their obligations and that the purpose in contracting is to be expressly clear. *Id.* at 95. Additionally, the Joint Petitioners agree that Parties should not be able to use the Applicable Law provision to circumvent what the Parties agree to in this agreement. *Id.* at 87.

Notwithstanding these admissions, the Joint Petitioners continue to advance language that results in the complete confusion of the Parties' respective obligations and potential obligations. In particular, the Joint Petitioners take the position that the law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise. (Tr. at 220; Russell Depo. at 142; 145). Taken to its logical extreme, under the Joint Petitioners' language, the Parties would only need a one-page

[24] This exact scenario is not unprecedented as NuVox and NewSouth are using this very argument in defense of BellSouth's attempt to conduct an EEL audit under their current agreement. (Tr. at 889).

interconnection agreement (rather than the 500-plus page agreement currently in existence) stating that the Parties agree to comply with Applicable Law. Consequently, the Joint Petitioners' language defeats the entire purpose of negotiation and arbitration pursuant to Section 252 of the Act (as well as the efforts of the Parties since June 2003).[25]

Additionally, a state commission has already rejected this exact argument in *In re: BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp.*, Docket No. P-772, Sub 7, *Order Granting Motion for Summary Disposition and Allowing Audit*, (Aug. 24, 2004). In that decision, NewSouth (one of the Joint Petitioners) argued that the FCC's *Supplemental Order on Clarification* ("SOC") regarding EEL audits was automatically incorporated into the current interconnection agreement via this same "Applicable Law" argument. The NCUC rejected NewSouth's "Applicable Law" argument, finding as follows:

> NewSouth has also argued that the general principle that agreements are interpreted in light of the body of law existing at the time agreements are executed is part of Georgia law. NewSouth applies this principle by arguing that the entire SOC, as part of the existing law at the time the Agreement was executed, must be read into the Agreement, and that the Parties would have had to have included an express statement excluding the SOC from the Agreement if they wanted to be relieved from the requirements and restrictions of the SOC. The Commission does not agree.

(*Id.* at 8). Further buttressing this conclusion, the NCUC also held that, "having entered into the Agreement, the Parties' dealings are now governed by the specific terms of the Agreement and not the general provisions of Section 251 and 252 of the Act or FCC rulings and orders issued pursuant to those stated sections." *Id.* at 6. The Commission should reach the same conclusion here.

[25] The Parties have been negotiating the instant agreement since at least June 2003. (Tr. at 218).

The Joint Petitioners' interpretation of this issue should be rejected for the additional reason that it attempts to improperly expand the scope of this agreement. For instance, the Joint Petitioners admit that, under their interpretation of this issue, Florida state unbundling laws are automatically incorporated into this Section 252 agreement upon execution, unless expressly excluded. (Tr. at 221, 223; Falvey Depo. at 90-91).[26] The Joint Petitioners further contend that, even if federal law provides that BellSouth no longer has an obligation to provide an unbundled element, BellSouth could still be obligated under state law to provide that element via this agreement, even though the agreement never referenced state unbundling law. (Tr. at 224-225). Such a result conflicts with the entire purpose of entering into a Section 252 arbitration agreement as well as the doctrine of preemption.

Section 32.1 of the General Terms and Conditions defines Applicable Law as being the law that relates to its obligations under this agreement. Moreover, the fourth "whereas" clause in the General Terms and Conditions establishes the general parameters of this agreement as it provides that the "Parties wish to interconnect their facilities and exchange traffic pursuant to and consistent with the rights and obligations set forth in Section 251 and 252 of the Act." Accordingly, Applicable Law, as it is defined in the agreement, is limited to the law addressing BellSouth's obligations under Section 251 and 252 of the Act, not unreferenced and potentially conflicting state law.

The NCUC reached this same conclusion in the BellSouth/DeltaCom arbitration. *See In re: Petition for Arbitration by ITC^DeltaComs*, Docket No. P-500, Sub 18, *Recommended Arbitration Order* at 25 (finding that the Commission was "acting under the authority granted by

[26] Ms. Johnson also stated that KMC could hold BellSouth in breach of these unstated state law obligations. (Johnson Depo. at 92). In another instance where the Joint Petitioners do not agree on an issue, Mr. Falvey stated, however, that state unbundling laws would not be incorporated into the agreement and that the Joint Petitioners could not hold BellSouth in breach for state unbundling laws that are not expressly addressed in the agreement. (Falvey Depo. at 101; 103-04).

TA96 in arbitrating interconnection agreements and its decisions are rendered pursuant to section 251 of TA96" and that "it is appropriate for the agreement to indicate compliance only with state and federal rules pursuant to Section 251."). Thus, the Commission should reject the Joint Petitioners' language because it improperly expands the already agreed-upon scope of this agreement and conflicts with the purpose of this Section 251/252 agreement.

Finally, an ILEC only has an obligation under the Act to negotiate those duties listed in Section 251(b) and (c) of the Act. *Conserv Limited Liab. Corp. v. Southwestern Bell Tel.*, 350 F.3d 482, 487 (5^{th} Cir. 2003). Further, only in cases where the Parties voluntarily agree to negotiate "issues other than those duties required of an ILEC by § 251(b) and (c)" do non-251 issues become subject to compulsory arbitration under Section 252. *Id.* As stated by the Fifth Circuit, a state Commission " ... may arbitrate only issues that were the subject of the voluntary negotiations" and that "[a]n ILEC is clearly free to refuse to negotiate any issue other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252." *Id.*

Adoption of the Joint Petitioners' language violates the legal principles established in *Conserv* as it essentially requires BellSouth to negotiate and arbitrate non-251 issues, including state unbundling laws, even though the parties never addressed such issues either in negotiation or arbitration in a Section 252 agreement. The Commission should prevent this attempt by the Joint Petitioners to violate BellSouth's rights under federal law by seeking to force BellSouth to negotiate, arbitrate, and incorporate yet-to-be identified issues that it has no duty to negotiate and address in a Section 252 agreement.[27]

[27] The Joint Petitioners claim that BellSouth's proposed language would result in the parties not being obligated to comply with CPNI laws because such laws are not included in the Interconnection Agreement is misplaced. As an initial matter, the Parties have already agreed to procedures that protect CPNI consistent with those laws in Attachment 7 regarding Customer Service Records and Letters of Authorizations. Further, even if factually correct,

Item 26: 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? (Attachment 2, Section 1.7)

*****SUMMARY POSITION: BellSouth has no obligation to commingle UNEs with 271 services and the Commission does not have jurisdiction to order otherwise.*****

The issue in dispute with Item 26 is whether the FCC in the *TRO* required BellSouth to commingle 271 elements with 251 elements.[28] As made clear by a review of the *TRO* as well as the FCC's errata to the *TRO*, the answer to this question is "no", and the Commission does not have jurisdiction to order otherwise.

As defined by the FCC, commingling involves the combining of a 251 element with a wholesale service obtained from an ILEC by any method other than unbundling under Section 251(c)(3) of the Act. *TRO* at ¶ 579. BellSouth has no 271 obligation to combine 271 elements or to combine elements that are no longer required to be unbundled pursuant to Section 251(c)(3) of the Act. *See TRO* at ¶ 655, n. 1990; *USTA II*, 359 F.3d at 589-90. Thus, it is clear that the FCC's reference to "wholesale services" in describing an ILEC's commingling obligations excludes 271 services.

To hold otherwise would require BellSouth to do exactly what the FCC and D.C. Circuit held was impermissible as it would require BellSouth to combine services that are no longer required to be unbundled under Section 251(c)(3). Indeed, under the Joint Petitioners' interpretation of BellSouth's commingling obligations, BellSouth could be required to combine 271 switching with a UNE loop, thereby resurrecting UNE-P. The FCC's decision in the *TRRO*

BellSouth's language is only applicable when there is a dispute as to the existence of an obligation that was not previously disclosed or set forth in the Agreement. Obviously, BellSouth does not dispute the existence of CPNI laws or that BellSouth is obligated to comply with them. Indeed, BellSouth is arbitrating Item 86(B), which deals with the rights the Parties should have when one Party violates CPNI laws relating to Customer Service Records.

[28] This identical issue is being addressed in the Commission's Generic Proceeding as Issue 14.

made it clear that BellSouth has no 251 obligation to provide UNE-P.[29] And, the New York Public Service Commission as well as the Mississippi Federal District Court have indicated that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to 271-based UNE-P arrangements.'" *BellSouth v. Mississippi Public Serv. Comm'n*, Civil Action No. 3:05CV173LN at 16-17 (stating that the court would agree with the New York Commission's findings) (quoting *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y. P.S.C. (Mar. 16, 2005)).

This conclusion is buttressed by the fact that the FCC, in its Errata, deleted the only reference to 271 in the entire discussion of commingling. Specifically, in paragraph 584, the FCC originally stated that "[a]s a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act." *TRO* at ¶ 584. In the Errata, the FCC deleted this phrase "unbundled pursuant to section 271." *See TRO* Errata at ¶ 27. Without this reference, there is no other discussion of 271 elements in the commingling section of the *TRO*. The Joint Petitioners do not dispute this fact nor the fact that the Errata is in force and effect. (Tr. at 211).[30]

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[29] BellSouth cites to the *TRRO* merely to point out substantive changes in the law that have transpired since the close of the evidentiary hearing in this case. The Parties have not and could not have included any *TRRO* specific issues in the arbitration because the window for raising issues expired several months prior to the FCC's issuance of the *TRRO*.

[30] The FCC, in note 1990 of the *TRO*, originally stated that it declined "to apply our commingling rule, set forth in Part VII.A above, to services that must be offered pursuant to these checklist items." The FCC deleted this sentence in the Errata presumably because it also deleted the reference to 271 elements in paragraph 584.

In fact, contrary to the Joint Petitioners' interpretation of this issue, throughout the entire commingling section in the *TRO*, the FCC limits its description of the wholesale services that are subject to commingling to tariffed access services.

- "We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff) ...." *TRO* at ¶ 579.

- "As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special access services offered pursuant to tariff) ...." *Id.*

- "Thus, we do not require incumbent LECs to implement any changes to their billing or other systems necessary to bill a single circuit at multiple rates (*e.g.*, a DS3 circuit at rates based on special access services and UNEs) ...." *TRO* at ¶ 580.

- "For these reasons, we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations." *TRO* at ¶ 581.

- "Instead, commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service, such as high-capacity multiplexing or transport services." *TRO* at ¶ 583.

These passages, in conjunction with the Errata, make it clear that the FCC never intended for ILECs to commingle 271 elements with 251 elements.[31]

[31] The Joint Petitioners' assertion that the Errata simply cleans up stray language from paragraph 584 because the FCC wanted to make clear that resale was a wholesale service is simply implausible. (Johnson Depo. at 130; Tr. at 615-617). To believe this assertion, the Commission must accept the Joint Petitioners' claim that there was confusion in the industry as to whether resale constitutes a wholesale service. The FCC never made this reference in the *TRO* and there is no evidence to support such a specious interpretation. Further, the Joint Petitioners' claim that the FCC could not have used the Errata to strike substantive law must also be rejected. Indeed, the Joint Petitioners focus on the fact that the FCC in the Errata deleted the last sentence of note 1990 in the *TRO*, which provided that ILECs have no obligation to commingle 251 with 271 elements (The FCC deleted this sentence presumably because of the Errata's deletion of 271 services in paragraph 584). To believe the Joint Petitioners would result in the Commission rejecting the very facts that the Joint Petitioners cite to support their argument. Stated another way, the Joint Petitioners rely on the deletion of a substantive provision in the *TRO* to support their claim regarding commingling. Apparently, the Joint Petitioners take the position that an Errata cannot affect substantive rights only if those rights are in BellSouth's favor.

Additionally, although not at issue in this arbitration, the *TRRO* provides further guidance on this issue that is consistent with BellSouth's position. Particularly, in addressing conversion rights, the FCC in the *TRO* used the same "wholesale services" phrase that forms the basis of the Joint Petitioners' commingling argument – that is "wholesale services" includes services offered pursuant to Section 271. *See TRO* at ¶ 585 ("We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations ...."). In the *TRRO*, the FCC described its holding in the *TRO* regarding conversions to be limited to the conversion of tariffed services to UNEs: "We determined in the *Triennial Review Order* that competitive LECS may convert tariffed incumbent LEC services to UNEs and UNE combinations ...." *TRRO* at ¶ 229. Thus, the FCC has subsequently construed the phrase "wholesale services" to be limited to tariffed services, which is consistent with BellSouth's position.

The only logical conclusion based upon the express wording of the *TRO* as well as the Errata (and the *TRRO*) is that BellSouth has no obligation to commingle 271 elements with 251 elements. At least two state commissions have reached the same conclusion. *See In re: DIECA Communications, Inc.*, Docket No. 04-2277-02, Utah P.S.C., 2005 WL 578197 at *13 (Feb. 8, 2005) (finding that "ILECs are required to commingle wholesale elements obtained by means other than Section 251(c)(3), except for Section 271 elements."); *In re: XO Illinois, Inc.*, 04-0371 Ill. C.C., 2004 WL 3050537 at 15 (Oct. 28, 2004) ("SBC is not required to commingle UNEs and UNE combinations with network elements unbundled pursuant to Section 271. The FCC specifically removed that requirement from the *TRO* 584 when it issued its *TRO* Errata.").[32]

[32] The Illinois Commerce Commission subsequently reached a different conclusion in *In re: Metro Access Transmission Services, Inc.*, Docket No. 04-0469. In addition, upon information and belief, the state commissions of Washington and Colorado have also reached a different understanding of an ILEC's commingling obligations.

Finally, the FCC and not the Commission has jurisdiction over elements provided pursuant to Section 271. 47 U.S.C. § 271(d)(6)(A). The FCC made this point clear in the *TRO*. *TRO* at ¶¶ 664-665. The only role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271-approval process. 47 U.S.C. § 271(d)(2)(B). State commissions' authority to arbitrate and approve interconnection agreements entered into "pursuant to section 251," are specifically limited by the Act to implementing Section 251 obligations, not Section 271 obligations. In sum, Congress did not authorize a state commission to ensure that an agreement satisfies Section 271, to establish any 271 obligations, or to establish rates for any Section 271 obligation. *See UNE Remand Order* at ¶ 470; *TRO* at ¶ ¶ 656, 664; *USTA II*, at 237-38.

In light of the clear statutory language, it is not surprising that in recent decisions addressing this issue, both state commissions and federal courts have confirmed the FCC's exclusive regulatory oversight over Section 271. For example, in an arbitration decision involving Qwest and Covad, the Washington Utilities and Transportation Commission ("Washington Commission") explained that "state commissions do not have authority under either Section 271 or Section 252 to enforce the requirements of Section 271." *In re: Petition for Arbitration of Covad with Qwest,* Docket No. UT-043045, Order No. 06 (Feb. 9, 2005).

Similarly, the Utah Public Service Commission ("Utah Commission") held that "Section 252 was clearly intended to provide mechanisms for parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the additional of new Section 251 obligations via incorporated by reference to access obligations under Section 271 or state law." *In re: Petition for Arbitration of*

Covad with Qwest, Utah Public Service Commission Docket No. 04-2277-02 (Feb. 8, 2005).

The above-decisions are consistent with recent decisions of federal district courts. Specifically, the United States District Court for the Southern District of Mississippi recently confirmed that the FCC is the sole body to enforce 271 obligations.

> It would further observe, though, that even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth has failed to comply, § 271 explicitly places enforcement Commission with the FCC ... Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service.

BellSouth v. Mississippi Public Serv. Comm'n, Civil Action No. 3:05CV173LN at 17. Likewise, a Kentucky Federal District Court confirmed this well-established principle:

> While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.

BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al., Civil Action No. 3:05-CV-16-JMH, Memorandum Opinion and Order, (E.D. Ky. Apr. 22, 2005).

Finally, state commissions, cannot assert state law authority to regulate 271 elements, which "are a purely federal construct." *InterLATA Boundary Order* ¶ 18. In particular, state commissions cannot rely on state law to expand the list of 271 elements or to regulate the rates, terms, and conditions on which BOCs provide access to those elements.

The FCC has held that, in section 271, Congress identified a limited set of specific network elements to which BOCs must provide access irrespective of whether their competitors would be impaired without access to those elements as UNEs. *See TRO* ¶ 653. Congress also expressly prohibited the FCC from "extend[ing] the terms used in the competitive checklist" to include additional network elements. 47 U.S.C. § 271(d)(4); *see also* 47 U.S.C. § 160(a), (d) (permitting the FCC to eliminate the obligation to provide 271 elements once "it determines that th[e] requirements [of section 271] have been fully implemented"). It necessarily follows that any decision by a state commission purporting to create new 271 obligations under state law authority conflicts with Congress's determination and, therefore, is preempted. *See, e.g. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 353 (2001)*; *International Paper Co. v. Ouellette,* 479 U.S. 481, 494 (1987).

This is especially true with respect to those network elements as to which the FCC has found no impairment and that Congress did not require BOCs to provide as 271 elements. Section 271 "does not gratuitously reimpose the very same requirements that" section 251 "has eliminated." *TRO* ¶ 659. Nor does it permit return to "virtually unlimited . . . unbundling, based on little more than faith that more unbundling is better." *Id.* ¶ 658. Therefore, once the FCC has concluded that such elements need not be provided as UNEs, state commissions have no authority to require BOCs to provide unbundled access to those elements.

State commission efforts to regulate the rates, terms, and conditions for 271 elements – like state efforts to regulate 271 access -- are also preempted. As an initial matter, there can be no serious dispute that state commissions are precluded from requiring BOCs to provide access to 271 elements at TELRIC, or substantially equivalent rates. The FCC has already determined that "TELRIC pricing for checklist network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute *nor necessary to protect the public interest*." *TRO* ¶ *656* (emphasis added). The FCC's conclusion is consistent with its earlier recognition that, where the FCC has found "that a competitor is not impaired in its ability to offer services without access to [an] element," "it would be *counterproductive* to mandate that the incumbent offers the element at forward-looking prices." *UNE Remand Order* ¶ 473 (emphasis added).

Any state law purporting to permit a state commission to require forward-looking rates for 271 elements – whether TELRIC rates or otherwise – is therefore preempted. Under the Supremacy Clause, "[t]he statutorily authorized regulations of a [a federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."[33] The FCC's conclusion that TELRIC pricing does not—and should not – apply to 271 elements constitutes "a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute" and thus preempts inconsistent state regulation.[34] State law, therefore, can provide no "back door" for the reimposition of TELRIC rates for network elements that the FCC has determined BOCs should not be required to make available at forward-looking prices.

Item 36: (A) How should line conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to line conditioning? (Attachment 2, Section 2.12.1)

Item 37: Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less? (Attachment 2, Section 2.12.2)

Item 38: Under what rates, terms, and conditions should BellSouth be required to perform Line Conditioning to remove bridge taps? (Attachment 2, Sections 2.12.3 and 2.12.4)

These issues represent another attempt by the Joint Petitioners to arbitrate issues that have no impact on their current business operations and to obtain rights that exceed what BellSouth offers its customers.[35] Further, the Joint Petitioners' position as to the scope of BellSouth's line conditioning obligations conflicts with the *TRO* and BellSouth's

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[33] *City of New York v. FCC,* 486 U.S. 57, 64 (1988); *see Geier v. American Honda Motor Co.,* 529 U.S. 861, 872, 881 (2000) (states may not depart from "deliberately imposed" federal standards); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 155 (1982) (federal) regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the flexibility' given it by [federal law]").
[34] *Bethlehem Steel Co. v. New York State Labor Relations Bd.,* 330 U.S. 767, 774 (1947); *United States v. Locke,* 529 U.S. 89, 110 (2000).
[35] These issues are encompassed within Issue 26 of the Generic Proceeding. Further, because all of these issues are interrelated as they address BellSouth's line conditioning obligations in both a general and a specific fashion, BellSouth will brief them together.

nondiscriminatory obligations under the Act and thus should be rejected. And, their stated need for arbitrating these issues is based on pure speculation and conjecture and, ultimately, are factually incorrect.

(Item 36)

*****SUMMARY POSITION: BellSouth's line conditioning obligation is limited to the type of line conditioning that BellSouth regularly undertakes to provides xDSL to its own customers.*****

Fundamentally, BellSouth is obligated to perform line conditioning on the same terms and conditions that BellSouth provides for its own customers. In paragraph 643 of the *TRO*, the FCC stated that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." *TRO* at ¶ 643. The FCC went on further to state that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services ***at parity*** with how incumbent LECs provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations." *Id.* (emphasis added). BellSouth's proposed language complies with this standard by offering to perform line conditioning for the Joint Petitioners pursuant to the same terms and conditions that it provides for its own customers. (Tr. at 676, 682).

As established by paragraph 643 of the *TRO*, the basis of BellSouth's obligation to perform line conditioning is established in its nondiscriminatory obligation under Section 251(c)(3) of the Act. The Joint Petitioners do not dispute this fact nor the fact that Section 251(c)(3) prohibits BellSouth from discriminating between its CLEC customers and its retail customers. (Tr. at 605, 607-608). Notwithstanding the clear wording of the *TRO* as well as their admissions, the Joint Petitioners' position is that BellSouth has an obligation to perform line conditioning that exceeds what it provides for its own customers. (Tr. at 604). This interpretation not only violates the FCC's express findings that BellSouth's line conditioning obligations are premised on Section 251(c)(3)'s nondiscrimination obligations but also the FCC's holding in the *TRO* that line conditioning does not result in the creation of a "superior network." *TRO* at ¶¶ 630; 643.

The D.C. Circuit in *USTA II* interpreted the FCC's routine network modification requirements in the *TRO,* and its analysis is entirely consistent with BellSouth's position on this issue.

> The ILECs claim that these passages manifest a resurrection of the unlawful superior quality rules. We disagree. The FCC has established a clear and reasonable limiting principle: the distinction between a "routine network modification" and a "superior quality" alteration turns on whether the modification is of the sort that the ILEC routinely performs, on demand, for its own customers. While there may be disputes about the application, the principle itself seems sensible and consistent with the Act as interpreted by the Eighth Circuit. Indeed, the FCC makes a plausible argument that requiring ILECs to provide CLECs with whatever modifications the ILECs would routinely perform for their own customers is not only allowed by the Act, but is affirmatively demanded by § 251(c)(3)'s requirement that access be "nondiscriminatory."

USTA II, 359 F.3d at 578.

Simply put, adoption of the Joint Petitioners' position violates BellSouth's nondiscrimination obligations under the Act and results in BellSouth performing line conditioning in instances when it does not provide line conditioning for its own customers. Accordingly, the only interpretation of both paragraph 643 as well as the FCC rule that gives effect to both provisions is BellSouth's interpretation. To hold otherwise, would be to "read away" and ignore the FCC's express findings in paragraph 643 because BellSouth would be required to perform line conditioning for the Joint Petitioners that exceed what BellSouth provides for its own customers. (Tr. at 682).

The fact that the Joint Petitioners' current agreements contain TELRIC rates for line conditioning in excess of what BellSouth provides for its customers is of no consequence. This is because their current agreements are not *TRO* compliant (Tr. at 730) and the FCC in the *TRO* clarified that BellSouth's line conditioning obligations are limited to what BellSouth routinely provides for its own customers. Additionally, the Joint Petitioners' argument (and Venn Diagram) that not all line conditioning is a routine network modification should be rejected. (Tr. at 720). In its discussion of routine network modifications, the FCC expressly equated its routine network modification rules to its line conditioning rules in the *TRO*: "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LEC currently undertake under our line conditioning rules." *TRO* at ¶ 635. The FCC echoed these sentiments in paragraph 250 of the TRO: "As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service." *TRO* at ¶ 250.

Further, as stated by BellSouth witness Fogle, who has a master's degree in Electrical Engineering, the Venn diagram (Exhibit 24) actually proves that line conditioning is subset of routine network modifications:

> And so to – specifically when you talk about the relationship between routine network modifications and line conditioning, the relationship is clearly articulated in a couple of places in the *Triennial Review Order*. But in particular, in Paragraph 643 the FCC says that line conditioning is properly seen as a routine network modification. The key word is properly. So if you go to a dictionary and look for the mathematical definition of properly, which is what you would do if you were to attempt to draw a Vin

> diagram of that particular sentence, properly is defined as a subset. A subset means that it's wholly contained within routine network modifications or that line conditioning is a subset of routine network modifications.

(Tr. at 721). For all of these reasons, the Commission should harmonize paragraph 643 and the FCC rule, adopt BellSouth's language, and find that BellSouth's obligation is to provide the Joint Petitioners with line conditioning on the same terms and conditions that it provides to its own customers.

(Item 37)

*****SUMMARY POSITION: BellSouth does not remove load coils on loops in excess of 18,000 feet and thus has no obligation to provide this service to the CLEC.*****

BellSouth should have no obligation to remove load coils in excess of 18,000 feet at TELRIC for the Joint Petitioners because BellSouth does not remove load coils on long loops for its own customers. As stated above, this standard complies with paragraph 643 of the *TRO* as well as BellSouth nondiscrimination obligations under the Act. (Tr. at 682-683). If requested, BellSouth will remove load coils on such loops pursuant to its tariff via the special construction process. (Tr. at 683).

Pursuant to current industry standards, BellSouth places load coils on loops greater than 18,000 feet to enhance voice service. (Tr. at 682, 699). Essentially, load coils are standard network devices used to promote and preserve voice services on long loops. (Tr. at 699). The Joint Petitioners do not dispute this fact. (Tr. at 455). Load coils exist in groups of 400 or more and are generally buried. (Tr. at 719-7120). Mr. Fogle described the difficulties in removing load coils on long loops in his testimony:

> In the field we do banks of load coils, there are 400 of them in a very large vault that is buried, it's been in place sometimes 20, 30, 40 years. So it's very difficult to remove one load coil in that we have to send out a crew, we have to dig up the load coil bank, open

> it up, find the particular load coil, remove it, and then of course, bury it and put it back.

(Tr. at 719). As a result of these difficulties and because BellSouth has no obligation to remove load coils on loops in excess of 18,000 feet, BellSouth will remove such load coils upon request of a CLEC but only pursuant to special construction pricing, which allows BellSouth's engineers to evaluate the specific costs associated with removing and replacing an individual load coil. *Id.* In fact, with special construction charges, the CLEC may actually be charged a rate that is less than the TELRIC rate for removing the load coil if the load coil is on an aerial cable and can be easily removed. (Tr. at 720).

NuVox argues that the adoption of BellSouth's definition of line conditioning would prevent them from using two new technologies that they were considering deploying, Etherloop and G.HDSL. (Tr. at 435). The Joint Petitioners boldly claim that, without line conditioning on loops in excess of 18,000 feet, these services will not work. This claim is based upon pure speculation and conjecture. In fact, the sole witness presented by the Joint Petitioners to support this allegation, Jerry Willis, testified that he was a consultant for NuVox and that his job duties did not include the development of new technologies. (Tr. at 453). He further testified that he was not familiar with the percentage of NuVox's loops that were in excess of 18,000 feet and that NuVox was not ordering services that would require load coils being removed over 18,000 feet (except for T-1s, which BellSouth removes at TELRIC and are not at issue in this dispute). (Tr. at 457, 458). Mr. Willis' lack of knowledge is not surprising given that (1) BellSouth received only 14 requests through-out its entire nine-state region to remove load coils in 2004, with only two of those requests being for loops in excess of 18,000 feet; and (2) the Joint Petitioners did not order any line conditioning in 2004. (Tr. at 708, 712; BellSouth Response to Staff Interrogatory No. 73(d)).

In addition to the fact the Joint Petitioners concerns regarding Etherloop and G.HDSL are factually inaccurate and are not based on actual experience, Mr. Fogle testified that new technologies will take into account and work with network limitations, such as load coils and bridged taps, in their development. (Tr. at 697). Thus, the Joint Petitioners' claim that BellSouth's proposed language will prevent them from deploying advanced services is simply not credible.

(Issue 38)

*****SUMMARY POSITION: BellSouth has offered the Joint Petitioners the same terms and conditions agreed to with CLECs in a collaborative regarding the removal of bridged taps.*****

This dispute centers on whether BellSouth should be required to remove bridged taps between 0 and 2500 feet at TELRIC. There is no dispute that BellSouth will remove bridged taps over 6500 feet for free and between 2500 and 6000 feet at TELRIC. (Tr. at 460). Bridged taps are standard network enhancements that are used to allow BellSouth to maximize the extent of voice service that can be provided over certain pairs. (Tr. at 459). Even though BellSouth does not remove bridged taps at any length for its own customers, in conjunction with the CLEC Shared Loop Collaborative, BellSouth has agreed to remove bridged taps for CLECs in the following scenarios: (1) Over 6,000 feet for free; (2) between 2500 and 6000 feet at TELRIC; and (3) between 0 and 2500 feet pursuant to special construction pricing. (Tr. at 662-663). BellSouth has offered these same terms and conditions to the Joint Petitioners.

In contrast to the CLEC community, the Joint Petitioners assert that BellSouth should be required to remove bridged taps between 0 and 2500 feet at TELRIC. However, as conceded by Mr. Willis and consistent with the fact that the Joint Petitioners did nor order any line conditioning in 2004, the Joint Petitioners are not currently deploying services that would require the removal of bridged taps between 0 and 2500 feet. (Tr. at 461-462). Further, current industry standard for xDSL services allow for the use of bridged taps up to 6,000 feet. (Tr. at 664). This lack of knowledge to support their claim is not surprising given that the Joint Petitioners did not participate in the CLEC collaborative that established the terms and conditions for the removal of bridged taps. (Tr. at 463). Accordingly, the Commission should reject the Joint Petitioners language on this issue and adopt BellSouth's as it provides the Joint Petitioners with exactly what the CLEC community has already agreed to.

Item 51: (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?

*****SUMMARY POSITION: The TRO does not obligate BellSouth to identify circuits in its notice or to provide supporting documentation for the audit. Further, the audit must be performed pursuant to AICPA standards and mutual agreement of auditor is not required.*****

This issue relates to the Joint Petitioners' attempt to impose unnecessary conditions on BellSouth's EEL audit rights in contravention of the *TRO* by (1) seeking to limit BellSouth's audit rights to those circuits identified in the notice of the audit and for which sufficient documentation is produced to support the audit; and (2) seeking to dictate the selection of the auditor.[36] There is nothing in the *TRO* that supports these conditions, which are only designed to impede or delay BellSouth's right to catch and correct the Joint Petitioners' unauthorized use of EELs.

An EEL or an Enhanced Extended Link is a UNE combination that contains loop and transport. (Tr. at 228). There are limitations as to when a CLEC can use an EEL under the *TRO*. (Tr. at 228; *TRO* at ¶ 597). For instance, as already agreed to by the Parties, an EEL must have 911 capability, terminate in a collocation arrangement, and be served by a switch capable of switching local voice traffic. (Tr. at 228; Attachment 6, §§ 5.2.5.2.1 – 5.2.5.2.7). In order to obtain an EEL, the CLEC has to certify that it is using the EEL in compliance with the *TRO*'s

[36] This issue is virtually identical to Issue 29 in the Generic Proceeding.

eligibility criteria. (Tr. at 229; *TRO* at ¶ 623). As an alternative to an EEL, a CLEC can purchase a special access circuit, which is more expensive than an EEL. (Tr. at 229). As admitted by the Joint Petitioners, the purpose of the certification is to ensure that the CLECs are using the EELs in compliance with the law, which the Joint Petitioners believe they are doing. (Tr. at 229, 234). Because BellSouth has no ability to challenge the CLEC's certification, the *TRO* provides BellSouth with audit rights to ensure compliance with the EEL eligibility criteria and to prevent gamesmanship by CLECs. (Tr. at 230; *TRO* at ¶ 626).

Contrary to the *TRO*, the Joint Petitioners assert that, in any notice provided by BellSouth to initiate an audit, BellSouth must identify the particular circuits that it believes are not in compliance with the eligibility requirements as well as provide all documentation that supports this belief. (Tr. at 231). The Joint Petitioners further claim that BellSouth's audit rights should be limited to the circuits identified in the audit and for which sufficient documentation is produced. *Id.* As conceded by the Joint Petitioners, however, there is nothing in the *TRO* that expressly requires these additional conditions. (Tr. at 233-234). In fact, the *TRO* is absolutely silent on the contents of any notice requirement and does not limit BellSouth's audit right to those circuits identified in any notice. The *TRO* does make it clear, however, that the auditor should determine the scope of the audit pursuant to standard auditing practices: "Consistent with standard auditing practices, such audits require compliance testing designed by the independent auditor, which typically include an examination of a sample selected in accordance with the independent auditor's judgment." *TRO* at ¶ 626.

KMC witness Johnson, who was an auditor, testified that, in general, standard auditing practices involve the use of sampling to determine the scope of the audit. (Johnson Depo. at 167, 185). She further testified that limiting the scope of the audit to circuits identified in the notice theoretically would actually skew the results of that audit to show more noncompliance than might otherwise exist if there was no limitation on the scope of the audit. *Id.*

Moreover, the Joint Petitioners' proposal effectively limits BellSouth's right to audit to when it can catch the CLECs using EELs in violation of the law. Not only is this unreasonable, but it may also allow CLECs to avoid audits altogether. BellSouth should not be put in the position of having its annual audit rights frustrated or precluded by unnecessary conditions and obstacles that are not supported by the *TRO*.

The Joint Petitioners' testimony proves how CLECs, including the Joint Petitioners, could abuse their proposed provisions to delay an audit. For instance, the Joint Petitioners concede that (1) they alone would determine if the documents produced along with the notice were sufficient for the audit to proceed; and (2) if they disagreed that the documentation was sufficient, the parties would have to go to dispute resolution prior to the audit commencing. (Tr. at 232). Similarly, if a CLEC has 100 circuits, all of which were obtained in violation of the law, and BellSouth identifies 20 circuits in the notice, the CLEC could convert those circuits to special access during the 30 days prior to the audit and then claim that BellSouth has no right to audit the remaining circuits, even though they are all in violation of the law. And, while the Joint Petitioners contend that there may be instances in which the initial audit could be expanded, they however refused to agree to such an expansion, even with an initial finding of systemic noncompliance. (Tr. at 237; Joint Petitioner Response to Interrogatory No. 94(b) (stating that "BellSouth might then be entitled to expand the scope of the initial audit")). Indeed, when confronted with this issue, Mr. Russell refused to agree that a finding of 60 percent, 70 percent, or even 80 percent noncompliance would result in NuVox not objecting to the expansion of the initial audit. (Tr. at 236).

Additionally, the Joint Petitioners' argument that the costs associated with audits support its position should also be rejected. The *TRO* makes it clear that the ILEC pays for the audit and that, to the extent the auditor's report concludes that the CLEC complied in all material respects with the eligibility requirements, the ILEC must reimburse the CLEC for its costs associated with the audit. *TRO* at ¶ 626, 628. The FCC even states that "audited carriers should account for the staff time and other appropriate costs for responding the audit (*e.g.*, collecting data in response to the auditor's inquiries, meeting for interviews, etc.)." *TRO* at ¶ 628, n.1908. And, given the Joint Petitioners' testimony that the Joint Petitioners will pass any audit (Tr. at 235), the Joint Petitioners should have no concerns about the costs associated with an audit as they will get reimbursed pursuant to the *TRO* (assuming their testimony is correct).

In addition to the "scope of the audit issue," the Parties also disagree on the selection of the auditor. The Joint Petitioners take the position that the Parties should be required to agree on the auditor prior to the audit commencing. (Tr. at 239). The stated purpose of this requirement is to remove any uncertainty as to whether the auditor is independent. There is no requirement in the *TRO* for mutual agreement in the selection of the auditor. Rather, the *TRO* simply states that the "independent auditor must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants ("AICPA") ...." *TRO* at ¶ 626. The Parties have already agreed to this standard. The Parties also agree that the AICPA standards require the auditor to have integrity and objectivity and to be independent. (Tr. at 239).

Further, recent history proves that adoption of the Joint Petitioners' proposal would not alleviate any CLEC objections associated with the selection of the auditor. Specifically, NuVox has repeatedly stated that it would not object to the selection of nationally recognized accounting firm, like KPMG, as the auditor. (Tr. at 240). In fact, in response to an inquiry from the Florida Staff, NuVox initially identified KPMG (along with other firms) as an acceptable auditor. (Tr. at 240-241). This is not surprising given that KPMG is NuVox's external auditor, the chairman of NuVox's Board of Directors was formally associated with KPMG, NuVox recommended KPMG as the auditor for the ongoing EEL dispute in Georgia (which BellSouth accepted), and NuVox has previously described KPMG as an independent auditor as it relates to the Georgia EEL audit proceeding. (Tr. at 241; Russell Staff Depo. at 55; Joint Petitioner Response to Staff Interrogatory No. 31). Now, however, NuVox has taken the position that KPMG is not independent, even after BellSouth and NuVox agreed to use KPMG in Georgia. (Tr. at 241). If NuVox is claiming that its own external auditor is not independent, then presumably no auditor is independent. This evidence makes it clear that there may be no auditor that the Joint Petitioners would find to be independent, especially if agreement on the auditor would result in the auditor proceeding and revealing a CLEC's noncompliance with the law.

The NCUC has rejected the Joint Petitioners' mutual agreement requirement under the *SOC* (not the *TRO*) in the *NewSouth Reconsideration Order*. Although not directly on point, this decision is instructive. In that proceeding, NewSouth argued that it should be allowed to challenge whether BellSouth's chosen auditor is an "independent auditor" under the *SOC*. The NCUC rejected this argument and held the following: "By establishing the independence requirement, the Commission does not believe the FCC intended to require ILECs to submit to hearings on their choice of auditor prior to exercising their audit rights. The CLECs remedy for failure to select an independent auditor is to attack the auditor's qualifications in a complaint proceeding should the ILEC file a complaint for non-compliance with local usage certifications based on the auditor's findings." *See NewSouth Reconsideration Order* at 7. The Commission should reach the same conclusion here based on the *TRO.*

In sum, the Commission should reject the Joint Petitioners' proposed language and adopt BellSouth's. To find otherwise would subject BellSouth to unnecessary conditions and obstacles designed to frustrate and delay BellSouth from exercising its audit rights. Simply put, if a CLEC is in violation of the law, there is no type of notice, or any sufficient amount of documentation, or any auditor that will satisfy the CLEC such that it will agree to proceed with the audit and not use the Joint Petitioners' language as a means to delay the revelation of their malfeasance.

Item 65: 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? (Attachment 3, Section 10.8.1 (NCS/NVS), 10.13 (XSP))

*****SUMMARY POSITION: BellSouth has no obligation to provide the transit function between two carriers at TELRIC and the Commission cannot order otherwise because it involves a request that is not encompassed within Section 251.*****

At issue with Item 65 is whether BellSouth must charge a TELRIC price for transiting traffic between a CLEC to another CLEC (or ICO) because the originating CLEC and terminating CLEC are not directly interconnected. The issue is not about whether BellSouth will provide the transiting function but at what rate should BellSouth be allowed to charge to perform this function. The Wireline Competition Bureau of the FCC in the *Virginia Arbitration Order* declined to find that BellSouth has to provide this transiting function at TELRIC.

> We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such duty. In the absence of such a precedent or rule, we decline, on delegated Commission, to determine for the first time that Verizon

> has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under section 251(A)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.

Virginia Arbitration Order at ¶ 117. The Georgia Public Service Commission recently reached the same conclusion it its transit traffic docket as it refused to order a TELRIC rate for the transit function and ordered that BellSouth's transit intermediary charge ("TIC") of $.0025 be applied as an interim rate. *See BellSouth's Petition for a Declaratory Ruling Regarding Transit Traffic*, Docket No. 16772-U, *Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies*, G.P.S.C. (Mar. 24, 2005). Likewise, the Kansas Commission recently refused to find that SBC had a duty to provide the transit function at a TELRIC rate. *See In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P.*, Docket No. 05-BTKT-365-ARB at 102 (Feb. 16, 2005).[37]

Further evidence that the TIC should not need to be priced at TELRIC is the fact that the Joint Petitioners have the option of, and currently are, directly interconnecting with terminating carriers instead of using BellSouth's transit function. **(Tr. at 411).** In addition, there are companies other than BellSouth that offer this transit service, including Neutral Tandem Services, and KMC has even considered providing this transit service as well. (Tr. at 412; Johnson Depo. at 220-222). Obviously, KMC will not provide this competing tandem service if BellSouth has to provide the same service at TELRIC.

Finally, the Commission has no jurisdiction to force BellSouth to provide this function at a TELRIC price. BellSouth only has an obligation to negotiate and arbitrate those issues duties listed in Section 251(b) and (c) of the Act. *See Consev,* 350 F.3d at 487. In addition, the Commission only has the authority under the Act to arbitrate non-251 issues if the issue was a

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[37] The Texas Commission reached a different conclusion in *Arbitration of Non-Costing Issues For Successor Interconnection Agreements to the Texas 271 Agreement*, T.P.U.C., Docket No. 28821 at 30 (Feb. 23, 2005).

condition required to implement the agreement. *MCI Tel. Corp. v. BellSouth Tel., Inc.*, 298 F.3d at 1274. As established by the cases cited above, there is no support for the proposition that BellSouth must provide this transit function at TELRIC under Section 251, and BellSouth submits that the Commission has no jurisdiction to make such a finding.

Issue 86B:* (B) *How should disputes over alleged unauthorized access to CSR information be handled under the Agreement? (Attachment 6, Sections 2.5.6.2 and 2.5.6.3)

*****SUMMARY POSITION: If there is a dispute about whether a party accessed CSR information inappropriately, the Commission should resolve the dispute.*****

The crux of this issue is simple. How long does a party need to produce documentation establishing that it has complied with the law by obtaining a customer's authorization to review the customer's records ***prior*** to reviewing such records? As explained below, and as conceded by the Joint Petitioners, two weeks is more than a sufficient amount of time for the parties to demonstrate compliance with their legal and contractual obligations.

Joint Petitioners concede that customer service record ("CSR") information contains Customer Proprietary Network Information ("CPNI"), and that BellSouth and the Joint Petitioners have an obligation under federal law to protect the unauthorized disclosure of CPNI. (Tr. at 629). Given such obligations, it is no surprise that the parties have agreed to refrain from accessing CSR information without an appropriate Letter of Authorization ("LOA") from a customer and to "access CSR information only in strict compliance with applicable laws." (Tr. at 629; *see* Att. 6, § 2.5.5)). Regarding LOAs, the parties have agreed that upon request, a party "shall use best efforts" to provide an appropriate LOA within seven (7) business days. (Tr. at 630; Att. 6, § 2.5.5.1)). Seven business days equates to at least nine (9) calendar days. (Tr. at 630).

Under BellSouth's most recent proposed language, if the accused party fails to produce an appropriate LOA within the allotted time period (7 business days), the requesting party will provide written notice via email to a person designated by the other party to receive such notice specifying the alleged noncompliance and advising that access to ordering systems may be suspended in five (5) days if such noncompliance does not cease. *See* BellSouth Exhibit A, Att. 6, §§ 2.5.5.2 and 2.5.5.3. Accordingly, Joint Petitioners' hypothetical fears about a "buried" written notice sitting on someone's desk for days have been eliminated.

With the 'buried" notice paranoia removed, the Joint Petitioners now appear to assert that producing an appropriate LOA with 5 days is an unreasonably short period of time to take corrective action. *See* Tr. at 630-631. Again, the Joint Petitioners' concerns are unfounded. As an initial matter, the Joint Petitioners have acknowledged that producing an appropriate LOA is something that could take as little as two (2) business days. *See* Falvey Depo. at 222-223. Additionally, the Joint Petitioners concede that immediate termination of service because of fraudulent, prohibited, or unlawful use of service is not a new concept; and, similar to BellSouth's tariff, the Joint Petitioners' Florida tariffs authorize immediate termination under similar circumstances. (Tr. at 635; Xspedius Tariff § 2.5.5(F); NuVox Tariff § 2.16.1; KMC Tariff § 2.5.5(H); BellSouth Tariff § A2.2.9).

Joint Petitioners acknowledge that under BellSouth's most recent proposed language, if the accused party disputes the allegations of noncompliance, then the requesting party will seek an expedited resolution of the CSR dispute from the appropriate regulatory body pursuant to the dispute resolution provisions contained in the agreement's GT&Cs section. (Tr. at 632-633; *see* BellSouth Exhibit A, Att. 6, §§ 2.5.5.2, 2.5.5.3). The agreement's dispute resolution provisions obligate the parties to continue meeting all contractual obligations while a dispute is pending.

(GT&Cs, § 13). As such, the Joint Petitioners' paranoia about BellSouth taking corrective action during the pendency of such a dispute has been obviated. In short, BellSouth's language for Item 86(B) gives the Joint Petitioners what they want.

Moreover, the Joint Petitioners' concerns are based upon pure speculation. Joint Petitioners concede that under BellSouth's proposed language, prior to any action being taken by the requesting party, the accused party has at least two full weeks to exercise best efforts to produce an appropriate LOA. (Tr. at 631). Two weeks is more than sufficient time to produce documentation that the Joint Petitioners are legally and contractually obligated to keep. This is particularly true here, given the fact that the Joint Petitioners' lead witness on this issue: (1) cannot identify any prior dispute regarding unauthorized access to CSR information (Falvey Depo. at 253); (2) acknowledges that Joint Petitioners have a contractual obligation to use "best efforts" to produce an appropriate LOA (Tr. at 630); and (3) affirmatively states that his company would exercise "good faith" to investigate any allegation regarding unauthorized access to CSR information. (Falvey Depo. at 236-237). In short, the Commission should adopt BellSouth's most recent proposed language on Issue 86(B) as it addresses all of the Joint Petitioners' concerns as well as giving the parties sufficient recourse if a party refuses to comply with its legal and contractual obligations regarding the protection of CSR information.

Issue 88: What rate should apply for Service Date Advancement (a/k/a service expedites)? (Attachment 6, Section 2.6.5)

*****SUMMARY POSITION: BellSouth has no 251 obligation to provide expedited services. If the CLEC wants this service, it can purchase it at BellSouth's tariff rate. Further, this issue is not appropriate for arbitration because the issue does not involve a 251 obligation.*****

As will be established below, this item is not appropriate for arbitration under Section 252 of the Act because BellSouth has no Section 251 obligation to expedite service orders. Compulsory arbitration under Section 252 should be properly limited to those issues necessary to implement a Section 251 interconnection agreement. *See MCI,* 298 F.3d at 1274. Expedite charges are not necessary to implement the agreement, especially since BellSouth meets its 251 obligations by providing service pursuant to standard provisioning intervals already established by the Commission. (Tr. at 1018; 1026). Accordingly, the Commission should refrain from arbitrating this issue.

BellSouth has a Section 251 obligation to provision interconnection services and UNEs within standard provisioning intervals. (Tr. at 1018; 1026; BellSouth Response to Staff Interrogatory No. 97). The Commission recognized this obligation in establishing a performance measurement plan ("SQM/SEEM plan") in Florida.[38] The SQM/SEEM plan is designed to ensure that BellSouth continues to meet its Section 251 obligations and requires BellSouth to pay SEEM penalties if BellSouth fails to provision services within such standard intervals. The SQM/SEEM plan contains no specific "expedited" provisioning measures.[39] Moreover, after seven months of workshops and conference calls (September 2004 through March 2005), BellSouth, CLECs, and the Commission Staff agreed upon a new SQM/SEEM plan, which was approved by the Commission in May 2005. Order No. PSC-05-0488-PAA-TP.[40] Notably, the new SQM/SEEM plan also contains no expedited provisioning measures and no party suggested adding such measures. These facts provide conclusive evidence that the expedited provisioning of a service order is a matter that is completely outside the scope of Section 251.

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[38] *See* SQM/SEEM Orders issued in Docket No. 00121A-TP.

[39] The current Florida SQM plan contains 18 provisioning measures, two examples of which are Percent Missed Installation Appointments (P-3) and Average Completion Interval & Order Completion Interval Distribution (P-4). These 18 provisioning measures are disaggregated into over 1,400 provisioning sub-measures. The current Commission approved SQM/SEEM plan is publicly available and can be found at http://pmap.bellsouth.com/content/documentation.aspx.

[40] The PAA authorizing a new SQM/SEEM plan has been challenged by one party (FDN). FDN's protest has nothing to do with the provisioning measures contained in the new SQM/SEEM plan.

Further buttressing this conclusion is the fact that the Joint Petitioners concede that BellSouth has no obligation to expedite service orders. (Collins Depo. at 59). Additionally, the Joint Petitioners admit that if a service expedite request cannot be met by BellSouth, the Joint Petitioners can look to alternative measures to satisfy its customer's service request. (Collins Depo. at 58-59). Without question, if a service expedite was as a 251 obligation, the Joint Petitioners would not concede (as they did) that BellSouth has no obligation to expedite a service order. (Collins Depo. at 59).

With the exception of citing to Section 251(c)(3) of the Act, the Joint Petitioners cannot cite to any authority that supports their contention that a service expedite request should be priced at TELRIC. (Falvey Depo. at 258-262). Of course, the words "expedite" or "advancement" do not appear in the text of Section 251(c)(3). As previously noted, it is undisputed that BellSouth has an ***option*** as to whether or not to accept a service expedite request. *See* BellSouth Exhibit A, Att. 6, § 2.6.5; Tr. at 1026-1027. Clearly, an ***optional*** service offering cannot be considered a Section 251 obligation, much less an obligation that BellSouth must price at TELRIC (which would require a finding of impairment). Instead, BellSouth has, among other things, a "nondiscriminatory" obligation under Section 251(c)(3). From a provisioning perspective, BellSouth satisfies such obligation by provisioning services within standard intervals and by charging CLECs the same service expedite rate that it charges its retail customers for purchasing services out of BellSouth's access tariff. (Tr. at 900-901; 1017-1019).

As a practical matter, if there were a TELRIC-based service expedite charge, it is likely that many (if not most) CLEC orders would be expedited, thus causing BellSouth to miss its standard intervals and its obligations to provide non-discriminatory access. (Tr. at 1028-1029). For example, as Ms. Blake testified, if it costs only slightly more than 37 cents to send a letter via overnight delivery, it stands to follow that the use of standard US first class mail would substantially decrease and the demand for overnight mail would increase. (Tr. at 1028). In a similar manner, pricing special, optional services such as service expedites at an artificially low rate (TELRIC) will substantially increase demand for service orders to be expedited.

Joint Petitioners' witness on this issue testified that BellSouth's $200 per circuit, per day service expedite charges is "unreasonable, excessive, and harmful to competition and consumers." (Tr. at 500). Such testimony is unsupported rhetoric. Specifically, during cross-examination Mr. Falvey acknowledged that his company charges its Florida customers an ***$800*** service expedite fee and that they have the right to charge more in certain circumstances. (Tr. at 637; Xspedius Tariff at § 11.4). If BellSouth's $200 service expedite charge is supposedly unreasonable and harmful, then Xspedius' ***$800*** service expedite charge defies description.[41]

Additionally, from a policy perspective, any requirement that forces BellSouth to price voluntarily-offered services at TELRIC prices will chill BellSouth's willingness to voluntarily offer services to CLECs. At its core, Joint Petitioners simply want something more than standard provisioning intervals priced at TELRIC without any justification for making such a request. The Commission should refrain from setting rates for voluntarily-offered services, and should adopt BellSouth's position on Issue 88 as it reasonable and nondiscriminatory.

Issue 97: When should payment of charges for service be due? (Attachment 7, Section 1.4)

*****SUMMARY POSITION: Payment should be due on or before the next bill date.*****

Payment for services should be made on or before the Payment Due Date (i.e. the next bill date) in immediately available funds. The Joint Petitioners, like all CLECs, have a set bill date for every bill they receive. (Tr. at 901). Based on the bill date, Joint Petitioners know the

[41] NuVox and KMC's tariffs permit these companies to recover from their customers any charges incurred in expediting a service order. NuVox Tariff § 2.14.5 & § 2.11.1; KMC Tariff § 2.1.9(E), § 2.4.9.1.

exact date when payment is due for each bill -- by the next bill issuance date. (Tr. at 1032). For example, a NuVox invoice that is dated the 5th day of the month, will always be dated the 5th day of the month, and will always be due by the 5th day of the following month.

In addition to knowing when their bills are due, the Joint Petitioners concede, as they must, that their monthly billings are reasonably predictable and that Joint Petitioners are in the best position to predict (or estimate) their monthly billings. (Russell Depo. at 237-238; Falvey Depo at. 315-316). Further, NuVox witness Russell testified in his deposition and in the hearing that, for at least a two year period, ***NuVox has paid all of its BellSouth bills in a timely manner.*** (Russell Depo. at 231; Tr. at 264). NuVox's self-proclaimed timely payment performance is significant, given the fact that NuVox repeatedly: (1) points out that it receives over 1,100 bills per month from BellSouth (Joint Petitioners' Response to Staff's Interrogatory No. 71); and (2) touts its "stellar" payment history (Tr. at 253). In short, Mr. Russell's uncontradicted testimony belies the Joint Petitioners' assertion that they need at least 30 days to review and pay their bills.

Further, it is difficult to reconcile the Joint Petitioners' own tariffs and billing practices with their assertion that BellSouth's payment terms would be considered "unacceptable in most commercial settings". (Tr. at 68). In fact, NuVox requires its Florida customers to pay their bills upon receipt (NuVox Tariff § 2.11.1 & 2.11.2) and imposes a late payment charge if its customers fail to pay their bills within twenty (20) days of bill issuance. (NuVox Tariff § 2.11.5).[42] Further, the payment terms that BellSouth seeks in this arbitration (payment on or before payment due date) are the same payment terms contained in BellSouth's retail tariff. (Exhibit 14 at § A2.4.3). Tellingly, the Joint Petitioners even expect BellSouth to pay their bills within 30 days of the bill date. *See* Exhibit 21 (stating that Xspedius' April 15, 2005 bill to

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[42] Similar to BellSouth's proposal on this issue, the retail tariffs of KMC and Xspedius require payment within thirty (30) days of bill issuance. (KMC Tariff § 2.5.2(A) & (B); Xspedius Tariff § 2.5.2(A) & (B).

BellSouth was due on or before May 15, 2005). Once again the standard imposed by the Joint Petitioners on their end users and even BellSouth is not acceptable to the Joint Petitioners.

The Joint Petitioners' suggestion that BellSouth, in its testimony, measured the time to pay the Joint Petitioners' bills from the date of receipt is both irrelevant and a mischaracterization of BellSouth's testimony. BellSouth used the date it received the CLEC bills to provide a meaningful way to measure its payment history with the Joint Petitioners because certain Joint Petitioners could not and presently cannot provide BellSouth with a timely bill. As discussed below, the Joint Petitioners do not have the same concerns with bills they receive from BellSouth.

Specifically, during cross-examination, Joint Petitioner witness Mertz acknowledged that the SQM/SEEM plan measures the time it takes BellSouth to deliver bills to CLECs (Tr. at 417). The SQM aggregate results for April 2004 through March 2005 show that CLECs received their BellSouth bills in about three (3) or four (4) days, on average. (Exhibit 19). Further, Mertz conceded that the SQM billing invoice timeliness results for KMC, for the first three (3) months of 2005, were substantially similar to the CLEC-aggregate results. (Tr. at 422-423). The SQM billing data unquestionably demonstrates that the Joint Petitioners' claim that they receive BellSouth bills in about (7) seven days or more is exaggerated and based on outdated and inaccurate bill studies.[43]

To minimize any perceived delay in receiving its bills, the Joint Petitioners can elect to receive its bills electronically, which the Joint Petitioners already do. (Russell Staff Depo. at 66; Johnson Depo. at 297-298; Falvey Depo. at 305). Further, if any Joint Petitioner has billing

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[43] The NuVox bill study concluded in July 2003. (Russell Staff Depo. at 66) The NewSouth bill study was conducted prior to NuVox/NewSouth merger (May 2004) and conducted outside of purview of NewSouth witness Russell. (*Id* at 64). The Xspedius bill study commenced in December 2003 and concluded four to eight months later. (Falvey Depo at 311-312). And, KMC did not conduct a bill study. (Tr. at 420-421).

questions, nothing precludes the Joint Petitioner from contacting BellSouth with such questions, and BellSouth will respond in a prompt manner. (Tr. at 902). Additionally, nothing prevents the Joint Petitioners from exercising their rights under the agreed upon billing dispute resolution provision if any Joint Petitioner received a bill that appears incomplete, confusing or late. (Tr. at 901-902; Att. 7, § 2.)

Moreover, granting special payment terms to the Joint Petitioners is also contrary to the Act. Specifically, under Section 251(c) BellSouth has, among other things, an obligation to provide interconnection services and UNEs on rates, terms, and conditions that are just, reasonable and non-discriminatory. For billing purposes, Bellsouth satisfies its nondiscrimination obligations by delivering bills to CLECs in the same time and manner that BellSouth delivers bills to its own retail customers. (Tr. at 1047). Additionally, BellSouth pays SEEM penalties if BellSouth fails to delivery CLEC bills in a timely manner. (Tr. at 902).

Finally, the Joint Petitioners' proposal would result in an ever extending, revolving payment due date and would require modifications to BellSouth's billing systems that involve substantial costs. (Tr. at 902). The Joint Petitioners are unwilling to pay the costs associated with their request for special billing treatment. (Tr. at 416). And, importantly, no modifications are warranted because this Commission and the FCC have already determined that BellSouth's current billing practices are non-discriminatory.[44] Accordingly, the Commission should reject the Joint Petitioners' request for special treatment, and adopt BellSouth's proposed language[45] on Issue 97.[46]

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[44] Memorandum Opinion and Order, *In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee,* WC Docket, No. 02-307, FCC 02-331 (Rel. Dec. 19, 2002) at ¶ 107 ("Like the state commissions, we reject competitive LECs' contentions that BellSouth fails to provide nondiscriminatory access to its billing system.")

[45] If it would resolve the issue, BellSouth would be willing to agree to the following language: Payment Due.

Issue 100: 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? (Attachment 7, Section 1.7.2)

*****SUMMARY POSITION: A CLEC should be required to pay all amounts that are past due as of the date of the pending suspension or termination action.*****

Three important agreed upon contractual provisions should not be forgotten when deciding Item 100. First, BellSouth's right to suspend or terminate service for nonpayment is not in dispute. (Tr. at 261). Second, Item 100 is limited to a Joint Petitioner's failure to pay undisputed amounts that are past due. *See* BellSouth Exhibit A, Att. 7, § 1.7.2. Third, BellSouth will not commence any suspension or disconnection activity involving amounts that are subject to a billing dispute. *Id.* Given these circumstances, if a Joint Petitioner receives a notice of suspension or termination from BellSouth as a result of the Joint Petitioners' failure to timely pay amounts that are not subject to a billing dispute, the Joint Petitioner should be required to pay all undisputed amounts that are past due as of the date of the pending suspension or termination action. Again, Joint Petitioners know when they receive bills, they know when the bills are due, and they admit that the amount of such bills can be predicted with a reasonable degree of accuracy. *See* Item 97, *supra*. Further, nothing precludes the Joint Petitioners from

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Payment for billed services sent electronically is due on or before the next bill date (Payment Due Date). If <<customer_short_name>> does not receive BellSouth's bill within eight (8) days of the bill date <<customer_short_name>> may notify its BellSouth billing contact. Upon BellSouth's notification to <<customer_short_name>> of a failure to receive a payment and <<customer_short_name>>'s determination that the bill has not been received, <<customer_short_name>> will inform BellSouth of the non-receipt of that particular bill. Although the actual bill date on the bill will not change as a result of such notification by <<customer_short_name>> or BellSouth's notification to <<customer_short_name>>, BellSouth shall waive late payment charges and defer normal collections for such payment for thirty (30) days after <<customer_short_name>>'s notification to BellSouth or BellSouth's notification to <<customer_short_name>>. Information required to apply payments must accompany the payment including the Billing Account Numbers (BAN) to which the payment is to be applied; the invoices paid; and the amount to be applied to each BAN and invoice (Remittance Information). Payment is considered to have been made when received by BellSouth.

Payment for billed services sent manually will be due on or before the next bill date and is payable in immediately available funds. Payment is considered to have been made when received by BellSouth.

[46] Regarding Issue 97, the Joint Petitioners assert that they will accept any of the rulings rendered in various BellSouth/DeltaCom arbitration proceedings. What the Joint Petitioners neglected to state is that they have rejected the payment and deposit terms that DeltaCom and BellSouth actually agreed upon and which are included in DeltaCom's interconnection agreement.

contacting BellSouth with any questions they may have regarding amounts owed and BellSouth will cooperate to promptly answer any billing related questions. *Id.*

The Joint Petitioners' objection to BellSouth's proposed language for Issue 100, is an unfounded and erroneous concern about a hypothetical "shell game" of guessing what additional past due amounts must be paid to avoid suspension or termination. (Tr. at 72). BellSouth has eliminated any legitimate concern by revising its proposed language to remove the Joint Petitioners' paranoia about perceived "guesswork". Specifically, BellSouth revised its proposed language for Issue 100 to state that, upon request, BellSouth will advise of the additional undisputed amounts that have become past due since the issuance of the original notice of suspension or termination. *See* BellSouth Exhibit A, Att.7, § 1.7.2; BellSouth Response to Staff Interrogatory 117.

Further, BellSouth's Response to Staff Interrogatory No. 117 unquestionably demonstrates that a CLEC that fails to timely pay undisputed amounts owed is in constant communication with BellSouth's collections group and that the CLEC is provided with an aging report(s) that shows, by billing account number, current charges, past due charges, disputed charges, total past due amount owed less current charges and disputed charges, plus the ability to determine amounts that will become past due during the notice period. Joint Petitioners witness Russell admitted that he had never seen a BellSouth aging report (Tr. at 267) and that his company had no recent interaction with BellSouth's collections process. (Tr. at 265). Not surprisingly, after reviewing the documents produced in Response to Interrogatory No. 117, Mr. Russell admitted that there is no guesswork involved in Bellsouth's collections process. (Tr. at 268-269).

Accordingly, the Commission should: (1) disregard Joint Petitioners' unsupported assertion about collections "shell games"; (2) allow BellSouth to protect its financial interest by giving BellSouth the right to discontinue providing service to any Joint Petitioner that fails to timely pay for services rendered. Holding otherwise would be to allow the Joint Petitioners to have a revolving extension for payment of undisputed, past due amounts.

Issue 101: How many months of billing should be used to determine the maximum amount of the deposit? (Attachment 7, Section 1.8.3)

*****SUMMARY POSITION: The industry standard of two-months billing should be the maximum deposit amount that can be requested.*****

The maximum amount of a deposit should not exceed an average of two months of actual billing for existing customers or two months estimated billing for new customers.[47] BellSouth's policy of reserving the right to require a deposit of no more than two months of a CLEC's actual or estimated billings is consistent with industry standards including the two months deposit requirement contained in Xspedius' tariff (Xspedius Tariff § 2.5.4).

It is undisputed that BellSouth has a right to a deposit (or to demand an additional deposit) if any Joint Petitioner fails to meet the specific and objective deposit criteria set forth in Attachment 7, Section 1.8.5.[48] Further, it cannot be disputed that a deposit reduces BellSouth's potential losses if a Joint Petitioner (or any CLEC that adopts a Joint Petitioner's interconnection agreement) ceases to pay its bills. Specifically, a two months deposit is necessary because BellSouth must wait at least two months after service is rendered before BellSouth can disconnect service for non-payment. It takes BellSouth approximately 74 days to disconnect a

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[47] BellSouth is not opposed to using billing associated with the most recent six month period to establish the maximum deposit amount.

[48] The agreed-upon deposit criteria terms takes into account a CLEC's payment history, and other objective financial measurements, such as liquidity status (based upon a review of EBITDA) and bond rating (if any). As such, BellSouth is at a loss as to why Issue 101 remains unresolved. In any event, the payment history for some of the Joint Petitioners is poor. An established business relationship that includes a poor payment history does not warrant a reduced maximum security amount nor does it reduce BellSouth's risk in providing service to such Joint Petitioners (or high-credit risk CLECs that may adopt a Joint Petitioner's interconnection agreement).

CLEC for non-payment under the provisions of the agreement. (Tr. at 907-908; BellSouth Response to Staff Interrogatory No. 118). Reserving the right to require a deposit of up to two months billing is necessary and demonstrates sound business judgment, as recognized by Xspedius adopting this same standard for its Florida customers.

Additionally, the Joint Petitioners' opposition to BellSouth's proposed maximum deposit amount disregards the Parties' experience. First, the Joint Petitioners have no maximum deposit amount in their current interconnection agreements. (Joint Petitioners Response to Staff Interrogatory No. 67). Second, Joint Petitioners acknowledge having existing deposits with BellSouth that are substantially less than two months billing. (Russell Depo. at 226-227; Falvey, Depo. at 314). In fact, Mr. Russell acknowledged that NuVox's current deposit with BellSouth (a $1 million letter of credit and $600,000 cash) is substantially less than NuVox's two months billings with BellSouth (around $6 or 7 million). (Tr. at 247). Third, and completely contrary to the assertion that BellSouth is continually trying to extract unreasonable deposits from the Joint Petitioners, witness Russell admitted that, in 2003, BellSouth reduced NuVox's deposit by 44% ($1.8 million letter of credit reduced to $1 million letter of credit and reduced NewSouth's deposit by 75% ($2.4 million cash deposit reduced to $600,000 cash). *See* Joint Petitioners Response to Staff Interrogatory No. 68; Tr. at 248. Again, and similar to Joint Petitioners assertions on other issues, the facts do not even remotely support the Joint Petitioners' position.

Further, the Joint Petitioners' request for a lower maximum deposit amount for existing CLECs overlooks the fact that a new CLEC may be in stronger financial shape than an existing CLEC and that the financial health of an existing CLEC can deteriorate. (Tr. at 909). In addition to allowing BellSouth to minimize its financial exposure in the event of non-payment or default by a CLEC, a two month maximum deposit amount is reasonable given that BellSouth will refund, return, or release any security deposit within 30 calendar days of determining that a Joint Petitioners' creditworthiness indicates a deposit is no longer necessary. *See* Att. 7, § 1.8.10. Accordingly, the Commission should approve BellSouth's language for Issue 101.[49]

Issue 102: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC? (Attachment 7, Section 1.8.3.1)

*****SUMMARY POSITION: There should be no offset because a CLEC's remedy for slow payment by BellSouth is late payment charges or termination of service.*****

As a general matter, a CLEC deposit should not be reduced by amounts owed by BellSouth to such CLEC.[50] (Tr. at 913-914). The CLEC's remedy for addressing late payment by BellSouth should be suspension/termination of service and/or application of interest/late payment charges. *Id.* BellSouth is within its rights to protect itself against uncollectible debts on a non-discriminatory basis. *Id.* Deposits are needed to mitigate the risk that a CLEC may not be able to fulfill its financial obligations in the future. *Id.* BellSouth attempts to collect a deposit amount that is consistent with that risk. For BellSouth to do otherwise would not protect the interests of BellSouth's shareholders, employees, or other customers.

Additionally, the Joint Petitioners' proposal on Item 102 is unreasonable and unacceptable as it fails to exclude amounts that are subject to a valid billing dispute. (Tr. at 621). And the Joint Petitioners' contention that BellSouth has a poor payment record is not supported by recent evidence.[51] As set forth in Exhibit 21, Xspedius' April 2005 bills to

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[49] Similar to Issue 97, Joint Petitioners assert that they will accept the deposit cap agreed to between BellSouth and DeltaCom. Again, what Joint Petitioners continue to fail to disclose is the fact that BellSouth offered the entire deposit terms agreed to between BellSouth and DeltaCom and the Joint Petitioners rejected the offer. (Tr. at 1065; 1067-1068).

[50] Joint Petitioners buy far more services from BellSouth than BellSouth buys from Joint Petitioners. BellSouth Response to Staff Interrogatory 49. Hence, the financial risks associated with non-payment (which a deposit helps reduce) is much greater for BellSouth than it is for Joint Petitioners.

[51] Xspedius' Supplemental Response to Staff Interrogatory No. 72, filed on April 19, 2005, contained two ***April 2004*** invoices from Xspedius to BellSouth. The first year-old invoice (April 2004 reciprocal compensation bill) showed a total amount due of $2,008,048. The second year-old invoice (April 2004 interconnection transport bill) showed a total amount due of $679,577. On cross-examination, Mr. Falvey conceded that the bills were a year old

BellSouth established an amount due of $111,494 for reciprocal compensation (with the bulk of the charges being for current charges) and $24,868 for interconnection transport. (Tr. at 625-626). In short, the April 2005 bills from Xspedius to BellSouth squarely and convincingly rebut Xspedius' tired, repeated, and grossly exaggerated claim that BellSouth has a poor payment history.[52]

That said, in an effort to compromise, BellSouth is willing to agree that when BellSouth makes a deposit demand (or a request for additional deposit) BellSouth will reduce its deposit demand by the undisputed amount past due (if any) owed by BellSouth to any Joint Petitioners for payments pursuant to Attachment 3 of the Interconnection Agreement. (Tr. at 914-915). Upon BellSouth's payment of such amount, Joint Petitioners would be required to immediately increase the deposit in an amount equal to such payment(s). *Id.*

Issue 103: 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? (Attachment 7, Section 1.8.6)

*****SUMMARY POSITION: Thirty calendar days is a reasonable time period within which the CLEC should have met its fiscal responsibilities as well as the already agreed-upon right for BellSouth to obtain a deposit.*****

To protect its financial interests, BellSouth should be able to terminate service if a Joint Petitioner fails to pay (or properly dispute) a deposit demand within 30 calendar days. It is undisputed that BellSouth has a contractual right to a deposit. *See* Att. 7, §1.8. It is undisputed that the parties have agreed to objective and specific criteria regarding deposits that govern BellSouth's right to demand a deposit. *See* Att. 7, § 1.8.5. Further, it is undisputed that if a Joint Petitioner satisfies the deposit criteria, then BellSouth will refund the deposit amount within 30 calendar days, plus accrued interest. *See* Att. 7, § 1.8.10. Accordingly, it logically follows that

and that the bills failed to identify disputed amounts. (Tr. at 622-623).

[52] NuVox has a "bill and keep" arrangement with BellSouth. As such, NuVox bills BellSouth about $1,000 per month. Given this low level of NuVox billing, the offset provision is effectively an Xspedius only issue.

if a Joint Petitioner fails to satisfy the objective and specific deposit criteria, thereby triggering BellSouth's right to a deposit, then BellSouth should be permitted to terminate service if a Joint Petitioner refuses to respond to a deposit demand within 30 calendar days. Termination for non-payment of a deposit is not a novel concept; it is expressly authorized by this Commission's rules (Rule 25-4.109) and BellSouth's retail tariff. (BellSouth Tariff § A2.2.10). Additionally the end user tariffs of the Joint Petitioners expressly authorize termination for non-payment. (NewSouth Tariff, §2.3; KMC Tariff §2.5.5; and Xspedius Tariff § 2.5.5).

Given such agreed upon contractual provisions, 30 calendar days is a reasonable time period for a Joint Petitioner to satisfy an undisputed demand for a deposit.[53] Every month, BellSouth provides services worth millions of dollars to the Joint Petitioners. The Joint Petitioners are valued customers; however, BellSouth has a responsibility to its shareholders and to its other customers to avoid unnecessary business risks. Continuing to provide service to a Joint Petitioner that fails to respond or ignores a deposit demand (or a request for an additional deposit) is such a risk. Accordingly, the Commission should adopt BellSouth's proposed language on Issue 103.

Issue 104: 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? (Attachment 7, Section 1.8.7)

*****SUMMARY POSITION: If a CLEC disputes the amount of deposit requested, it can seek dispute resolution at the Commission but must post one-half of the amount of deposit requested as a bond during the pendency of the dispute to protect BellSouth's interests.*****

If a Joint Petitioner does not agree with the amount or need for a deposit demanded by BellSouth, the Joint Petitioner may file a petition with the Commission seeking resolution of such dispute[54] and BellSouth will cooperate in pursuing an expedited resolution of the dispute.

[53] Joint Petitioners remain confused about the scope of Issue 103. Issue 103 has nothing to do with disputes. Rather Issue 103 addresses BellSouth's rights if a Joint Petitioner disregards or simply ignores a deposit demand.

[54] If it will resolve the issue, BellSouth will agree that either Party may file a Petition for resolution of the dispute

(Tr. at 743). If there is disagreement over BellSouth's deposit demand, which only comes into play if a Joint Petitioner fails to establish specific and objective deposit criteria, then it is appropriate for the party disputing or disagreeing with the deposit demand to seek resolution of such dispute. *Id.* During the pendency of such a proceeding, BellSouth will not terminate service, provided that the Joint Petitioner posts a payment bond. (Tr. at 916). In an effort of compromise, and to address the Joint Petitioners' incorrect impression that the bond requirement somehow makes a CLEC the "loser" of a pending deposit dispute proceeding, BellSouth reduced its bond requirement to one-half of its deposit demand. *See* BellSouth Attachment 7, Section 1.8.7.

BellSouth has a responsibility to ensure that risk of nonpayment is minimized and posting a bond serves to minimize BellSouth's risk. (Tr. at 916). To minimize the risk of financial loss, it is reasonable to require a Joint Petitioner to post a bond while a deposit dispute is pending. Again, BellSouth's right to a deposit (or an additional deposit) hinges on a Joint Petitioner's failure to satisfy already-agreed to specific, independent and objective deposit criteria. (Att. 7, §1.8.5). As such, it is unreasonable to expect BellSouth to remain completely, or inadequately, unsecured during the pendency of a Commission proceeding regarding the need for a deposit or additional deposit.

In fact, to allow such a situation could encourage a Joint Petitioner (or a CLEC that adopts a Joint Petitioner's interconnection agreement) that is on the verge of bankruptcy, to file a complaint simply to avoid paying a deposit while such Joint Petitioner files for bankruptcy protection. (Tr. at 916). This has actually occurred in the past to BellSouth. A bond requirement would protect BellSouth in such cases.

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relating to a deposit request.

In sum, a bond requirement takes into consideration any legitimate disagreement the parties may have regarding the need for, or the amount of, a deposit, while protecting BellSouth during the resolution of any such dispute. This particularly is true in light of the fact that BellSouth is willing to accept a bond requirement of one-half of the deposit demand. Accordingly, the Commission should adopt BellSouth's language on Issue 104.

CONCLUSION

The Commission should adopt BellSouth's positions on each of the issues in dispute. BellSouth's positions on these issues are reasonable and consistent with the Act, which cannot be said about the positions advocated by the Joint Petitioners. With few exceptions, the issues that the Joint Petitioners have brought before the Commission have little or nothing to do with the Joint Petitioners providing local service to Florida consumers. Rather, the Joint Petitioners' issues serve mainly to shift their costs of doing business in Florida to BellSouth. For the foregoing reasons, BellSouth requests that the Commission rule in BellSouth's favor on each arbitration issue.