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June 9, 2006

Ms. Blanca S. Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: Docket Nos. 050119-TP and 050125-TP

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket on behalf of Quincy Telephone Company, d/b/a TDS Telecom, Northeast Florida Telephone Company, d/b/a NEFCOM, GTC, Inc., d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom and Frontier Communications of the South, LLC ("Small LECs") are the following documents:

1. Original and fifteen copies of the Small LECs' Posthearing Brief; and

2. A disk containing a copy of the Posthearing Brief in Word Perfect 6.0.

Please acknowledge receipt of these documents by stamping the extra copy of this letter filed and returning the copy to me. Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition of Quincy Telephone Company d/b/a TDS Telecom, ALLTEL Florida, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom, ITS Telecommunications Systems, Inc. and Frontier Communications of the South, LLC, ("Joint Petitioners") objecting to and requesting suspension of Proposed Transit Traffic Service Tariff filed by BellSouth Telecommunications, Inc.	)	Docket Nos. 050119-TP and 050125-TP
	)	Filed: June 9, 2006

POSTHEARING BRIEF OF QUINCY TELEPHONE COMPANY D/B/A TDS TELECOM, NORTHEAST FLORIDA TELEPHONE COMPANY D/B/A NEFCOM, GTC, INC. D/B/A GT COM, SMART CITY TELECOMMUNICATIONS, LLC D/B/A SMART CITY TELECOM AND FRONTIER COMMUNICATIONS OF THE SOUTH, LLC

Pursuant to the Order Establishing Procedure (Order No. PSC-05-1206-PCO-TP) issued in these dockets on December 6, 2005, Quincy Telephone Company d/b/a TDS Telecom, Northeast Florida Telephone Company, d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom and Frontier Communications of the South, LLC (hereinafter referred to collectively as the "Small LECs"), respectfully submit their Posthearing Brief.

STATEMENT OF BASIC POSITION

Over the past decades, BellSouth and the Small LECs have established service arrangements for the provision of intrastate toll, access to interexchange carriers, and in more recent times, extended area service ("EAS") calling between the end users in some of the Small LECs' exchange

areas and end users in BellSouth's neighboring communities. These EAS arrangements, embraced and approved by the Commission, allowed for local calling between customers of BellSouth and the Small LECs between specific areas. Trunking arrangements between the Small LECs and BellSouth were implemented at the border between the two carriers for the exchange of EAS calls. These arrangements have traditionally been conducted on a bill and keep basis. (Tr. 141, 327).

With the opening of local markets to competition and the advent of competitive carriers, traditional EAS calls from a Small LEC to BellSouth may now also involve local calls from the Small LEC to a customer of a competitive local exchange company ("CLEC") or commercial mobile radio service provider ("CMRS provider") that competes with BellSouth. Rather than doing what BellSouth did, i.e., interconnecting with the Small LECs at the border of the Small LECs' networks, the CLECs and CMRS providers chose instead to utilize the BellSouth network to have this local traffic switched and trunked through a BellSouth tandem, commingled with other BellSouth traffic either over toll/access facilities or over EAS trunks. (Tr. 328).

The CLECs and CMRS providers have entered into interconnection agreements with BellSouth for the use of the BellSouth tandem switch to complete their indirect interconnection with the Small LECs. These negotiations were conducted without participation by the Small LECs. (Tr. 329). The Small LECs accepted these arrangements because, prior to the filing of BellSouth's proposed Transit Tariff, there was no change in the status quo. (Tr. 328, 334, 394). BellSouth had never asked the Small LECs to pay for the CLECs' and CMRS carriers' use of BellSouth's network. Even though new CLECs and CMRS providers had become the new calling or called party on these local routes, and had elected to use (and presumably pay for) BellSouth's switching facility to interconnect with the Small LECs - - rather than making the investment to directly interconnect with

the Small LECs on the Small LECs' respective networks - - the Small LECs were not affected until the filing of BellSouth's proposed Transit Tariff.

After years of engaging in one consistent course of conduct where BellSouth exchanged this local traffic with the Small LECs without payment of compensation by either party (Tr. 141), BellSouth has now attempted to unilaterally, through an unlawful tariff mechanism, impose *costs caused by the CLECs and CMRS providers* on the Small LECs. The principle of cost causation is driven by one binding rule of law - - a rule of law expressly set forth in the Telecommunications Act of 1996, reaffirmed by the FCC and this Commission and acknowledged by witnesses representing every segment of the telecom industry who testified in this case. That rule of law is that the Small LECs are required only to interconnect, directly or indirectly, with the CLECs and CMRS providers for the purpose of exchanging local traffic at a technically feasible point *on the actual network of the Small LECs*.

To establish a direct interconnection, the CLECs and CMRS carriers must make the investment in the facilities necessary to complete the direct interconnection within the Small LEC network. However, they are not required to directly interconnect. They can indirectly interconnect and save the money required to make these direct interconnection investments. That is what the CLECs and CMRS providers have done. These carriers have elected to indirectly interconnect with the Small LECs' networks by directly interconnecting with BellSouth's network and purchasing BellSouth's transit service to reach the Small LECs' networks. It is illogical, inequitable and unlawful to require the Small LECs to pay for and subsidize the CLECs and CMRS providers' use of BellSouth's network to establish an indirect interconnection with the Small LECs.

There are a number of specific issues in this proceeding. As a general road map, the Small LECs offer the following essential components of their overall basic position.

(1) A tariff cannot be used by BellSouth to establish rates, terms and conditions and impose compensation obligations for local traffic. Further, the Florida Public Service Commission ("FPSC" or "Commission") lacks jurisdiction to approve BellSouth's Tariff because a commingled portion of the transiting service provided by BellSouth is for Internet Service Provider ("ISP")-bound traffic which is an interstate service. BellSouth should properly establish interconnection terms and conditions in the same manner as other carriers and as required by law.

(2) The BellSouth Transit Tariff should not be permitted to be used as a vehicle to thrust obligations on the Small LECs beyond those that they are subject to under the Federal Telecommunications Act of 1996 and controlling Federal Communications Commission ("FCC") rules and the orders of this Commission. The Small LECs' interconnection obligation for the exchange of traffic with the third party CLEC and CMRS providers is only to interconnect at a technically feasible point on the network of the Small LEC. The Small LEC has no obligation to exchange traffic with a CLEC or CMRS provider through an interconnection that is not on the network of the Small LEC - - in this case, the BellSouth tandem. The Small LECs have been and remain willing to continue to exchange traffic under this scenario so long as the cost causing CLEC or CMRS provider utilizing the BellSouth tandem switch - - as an essential alternative to the investment necessary to establish a direct interconnection - - pays BellSouth for the use of its network.

(3) The Small LECs have no obligation to pay the proposed transit traffic charge or any transit traffic charge caused by the network decision of the CLECs and CMRS providers. The Small

LECs have no obligation to incur extra costs to transit local traffic to points beyond a technically feasible interconnection point on their incumbent LEC networks to accommodate a choice and request made by a CLEC or CMRS providers. As previously stated, the Small LECs are willing to continue to provision such extraordinary arrangements so long as the CLECs and CMRS providers are held responsible for the extraordinary costs that they caused (i.e., the expense of the transit service) as a direct result of their preferred interconnection arrangements.

(4) If the Commission determines that the Small LECs, in some situations, are responsible for the true cost of transit services, then all interconnection terms and conditions, including proper cost-based rates, should be properly established for BellSouth's transit service. Such interconnection terms and conditions should require, among other things, the discontinuation of BellSouth's commingling of third party transit traffic with BellSouth's own access traffic. CMRS transit traffic should be provisioned on trunks separate from wireline CLEC transit traffic. When the traffic with a particular CLEC or CMRS provider reaches a DS-1 level of traffic, then that CLEC or CMRS provider should be required to provision dedicated trunks with the Small LEC as opposed to commingling its traffic with other transit carriers.

ISSUES AND ARGUMENT

Issue 1: Is BellSouth's Transit Service Tariff an appropriate mechanism to address transit service provided by BellSouth?

*No. Under the *T-Mobile Declaratory Ruling and Report and Order*, BellSouth cannot establish rates, terms and conditions for the exchange of non-access traffic, including transit service, pursuant to a tariff. Furthermore, the Commission lacks jurisdiction to approve this tariff due to the interstate nature of ISP-bound calls.*

Argument: The FCC's ruling in the *T-Mobile Declaratory Ruling and Report and Order*[1] confirms that BellSouth cannot establish rates, terms and conditions for the exchange of local traffic pursuant to a tariff. In *T-Mobile*, the FCC addressed the issue of whether an ILEC may impose compensation obligations on wireless carriers for non-access traffic pursuant to tariff. The FCC held, on a prospective basis, that an ILEC was prohibited from imposing such compensation obligations for non-access traffic pursuant to tariff and amended Section 20.11 of the FCC rules to add new subsection 20.11(e) which provides:

> Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.

The rationale of the *T-Mobile* decision applies equally as well to wireline carriers such as the Small LECs and the CLECs. As emphasized by Mr. Watkins, in discussing the *T-Mobile Declaratory Ruling*:

> The FCC has decided, with respect to tariffs filed by LECs for the exchange of traffic with wireless carriers, that tariffs are not the appropriate on-going mechanism for the establishment of terms and conditions for the exchange of non-access traffic. (*See, e.g., Declaratory Ruling and Report and Order* issued by the Federal Communications Commission on February 24, 2005 in CC Docket No. 01-92 at para. 14: Regarding intercarrier compensation for the exchange of non-access traffic. The FCC concluded that "[p]recedent suggests that the [FCC] intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between carriers are more consistent with the pro-

[1] *In the Matter of T-Mobile et. al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, Declaratory Ruling and Report and Order*, CC Docket No. 01-92 (Feb. 24, 2005).

> competitive process and policies reflected in the 1996 Act.") For the same reasons, the Small LECs maintain that unilateral tariffs are also not appropriate here.

(Tr. 337). Accordingly, under the *T-Mobile Declaratory Ruling*, BellSouth is prohibited from imposing local traffic compensation obligations, not only on the CMRS providers as explicitly held by the FCC in the *T-Mobile Declaratory Ruling*, but on the Small LECs and CLEC wireline carriers as well.

BellSouth's Transit Tariff is also fatally defective because it applies to local calls that terminate to ISPs. (Tr. 65-66, 74). In the *ISP Remand Order* released April 27, 2001,[2] the FCC held that ISP-bound traffic is interstate in nature and that the switching, transport and termination services that carriers provide to connect end-users to ISPs are also interstate services.[3] As confirmed by BellSouth witness McCallen, interstate services are not subject to the jurisdiction of this Commission and there is no evidence in the record that BellSouth has the ability to track and carve out the ISP-bound traffic - - the interstate traffic - - from the other traffic that would be subject to the proposed tariff. In view of the FCC's determination that ISP-bound traffic is interstate in nature and that the interconnection services provided in connection with ISP-bound traffic are interstate in nature, together with the fact that the jurisdictionally interstate aspects of BellSouth's tariff are commingled and bundled with the intrastate services provided by the tariff, the Commission lacks authority to approve this tariff.

Apart from the legal deficiencies in the tariff, the use of a unilateral tariffing mechanism to

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[2]*In the Matter of Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, CC Docket No. 99-68 (April 27, 2001).

[3]*ISP Remand Order*, at par. 55, 57, 58 and 65.

attempt to address all of the relevant terms and conditions of interconnection arrangements with BellSouth is futile and bound to lead to further litigation. As Mr. Watkins explained, BellSouth's Transit Tariff lacks the necessary flexibility to allow parties subject to non-access transit arrangements to put in place and modify, if necessary, the terms and conditions necessary to address the rights and responsibilities of all parties, including terms and conditions that address such critical issues as separate trunking facilities, physical interconnection points, local traffic, billing, collection and auditing of traffic, dispute resolution and related issues. (Tr. 338-340). In addition to lacking the specific terms necessary for a viable working interconnection arrangement, BellSouth's Transit Tariff (Ex. 7) comes with a number of express and specific deficiencies. For example:

(1) There is no assurance or guarantee that any of the three affected parties - - the originating carrier, BellSouth, or terminating carrier - - will be able to identify or measure completely and accurately all traffic that BellSouth intends to define as transit traffic. (Tr. 342).

(2) In addition, through the tariff, BellSouth attempts to coerce a commitment on the part of the originating carrier to enter into a traffic exchange agreement or other appropriate agreement with the terminating carrier for the purpose of addressing compensation between the originating and terminating carriers. BellSouth has no authority to impose such a requirement.

Finally, BellSouth's attempt to impose interconnection rates and obligations by tariff, rather than by agreement or arbitration, presents the potential for a tariff "free for all." As evidenced in the

tariff filing and by Commission order,[4] BellSouth's Transit Tariff was filed as a "nonbasic service" pursuant to Section 364.051(5)(a), Florida Statutes. This statute authorizes a price regulated company such as BellSouth to file tariffs reflecting the rates, terms and conditions for nonbasic services. This same statute similarly authorizes price regulated companies such as the Small LECs to file tariffs reflecting the rates, terms and conditions for nonbasic services. As BellSouth witness McCallen admitted, nothing prevents the price regulated Small LECs from filing a competing "transit tariff" with rates, terms and conditions that are different than BellSouth's Transit Tariff. (Tr. 158-159). Such a recipe for chaos and confusion can and should be avoided by rejecting BellSouth's Transit Tariff.

Issue 2: **If an originating carrier utilizes the services of BellSouth as a tandem provider to switch and transport traffic to a third party not affiliated with BellSouth, what are the responsibilities of the originating carrier?**

Each Small LEC has the obligation to interconnect with either BellSouth or the CLEC/CMRS provider within and on the network of the Small LEC. The CMRS providers and CLECs must interconnect on the BellSouth network or on the network of the Small LEC. All carriers have the obligation to negotiate interconnection agreements for the exchange of non-access traffic.

Argument: The record in this proceeding indicates that the obligation of the originating carrier will vary depending on whether the originating carrier is a Small LEC or a CLEC or CMRS provider.

The Small LECs' interconnection obligations are grounded in federal law. Under 47 U.S.C. §251(c)(2)(B), an incumbent local exchange company ("ILEC") that is subject to this provision has

[4]Order No. PSC-05-0517-PAA-TP issued May 11, 2005, consummated by Order No. PSC-05-0623-CO-TP issued June 6, 2005.

the duty to provide interconnection for the transmission and routing of local calling and exchange access at any technically feasible point within that ILEC's network. *See also* FCC Rule 47 C.F.R. 51.305. Further, under 47 U.S.C. § 251(c)(2)(C), the interconnection provided by the ILEC must be "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection . . . ." In the FCC's *Local Competition Order* released on August 8, 1996,[5] after the passage of the Telecommunications Act of 1996, the FCC reiterated that interconnection provided by an ILEC under §251(c)(2)(B) must be provided by the ILEC at "any technically feasible point within [its] network." *Local Competition Order* at par. 173.

This Commission has followed the mandate of Congress and the FCC. In an arbitration proceeding involving Level 3 and BellSouth, the Commission noted that "[a] competitive LEC has the authority to designate the point or points of interconnection *on an incumbent's network* for the mutual exchange of traffic." Order No. PSC-01-1332, at 10 (emphasis supplied). (Ex. 48). Subsequently, in the Commission's generic docket addressing a host of reciprocal compensation issues, the Commission again held "that ALECs have the exclusive right to unilaterally designate single POIs for the mutual exchange of telecommunications traffic at any technically feasible location *on an incumbent's network* within a LATA." Order No. PSC-02-1248-FOF-TP, at 25 (emphasis supplied). (Ex. 49).[6]

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[5]*In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, FCC 96-325, CC Docket Nos. 96-98, 95-185 (Aug. 8, 1996).

[6]As explained by Mr. Watkins, a Small LEC, as a rural telephone company, would be subject to no more than the interconnection requirements applicable to a non-rural telephone company such as BellSouth. (Tr. 346). *See* 47 U.S.C. §251(f)(1).

The Small LECs' obligation to interconnect at any technically feasible point within its network is an interconnection duty that may be accomplished by either a direct or indirect interconnection with the facilities and equipment of the other telecommunications carrier. 47 U.S.C. §251(a)(1). Thus, in the case of the Small LECs, each Small LEC has the obligation to interconnect with other telecommunications carriers by providing an interconnection on the network of the Small LEC. With BellSouth, the connection with the Small LECs is a direct interconnection. (Tr. 327). With the CLECs and CMRS providers who utilize BellSouth's tandem switch and transit service, the interconnection is an indirect interconnection with BellSouth serving as the intermediary carrier that has the direct interconnection on the network of the Small LEC. (Tr. 155). These legal principles and requirements were repeatedly confirmed by witnesses testifying on behalf of the various segments of the telecom industry at the hearing. Small LEC witness Watkins testified that:

> The interconnection obligations of incumbent LECs, under the most severe application, apply only with respect to the incumbent's network, not with respect to some other carrier's network in some other incumbent service area. An incumbent LEC has no responsibility to deliver local (non-access) traffic to an interconnection point that is neither on its incumbent LEC network nor to a point where the incumbent LEC is not an incumbent.
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> * * *
>
> When a Small LEC sends traffic to CLECs and CMRS providers that have elected to use BellSouth in lieu of establishing an interconnection point on the incumbent LEC networks of the Small LECs, the CLECs and CMRS providers have effectively elected... to designate the service border meet point that the Small LEC has with BellSouth as their

> interconnection point. Accordingly, it is the CLEC or CMRS provider that is utilizing BellSouth's transit service arrangement.

(Tr. 349-350).

Mr. Watkins' testimony regarding the interconnection obligations of the Small LECs was mirrored by the testimony of BellSouth witness McCallen and CompSouth witness Gates. Mr. McCallen confirmed that both BellSouth and the Small LECs have the same obligation to interconnect directly or indirectly *on their respective networks* with other carriers. (Tr. 154). He acknowledged that BellSouth typically interconnects with other carriers on the BellSouth network. (Tr. 155). Mr. McCallen stated that the CLECs and CMRS providers essentially have two choices to accomplish the exchange of traffic with the Small LECs: they can either use BellSouth's intermediary network or establish a direct interconnection of the network of the Small LEC. (Tr. 157-158). Based on his experience in negotiating with the CLECs and CMRS providers, Mr. McCallen went on to state that the CLECs and CMRS providers have made affirmative decisions to utilize "BellSouth's existing network to produce an indirect interconnection with a Small LEC rather than ... make the investments and extend and make a direct interconnection to the Small LECs...." (Tr. 155).[7] Thus, as Mr. McCallen confirmed, if BellSouth's network were not in place, these carriers would either have to make the investment to establish a direct point of interconnection or try to find another transiting carrier. (Tr. 156).

[7]At one point, Mr. McCallen tried to suggest that the CLECs and CMRS providers had real transit carrier alternatives to BellSouth if they did not wish to make the investment to establish a direct connection with the Small LECs networks. (Tr. 156). This supposedly viable alternative goes by the name of Neutral Tandem, a company that has a switch in Miami, Florida, hundreds of miles away from the Small LECs' networks. (Tr. 153). Cross examination of Mr. McCallen revealed that he knew virtually nothing about Neutral Tandem other than that they had a website. (Tr. 152-153, 746-747).

CompSouth witness Gates reiterated Mr. McCallen's positions and conclusions on this issue. Mr. Gates provided a succinct statement regarding the interconnection obligations of an ILEC:

> ... if you're going to interconnect directly with an incumbent, like if NuVox is going to directly interconnect with BellSouth, that interconnection would occur on the BellSouth network, as Mr. Hoffman explained. That does not go to the issue of indirect interconnection, which by necessity uses the transit service of BellSouth.

(Tr. 568).

The only witness who appeared to take issue with the limitation imposed by Congress and implemented by the FCC regarding the Small LECs' interconnection obligations was FCTA witness Wood. Mr. Wood incorrectly characterized Mr. Watkins' testimony as advocating a requirement that the CLECs and CMRS providers must directly interconnect within the network of the Small LECs. (Tr. 724-726). Mr. Watkins made no such claim. Mr. Watkins' testimony clearly provides that a CLEC or CMRS provider may establish a direct or indirect interconnection point on the incumbent LEC network of the Small LEC. (Tr. 379-380, 395). Mr. Wood then went on to assert that Mr. Watkins had provided no citations to the Federal Telecommunications Act of 1996 in support of this position and concluded by asserting that the Act "in no way creates an obligation for all carriers who have a need to interconnect with the ILEC to do so directly rather than indirectly." (Tr. 725).

Mr. Wood's attempt to restate Mr. Watkins' testimony and the applicable law should be rejected. As outlined in his testimony and in this brief, Mr. Watkins' testimony is replete with citations to the Federal Telecommunications Act of 1996 (the "Act"), FCC orders and the orders of this Commission, all of which confirm that the interconnection obligations of the Small LECs are at a technically feasible point within their networks. That interconnection, under 47 U.S.C. §

251(a)(1), can be accomplished through a direct interconnection or an indirect interconnection. The implication suggested by Mr. Wood - - that the Small LECs have an obligation to establish a direct interconnection with CLECs and CMRS providers at a point beyond their networks has been rejected by the United States Court of Appeals for the Eighth Circuit, as explained by Mr. Watkins in his testimony. (Tr. 354-355). In *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744 (8th Cir. 2000), the Eighth Circuit Court of Appeals held that the FCC had unlawfully adopted and attempted to impose interconnection requirements on incumbent LECs that would have resulted in the incumbent LECs providing superior arrangements to that which the incumbent LEC provides to itself. Accordingly, the notion that the Small LECs are required to provide a direct interconnection to the CLECs and CMRS providers beyond their networks, a level of interconnection that would be superior to that which the Small LECs provide to themselves and other interconnecting carriers such as BellSouth, violates 47 U.S.C. § 251(c)(2)(C) and the decision of the Eighth Circuit in *Iowa Utilities Board.*

While the Small LECs and the CLECs/CMRS providers have different interconnection obligations in their roles as originating carriers (or, for that matter, as terminating carriers), all carriers should be encouraged by the Commission to negotiate interconnection agreements concerning the rates, terms and conditions of interconnection and the exchange of transit traffic. (Tr. 338-341, 352, 702).

Issue 3: Which carrier should be responsible for providing compensation to BellSouth for the provision of the transit transport and switching services?

*The CLECs and CMRS providers have elected to utilize BellSouth's network in lieu of paying for and establishing direct interconnection points on the networks of the Small LECs and, therefore, should be responsible for

providing compensation to BellSouth for the provision of transit transport and switching services.*

Argument: The CLECs and CMRS providers, joined by BellSouth, take the position that the originating carrier should be responsible for payment to BellSouth for transit transport and switching services. BellSouth and the CLECs/CMRS providers rely, in large part, on an FCC rule which has no application to transit service. While the CLECs and CMRS providers complain that the Small LECs unfairly want them to pay for the use of BellSouth's network on the originating and terminating sides of the calls, a close, objective analysis of the law demonstrates that it is the CLECs and CMRS providers who, along with BellSouth, are asking the Small LECs to subsidize the CLECs and CMRS providers' use of BellSouth's network to exchange local traffic - - an affirmative decision made by these carriers in lieu of making the investments necessary to establish a direct interconnection on the Small LECs' network. In light of the obligation of the Small LECs to provide direct or indirect interconnection only on the network of the Small LECs, the conclusion is inescapable that the affirmative election by the CLECs/CMRS providers to utilize the BellSouth network in lieu of making the investments necessary to establish a direct interconnection is the sole and direct cause of and requires the use of the BellSouth tandem switched transit services at issue in this proceeding. If these carriers established direct interconnections with the Small LECs, there would be no need for transit service and there would be no transit fee issue.

As Mr. Watkins explained, once the CLECs/CMRS providers enter into interconnection arrangements and make that election to utilize the BellSouth network "... the Small LECs are left with no options other than to participate in the Transit Tariff, at additional costs and burden to the Small LECs, to the benefit of the CLECs and, CMRS providers." (Tr. 335). Mr. Watkins provided

a simple example demonstrating the cost causing role of the CLECs and CMRS providers. Specifically, he pointed to the situation where a BellSouth end user decides to change his or her local service to a CLEC that competes with BellSouth with the result being that the Small LEC, who previously had exchanged EAS calls with BellSouth on a bill-and-keep basis, would now be responsible for additional transit charges and costs simply because of the end user's switch from BellSouth to the CLEC. (Tr. 351-352). (Tr. 385). As Mr. Watkins put it:

> The fact that an end user of BellSouth changes his or her service to a CLEC cannot create new and extraordinary obligations and costs for a Small LEC for what is the exact same EAS call to the same end user located at the same location. To the extent there is additional switching performed and additional transport above and beyond that which would apply if the same EAS call were exchanged with a BellSouth end user, the cause of the additional cost is the CLEC that demands a different and more costly treatment of the same EAS call... The Small LECs have no obligation (under 47 U.S.C. §251(c)(2)(C)) to subsidize CLECs by being responsible for the extraordinary costs that arise for network arrangements that go beyond what the incumbent LECs do for any other local call.

(Tr. 385-386).

Although the record demonstrates and supports a determination that the CLECs and CMRS providers: (a) cause and trigger the need for the BellSouth transit service; (b) are the cost causers of any transit charge; and (c) should bear the cost of any transit charge that may be approved by the Commission, a number of theories were trotted out attempting to "split the baby" by placing responsibility for transit fees on the Small LECs when they are the originating carriers. These arguments do not withstand careful scrutiny.

First, both BellSouth and the CLECs/CMRS providers repeatedly pointed to FCC Rule 51.703(b)[8] and "industry practice" as the basis for a ruling by this Commission that the originating LEC should pay the transit charge. BellSouth witness McCallen was the first to attempt to defend that position. He suggested in his rebuttal testimony that placing the charge on the originating carrier is consistent with "general industry concepts." (Tr. 83). However, on cross-examination, Mr. McCallen admitted that even after he filed his testimony, he had no idea whether any specific industry precedent supported a position that it is appropriate to impose the transit charge on the originating carrier. (Tr. 143-144).

The other witnesses did not fare better with Rule 51.703(b). That rule states as follows:

> (b) A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

On cross examination, CompSouth witness Gates acknowledged that the only party proposing to assess a charge under the tariff is BellSouth and BellSouth's role in a transiting scenario is not one of an originating carrier but is one of an intermediary carrier. (Tr. 566). Rule 51.703(b) addresses the responsibility of an originating carrier and has no application to BellSouth's Transit Tariff where BellSouth, as an intermediary carrier, seeks to assess charges on other telecommunications carriers.

The notion that industry practice or FCC precedent supports a conclusion that the originating carrier pays the transit charge is simply untrue. In the *TSR Wireless* decision released June 21, 2000, the FCC held that the complainants in the case, who were *terminating* CMRS providers, were required to pay for transit traffic that originated from a carrier other than the interconnecting LEC

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[8] *See* Sterling Direct, Tr. 585-586; Gates Rebuttal, at Tr. 517; Pruitt Rebuttal, at Tr. 656-657; and Wood Rebuttal, at Tr. 732 .

but was carried over that interconnecting LEC's network to the paging carrier's network.[9] Subsequently, in the *Texcom* decision released on March 27, 2002, the FCC held again that it was appropriate for a terminating carrier to pay a transit charge but allowed the terminating carrier the opportunity to attempt to recover those transit costs from the originating carrier through negotiated reciprocal compensation rates.[10]

The point here is that there is no FCC precedent that supports placement of a transit obligation on an originating carrier. If anything, prior to the FCC's most recent pronouncement on the issue, the *TSR Wireless* and *Texcom* decisions targeted the terminating carrier as the appropriate paying carrier. In any case, the Commission must be mindful of the most recent pronouncement of the FCC on this issue in its *Further Notice of Proposed Rulemaking on Intercarrier Compensation*, FCC O5-33, CC Docket No. 01-92 (March 3, 2005). In the *Intercarrier Compensation FNPRM* at par. 132 (Ex. 34), the FCC stated:

> The reciprocal compensation provisions of the Act address the exchange of traffic between two carriers, but do not explicitly address the intercarrier compensation to be paid to the transit service provider for carrying Section 251(b)(5) traffic.

Thus, the issue of which carrier should pay for transit service and the terms and conditions that will determine when certain carriers should pay for transit service remain open issues before the FCC. (Tr. 442-443, 764-765).

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[9] *In the Matter of TSR Wireless, LLC, et. al. v. US West Communications, Inc., et. al., Memorandum Opinion and Order*, FCC 00-194 (June 21, 2000), at fn. 70 (2000 WL 796763 (F.C.C.), 15 F.C.C.R. 11166). (Ex. 35).

[10] *Texcom, Inc. d/b/a Answer Indiana v. Bell Atlantic Corp., d/b/a Verizon Communications, Order on Reconsideration*, FCC 02-96 (March 27, 2002), (2002 WL 459938 (F.C.C.), 17 F.C.C.R. 6275).

The reliance of the intervenors in this proceeding on court cases and distinguishable state regulatory decisions in support of an "originating carrier pays" proposition is misplaced. For example, Verizon Wireless directs the Commission to *Atlas Telephone Company v. Oklahoma Corporation Commission*, 400 F.3d 1256 (10th Cir. 2005) and *Mountain Communications, Inc. v. Federal Communications Commission*, 355 F.3d 644 (D.C. Cir. 2004). (Tr. 585). Neither of these court cases mentions the FCC's pronouncement in the *Intercarrier Compensation FNPRM* regarding the unresolved status of transit traffic issues.[11] In *Atlas Telephone Company*, the court was careful to point out that the issue of whether an originating carrier must pay an intermediary ILEC for transit service was not before the court. 400 F.2d 1256, 1257, fn. 12. In *Mountain Communications*, the court made no formal decision on the transit traffic issue after the petitioner withdrew that part of its appeal. Perhaps more significantly, Mr. Sterling's purpose in citing these cases to the Commission is to purportedly show that these court decisions are consistent with the application of FCC Rule 51.703(b)[12] - - a rule that has no application in this case.

The intervenors also point to recent decisions of the Georgia and Tennessee regulatory commissions addressing transit traffic issues. These decisions are easily distinguishable and, of course, have no binding precedential impact on the Commission. Verizon Wireless and AT&T referred to a decision of the Georgia Public Service Commission where the Georgia Commission concluded that the originating carrier is responsible for transit charges. (Tr. 272-273, 585). Mr. Watkins distinguished the Georgia decision by emphasizing that "[i]n Georgia, the incumbent LECs

[11]The *Atlas Telephone Company* opinion was issued only seven days after the release of the FCC's *Intercarrier Compensation FNPRM* and the *Mountain Communications* opinion was issued before the *Intercarrier Compensation FNPRM*.

[12]Tr. 585-586.

are free to require in the course of establishing interconnection with a CLEC that the CLEC be responsible for the extraordinary cost of transit if the small, incumbent LEC is willing to send local traffic via BellSouth." (Tr. 386-387).

A number of the Intervenors pointed to the January 12, 2006 decision of the Tennessee Regulatory Authority[13] in support of their "originating carrier pays" position. (*See* Tr. 522, 585, 666-668, 726; Ex. 47, BHP-6). The *Cellco* order has no bearing on this case. In *Cellco,* the Tennessee Regulatory Authority appeared to predicate its determination that an independent telephone company could be required to pay for transit costs associated with the delivery of intraMTA traffic originated on its network on a finding that the independent companies had affirmatively decided to extend their networks past the existing point of interconnection with BellSouth to the BellSouth tandem switch:

> Because the ICOs have opted to utilize the BellSouth tandem as opposed to their own tandem to handle the exchange of traffic between an ICO member and a CMRS provider, the ICO members have in fact extended their networks past the existing POI to the tandem switch. Thus, the Coalition's assertion that the Authority cannot require an ICO to take financial responsibility for the transport of CMRS traffic to the tandem switch must be rejected.

(Ex. 47 (BHP-6), at 29). In contrast, in this proceeding, the record is clear and uncontroverted that the Small LECs have *not* extended their networks past their respective points of interconnection with BellSouth on or near the border of the particular Small LECs' networks. (McCallen, Tr. 141; Watkins, Tr. 327). Thus, the factual underpinning of the *Cellco* decision is absent in this case.

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[13] *In re: Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless, etc.*, Order of Arbitration Award, Tennessee Regulatory Authority Docket No. 03-00585 (January 12, 2006) (hereinafter referred to as "*Cellco*") (Ex. 31, Ex. 47).

Further, as pointed out by Mr. Watkins, the *Cellco* decision specifically states that if the Small LEC must transport traffic to a distant location, then the traffic may be treated as an interexchange service and routed by an interexchange carrier, thereby removing BellSouth's role as an intermediary transit provider. (Tr. 386).

One witness, AT&T witness Guepe, attempted to support the "originating carrier pays" theory by citing to an interconnection agreement where one of the Small LECs, Northeast Florida Telephone Company, and New Cingular Wireless have allegedly agreed that the originating party pays the provider of transit service. (Tr. 274). This attempt by AT&T to fashion an "admission" on the part of the Small LECs that "originating carrier pays" is appropriate is specious. First, the Small LECs' position that the CLECs and CMRS providers should pay any transit fee approved by the Commission was presented and supported at hearing and remains the position of the Small LECs. Second, the fact that Northeast Florida would have agreed to a request by New Cingular Wireless to insert language in an agreement placing financial responsibility on the originating carrier for transit traffic is meaningless. Northeast Florida has no transit traffic. (Tr. 399). The same rationale applies to Mr. Sterling's testimony on cross-examination that Verizon Wireless has an interconnection agreement with GT Com under which the originating carrier pays transit fees. (Tr. 591). GT Com currently has no transit traffic. (Tr. 399). As the witnesses in this proceeding explained, negotiations are a give and take process, parties may allow for language in a negotiated agreement that in no way reflects their stand alone position in a litigated proceeding and, most of all, a party such as Northeast Florida will typically "give" on a negotiated issue, such as a high transit traffic rate or originating carrier responsibility, if it has no impact on the company (because Northeast Florida has no transit traffic). (Tr. 149-150; 570).

At the conclusion of the hearing, Staff requested the parties to address the impact, if any, of Section 364.16(1), Florida Statutes, on the issues in this proceeding. Section 364.16(1) states:

> (1) Whenever the commission finds that connections between any two or more local exchange telecommunications companies, whose lines form a continuous line of communication or could be made to do so by the construction and maintenance of suitable connections at common points, can reasonably be made and efficient service obtained, and that such connections are necessary, the commission may require such connections to be made, may require that telecommunications services be transferred, and may prescribe through lines and joint rates and charges to be made, used, observed, and in force in the future and fix the rates and charges by order to be served upon the company or companies affected.

The potential implications of Section 364.16(1) in this proceeding are two-fold. First, as will be addressed under Issue 11, Section 364.16(1) provides the Commission with independent state statutory authority to establish cost based rates for BellSouth's transit service. Second, with respect to Issue 3, the Small LECs are concerned that the Commission may believe that the statute would authorize the Commission to require the Small LECs to establish interconnections with the CLECs and CMRS providers beyond technically feasible interconnection points on the Small LECs' networks, as required by federal law and prior Commission orders. The Small LECs would respectfully submit that any such requirement is unlawful as it would be preempted by 47 U.S.C. §251(c)(2)(C) and FCC rules and orders implementing this statutory mandate.

Federal statutes and regulations can preempt state law as well as the regulations of a state agency. Preemption of federal law arises under Article VI, Clause 2 of the United States

Constitution, which is often referred to as the "Supremacy Clause."[14]

Federal statutes may have preemptive effect as may regulations and the decisions of a federal agency as long as they are authorized by a federal statute. *City of New York v. Federal Communications Commission*, 486 U.S. 57, 63 (1988) *citing* U.S. Const., Art. VI Cl. 2; *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368-369 (1986). In *Louisiana Public Service Commission v. FCC*, the court held that a federal statute or a statutorily authorized federal regulation will preempt a state law when Congress or the federal agency has (1) expressed an intent to preempt state law , (2) implied an intent to preempt state law, or (3) when the federal law and the state law conflict. *Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 152-154 (1982).

The issue here is whether the limitation on the ILEC/Small LECs' interconnection obligation, specifically, the obligation to interconnect at a technically feasible point on the Small LEC network, would preempt a potential determination by this Commission that Section 364.16(1) authorizes the Commission to require the Small LECs to interconnect with CLECs and CMRS providers at a point beyond and off of their networks. Under the case law, if a court finds that Congress or a federal agency has expressed its intent to preempt state law, then the court is not required to examine whether the state and federal laws actually conflict or whether it would be possible to comply with both the state and federal regulation. *See*, *City of New York*, 486 U.S. at 65-66; *de la Cuesta*, 458

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[14]Article VI, Clause 2 of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. at 153 (1982). In *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002), the court held that "Congress has clearly stated its intent to supercede state laws that are inconsistent with the provisions of the FTA [Federal Telecommunications Act]." Accordingly, the Commission should refrain from interpreting and applying Section 364.16(1), Florida Statutes, in a manner that would conflict with the limited interconnection obligation of the Small LECs to interconnect at any technically feasible point within their networks as set forth in 47 U.S.C. §251(c)(2)(C) and applicable FCC rules and orders.

Issue 4: **What is BellSouth's network arrangement for transit traffic and how is it typically routed from an originating party to a terminating third party?**

Transit traffic exchanged between Small LECs and CLECs/CMRS providers traverse a BellSouth tandem switch. The traffic is then routed to the Small LECs over common trunk groups to the point of interconnection between BellSouth and the Small LEC.

Argument: It is the Small LECs' understanding that BellSouth routes transited traffic over different types of trunk groups for the specific Small LECs. The Small LECs wrestle with the uncertainty surrounding BellSouth's practice of commingling various types of traffic - - CLEC originated, CMRS provider originated and interexchange/access traffic - - over the same trunk group for termination to the Small LECs. (Tr. 366-367).

As explained by Mr. Watkins, the Small LECs are receiving the commingled traffic of multiple carriers over a BellSouth access trunk group that would otherwise be subject only to access compensation. These trunk groups are being used for terminating long distance calls that transit the BellSouth tandem (access traffic) as well as non-access calling originating from CLECs and CMRS providers. In response to Staff's First Set of Interrogatories, Interrogatory No. 10, and Staff's Second

Set of Interrogatories, Interrogatory No. 21, the Small LECs offered a multi-layer proposal for trunking arrangements and request that the Commission approve this proposal. Under the Small LECs' proposal, BellSouth may continue to provide transit service which involves the switching of third party (CLEC/CMRS) traffic through BellSouth's tandem and the commingling of some traffic on specific trunk groups subject to the following conditions.

1. Subject to the conditions set forth in Items 3 and 4 below, local (i.e., non-access) CLEC transit traffic to and from the Small LECs should be provisioned on a dedicated trunk group between BellSouth and each Small LEC separate from the trunk groups BellSouth and the Small LEC use for access and toll purposes and separate from the trunk groups used for commingled CMRS provider traffic.

2. Subject to the conditions set forth in Items 3 and 4 below, local (i.e., non-access) CMRS provider traffic to and from the Small LECs should be provisioned on a dedicated trunk group between BellSouth and each Small LEC separate from the trunk groups BellSouth and the Small LECs use for access and toll purposes and separate from the trunk groups used for commingled CLEC traffic as set forth above.

3. When the local traffic between a specific CLEC and a Small LEC or between the specific CMRS provider and a Small LEC reaches the level of traffic that constitutes a level of typically associated with one DS-1, then the CLEC or CMRS provider should be required to provision a dedicated arrangement (i.e., not switched through the BellSouth tandem and not commingled with

other carriers' traffic) either through a direct or indirect facilities arrangement consistent with the discussion in paragraph 1039 of the *FCC's Local Competition Order.*

4. Where a Small LEC deploys its own tandem, then it should not be required involuntarily to continue to subtend the BellSouth tandem and should not be required to terminate traffic over trunks where multiple carriers' traffic is commingled. However, subject to the limitations set forth above, a Small LEC may decide voluntarily to continue this arrangement.

See Ex. 2.

The Small LECs' trunking proposal is consistent with the manner in which the FCC has addressed the issue of potential direct and indirect trunking arrangements for the exchange of §251(b)(5) traffic in paragraph 1039 of the *Local Competition Order,* which do not include the commingling of local traffic with interexchange carriers' access service trunks. The Small LECs' proposal will help minimize potential billing disputes arising out of the termination of the various types and scopes of traffic and should be approved by the Commission.

Issue 5: **Should the FPSC establish the terms and conditions that govern the relationship between an originating carrier and the terminating carrier, where BellSouth is providing transit service and the originating carrier is not interconnected with, and has no interconnection agreement with, the terminating carrier? If so, what are the appropriate terms and conditions that should be established?**

*Yes. The Commission should determine that the CLECs and CMRS providers are responsible for payment to BellSouth for any charges approved by the Commission for BellSouth's transit service. In addition, the

Commission should address numerous other billing, operational and enforcement issues if not resolved through an interconnection agreement.*

Argument: The Commission should utilize the time and resources spent by the parties and and the Commission in this proceeding and the record developed in this proceeding to establish principles or requirements that will guide parties in future negotiations concerning rates, terms and conditions of transit traffic. While BellSouth suggests in Mr. McCallen's testimony that "BellSouth will not dictate terms and conditions between other parties," (Tr. 71), the presence of the BellSouth tariff, as Mr. Wood and Mr. Gates confirmed, effectively removes any leverage of the non-BellSouth negotiating party and places that party in the position of having to accept the BellSouth tariffed rate (Tr. 536, 701, 748).

Should the Commission rule that it is unlawful and/or inappropriate to utilize a tariff mechanism to govern the provision by BellSouth of its transit service, then virtually all parties are in agreement that the rates, terms and conditions governing the provision of transit service would be the subject of interconnection negotiations between and among the affected carriers subject to arbitration, if necessary. (*See, e.g.*, Watkins, Tr. 337-338; Wood, Tr. 702-703).

Such negotiations and potential arbitrations should be subject to "default" guidelines, principles and/or requirements established by the Commission through this proceeding. First and foremost, the Commission should follow federal law and reiterate its conclusions in prior Commission orders by determining that the Small LECs' interconnection obligations are limited to interconnecting with the CLECs and CMRS providers either directly or indirectly on the incumbent LEC network of the Small LEC. Such a determination will enable the CLECs and CMRS providers to make a business decision as to whether to make the investment necessary to establish a direct

interconnection, just as BellSouth has, or to purchase BellSouth's transit service to establish an indirect interconnection with the Small LEC. These findings should then support a determination by the Commission that the CLECs and CMRS providers are responsible for payment to BellSouth for any transit charge approved by the Commission to this proceeding or in future proceedings for BellSouth's transit service.

In addition, the Small LECs request that the Commission establish a list or set of mandatory contract issues that must be resolved to inform BellSouth and the negotiating parties in future negotiations and potential arbitrations before the Commission. A detailed set of such contract issues, the resolution of which are necessary to establish viable, working contractual interconnection arrangements were provided only by Mr. Watkins on behalf of the Small LECs (Tr. 339-341), remain unrebutted in this record, and are set forth in Appendix A to this Posthearing Brief.

Issue 6: **Should the FPSC determine whether and at what traffic threshold level an originating carrier should be required to forego use of BellSouth's transit service and obtain direct interconnection with a terminating carrier? If so, at what traffic level should an originating carrier be required to obtain direct interconnection with a terminating carrier?**

Yes. Generally speaking, a reasonable level of traffic for a threshold would be the amount of traffic that constitutes one T-1 of traffic usage. When the threshold is exceeded by an individual CLEC or CMRS provider, that provider would establish a single, dedicated T-1 trunk group for transit traffic.

Argument: Once again, if the Commission's goal is to utilize this proceeding to establish guidelines or requirements that will inform future negotiations and limit the number of future arbitrations, the Commission should act on this issue and establish a traffic threshold level under which a CLEC or CMRS provider should be required to forego the use of BellSouth's transit service

and establish a direct interconnection with the terminating carrier. The only recommendation on this issue was offered by Mr. Watkins on behalf of the Small LECs who recommended that a reasonable level of traffic for a threshold would be the amount of traffic, sustained over a three month consecutive period, that constitutes one T-1 of traffic usage. As Mr. Watkins explained, this would not mean that the CLEC or CMRS provider would have to make the investment to establish its own direct interconnection on the Small LEC network; it could make a business decision and opt to purchase dedicated trunks from BellSouth. (Watkins, Tr. 360-361, 392, 397; Gates, Tr. 464). The other witnesses who chose to address this issue essentially advocated that there be no express threshold level and that the matter be left to negotiations or market forces. (*See, e.g.*,Guepe at Tr. 277-78, Gates at Tr. 459-463). However, as Mr. Watkins emphasized, the significant imbalance and one-way nature of ISP-bound traffic skews, if not eliminates, the effects and benefits of market forces and can leave the Small LECs "holding the bag" for substantial transit fees as there is no economic incentive for the CLEC to establish a direct interconnection with the Small LEC. (Tr. 392). The Small LECs request that the Commission adopt Mr. Watkins' approach which provides both flexibility and a level of certainty for future negotiations and arbitrations.

Issue 7: **How should transit traffic be delivered to the Small LEC's network?**

Subject to and apart from specific negotiated arrangements, BellSouth should be required to establish separate trunk groups for CLEC and CMRS provider local transit traffic, to avoid commingling such traffic with toll/access traffic.

Argument: BellSouth should be required to establish separate trunk groups for CLEC and CMRS provider local transit traffic to avoid commingling such traffic with toll/access traffic. (Ex. 2, Small LECs' Responses to Staff's Second Set of Interrogatories, No. 21). These separate trunking

requirements will enhance the accuracy of the billing between and among the parties for local land line traffic, local intra-MTA wireless traffic, and toll/access traffic, thereby minimizing disputes and the cost and resources expended for dispute resolution.

Issue 8: **Should the FPSC establish the terms and conditions that govern the relationship between BellSouth and a terminating carrier, where BellSouth is providing transit service and the originating carrier is not interconnected with, and has no interconnection agreement with, the terminating carrier? If so, what are the appropriate terms and conditions that should be established?**

Yes. Such terms and conditions should be established by the FPSC absent contractual agreements addressing the rights and responsibilities of all of the participants. The Commission should resolve open issues to the extent voluntary negotiations do not result in agreements.

Argument: *See* discussion under Issue 5.

Issue 9: **Should the FPSC establish the terms and conditions of transit traffic between the transit service provider and the Small LECs that originate and terminate transit traffic? If so, what are the terms and conditions?**

*Yes. *See* the Small LECs' responses to Issues 5 and 8.*

Argument:

Issue 10: **What effect does transit service have on ISP-bound traffic?**

The Commission does not have the authority to approve BellSouth's Transit Tariff as it includes the transiting of ISP-bound traffic which is an interstate service. The FCC's limit of $0.0007 per MOU to recover all costs for ISP-bound traffic confirms no compensation for transiting should be paid.

Argument: As previously discussed, the Commission lacks the authority to approve BellSouth's transit tariff to the extent it would authorize BellSouth to impose a transit fee for ISP-bound traffic which is an interstate service. In the *ISP Remand Order*, the FCC ruled that the links that local exchange companies provide between an end-user and an ISP to connect subscribers to

enhanced service providers or Internet service providers is an interstate access service. *ISP Remand Order*, at par. 55, 57, 58 and 65. BellSouth's basic position on this issue is that ISP-bound traffic should be subject to the transit charge to allow BellSouth to be compensated for the transit functions utilized for an ISP-bound call. (Tr. 64, 74). BellSouth's position not only ignores the jurisdictional nature of ISP-bound calls but the financial implications to the originating carriers as well as the pronouncement of the FCC regarding intercarrier compensation for ISP-bound calls.

As Mr. McCallen readily admitted, the hold times for a call terminated to an ISP are typically much longer than a traditional local voice call (Tr. 151-152) and the amount of transiting fees imposed under BellSouth's tariff could exceed the amount billed by the originating carrier to a subscriber for local service. (Tr. 153). Mr. Watkins provided an example. If a small business had a line dedicated to stay "dialed-up" continuously to an ISP served by a CLEC that has a transit arrangement in place for BellSouth, the monthly transit charge under BellSouth's tariff would be $129.60 for the traffic generated by that one business customer. Even for more modest ISP users who are "dialed up" for approximately two hours per day, the transit charge would still amount to $10.80 per month. (Tr. 365).

Moreover, as emphasized by Mr. Watkins, the FCC has interim rules in place that limit the total of intercarrier compensation for ISP-bound traffic to no more than $0.0007 per minute of use. BellSouth, in providing its transit service, provides only a portion of the transport and termination functions that are the subject of the FCC's ISP-bound traffic limitation. (Tr. 364). Accordingly, the FCC's limit of $0.0007 per minute of use to recover all costs for ISP-bound traffic confirms that no compensation for transiting should be paid.

Issue 11: How should charges for BellSouth's transit service be determined?

(a) What is the appropriate rate for transit service?

(b) To what type of traffic do the rates identified in (a) apply?

(a)(b) *If the Commission approves a charge for BellSouth's transit service, the rates should be no higher than the rate that would apply for BellSouth's equivalent interstate access services. For ISP-bound traffic, no transit rate should be approved. However, if the Commission determines that transit should apply to ISP-bound traffic, the Commission should establish a rate that is less than the reciprocal compensation rate established by the FCC for ISP-bound traffic.*

Argument: If the Commission determines that it is appropriate to establish a rate for BellSouth's transit service, then the record supports the establishment of a cost based rate that does not exceed the sum of the rates established for equivalent interstate access services. The evidence in this proceeding supports the use of equivalent interstate access services as a "ceiling" for the establishment of a cost based transit rate. (Tr. 366-367, 390-391, 476).

In Section 364.164, Florida Statutes, the Legislature has recognized the need to remove the subsidies present in intrastate access charges and provided a mechanism by which ILECs may petition the Commission to reduce their intrastate switched network access rates to interstate levels and at the same time increase rates for basic local telecommunications services on a revenue neutral basis. Mr. Watkins testified that BellSouth had filed a petition for relief under this statute based on BellSouth's position that its intrastate access charges were priced above cost thereby creating an uneconomic subsidy and that these intrastate access charges should be reduced to interstate levels (with a commensurate increase in local rates) on a revenue neutral basis.[15] Yet, as Mr. Gates pointed

[15]BellSouth's petition was granted in Order No. PSC-03-1469-FOF-TL issued December 24, 2003. The Commission's final order was affirmed by the Supreme Court of Florida in *Crist*

out (and Mr. Watkins concurred), when it comes to its Transit Tariff, BellSouth is attempting to impose a transit rate that is priced substantially above cost - - indeed, a rate that "is an increase of more than 114% over BellSouth Florida's interstate switched access tandem switching/common transport rates." (Tr. 391, 476). Mr. Gates provided the detailed rates and citations to BellSouth's FCC interstate access tariff:

> BellSouth Florida's interstate switched access tandem switching per MOU rate is $0.001198, common transport fixed termination per MOU rate is $0.000176 and common transport per mile per MOU rate is $0.000023, for a composite rate of $0.001397. BellSouth Telecommunications, Inc. FCC Tariff No. 1, 14th revised 6-157.27 and 7th revised 6-157.2.4. Note: the common transport, per mile component of this rate will vary depending on common transport mileage.

(Tr. 476, fn. 36).

If the Commission determines that it is appropriate to establish a transit rate outside of the proposed invalid tariffing mechanism, the Small LECs support and the record supports a cost based rate that does not exceed the $0.001397 rate for equivalent interstate access functions provided in the direct testimony of Mr. Gates. While there may be a fair debate as to whether the Commission can establish cost based rates under federal law, it is clear that Section 364.16(1), Florida Statutes, authorizes the Commission to establish cost based rates under state law. Further, by utilizing the $0.001397 rate as a ceiling, the Commission will remedy the discrimination issues raised by Mr. Gates and Mr. Watkins if the Commission failed to require BellSouth to charge CLECs and CMRS providers the same rates charged to interexchange carriers for the same functions.[16] (Tr. 391, 476).

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v. Jaber, 908 So.2d 426 (Fla. 2005).

[16]Although Mr. McCallen stated in his prefiled testimony that BellSouth should also be compensated for assisting in the termination of transit traffic (Tr. 74, 160), he admitted on cross-

The magnitude of the difference between BellSouth's proposed tariff rate of $0.003 and the $0.001397 rate (the interstate access equivalent) leaves little mystery as to why BellSouth would advocate its inflated market based rate which came with its own set of problems. BellSouth repeatedly acknowledged that its tariffed rate of $.003 is not a cost based rate (Tr. 113, 204) and was very clear on the record that it had not performed or provided a cost study in support of the rate. (Tr. 203). BellSouth's version of a market based rate was not based on what other transit providers charge; indeed, BellSouth's attempt to suggest that there was an alternative provider in the form of an entity by the name of Neutral Tandem was somewhat hapless and certainly did not include any specifics as to Neutral Tandem's alleged network and rates. Instead, BellSouth asserted that its tariffed rate of $.003 was comparable to transit rates reflected in numerous interconnection agreements. (McCallen, Tr. 75, 201; Ex.8, 39).

BellSouth's proposal did little to inform the Commission, even as to an appropriate non-cost based rate. When looking from the "outside in" to an interconnection agreement negotiated by two parties, the Commission has no way of knowing the details of the give and take of the negotiation process. (Tr. 150). For example, as Mr. Gates pointed out, interconnection agreements with higher transit rates than the rate reflected in BellSouth's tariff typically reflect that there is no transit traffic being exchanged between the parties. (Tr. 570). In other words, it is a non-issue so the CLEC or CMRS provider agrees to a relatively high rate. Id. The record also shows that a Small LEC may have negotiated higher transit rates for transit services provided by that Small LEC in light of the fact that Small LECs do not benefit from the same economies of scale and typically have higher unit

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examination that BellSouth does not provide a termination function as part of its transit service (Tr. 160-161).

costs than BellSouth to perform the same function. (Tr. 420-422). In addition, the interconnection agreement rates presented by BellSouth were replete with incorrect information, repeatedly revised, and contained rates both lower and higher than BellSouth's proposed tariff rate of $0.003 (Tr. 114, 718-719; Ex. 8, 39).

The record supports a determination that any rate approved by the Commission should not exceed the interstate access equivalent of $0.001397 per minute of use. As far as ISP-bound traffic is concerned, for the reasons previously stated under Issues 1 and 10, any transit rate approved by the Commission should not apply to ISP-bound traffic which is jurisdictionally interstate traffic. The Small LECs have never been subject to transit compensation responsibility for such traffic. In addition, "[g]iven the FCC's interim treatment of ISP-bound calls to limit intercarrier compensation for such calls .... (and) the FCC's discussion about the irrational (and potentially harmful) consequences of potential intercarrier compensation for dial-up calls to ISPs," ISP-bound calls should not be subject to transit compensation. At minimum, any rate established by the Commission for ISP-bound calls should be less than the $0.0007 reciprocal compensation rate established by the FCC for ISP-bound traffic. (Tr. 367).

Issue 12: **Consistent with Order Nos. PSC-05-0517-PAA-TP and PSC-05-0623-CO-TP, have the parties to this docket (parties) paid BellSouth for transit service provided on or after February 11, 2005? If not, what amounts if any are owed to BellSouth for transit service provided since February 11, 2005?**

Yes. BellSouth has billed Smart City Telecom and Frontier Communications and these Small LECs have paid for transit service billed by BellSouth on or after February 11, 2005. These charges are being held by BellSouth subject to refund pending the outcome of this proceeding.

Argument: The Small LECs incorporate their summary position on this issue. There

appears to be agreement between the Small LECs and BellSouth on this issue. (Tr. 76, 368-369, 399).

Issue 13: **Have parties paid BellSouth for transit service provided before February 11, 2005? If not, should the parties pay BellSouth for transit service provided before February 11, 2005, and if so, what amounts, if any, are owed to BellSouth for transit service provided before February 11, 2005?**

No amounts have been paid and no amounts are owed to BellSouth for periods prior to February 11, 2005. If the Commission approves a transit rate, no amount should be paid by the Small LECs for period prior to February 11, 2005.

Argument: As acknowledged by Mr. McCallen, BellSouth has never invoiced any of the Small LECs for transit service prior to February 11, 2005. (Tr. 161). The Small LECs and BellSouth both testified that the Small LECs have not paid BellSouth for local transit services prior to February 11, 2005. (Tr. 76, 369). BellSouth provided no testimony that would support a determination that it would be due compensation from the Small LECs for transit service provided before February 11, 2005. The only testimony on this issue was provided by Mr. Watkins who testified that BellSouth has knowingly provided its transit service without charge to certain Small LECs without seeking any contractual terms or compensation in connection with such service. Mr. Watkins also testified that BellSouth has established no right to backbill the Small LECs for any transit service provided prior to February 11, 2005. (Tr. 369).

Issue 14: **What action, if any, should the FPSC undertake at this time to allow the Small LECs to recover the costs incurred or associated with BellSouth's provision of transit service?**

The Commission should authorize the Small LECs to recover such costs pursuant to a surcharge or a rate increase under Section 364.051(4), Florida Statutes, predicated by a finding that the imposition of a transit traffic rate constitutes a substantial change in circumstances.

Argument: The Commission should authorize the Small LECs to recover any additional costs that may be imposed on the Small LECs as a result of approval of any BellSouth transit rate or charge by authorizing the Small LECs, in this proceeding, to recover these new, additional costs pursuant to Section 364.051(4), Florida Statutes. [17] As the record confirms, BellSouth has traditionally exchanged EAS traffic and transit traffic with the Small LECs on a bill and keep basis. That history supports a determination by the Commission that the imposition of a new transit charge would constitute a substantial change in circumstances under Section 364.051(4), Florida Statutes. The fact that the Commission has held a formal administrative hearing coupled with a finding that a new transit charge on the Small LECs constitutes a substantial change in circumstances would satisfy the procedural requirements under Section 364.051(4), Florida Statutes, to allow the Commission, in this proceeding, to authorize the Small LECs to recover such increased costs (from each company's general body of customers). Such a finding would relieve the Small LECs of significant litigation costs in the future by alleviating the need for filing petitions for rate relief under Section 364.051(4), Florida Statutes. (Tr. 370-371). Such a determination may be particularly necessary if the Commission approves any transit charge as a "non-basic service" thereby allowing BellSouth to increase that charge up to 20% per year under Section 364.051(5)(a), Florida Statutes.

Issue 15: Should BellSouth issue an invoice for transit service, and if so, in what detail and to whom?

*Any transit service charge approved by the Commission should be reflected

[17]Unlike the CLECs or CMRS providers who do not need regulatory approval to raise their basic local rates (*see, e.g.*, Tr. 264), the Small LECs are limited by statute to an annual inflation adjustment increase minus 1% and may also seek rate relief upon filing a petition with the Commission and demonstrating through the hearing process "a compelling showing of changed circumstances." *See* §364.051(3) and (4), Fla. Stat. (2004).

by BellSouth in a separate invoice reflecting only the transit charge and not a netting of the charge against compensation due from BellSouth. The separate invoice should include details of call records and any other information necessary to determine accuracy and completeness of usage.*

Argument: The Commission should require BellSouth to submit a separate invoice setting forth sufficient details of call records and any other information necessary to determine the accuracy and completeness of usage. At a minimum, the invoice should include dates for the billing period, a summary by carrier indicating the number of calls and minutes, and a summary of total calls and minutes to which any approved transit rate applies. Any carrier that may be charged for transit services should have the right to obtain complete and accurate information and to audit other information to verify the accuracy of BellSouth's billing of transit service. Finally, BellSouth should not be permitted to obtain its payment for transit service by netting the transit charge against amounts that BellSouth otherwise owes other carriers. The problem with this approach is that if there is a dispute, BellSouth will have already engaged in "self help" by having received its payment. (Tr. 371-372).

Issue 16: Should BellSouth provide to the terminating carrier sufficiently detailed call records to accurately bill the originating carrier for call termination? If so, what information should be provided by BellSouth?

Yes. At minimum, BellSouth should provide call detail records in the "EMI Category 11 - - Carrier Access Usage" format and include the actual originating number, the Carrier Identification Code of the originating carrier, and the local routing number, if present.

Argument: This issue was raised by the Small LECs based on the difficulties Smart City Telecommunications has experienced with BellSouth's invoices and billing records for transit traffic. Specifically, as indicated in the Small LECs' responses to Staff's First Set of Interrogatories, No. 12

(Ex. 2), BellSouth alters some of its records by replacing the originating number on calls terminating to Smart City through BellSouth's tandem with a so-called "billing telephone number." Mr. McCallen acknowledged that in some cases BellSouth replaces the actual originating telephone number with an assigned "billing telephone number." (Tr. 162). This prohibits Smart City from determining the correct jurisdiction applicable to these calls. That's not the only problem. The billing records provided by Smart City also show interexchange calls terminated by Smart City over the intraLATA toll trunk group where Smart City has received *no records* from BellSouth. Finally, the Smart City billing data provided in response to this interrogatory showed that the records for calls originated by a CLEC (Grande Communications) shows different carriers for the same call as matched to time and terminating number.

The Commission should utilize this proceeding to establish clear and concise billing requirements on BellSouth for the multiple types of terminating traffic that are subject to different terms and conditions. BellSouth should be required to provide complete and accurate information for all types of traffic that it delivers to the networks of the Small LECs. Specifically, at minimum, BellSouth should provide unaltered call detail records in the "EMI category 11-Carrier Access Usage Format." BellSouth should be required to send a complete record, including the actual *originating telephone number*, the "Carrier Identification Code" of the originating carrier and the "Local Routing Number," if present. The field in the BellSouth call record that identifies the "operating carrier number" should be populated by the originating carrier and should, in any case, be populated if the originating carrier does not have a "Carrier Identification Code." (Tr. 373-374).

Issue 17: **How should billing disputes concerning transit service be addressed?**

Billing disputes should be resolved among all of the carriers and, if necessary, by the Commission.

Billing disputes should be resolved among all carriers and, if necessary, by the Commission. BellSouth must necessarily be involved to provide information as necessary to facilitate resolution of disputes between originating and terminating carriers. (Tr. 374). Unresolved disputes should be resolved pursuant to the dispute resolution process set forth in an interconnection agreement or ultimately by this Commission. (Tr. 78).

Respectfully submitted,

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APPENDIX A TO SMALL LECS' POSTHEARING BRIEF

The Small LECs' proposal would require BellSouth to establish proper contractual provisions that include, but are not limited to, terms and conditions that:

(a) identify the trucking facilities, physical interconnection point with a Small LEC, and scope of traffic that either party may to deliver to the other party over such facilities. Each type of traffic may be subject to individual terms;

(b) establish proper authority for the delivery of the traffic of other carriers, including third parties, over such facilities;

(c) address potential abuse of the scope of traffic authorized by the arrangement (*i.e.*, the transmission of unauthorized traffic);

(d) ensure that the tandem provider produces complete and accurate usage records and specifies what happens when the tandem provider fails to provide complete and accurate information regarding the scope and components of traffic;

(e) coordinate billing, collection, compensation, and auditing of traffic (for traffic that is subject to compensation) where multiple parties use the same facilities and bills are paid by multiple parties;

(f) require all of the parties to participate in the resolution of disputes that will necessarily involve issues where the factual information is in the possession of the tandem provider and the resolution involves multiple carriers (*e.g.*, how much traffic was transmitted and which carrier originated or terminated the traffic). Where there is multiple carrier traffic commingled over the same facilities, the components must necessarily equal the total. If there is a

discrepancy, the remedy will potentially affect all of the components and all of the parties. Disputes necessarily involve all parties, including most notably the tandem provider which most likely has in its possession the best information;

(g) define the terms under which network changes may be implemented to alter or terminate the voluntary tandem arrangement between a Small LEC and BellSouth, and allow for the Small LEC to establish a new end office/tandem arrangement with some other carrier's tandem or its own Small LEC tandem;

(h) set forth terms under which tandem transit arrangements would not be available to carriers (*e.g.*, above some potential threshold of traffic); and

(i) require the tandem operator to take enforcement actions against other carriers with which the tandem provider has a transit traffic agreement in the event of default or non-payment by such carrier (again, for components of traffic that are subject to compensation). (Tr. 339-341).