BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Petition of TDS Telecom d/b/a TDS Telecom/Quincy Telephone, 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, concerning BellSouth Telecommunications, Inc.'s Transit Service Tariff	Docket No. 050119-TP
Petition and Complaint of AT&T Communication of the Southern States, LLC for suspension and cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth Telecommunications, Inc.	Docket No. 050125-TP Filed: June 9, 2006

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JOINT POST-HEARING BRIEF AND STATEMENT OF ISSUES AND POSITIONS OF THE COMPETITIVE CARRIERS OF THE SOUTH, INC. AND NUVOX COMMUNICATIONS, INC.

The Competitive Carriers of the South, Inc. (CompSouth)[1] and NuVox Communications, Inc. (NuVox) (hereinafter, Joint CLECs) submit the following Joint Post-Hearing Brief and Statement of Issues and Positions in the above-referenced proceeding.

INTRODUCTION

The availability of transit service is critical to a competitive local telecommunications market. Transiting allows carriers that are not directly interconnected to route traffic efficiently through an intermediary carrier so that end use customers of the

[1] CompSouth members participating in this proceeding are: Access Point Inc., InLine, ITC^Delta Com, LecStar Telecom, Inc., Momentum Telecom, Inc., NuVox Communications, Inc., Providing Active Competition Everywhere (PACE), Supra Telecom, Trinsic, XO Communications, and Xspedius Communications.

carriers can exchange telephone calls. If transit service were not available on reasonable terms and conditions, each carrier would be required to establish direct trunks with *every other* carrier with which it exchanges traffic so that end users' calls could be completed. This is not at all the way the public switched network is arranged today. Such an arrangement would be contrary to the Telecommunications Act of 1996 (Act), would be extremely inefficient from a networking and an economic perspective, and would result in a wasteful duplication of facilities. Further, due to BellSouth Telecommunications, Inc.'s (BellSouth) legacy role as the incumbent LEC, only BellSouth's network can provide the ubiquity needed for carriers to transit traffic with all carriers.

As the Commission recognized on the closing day of the hearing held in this matter, the genesis of this case is a dispute between BellSouth and the independent telephone companies (Small LECs). Because these entities were unable or unwilling to resolve their dispute, BellSouth has attempted to short circuit the normal negotiation/arbitration process by filing a far-reaching tariff. This tariff would snare not only the Small LECs but other telecommunications companies and allow BellSouth to collect millions of dollars in windfall profits. The tariff would also provide BellSouth with a significant and unfair advantage in all future negotiations regarding transiting by establishing unnecessary and unreasonable "de facto" terms, conditions and rates that would apply if BellSouth disagreed or refused to negotiate with a carrier.

The Commission should cancel BellSouth's tariff and require BellSouth to continue to provide transiting through § 252 Interconnection Agreements (ICAs). This outcome is consistent with the way the Commission has addressed transiting in the past, and would preserve each party's ability to bring to the Commission for resolution

disputed issues arising from negotiations. While Joint CLECs oppose the approval of any tariff for transit service, if the Commission does approve a tariff, it should make it clear that the tariff does not impact ICAs, that it may not be used as a benchmark for future negotiations, and that the tariff rate must be TELRIC-based, just, reasonable and non-discriminatory.

The Commission should also uphold the long-standing telecommunications policy which requires the company that originates traffic (the cost causer) to pay the costs for such traffic. Any other ruling would contradict the well-established intercarrier compensation regime. Finally, the Commission should not require three-party contracts or impose any threshold for direct trunk interconnection. Each of these proposals, if adopted, would have a chilling effect on competition in Florida.

ARGUMENT

A TARIFF IS NOT APPROPRIATE FOR TRANSIT SERVICE[2]

ISSUE 1

IS BELLSOUTH'S TRANSIT SERVICE TARIFF AN APPROPRIATE MECHANISM TO ADDRESS TRANSIT SERVICE PROVIDED BY BELLSOUTH?

Joint CLECs' Position: *No. A transit tariff is inappropriate. BellSouth has provided transiting for many years through ICAs and has been compensated via Commission-approved, TELRIC-compliant tandem switching and common transport rates. BellSouth should not be permitted to alter this arrangement by establishing onerous terms and dramatically increasing rates over which it has unilateral control.*

There is no dispute as to what comprises transit service. Transiting occurs when two carriers who are not directly interconnected exchange non-access traffic by routing

[2] Joint CLECs have grouped related issues for discussion to avoid duplication.

the traffic through an intermediary carrier's network. Typically, the intermediary carrier is an ILEC. (Tr. 436).

Transit service is critical in a competitive environment because if it were not available, all carriers would have to establish direct interconnections with all other carriers. (Tr. 437). As the FCC has said: "[w]ithout the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks."[3]

BellSouth argues that it has no obligation to provide transit service and is providing it strictly as a "business decision," though it does admit that it has a ubiquitous network that is interconnected with most telecommunications providers in its territory. (Tr. 62-63). However, it is not in BellSouth's "discretion" to decide whether or not it may provide transit service. As discussed below, transit service is an interconnection service under the Telecommunications Act of 1996 (Act) and BellSouth must provide it; further, its obligations under the Act determine how the service must be priced. It is ironic that, while BellSouth argues on one hand that transit is not an obligation under the Act, on the other hand, the *sole* evidence it has produced regarding the alleged reasonableness of its tariff rate is a listing of *ICAs* which contain a transit rate. If transit is not a § 251 obligation, why has BellSouth included in it in hundreds of ICAs?

BellSouth has provided transit service for many years via ICAs. It now seeks to change that long-standing practice and provide a "one size fits all" tariff. BellSouth has readily admitted that the primary factor behind its tariff filing is the inability of BellSouth and the Small LECs to agree to a transit rate. (Tr. 105, 133). If an agreement had been

[3] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, Federal Communications Commission, 20 FCC Rcd 4685 at ¶ 120.

reached or BellSouth and the Small LECs had resolved their dispute in the proper manner (i.e., via bilateral arbitration), there would have been no need for this proceeding, (Tr. 106), and parties, such as the Joint CLECs, who have been forced to participate to protect their rights, would not have had to expend resources in this case.

BellSouth's tariff should be rejected because: a) a tariff for transit service is not legally appropriate; b) a tariff for transit service would have a detrimental impact on competition; and c) a transit tariff is unnecessary as a practical matter.

Transit Service May Not Be Tariffed[4]

A tariff is not appropriate for transit service because transit service is an interconnection service which must be provided under § 251 of the Act. (Tr. 624). The Act sets out the obligations of different categories of providers. Section 251(a)(1) provides that *all* telecommunications carriers are required to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Transit is simply a form of indirect interconnection which BellSouth is obligated to provide. (Tr. 444). Section 251(b) creates obligations applicable to all *local exchange carriers*, including the Small LECs. Those duties include the obligation to establish reciprocal compensation arrangements and to provide dialing parity.

Finally, ILECs, such as BellSouth, have the additional obligation under § 251(c)(2)(A) to interconnect "for the transmission and routing of telephone exchange service and exchange access . . . .on rates, terms and conditions that are just, reasonable,

[4] It is Joint CLECs' position that a transit tariff is not legally permissible. However, if the Commission were to decide otherwise and approve a tariff, it should not approve the one that BellSouth has filed. As discussed in Mr. Gates' testimony, (Tr. 449-454), the tariff contains many unreasonable terms which must be altered. Further, as discussed in Issue 11, the rate filed must be rejected as non-TELRIC, unreasonable and discriminatory.

and nondiscriminatory, in accordance with . . . the requirements of . . . section 252." (Tr. 444, 616-617). This clearly includes transit service.

Section 252 of the Act provides that arrangements, including compensation, for § 251 interconnection services are to be arrived at through negotiation. If negotiation is unsuccessful, then the parties may arbitrate the issues before the appropriate state commission. BellSouth's tariff is an attempt to circumvent the established procedures in §§ 251 and 252 of the Act and to impose unilateral rates for this vital service. The Commission should reject this attempt and direct BellSouth to follow the Act's established procedures.

The FCC clearly rejected the use of a tariff for transit service in its *T Mobile Order*.[5] In the *T Mobile* case, carriers sought a declaratory ruling from the FCC regarding the propriety of wireless termination tariffs for the transport and termination of traffic. In the *T Mobile Order,* the FCC held that tariffs are not to be used to extract compensation for transit service and that the appropriate mechanism for establishing compensation arrangements for interconnection services under the Act is negotiation, and if necessary, arbitration. The FCC found that:

> Going forward . . . we amend our rules to make clear our preference for contractual arrangements by *prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff*. In addition, we amend our rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act.[6]

The FCC also held in the *T Mobile Order* that:

> [P]recedent suggests that the Commission intended for compensation arrangements to be negotiated agreements and we find that negotiated

[5] In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Declaratory Ruling and Report and Order* (*T Mobile Order*) (Feb. 24, 2005) (Exhibit 2).
[6] *Id*. at ¶ 9, footnote omitted, emphasis added.

> agreements between carriers are more consistent with the pro-competitive process and polices reflected in the 1996 Act.[7]

Though the proceeding giving rise to the *T Mobile Order* was initiated by CMRS carriers, the FCC's rationale is equally applicable to CLECs. The FCC prohibited the use of tariffs for intercarrier compensation. (Tr. 575). Further, just as negotiated agreements between CMRS carriers and ILECs are consistent with the Act, so are negotiated agreements between CLECs and ILECs.

In addition, the Commission has independent authority under state law to require parties to interconnect. Section 364.16(1), Florida Statutes, authorizes the Commission to require connections between local exchange companies if such connections "can reasonably be made and efficient service obtained. . . ." Transit service (in the context of the issues in this docket) requires the Small LEC to connect with BellSouth for efficient service. Section 364.16 authorizes the Commission to mandate such interconnection. As noted above, transit service is critical to the efficient completion of calls. The Commission has the necessary authority to ensure that transit service is provided.

Other state commissions have found that transit service is a § 251 obligation. For example, the North Carolina Commission has held that: "[t]he tandem transit function is a § 251 obligation and BellSouth must charge TELRIC rates for it."[8] The Michigan Public Service Commission reached a similar result and it was upheld on appeal.[9] The Kansas

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[7] *Id*. at ¶ 14.
[8] *In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc*., Docket No. P-772, Sub 8, Docket No. P-913, Sub 5; Docket No. P-989, Sub 3; Docket No. P-824, sub 6; Docket No. P-1202, Sub 4, North Carolina Utilities Commission, July 26, 2005.
[9] *Michigan Bell Telephone Co., d/b/a Ameritech Michigan v. Laura Chappelle, et al*., 222 F. Supp. 2d 905 (E.D. MI 2002).

Commission also found that transit service is appropriately addressed in a § 252 arbitration.[10] In January of this year, the Tennessee Regulatory Authority found:

> …the reciprocal compensation requirements of 47 U.S.C. § 251(b)(5) and the related negotiation and arbitration process in § 252(a) and (b) apply to traffic exchanged indirectly between a CMRS provide and ICO member.[11]

Similarly, the Kentucky Public Service Commission has found that BellSouth is required to negotiate and arbitrate transit issues.[12] The Florida Commission should reach the same result in this case.

Joint CLECs are aware that in a bilateral arbitration case, the Commission determined that transit is not a §251 element.[13] However, that proceeding is not controlling in this docket for the following reasons. First, the Joint Arbitration proceeding was a bilateral arbitration, (Tr. 539), involving only certain carriers; it was not a generic policy docket like the current case. The Commission does not permit non-arbitrating parties to intervene in arbitration dockets, (Tr. 243), so the parties who would be affected by the Joint Arbitration decision, if it were to be used as precedent here, will have had no opportunity to participate or provide information for the Commission's consideration. That is, the Commission had no opportunity to hear from the entire industry regarding these important issues.

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[10] *Order 11: Commission Order on Arbitrator's Award*, State Corporation Commission of the State of Kansas, Docket No. 05-ABIT-507-ARB (July 21, 2005).

[11] *In re: Petition for Arbitration of CELLCO Partnership d/b/a Verizon Wireless*, Docket No. 03-00585, Tennessee Regulatory Authority, Order of Arbitration Award (*CELLCO Arbitration*) at 18.

[12] *In the Matter of Joint Petition for Arbitration of NewSouth Communications Corp., Nuvox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xsepdius Management Co. of Lexington, LLC and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as amended.* Kentucky Public Service Commission Order in Case No. 2004 – 00044, September 26, 2005 (*Kentucky Order*) at 15.

[13] *In re: Joint Petition by NewSouth Communications Corp., NuVox Communications, Inc., and Xspedius Communications LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecommunications, Inc*., Docket No. 040130-TP, Order No. PSC-05-0975-FOF-TP at 53 (*Joint Arbitration Order*).

Second, unlike the Joint Arbitration docket, the parties that would be subject to the transit tariff here have *not* negotiated at all with BellSouth regarding the transit rate. Instead, they would be unilaterally subject to the BellSouth transit rate. In the *Joint Arbitration Order*, the Commission agreed that the TIC (one iteration of BellSouth's transit rate) should be a negotiated rate.[14] It is undisputed that no party has negotiated the tariff rate before the Commission in this case. (Tr. 509).

Third, the record in this proceeding differs significantly from the record in the Joint Arbitration.[15] In the Joint Arbitration, the Commission considered many diverse issues. In this case, the Commission and the parties have been able to address the transit issues in depth. The Commission must base its decision on this record.[16] The Commission should do so and find that transit is a §251 service.

A Transit Tariff Will Have a Detrimental Impact on Competition

A transit tariff will detrimentally impact competition. While Joint CLECs currently receive transit service under their ICAs, the move to a tariffed service, especially at the very high rate BellSouth has filed, will make the tariffed rate a *floor* in all future negotiations. BellSouth will have little incentive to negotiate a rate *lower* than the tariffed rate if it may simply default to its tariff and receive a rate over 300% higher than the TELRIC rate. (Tr. 536). If the BellSouth tariff becomes the "default" rate, no meaningful negotiations will occur. BellSouth can simply refuse to provide the transit function in an ICA and force a carrier to take the tariff terms and rate. (Tr. 448). The

[14] *Joint Arbitration Order* at 51.
[15] In the *Joint Arbitration Order*, the Commission referenced costs that may not be recovered by BellSouth's TELRIC rates for tandem switching and transport. However, Mr. McCallen, in his deposition (Exhibit 6 at 53), delineated all the costs BellSouth incurs to provide transport. All those costs are recovered in the UNE rates. Further, no proof regarding such costs was provided in this case.
[16] §120.57(1)(f), Florida Statutes.

tariff will be the "elephant in the room" during negotiations and provide BellSouth with significant and, particularly considering the other overwhelming advantages it enjoys in such negotiations, inappropriate leverage over its competitors. As Mr. Wood testified, " [t]he implementation of BellSouth's "shall apply" tariff with a rate that is above cost would mean that – unless BellSouth is feeling charitable that day – no future interconnection agreement can be negotiated with a cost-based rate for transit." (Tr. 720).

Further, as the rate BellSouth seeks in this case demonstrates, if a tariff approach is sanctioned, there will be no controls in place to evaluate or determine what the appropriate tariff transit rate should be. BellSouth will be able to "adjust" the rate at will. (Tr. 448). Carriers needing this service to complete end users' calls will be forced to pay the exorbitant rate BellSouth levies or leave the market. Because there is no competition for this service (certainly no competition that can provide the same ubiquitous service as BellSouth), and because BellSouth has a clear incentive to increase the cost of its competitors, (Tr. 448), the Commission should cancel the tariff.

A Transit Tariff is Unnecessary

As a practical matter, a tariff is entirely unnecessary. (Tr. 447). BellSouth has provided a transit function for many years through ICAs and has been compensated for this service via Commission-approved, TELRIC-compliant rates. (Tr. 447- 448). This is the standard, established method that has been used in the telecommunications industry for determining interconnection rates, terms and conditions, (Tr. 534), and is, of course, the method required by the Act. BellSouth now seeks to change this well-established practice and bypass negotiation and arbitration via a tariff. BellSouth should be required

to engage in negotiation and then arbitration, if needed, to resolve any disputes with particular parties, just as it has in the past in regard to transit service.

It is ironic that BellSouth's positions on Issues 5, 8, and 9 (discussed below) – which all relate to whether the Commission should establish terms and conditions between carriers – is no.[17] (Joint CLECs agree with BellSouth on these issues). However, the tariff BellSouth has filed would have exactly that effect – it would result in the Commission approving BellSouth's unilateral terms, conditions, and rates for transit arrangements. (Tr. 497). Just as the Commission should not establish terms and conditions under Issues 5, 8, and 9, it should not approve a tariff under this issue which would have the same effect.

BellSouth suggests that, without this tariff, some telecommunications providers will use BellSouth's network for free. (Tr. 65). However, BellSouth has created a "solution" (a heavy-handed unilateral tariff) to solve a "problem" (transiting carriers do not want to pay more than an appropriate TELRIC rate for transit) that this Commission should reject. Section 251(b)(5) of the Act clearly requires *all* telecommunications providers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." If BellSouth cannot agree with the Small LECs on the appropriate transit arrangements, it must bring its dispute to the Commission for resolution, (Tr. 492), not circumvent the process with a tariff.[18] And, as discussed above, the *T Mobile Order* prohibits the use of tariffs to impose compensation arrangements.

[17] Prehearing Order, Order No. PSC-06-0244-PHO-TP at 23, 28, 29.

[18] The fact that the negotiation/arbitration process is working is evidenced by the fact that Verizon Wireless has reached interconnection agreements with two of the Small LECs in this docket – GTCom and Smart City. (Tr. 591).

Mr. Wood succinctly summarized the situation in which the Commission finds itself and his recommendation as to resolution, which Joint CLECs endorse:

> [T]he present proceeding has evolved from a specific dispute between carriers, and its focus should remain on that dispute while avoiding a disruption of how other carriers interconnect, exchange traffic, and compensate each other. BellSouth is performing a service for the small ILECs for which it should be fairly compensated at a rate that will permit cost recovery, but the proper remedy for BellSouth is negotiation and if necessary arbitration, not an end-run around the negotiation process with a tariff filing.

(Tr. 706).

Finally, the fact that BellSouth's tariff is "presumptively valid," pursuant to section 364.051(5)(a), Florida Statutes, does not affect the Commission's deliberations on this matter.[19] The two petitions filed challenging BellSouth's tariff, as well as the extensive testimony in this case, have put all aspects of the transit tariff before the Commission for review.

The "presumptively valid" standard is related to whether the Commission should suspend a tariff. Non-basic tariffs are "presumptively valid" and will only be suspended if the "tariff will cause significant harm that cannot be adequately addressed if the tariff is ultimately determined to be invalid."[20] Thus, this term relates to the criteria for suspension – it has nothing to do with the Commission's duty to review and evaluate the substantive merits of a tariff.

In this instance, while the Commission found that the standard for suspension had not been met, it did:

[19] At the conclusion of the hearing, Staff requested that the parties address certain items in their briefs. (Tr. 788-790). Joint CLECs have addressed the Staff items in the appropriate context of their arguments.
[20] Order No. PSC-05-0517-PAA-TP at 3.

> find it appropriate that revenues from the tariff be held by BellSouth subject to refund pending the outcome of this proceeding. Furthermore, at the end of the proceeding, if the tariff is found to be invalid, a refund would be appropriate.[21]

Thus, the Commission had such serious concerns with the tariff that it required that money collected under the tariff be held subject to refund. The "presumptively valid" nomenclature in no way prevents the Commission from reviewing and addressing the substantive merits of the tariff.

To the extent the meaning of "presumptively valid" is related to the issue of which party has the burden of proof, that burden remains with BellSouth as the party seeking permanent approval of its tariff.[22] In this case, BellSouth has filed a tariff for Commission approval and the Commission has required any monies collected pursuant to the tariff to be held subject to refund. Numerous parties oppose the tariff on factual and legal grounds. The burden rests with BellSouth to demonstrate that the tariff should be permanently approved.

Last, if the Commission does not reject BellSouth's tariff, it should make it absolutely clear that the tariff provisions are limited to instances in which the originating carrier does not seek an ICA with BellSouth. (Tr. 704). The tariff should not be applicable in any other circumstances.

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[21] *Id*. at 4.

[22] *See, i.e., National Industries, Inc. v. Commission on Human Relations*, 527 So.2d 894, 896 (Fla. 5th DCA 1988) ("It is well established that the burden of proof is upon the party asserting the affirmative of an issue before an administrative tribunal.")

THE TRANSIT RATE MUST BE TELRIC-BASED

ISSUE 11

HOW SHOULD CHARGES FOR BELLSOUTH'S TRANSIT SERVICE BE DETERMINED?

(a) WHAT IS THE APPROPRIATE RATE FOR TRANSIT SERVICE?

(b) WHAT TYPE OF TRAFFIC DO THE RATES IDENTIFIED IN (A) APPLY?

Joint CLECs' Position: *Sections 251(a) and 251(c) require BellSouth to provide transit service. § 251(c)(2)(D) requires interconnection ". . . in accordance with . . . the requirements of this section and section 252." Section 252(d) requires transit rates to be TELRIC-based. If a single per-minute of use rate is used, it should be no more than $0.0009368.*

Transit Service Must Be Priced at TELRIC

In contrast to the Small LECs' position that they should receive transit service for free, Joint CLECs agree that BellSouth should be compensated for the provision of this service. However, such compensation must be at TELRIC rates, (Tr. 535-536), not at whatever rate BellSouth can extract.[23] The TELRIC rates should be computed based on the cost for each network component required to complete a transit call, (Tr. 638), as discussed below.

BellSouth has provided no cost information in this docket to support its transit rate and has steadfastly maintained that it need not do so. BellSouth claims it may charge "what the market will bear." (Exhibit 6, McCallen deposition at 37, 71). Even when Staff requested cost studies to support the transit rate, BellSouth refused to provide any.

[23] BellSouth claims it wants to be compensated for the costs it incurs to provide transit service (a proposition with which Joint CLECs have no issue). However, BellSouth also wants to recover what it calls "added value." (Tr. 110; Exhibit 6, McCallen deposition at 34). No evidentiary basis for this nebulous "added value" was provided.

(Tr. 203; Exhibit 11, Staff Request for Production to BellSouth, No. 1). Mr. McCallen firmly testified that the BellSouth filing is "not a cost-supported tariff." (Tr. 203-204).

As discussed in Issue 1, BellSouth has an obligation under §§251(a) and 251(c) to provide transit service. The pricing standards for such service are found in § 252(d)[24]; such pricing is generally referred to as TELRIC. (Tr. 473). Because BellSouth has provided no cost information and declined to respond to Staff discovery requesting such information, to determine a TELRIC rate, the Commission should refer to its UNE Pricing Docket[25] for the appropriate pricing for the elements comprising transit service.

As explained by several experts at hearing, the TELRIC prices this Commission set in its UNE Pricing Docket allow BellSouth to not only recover the costs of providing the transit service, but also include an allocation of joint and common costs. Thus, these rates contain a fair level of profit for BellSouth. (Tr. 571, 686, 769). Anything above the TELRIC rate simply provides BellSouth with a windfall. Mr. Gates estimated that the windfall could be as much as **$45 million a year**, for CLEC lines alone. (Tr. 571). This amount is over and above TELRIC's cost plus profit to provide the service.

BellSouth's costs (including an appropriate profit) to provide transit service are not in dispute. At deposition and at hearing, Mr. McCallen described the components of transit service:

- Tandem switching (charged on a minute of use basis);
- Tandem trunk port (charged on a per minute of use basis);

[24] Despite BellSouth's attempt to claim that transit is not a § 251 obligation, Ms. Blake admitted that BellSouth has arbitrated the transit issue in § 252 arbitrations. (Tr. 239).
[25] *In re: Investigation Into Pricing of Unbundled Network Elements,* Docket No. 990649-TP (UNE Pricing Docket).

- Common transport (charged on a per mile basis[26]); and
- Common transport facilities termination (charged on a per minute of use basis).

(Tr. 110-111, 169). Mr. McCallen admitted that there are no other costs related to the transit function. (Tr. 113; Exhibit 6, McCallen deposition at 53). In the UNE Pricing Docket, BellSouth provided rates for tandem switching, common transport, common transport facility termination, and shared tandem trunk port – the very components of transit service. The cost-based transit rate, based on BellSouth's own cost information, is $0.0009368 per MOU. (Tr. 505).[27] BellSouth's tariff rate of $0.003 per MOU far exceeds that. Therefore, BellSouth's tariff rate, which greatly exceeds the cost plus profit of providing transit, has no basis and would simply price gouge CLECs and CMRS providers for a critical service.

Other state commissions that have considered this issue have found that transit service must be priced at TELRIC. The Tennessee Regulatory Authority found TELRIC pricing to be the correct pricing for transit service. It stated: ". . .[transit] rates should be based on forward-looking economic costs. Specifically, the costs should be set using the TELRIC pricing methodology."[28] The North Carolina Utilities Commission also rejected BellSouth's non-TELRIC rate:

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[26] Even though common transport is an element based on mileage, BellSouth did not use any type of average mileage assumption for this component in its transit rate. (Tr. 111).

[27] This calculation compares the BellSouth rate with the Commission-approved rates from the UNE pricing docket and assumes 40 miles of transport. The per-minute of use rates are: tandem switching – per minute ($0.0001263), common transport mileage – per minute ($0.0000034), common transport facility termination – per minute ($.0004493), shared tandem trunk port ($0.0002252). See, *In re: Investigation Into Pricing of Unbundled Network Elements.* Florida Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP, May 25, 2001, Appendix A. The composite rate is based on an assumed 40 miles of common transport and is calculated as follows: .0001263 + (.0000034*40) + .0004493 + .0002252 = .0009368.

[28] *CELLCO Arbitration* at 40.

> Although BellSouth has conceded that the tandem transit function is a Section 251 obligation, it is unclear why BellSouth still maintains that this function is not subject to the pricing requirements set forth in Section 252… The Commission can find no basis for permitting BellSouth to impose a TIC for the tandem transit function. The tandem transit function is a Section 251 obligation, and BellSouth must charge TELRIC rates for it… The Commission concludes that BellSouth should not be permitted to charge a TIC when providing a tandem transit function for CLPs.[29]

The Kentucky Public Service Commission also rejected BellSouth's non-TELRIC charge and required BellSouth to assess only TELRIC-based tandem switching and common transport rates for transit.[30] Similarly, the Texas Public Utilities Commission requires SBC-Texas to "provide transit services at TELRIC rates."[31]

The Transit Rate Must Be Just and Reasonable

Even if the Commission disagrees with Joint CLECs and does not adopt the TELRIC standard for the transit rate, the Commission should set a rate which is just, reasonable, and nondiscriminatory under sections 201 and 202 of the Act. (Tr. 517). Pertinent excerpts of these sections provide:

> 201 (b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.
>
> 202 (a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to

[29] *In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.*, Docket No. P-772, SUB 8; Docket No. P-913, Sub 5; Docket No. P-989, Sub 3; Docket No. P-824, SUB 6; Docket No. P-1202, SUB 4, North Carolina Utilities Commission Order, July 26, 2005, at 45.
[30] *Kentucky Order* at 15.
[31] *Arbitration of Non-Costing Issues for Successor Interconnection Agreement to the Texas 271 Agreement,* Arbitration Award, Track 1, Texas Docket 28821, February 22, 2005.

> subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

As the FCC noted in the *Triennial Review Order* (*TRO*), prices for elements that are not required to be unbundled must be reviewed pursuant to the just and reasonable standard.[32]

The fact that the transit rate is not just and reasonable is illustrated in several ways. First, BellSouth has made no demonstration that its costs have increased, that its costs would not be recovered without a transit charge, or that reductions have been made elsewhere so that the impact of the rate is revenue neutral. (Tr. 475). Without such an inquiry, BellSouth will be unjustly enriched through the collection of highly excessive transit charges. (Tr. 546).

Second, the proposed transit rate would allow BellSouth to recover its costs twice. The cost-based rates for tandem switching and common transport set in the UNE Pricing Docket were designed to cover costs associated with tandem traffic terminated to BellSouth end offices *and* tandem traffic terminated to third parties. That is, BellSouth used a "pool" of costs to design its UNE rates that included both BellSouth-terminated and transit traffic. (Tr. 506-507). BellSouth now wants the Commission to bifurcate this rate so that it can charge a TELRIC rate for traffic terminated to BellSouth end offices, but a non-TELRIC inflated rate for transit traffic, even though BellSouth's UNE costs are still based on the entire "pool" of costs. By assessing both the TELRIC rates (which recover the total pool of costs – both BellSouth-terminated and transit) and the non-TELRIC rate, BellSouth would receive a double recovery of transit costs under its proposal. (Tr. 507).

[32] *TRO*, ¶¶ 663-664.

Third, further evidence of the unreasonableness and anticompetitive nature of the transit rate is illustrated by reviewing BellSouth's interstate access rates. The transit charge BellSouth proposes here is higher than BellSouth's interstate switched access tandem switching/tandem transport rates for interexchange carriers. (Tr. 503-504). While these rates should not be used to establish a transit rates because they are not TELRIC-based, they demonstrate the unreasonableness of the transit rate. If a carrier buys transit with 40 miles of transport from BellSouth's interstate access tariff, it would pay $0.002294 per minute. Thus, the rate proposed by BellSouth in this case is greater than the total charge it applies to customers purchasing transit from its interstate tariff. (Tr. 503-504).

Fourth, approval of a tariff transit rate will give BellSouth almost unilateral control over the rate. Transit service is a non-basic service.[33] Therefore, BellSouth may increase it 20% per year. That it is likely that BellSouth will do so is illustrated by its actions in Tennessee. In December 2005, the BellSouth Tennessee tariff had a transit rate of $0.003; BellSouth increased it to $0.006 in January 2006. (Tr. 165). This $0.006 rate is the same rate BellSouth originally filed (and withdrew) in Florida. (Tr. 117). Accordingly, approval of a tariff rate will ensure increases for Florida carriers and ultimately consumers.

Finally, this Commission has an obligation under Florida law to ensure that all providers of telecommunications services are treated fairly by preventing anticompetitive behavior.[34] Approval of transit rates of the magnitude over cost plus profit that BellSouth proposes is anticompetitive. Such anticompetitive pricing is even more blatant when one

[33] § 364.051(5)(a), Florida Statutes.
[34] § 364.01(4)(e), Florida Statutes.

considers that BellSouth provides transit service as a result of a ubiquitous network financed over the last 100 years by captive ratepayers and that it was unable to adduce any evidence at hearing of other competitive providers of the service. Charging many multipliers of cost as BellSouth proposes to do for this vital service is unreasonable and unjust on its face.

BellSouth's Transit Rate is Not a "Market" Rate

Even if the Commission were to accept BellSouth's argument that it is entitled to a "market" rate[35] for transit service, BellSouth has provided no evidence of what a "market" rate would be for this service. The sole support for BellSouth's alleged "market" rate is no support at all.

BellSouth claims its $0.003 rate is a "market" rate because it is "comparable" to recently negotiated transit rates. (Tr. 67, 75). BellSouth provided no other support for its "market" rate. (Tr. 201; Exhibit 6, McCallen deposition at 36). However, BellSouth's assertion that the rates in Exhibit 39 (KRM-2, 2nd revised) are somehow market rates[36] must be summarily rejected for a number of reasons.

First, as Mr. Gates testified, to the extent that many of the carriers listed on Exhibit 39 have *no* transit traffic, the listed rates are indicative of nothing. And, in fact, Exhibit 9, BellSouth's Supplemental Response to MetroPCS Interrogatory No. 3, illustrates just that point. The discovery response shows the number of transit minutes originated by every Florida CLEC for November 2005. It contains 279 carriers. Of those 279 carriers, 240 originated *no* transit traffic. (Tr. 186). Thus, very few of the carriers

[35] When BellSouth's tariff was first filed, it contained a "market rate" of $0.006. (Tr. 117).
[36] While Mr. McCallen maintained that the rates on KRM-2 were market rates, he discounted the rate listed on the exhibit for MCI of .000576. (Tr. 184).

that BellSouth claims pay a "comparable" rate for transit service, purchase any transit service at all.

In negotiations and arbitrations, issues are ranked in order of importance. If a carrier does not use the transit service, it does not matter to that carrier how the rate is set. (Tr. 570). The transit rate becomes merely a give away in a very large ICA. And in fact, in negotiation, carriers will usually concede on issues which are not important to them in order to gain something in return. (Tr. 415, 647).

The amount (or lack) of transit traffic originated by most of the carriers on Exhibit 39 (which in not only many but most cases is zero) certainly does not justify the cost of arbitrating or litigating the rate for them. (Tr. 251). Ms. Bishop, who has direct experience negotiating interconnection agreements (in contrast to Mr. McCallen) testified:

> [I] can say from personal experience that during the negotiation process a carrier chooses which terms and rates mean the most to that carrier and which are of no consequence. If a carrier does not use a transit rate, the fact it may be an agreed-to rate, a transit rate is irrelevant.

(Tr. 259).

Mr. McCallen, who sponsored Exhibit 39, does not personally deal with or negotiate with CLECs or CMRS carriers. (Tr. 115-116). He had no knowledge as to which of the ICAs listed on his exhibit were signed by the CLEC or CMRS carrier with no negotiation at all. (Tr. 116, 121-122). He had no information as to whether some of the listed carriers were resellers or prepaid card providers (Tr. 119-120), though Mr. McCallen did admit that resellers would not use transit service at all nor would UNE-P providers. (Tr. 125). Essentially, Mr. McCallen had no idea which, if any, of the carriers he listed on Exhibit 39 even use transit service. (Tr. 123).

Second, some of the rates listed on Exhibit 39[37] include a tandem intermediary charge (TIC). This is a non-cost based element that BellSouth adds on to the tandem switching and common transport elements in some ICAs. It is simply an additive to increase BellSouth's profits and does not recover any costs of transit service, which are fully recovered in the appropriate transit elements. (Tr. 499 - 500).[38]

Third, in order for there to be a market rate, the service at issue must be available from others besides the incumbent monopoly. BellSouth provided no evidence that there were other providers of transit service to whom carriers could turn as an alternative to BellSouth's "market" rate. BellSouth is the only transit provider of which Joint CLECs are aware that has a ubiquitous network that is interconnected with all carriers. And, in fact, during negotiations between CLECs and BellSouth, Mr. McCallen admitted that he was not aware that a CLEC or CMRS provider had ever raised the argument that there were other transit providers who could provide the service at a lower rate than what BellSouth offered. (Tr. 131-132). BellSouth defined "market rate" as "what the market will bear" (Exhibit 6, McCallen deposition at 37, 71), which, in this case, must mean what BellSouth, the monopoly provider, can extort from CLECs, CMRs providers and Small LECs before such companies are forced onto inefficient direct connections.

If carriers do not have access to BellSouth's transit service on reasonable terms and conditions, BellSouth will have an unfair competitive advantage. (Exhibit 2, CompSouth response to Staff Interrogatory No. 12). BellSouth provided no information in its testimony regarding other transit providers, (Tr. 137), who such alternative transit providers might be (if any), or what areas such providers might cover. In fact, BellSouth

[37] Exhibit 39, footnote 1.
[38] In ICAs where there is a TIC, it more than doubles the transit charge.

provided no information on the "market" at all aside from its list of ICAs. (Tr. 137-138). BellSouth did not provide the testimony of an economist who had performed a market analysis. Therefore, even if the Commission were to determine that a "market" rate is appropriate, the record is devoid of any evidence upon which to base such a rate.

OBLIGATIONS OF ORIGINATING CARRIERS

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?

Joint CLECs' Position: *Originating carriers are responsible for: establishing trunks to the BellSouth access tandem, compensating BellSouth for transit service, delivering their traffic to the terminating party's network (or terminating carrier's POI with the transit carrier) and compensating the terminating carrier for terminating the traffic to the end user.*

ISSUE 3

WHICH CARRIER SHOULD BE RESPONSIBLE FOR PROVIDING COMPENSATION TO BELLSOUTH FOR THE PROVISION OF THE TRANSIT TRANSPORT AND SWITCHING SERVICES?

Joint CLECs' Position: *The originating carrier is responsible for compensating BellSouth for transit services. Long-standing practice in the telecommunications industry requires that the originating party bear these expenses.*

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?

Joint CLECs' Position: *None. The Small LECs' recommendations would turn the "originating party pays" concept on its head and force CLECs to pay the costs of calls Small LEC customers originate. The originating carrier should continue to be responsible for transit costs. See discussion of Issue 11, which is incorporated herein by reference.*

The carrier that originates transit traffic is responsible for establishing the appropriate trunks to the BellSouth access tandem. In addition, the originating carrier is responsible for compensating BellSouth at TELRIC-compliant rates.[39] (Tr. 454). The originating carrier is also responsible for delivering its traffic to the terminating party's network (or the terminating carrier's point of interconnection with the transit carrier) and compensating the terminating carrier for terminating the transit traffic to the end user. (Tr. 455).

With the exception of the Small LECs[40], all the parties to this proceeding agree that the originating carrier is responsible for paying for transit service for the traffic it originates. Alone in this unusual, self-serving view, the Small LECs claim there should be no compensation impact on them when they originate traffic. (Tr. 519). However, as several witnesses testified, the "originator pays" concept is a well-established telecommunications policy, (Tr. 105, 143, 273, 282, 555, 629, 703), based on sound principles of cost causation.

[39] See discussion regarding the appropriate transit rate in Issue 11, which is incorporated herein by reference.

[40] Mr. Watkins, testifying on behalf of the Small LECs, admitted that they are the only party that has taken this position. (Tr. 401).

As Mr. Guepe testified, if a Small LEC chooses to deliver its originating traffic directly to a CLEC without utilizing BellSouth's transit function, the Small LEC would *still* be responsible for transporting the traffic. The Small LEC's use of a transit provider does not change its compensation obligations. (Tr. 283). A terminating carrier has no control over how a call is sent to its network and thus should not be required to pay the cost of transporting the call. (Tr. 555). Further, if the Small LEC uses BellSouth's tandem to deliver traffic to other providers who are also connected to the tandem, the Small LEC should incur the same cost that any other carrier incurs to use the same functions as a matter of competitive fairness. (Tr. 657).

The Small LECs claim that their responsibility for a call originated on their networks ends at their border, making the bizarre argument that, if they have to deliver a call beyond that point, they will be subsidizing other carriers. Contrary to the position of the Small LECs, the CLECs are not the cost causers of traffic that originates on the Small LECs' network – it is the customers of the Small LECs who have placed these calls. The costs caused by a Small LEC customer originating a call are not "extraordinary" at all; they are costs caused by the Small LEC customer and are an "ordinary" cost of doing business. (Tr. 520, 657, 730).

The Small LECs' proposal would result in traffic originating from Small LEC customers being paid for by everyone but the Small LEC. If the Small LECs' proposal were to be adopted, the Small LECs would receive a "free ride" and thus this proposal is entirely one-sided in favor of the Small LECs. (Tr. 520). Not only should such a scheme be rejected because the Small LEC is compensated by its customers for the calls originating on its network, (Tr. 537), this proposal is also directly in conflict with the

Small LECs' obligations under the Act to "interconnect directly or indirectly" under § 251(a)(1), (Tr. 724-725), discussed in Issue 1.

The Small LECs proposed the same notion (that they escape financial responsibility for calls they originate) to the Georgia Public Service Commission, which soundly rejected it. The Georgia Commission adopted the CLECs' position on this issue and found: "…the decision to find that calling party pays is consistent with policy rationale of the *Texcom Orders* as well as the traditional principles of holding the cost causer accountable."[41] The Georgia Commission reaffirmed this ruling on a request for reconsideration filed by the Georgia Telephone Association (GTA) (an organization of small LECs): "GTA has not cited to any authority that would alter the principle that the calling party pays."[42] Likewise, the Tennessee Regulatory Authority found that, "if a call originates in a switch on one party's network then that party is responsible for the transiting costs" and that if the originating carrier is a Small LEC, the Small LEC is obligated "to pay the appropriate transport and termination charges associated with getting that call to the POI … which is located at the BellSouth tandem."[43]

In addition, two federal court rulings have made it clear that the originating carrier is responsible for transit costs. *See*, *Atlas Telephone Co. v. Oklahoma Corporation Commission*, 400 F.3d 1256 (10th Cir. 2005); *Mountain Communications, Inc. v. FCC*, 355 F.3d 644 (D.C. Cir. 2004). These court cases are consistent with 47 CFR § 51.703(b), which states: "A LEC may not assess charges on any telecommunications

[41] *In Re: BellSouth Telecommunications Inc.'s Petition for Declaratory Ruling Regarding Transit Traffic,* Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies, Georgia Public Service Commission, Docket No. 16772-U, March 24, 2005 at 8.
[42] *In re: BellSouth Telecommunications, Inc's Petition for Declaratory Ruling Regarding Transit Traffic, Order on Clarification and Reconsideration* at 3. Georgia Public Service Commission, Docket No. 16772-U, May 2, 2005 (Exhibit 30, BHP-5).
[43] *CELLCO Arbitration* at 30.

carrier for telecommunications traffic that originates on the LEC network." (Tr. 585-586).

The Small LECs incorrectly characterize their transit responsibilities as relating to the establishment of a Point of Interconnection (POI). They claim that, in a transit situation, a CLEC establishes a POI with the Small LEC that is not technically feasible. But contrary to the Small LECs' assertion, the CLEC has not established a POI with the Small LEC but with BellSouth in order to exchange transit traffic. (Tr. 523). As the Tennessee Regulatory Authority found:

> What is at issue in this docket is the point of indirect interconnection on the network which determines the compensation obligation of an ICO member or a CMRS provider. A majority of the Arbitrators concluded that the most efficient means to resolve this issue is by maintaining the point of interconnection that currently exists between the ICO members and BellSouth and between the CMRS providers and BellSouth and voted that, pursuant to 47 C.F.R. § 51.703(a) and (b), the company that originates the call is responsible for paying the party terminating the call.[44]

The Small LECs suggested at hearing that this Commission has previously confirmed the Small LECs' obligation to only interconnect with a CLEC on their own network.[45] However, as Mr. Gates testified, the orders the Small LECs attempt to rely on do not address the issues in this docket. (Tr. 575). First, the POI issue addressed in Exhibits 48 and 49 related to the obligations of a *CLEC* vis-à-vis the *ILEC*. Further, the *Reciprocal Compensation Order* actually supports Joint CLECs' position that the originating carrier is required to bear the cost responsibility for the calls it originates.[46] Finally, contrary to the Small LECs' testimony, "technical feasibility" is not an issue in this case. The current transit arrangements have been in place for some time. (Tr. 522).

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[44] *CELLCO Arbitration* at 24.
[45] The Small LECs cite Order No. PSC-01-1332-FOF-TP (*Level 3 Arbitration Order*) (Exhibit 48) and Order No. PSC-02-1248-FOF-TP (*Reciprocal Compensation Order*) (Exhibit 49), for this proposition.
[46] *Reciprocal Compensation Order* at 26.

In sum, the Small LECs' obligations, both as to interconnection and compensation, have been clearly delineated by the FCC, the federal courts, and various state commissions. The positions the Small LECs advocate in this docket regarding those obligations have been uniformly rejected in other forums and should be rejected by this Commission as well.

THE COMMISSION SHOULD NOT MANDATE TERMS AND CONDITIONS

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?

Joint CLECs' Position: *No. The Commission should establish such terms and conditions only if the parties ask for it in an arbitration proceeding. BellSouth's transit tariff would inappropriately require all carriers to have a traffic exchange agreement in effect as a prerequisite to receiving BellSouth's tariffed transit service. *

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?

Joint CLECs' Position: *No. Transiting arrangements in ICAs sufficiently establish this relationship. No additional terms and conditions are necessary. Parties can request negotiation, and if needed, arbitration with other parties related to transiting arrangements and compensation.

Broader Commission involvement into transiting carrier - terminating carrier relationship is unnecessary.*

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?

Joint CLECs' Position: * No. Terms and conditions of transit traffic between BellSouth and small LECs should be established as they are established between BellSouth and CLECs – negotiation and ICA. Since transit service must be provided in a nondiscriminatory manner, the means to establish transit terms and conditions should be the same for all carriers.*

ISSUE 17

HOW SHOULD BILLING DISPUTES CONCERNING TRANSIT SERVICE BE ADDRESSED?

Joint CLECs' Position: *Billing disputes between CLECs and BellSouth should be addressed according to the terms of their ICAs, and the same should be the case between BellSouth and any other party. There is no need to change these processes or create new processes.*

This group of issues involves the question of whether the Commission should mandate, outside the content of an arbitration between two carriers, the terms and conditions that will govern the relationship between telecommunications providers. Joint CLECs' answer to these questions is a simple "No." Unless two parties come to the Commission because they cannot agree on the terms to govern their specific relationship, the Commission should not impose "one size fits all" requirements.

As discussed in detail in Issue 1, arrangements regarding transit traffic should be negotiated between the specific parties as the Act requires. Only if the parties are unable to negotiate suitable arrangements and come to this Commission to arbitrate the issue,

should the Commission establish the terms that will govern those particular parties' relationship. (Tr. 457). The same is true of arrangements between originating and terminating carriers.[47]

With the exception of the Small LECs, all the parties appear to agree that the Commission should not dictate the terms and conditions between providers. BellSouth's position on this issue is somewhat unclear, but it appears to agree as well. While BellSouth's tariff would require carriers to have a traffic exchange agreement in place before receiving transit service, (Exh. 7, § A16.1.2.C.), in its Prehearing Statement, BellSouth states that under the Act, the originating and terminating should negotiate these arrangements and that "BellSouth will not dictate terms and conditions between other parties."[48]

In contrast, the Small LECs want the Commission to dictate the terms, conditions and rates among three parties and essentially write a three-party transit contract. (Tr. 358-359, 362-363, 374). The Small LECs admit, however, that there is nothing in the Act that would require BellSouth to involve the Small LECs in its negotiations with CLECs and that ICAs are bilateral contractual agreements. (Tr. 4044). Thus, there is no support for the Small LECs' position that three-party contracts are required and the Commission should reject it.

The current structure the Act requires allows telecommunications companies to engage in negotiations to establish terms and conditions related to transit. BellSouth and the CLECs have used this mechanism for years to address transiting. The Small LECs

[47] At the conclusion of the hearing, the parties were asked to address the Commission's authority to impose terms and conditions on carriers under Issues 5, 8, and 9. Because transit is a §251 service, the process for negotiating and arbitrating terms and conditions is set out in the Act and must be followed.
[48] Prehearing Order, Order No. PSC -06-0244-PHO-TP at 23.

have not demonstrated that any changes to this process are needed nor could the Commission impose a structure contrary to one the Act requires. If a carrier does not have a transit agreement in place with BellSouth and/or believes that its rights are not being appropriately addressed under the current structure (either in its relationship with BellSouth as a transit provider or in its relationship with a third party originating/terminating carrier), it may deal with those issues in negotiations with the appropriate carrier. Another layer of contracts which duplicate, revise or contradict existing contracts is inappropriate. (Tr. 525).

In addition, the Small LECs' three-party contract scenario would require hundreds of new contracts. It is the proverbial problem in search of a solution. Each party in a transit situation would have to execute a three-party contract for every transit arrangement. As Mr. Gates testified, if all of the CLECs in Exhibits 7 and 39 (KRM-2 and KRM-3) used BellSouth's transit service to terminate calls to just one Small LEC, it would be necessary to have approximately 200 new contracts in place. (Tr. 526). The Small LECs' "solution" should be rejected as unnecessary, unworkable and administratively burdensome.

The Tennessee Regulatory Authority rejected the Small LECs' three-party contract request and stated:

> The Arbitrators unanimously concluded that when a third-party provider transits traffic, the third party is not required to be included in the interconnection agreement between the originating and terminating carriers. This circumstance will require the ICO members to also negotiate an interconnection agreement with a transit provider. This conclusion is supported by the definition of "interconnection" in 47 C.F.R. § 51.5 which states that interconnection is "the linking of two networks for the mutual exchange of traffic." This definition embraces the linking of two networks which, of necessity, will result in an interconnection agreement between the two networks (parties) being linked. The

> Arbitrators found nothing in the 1996 Act, FCC Rules or any FCC Order that requires three-party interconnection agreements. To the contrary the FCC has discouraged three-party interconnection agreements.[49]

In reaching its conclusion, the Tennessee Regulatory Authority relied, in part, on the FCC's finding that opening an arbitration to third parties would be unwieldy:

> We believe that the arbitration proceedings generally should be limited to the requesting carrier and the incumbent local exchange provider. This will allow for a more efficient process and minimize the amount of time needed to resolve disputed issues. We believe that opening the process to all third parties would be unwieldy and would delay the process.[50]

This Commission should reject the Small LECs' position.

THE COMMISSION SHOULD NOT IMPOSE A DIRECT TRUNK REQUIREMENT

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?

Joint CLECs' Position: *No. The market can and does determine when it is appropriate to establish direct interconnection between two carriers for exchanging traffic that has been exchanged heretofore as transit traffic. This is especially true since BellSouth is being compensated for its role in transiting the traffic.*

The Small LECs advocate the establishment of a threshold of traffic constituting T-1 usage. When that threshold is reached, the Small LECs would have the Commission require direct trunks. (Tr. 360-361).

[49] *CELLCO Arbitration* at 26, citations omitted.
[50] *First Report and Order,* 11 FCC Rcd 15499, ¶ 1295 (1996)

No support for this "direct trunk" threshold was provided.[51] As even the Small LECs appear to recognize[52], no threshold can work for all carriers.[53] Each carrier's business plan and objectives are different. A direct connection might make sense for one carrier in one situation but be totally inappropriate for another carrier in a different situation. The calculation of an appropriate threshold is an individual carrier decision and will turn on many variables, including, but not limited to, distance between carriers; ILEC transit rates; the availability and prices of alternative transit providers, if any; and the type of facilities constructed. (Exhibit 2, CompSouth response to Staff Interrogatory 7(i)). Use of an artificial threshold could create an unfair advantage for BellSouth and/or the Small LECs because it would require the placement of expensive, unnecessary facilities by CLECs. (Tr. 635).

Carrier decisions about what type of facilities to deploy and when, where and how to deploy them are matters which the market, not a regulatory authority, should decide. These business decisions must be left to the originating carrier. That decision will be made on a business basis after individual analysis related to the crossover point between paying transit charges on a per minute-of-use basis versus the monthly recurring charges and overhead associated with a direct facility. (Tr. 634). A carrier will utilize direct trunking when, and if, it becomes economical for it to do so. The market, not the Commission, already does, and should, provide these signals. ((Tr. 454).

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[51] Mr. Gates testified that if the Commission were to consider such a threshold (which he does not recommend), it would have to be established based on accurate and detailed analyses which has not been provided in this case. (Tr. 462-464, 530). Nor do the Small LECs explain who would pay for the direct trunks or whether they would be one way or two way trunks. (Tr. 531). This is just one of many "details" omitted from the Small LEC "threshold" proposal.

[52] In their Prehearing Statement, the Small LECs recommend this threshold "generally speaking." Prehearing Order, Order No. PSC-06-0244-PHO –TP at 23. This implies that there will be situations where the threshold they recommend would not be appropriate.

[53] Mr. Watkins testified: " . . . I do not believe that a rigid requirement would be the right way to go . . . [T]he approach to any threshold level of traffic should be flexible." (Tr. 360).

Arbitrary thresholds will subvert market signals and introduce unnecessary market inefficiencies. If a threshold is too low, and a carrier must establish a direct trunk before it is economical to do so, it would have to refrain from originating further traffic above the cap to avoid the arbitrary direct trunk requirement. An arbitrary threshold could result in calls being dropped or blocked and would act as an impediment to competition. (Tr. 460). Conversely, if the threshold is too high, a direct connection will be established before the threshold is met. (Tr. 460).

The establishment of arbitrary thresholds will result in duplicative and unnecessary facilities. (Tr. 460). The Commission's policy should be just the opposite – efficient and economic network architecture should be encouraged, not discouraged. Competitors' cost to serve should not be unnecessarily increased and the ubiquitous network paid for by ratepayers should be fully and efficiently utilized. (Tr. 461).

Finally, as discussed in Issue 1, BellSouth's transit obligation stems from its duties under the Act. These obligations are not conditioned upon a certain threshold level of traffic. (Tr. 462). A direct trunk threshold should be rejected.

MISCELLANEOUS ISSUES

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?

Joint CLECs' Position: *BellSouth is in the best position to provide information on its network arrangements.*

This appears to be an "informational" issue. As such, BellSouth is in the best position to describe to the Commission how it typically provides transit service. (See, Tr.

70-71). In general, transit traffic should be routed in the most efficient and economical manner for all carriers involved. Duplication of facilities should be avoided.

ISSUE 7

HOW SHOULD TRANSIT TRAFFIC BE DELIVERED TO THE SMALL LECS' NETWORK?

Joint CLECs' Position: *Traffic should be delivered in the most economically and technically feasible manner.*

ISSUE 10

WHAT EFFECT DOES TRANSIT SERVICE HAVE ON ISP BOUND TRAFFIC?

Joint CLECs' Position: *Transiting allows Carrier A's customer (dial-up internet subscriber) to call Carrier B's customer (ISP) through indirect interconnection. It lets the user access the Internet where its carrier is not directly interconnected with his/her ISP's carrier. A high transit rate would significantly increase costs for dial up internet service. *

In an ISP-bound situation, the transit function lets a dial up internet subscriber who has a call bound for the internet send that call to an Internet Service Provider (ISP). It allows an end user to access the Internet without its service provider being directly interconnected with an ISP carrier. This arrangement provides choice and allows more citizens to reach the Internet. (Tr. 469-470).

If BellSouth's transit rate is approved, the cost of terminating ISP-bound traffic will significantly increase and detrimentally impact the availability of ISP service. Such action would contradict the FCC's action in its *ISP* Remand Order. [54] In that order, the FCC reduced compensation rates for ISP-bound traffic. In contrast, BellSouth's transit rate is 329% higher than the $0.0007 ISP-bound compensation rate. (Tr. 472).

[54] Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Order on Remand and Report and Order*, FCC 01-131 (Apr. 27, 2001).

An increase in transit costs will increase the amount originating carriers pay to BellSouth for the ability to terminate a call to the terminating carrier. This would result in the originating carrier increasing its rates to cover the excessive transit rate BellSouth charges or it would result in the end user customer canceling his or her Internet account due to higher prices[55], (Tr. 472), thus detrimentally impacting this market.

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?

Joint CLECs' Position: *Transit service provided by BellSouth to Joint CLECs is provided via ICAs. Joint CLECs do not owe BellSouth for unpaid transit service charges. BellSouth does not dispute this.*

Joint CLECs currently receive transit service pursuant to their ICAs with BellSouth and have paid for transit service pursuant to the ICAs both before and after February 11, 2005. Thus, Joint CLECs do not owe anything to BellSouth for unpaid transit charges. BellSouth does not dispute this.[56]

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?

Joint CLECs' Position: *Transit service provided by BellSouth to the Joint CLECs is provided via ICAs. Joint CLECs do not owe BellSouth for unpaid transit service charges. BellSouth does not dispute this.*

[55] Though the popularity of dial up Internet service may be on the decline, it remains important to rural consumers who may not have broadband access or competitive alternatives. (Tr. 471).
[56] Prehearing Order, Order No. PSC-06-0244-PHO-TP at 34.

Joint CLECs currently receive transit service pursuant to their ICAs with BellSouth and have paid for transit service pursuant to the ICAs both before and after February 11, 2005. Thus, Joint CLECs do not owe anything to BellSouth for unpaid transit charges. BellSouth does not dispute this.[57]

ISSUE 15

SHOULD BELLSOUTH ISSUE AN INVOICE FOR TRANSIT SERVICES AND IF SO, IN WHAT DETAIL AND TO WHOM?

Joint CLECs' Position: *Yes, just as it does today. The originating carrier should be responsible for compensating BellSouth for the transit charges related to transit traffic. As such, BellSouth should provide the invoice for transit services to the originating carrier.*

As discussed in detail in Issue 3, the originating carrier should be responsible for compensating the transit service provider as it is the originating carrier that is the cost causer. A detailed invoice for transit service should be provided to the originating carrier to enable that carrier to properly review and evaluate the charges for services provided. It appears that the current invoices used by BellSouth for invoicing this service are sufficient. (Tr. 479).

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?

Joint CLECs' Position: *Yes. If approved, any tariff should specify that BellSouth will provide sufficiently detailed call records to identify the originating carrier and render accurate bills. Some carriers have SS7 networks that obviate the need for BellSouth's call records. No tariff should require such carriers to pay for records they do not need.*

[57] *Id.* at 34.

Accurate call records are critical to ensure proper billing and payment. Appropriate call records must be issued to the terminating carrier so that the carrier can bill the originating carrier for termination. If sufficient records are not provided so that the terminating carrier can bill the originating carrier, the terminating carrier may have uncollectible revenues. (Tr. 479).

As previously discussed in Issue 1, no tariff should be approved for transit service. However, if a tariff is approved, it should contain a provision that requires BellSouth to provide sufficiently detailed call records to allow the terminating carrier to identify the originating carrier and to provide that carrier with accurate bills. The Commission should specify that BellSouth must provide an adequate combination of information to the terminating carrier, without alteration, to allow the terminating carrier to render appropriate bills.[58] The Commission should recognize, however, that some carriers have their own SS7 networks which do away with the need for BellSouth to provide separate call records. (Tr. 480). For carriers who do not need this information, they should not be required to pay for it. Further, terms and conditions in ICAs that relate to information provided to the terminating carrier should not be changed in any way. (Tr. 480).

CONCLUSION

The Commission should void BellSouth's transit traffic tariff. If BellSouth and the Small LECs cannot agree on appropriate rates for this service, BellSouth should be directed to purse the normal negotiation/arbitration process to resolve the dispute. If the

[58] For example, originating carriers can be identified via the Operating Company Number (OCN), the Carrier Identification Code (CIC), Location Routing Number (LRN) and Calling Party Number (CPN). (Tr. 480).

Commission does approve a tariff, which it should not, it should revise all onerous terms and conditions and require all tariff rates to be TELRIC based. The Commission should reject the Small LECs' request for three-party agreements as well as any direct trunk threshold. Finally, the Commission should continue to keep the financial responsibility for the transport of traffic on the originating carrier.

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CERTIFICATE OF SERVICE
Docket Nos. 050119-TP and 050125-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint Post-Hearing Brief and Statement of Issues and Positions of the Competitive Carriers of the South, Inc. and NuVox Communications, Inc. was served via electronic mail and first class United States mail this 9th day of June, 2006, to the following:

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