BELLSOUTH

BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy hicks@bellsouth com

Guy M Hicks
General Counsel
615 214 6301
Fax 615 214 7406

October 29, 2004

VIA HAND DELIVERY

LATE FILED

Hon. Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Joint Petition for Arbitration of NewSouth Communications Corp., et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*
Docket No. 04-00046

Dear Chairman Miller:

Enclosed are the original and fourteen copies of Supplemental Direct Testimony by the following witnesses on behalf of BellSouth:

Kathy Blake
Eric Fogle
Scot Ferguson
Carlos Morillo
Eddie Owens.

Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

CERTIFICATE OF SERVICE

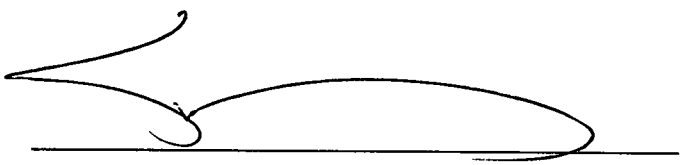
I hereby certify that on October 29, 2004, a copy of the foregoing document was served on the following, via the method indicated:

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[ ] Electronic

H. LaDon Baltimore, Esquire
Farrar & Bates
211 Seventh Ave. N, # 320
Nashville, TN 37219-1823
don.baltimore@farrar-bates.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[ ] Electronic

John J. Heitmann
Kelley Drye & Warren
1900 19th St., NW, #500
Washington, DC 20036
jheitmann@kelleydrye.com



BELLSOUTH TELECOMMUNICATIONS, INC.

SUPPLEMENTAL DIRECT TESTIMONY OF KATHY K. BLAKE

BEFORE THE TENNESSEE REGULATORY AUTHORITY

DOCKET NO. 04-00046

OCTOBER 29, 2004

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH"), AND YOUR BUSINESS ADDRESS.

A. My name is Kathy K. Blake. I am employed by BellSouth as Director – Policy Implementation for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. PLEASE PROVIDE A BRIEF DESCRIPTION OF YOUR BACKGROUND AND EXPERIENCE.

A. I graduated from Florida State University in 1981 with a Bachelor of Science degree in Business Management. After graduation, I began employment with Southern Bell as a Supervisor in the Customer Services Organization in Miami, Florida. In 1982, I moved to Atlanta where I held various positions involving Staff Support, Product Management, Negotiations, and Market Management within the BellSouth Customer Services and Interconnection Services Organizations. In 1997, I moved into the State Regulatory Organization with various responsibilities for testimony preparation, witness

support and issues management. I assumed my currently responsibilities in July 2003.

Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes. I filed direct testimony on June 25, 2004.

Q. WHAT IS THE PURPOSE OF YOUR SUPPLEMENTAL DIRECT TESTIMONY?

A. On July 15, 2004, the Parties filed a Joint Motion for Abeyance with the Tennessee Regulatory Authority ("Authority" or "TRA") where the Parties asked for 90-day abatement of the arbitration proceeding so that they could include and address issues relating to the D. C. Circuit's decision in *United States Telecom Ass'n v.* FCC, 359 F.3d 554 (D.C. Circuit 2004) ("*USTA II*") in this proceeding. During this 90-day abatement period, the Federal Communications Commission ("FCC") issued its *Order and Notice of Proposed Rule Making* in WC Docket No. 04-313, CC Docket No. 01-338 ("*Interim Rules Order*" or "FCC 04-179"). Consequently, the parties agreed to include issues relating to the *Interim Rules Order* into this arbitration proceeding as well. In this regard, my Supplemental Direct Testimony addresses several supplemental issues relating to *USTA II* and the *Interim Rules Order* ("Supplemental Issues"), which are identified as Issue Nos. S-1

through S-7[1] in the Revised Joint Matrix filed on October 15, 2004. In my Supplemental Direct Testimony, I also restate BellSouth's position from my original testimony for those issues relating to the General Terms and Conditions, Attachment 2 and Attachment 3 that were not settled during the 90-day abatement period. Finally, because BellSouth's original position for a limited number of issues has been refined during the 90-day abatement period as a result of the ongoing negotiations between the parties, my Supplemental Direct Testimony provides BellSouth's updated positions on Issue Nos. 4, 9, 12, 23, 50 and 51.

Q. HOW IS YOUR SUPPLEMENTAL DIRECT TESTIMONY ORGANIZED?

A. First, I address the Supplemental Issues. Next, I restate my original direct testimony verbatim for those issues that have not been resolved during the 90-day abatement period and provide updated testimony for Issue Nos. 4, 9, 12, 23, 50 and 51. It should be noted that, since the original filing of the Petition for Arbitration, the parties have had three face-to-face multi-day meetings and have resolved over fifty issues.

[1] Issue S-8 has been withdrawn by the Joint Petitioners. Furthermore, as set forth in my testimony, BellSouth does not agree that all of the asserted supplemental issues are appropriate for arbitration

Q. PLEASE IDENTIFY BELLSOUTH'S WITNESSES AND THE UNRESOLVED ISSUES THEY ADDRESS IN THEIR SUPPLEMENTAL DIRECT TESTIMONY.

A. The chart below identifies the BellSouth witnesses and the unresolved issues they address in whole or in part in their Supplemental Direct Testimony:

Witness	Issue Nos.
Kathy Blake	G-2, G-4, G-5, G-6, G-7, G-8, G-9, G-12, 2-5, 2-8, 2-9, 2-32, 2-33, 2-39, 3-4, 3-6 and Supplemental Issues S-1 through S-7
Carlos Morillo	6-5, 7-1, 7-3, 7-5, 7-6, 7-7, 7-8, 7-9, 7-10, 7-12
Eric Fogle	2-18, 2-19, 2-20, 2-28
Scot Ferguson	2-25, 6-3
Eddie Owens	6-11, 7-2

SUPPLEMENTAL ISSUES

Q. DO YOU HAVE ANY PRELIMINARY COMMENTS?

A. Yes. There are numerous unresolved issues in this arbitration that have underlying legal arguments. Because I am not an attorney, I am not offering a legal opinion on these issues. I respond to these issues purely from a policy perspective. BellSouth will address all legal arguments in its post-hearing brief.

Q. SHOULD THE AUTHORITY DEFER RESOULTION OF THE SUPPLEMENTAL ISSUES IN THIS ARBITRATION PROCEEDING?

A. Yes. While BellSouth believes that it is appropriate to include issues relating to *USTA II* and the *Interim Rules Order* in this arbitration proceeding, BellSouth submits that the Authority should defer resolution of the Supplemental Issues to the generic proceeding BellSouth filed on October 28, 2004 ("Generic Proceeding"). The Generic Proceeding will address issues relating to the *Triennial Review Order*, *USTA II*, and the *Interim Rules Order* and includes issues that are similar if not identical to Supplemental Issues Nos. S1 through S-6.[2] To avoid duplicative efforts and unnecessary costs in litigating the same issues in multiple proceedings, the Authority should defer these Supplemental Issues to the Generic Proceeding and incorporate its findings there into this case.

In the event the Authority decides not to defer these issues to the Generic Proceeding (which it should), I provide BellSouth's position for each of the Supplemental Issues below.

Item 107, Issue S-1: How should the Final FCC Unbundling Rules be incorporated into the Agreement?

Q. WHAT ARE THE "FINAL FCC UNBUNDLING RULES"?

A. The Final FCC Unbundling Rules are the permanent rules that the FCC will issue in response to *USTA II's* vacatur of certain FCC unbundling rules ("Final

[2] Issue No S-7 (Item 113) is not appropriate for arbitration because it exceeds the scope of the parties' agreement regarding what could be raised as a Supplemental Issue

FCC Unbundling Rules" or "Final Unbundling Rules"). Specifically, in *USTA II*, the D.C. Circuit vacated the FCC's rules associated with the unbundling of mass market local switching, high capacity dedicated transport, and high capacity loops, including dark fiber. The D.C. Circuit summarized the vacated FCC unbundling rules as follows:

> We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). *We also vacate and remand the Commission's nationwide impairment determinations with respect to these elements* [3]

In the *Interim Rules Order*, the FCC set forth a comprehensive 12-month plan, consisting of two phases to stabilize the market while it prepares its Final Unbundling Rules. First, the FCC required ILECs to continue to provide unbundled access to mass marketing switching, enterprise market loops, and high capacity dedicated transport under the rates, terms and conditions set forth in CLEC interconnection agreements as of June 15, 2004 until the earlier of (1) the FCC issuing its Final Unbundling Rules; or (2) six months after Federal Register publication of the *Interim Rules Order* (March 12, 2005) (this period is defined hereafter as the "Interim Period").[4] Second, in the event the FCC

[3] *USTA II*, 359 F 3d at 594 (emphasis added).

[4] *See Interim Rules Order* at ¶ 1. The FCC further stated that the rates, terms, and conditions frozen as of June 15, 2004 during the Interim Period could be superseded by (1) voluntary agreements, (2) intervening FCC order; and (3) a state commission order raising the rates for network elements *See Interim Rules Order* at ¶1

fails to establish its Final Unbundling Rules prior to March 12, 2005, the FCC established "transitional measures" for an additional six months ("Transition Period") that would allow CLEC to serve existing customers with the vacated elements but at higher rates. *Id*

This issue addresses how the FCC's Final Unbundling Rules should be incorporated into the parties' agreement.

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The Agreement should automatically incorporate the Final FCC Unbundling Rules immediately upon those rules becoming effective for the following reasons.

First, as established in the *Interim Rules Order*, the FCC clearly intended that its Final Unbundling Rules as well as the Transition Period would take effect without delay. Specifically, in paragraph 22 of the *Interim Rules Order*, the FCC stated:

> In order to allow a speedy transition in the event we ultimately decline to unbundled switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements. To that end, we do not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs of section 251 obligations with respect to some or all of the

> elements, but under any such presumption, the result of such proceedings must reflect the transitional structure set forth below.

The FCC restated this general principal in paragraph 23 of the *Interim Rules Order*: "Thus, whatever alterations are approved or deemed approved by the relevant state commission may take effect quickly if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order." *Interim Rules Order* at ¶ 23.

Contrary to the Joint Petitioners' position, there is nothing in the *Interim Rules Order* to even suggest that the FCC contemplated that its Final Unbundling Rules would be the subject of long-drawn-out negotiations and dispute resolution proceedings before being made applicable, which is exactly what the Joint Petitioners request. To the contrary, the *Interim Rules Order* makes it clear that the FCC intended for the speedy incorporation of its Final Unbundling Rules. BellSouth's position advances this expressed intention and unambiguous instruction while the Joint Petitioners' position only advances unnecessary delay. The Joint Petitioners' position is not surprising given that they appear to have no incentive to make their Agreement compliant with the current status of the law.

Second, the failure to automatically incorporate the FCC's Final Unbundling Rules into CLEC agreements results in discrimination against facilities-based carriers that have already made their agreements compliant with the current

law. It also discriminates against those carriers that have negotiated commercial agreements with BellSouth based upon the presumption that all carriers will be subject to the FCC's Final Unbundling Rules without unnecessary delay. Delaying the implementation of the current status of the law by requiring negotiations and protracted dispute resolution only benefits those CLECs that have no incentive to abide by the Final FCC Unbundling Rules.

Item 108, Issue S-2: Should the Agreement automatically incorporate any intervening order of the FCC adopted in WC Docket 04-313 or CC Docket 01-338 that is issued prior to the issuance of the Final FCC Unbundling Rules to the extent any rates, terms or requirements set forth in such an order are in conflict with, in addition to, or otherwise different from the rates, terms and requirements set forth in the Agreement?

Q WHAT DOES THIS ISSUE ADDRESS?

A. In the *Interim Rules Order*, the FCC recognized that the rates, terms, and conditions frozen as of June 15, 2004 during the Interim Period could be superseded by an intervening order of the FCC (e.g., an order addressing a pending petition for reconsideration). *See Interim Rules Order* at ¶ 29.[5] This issue addresses how the parties should incorporate such intervening orders into

[5] For example, on October 14, 2004, the FCC granted BellSouth's *TRO* Motion for Reconsideration and found that BellSouth did not have an obligation to unbundle fiber-to-the-curb loops *See Order on Reconsideration,* FCC 04-248, CC Docket 01-338, (rel. Oct. 18, 2004) This order would be considered an intervening order under the *Interim Rules Order*

their Agreement.

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. For the same reasons discussed above, if the FCC enters an intervening order prior to issuing the Final FCC Unbundling Rules, the requirements of the intervening order should take precedence over rates, terms and conditions in the Agreement that are inconsistent with the rates, terms and conditions set forth in the intervening order. In order to effectuate this, the Agreement should automatically incorporate the findings contained in an intervening order on the effective date of such order.

Q. DO YOU HAVE ANY COMMENTS REGARDING THE JOINT PETITIONERS' ISSUE STATEMENT AND POSITION?

A. Yes. With their issue statement, the Joint Petitioners' are improperly expanding the scope of this issue to include consideration of an intervening and potentially conflicting state commission order. The Authority should refuse to consider the issue because it exceeds the parties' agreement regarding the type of issues that could be raised after the 90-day abatement period. Specifically, the parties agreed to only add to the arbitration new issues related to *USTA II* and the *Interim Rules Order*. The Joint Petitioners' issue regarding how an intervening and potentially conflicting state commission order should be incorporated is beyond the scope of the parties' agreement. In addition, the issue is purely hypothetical in nature and not sanctioned by the *Interim Rules*

Order, which specifically recognized the possibility that the FCC and only the FCC would issue an intervening order (which it has) during the Interim Period and that any such order would supersede the FCC's findings in the *Interim Rules Order*.

Further, while I am not an attorney, it is my understanding that state commissions are prohibited from ordering anything that conflicts with the *Interim Rules Order*. In fact, the *Interim Rules Order* identified the only type of state commission order that is permissible – one that increases rates for the frozen elements: "[The frozen] rates, terms, and conditions shall remain in place during the interim period, except to the extent that they are or have been superseded by ... (3) (with respect to rates only) a state public utility commission order raising the rates for network elements." *See Interim Rules Order* at ¶ 29. Thus, unless the Authority increases rates for the frozen elements, the Authority is prohibited from issuing any intervening orders that conflicts with the *Interim Rules Order*.

Further, BellSouth's position is consistent with the Telecommunications Act of 1996 (the "Act"). The unbundling requirements of Section 251 are ***federally*** mandated and do not reference ***state*** law. The reason for this is obvious -- state law is not allowed to frustrate the national regulatory scheme as implemented by the FCC. Although a state commission has the authority to enforce state access and interconnection obligations, it may do so only to the extent "consistent with the requirements" of federal law and so as

not to "substantially prevent implementation" of the requirements and purposes of federal law. *See* 47 U.S.C. §251(d)(3).

While the Act is clear on this point, the FCC's *TRO*[6] decision emphasizes and reiterates that states may not use state law to impose additional unbundling requirements. The FCC specifically discussed the potential impact of state law on the federal unbundling regime, noting:

> We also find that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, is limited by the restraints imposed by subsections 251(d)(3)(B) and (C). We are not persuaded by AT&T's argument that a state commission may impose additional unbundling obligations in the context of its review of an interconnection agreement without regard to the federal scheme.... Therefore, we find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.
>
> ... If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has: either found no impairment - and thus found that unbundling that element would conflict with the limits in section 251(d)(2) - or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)l. Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation.

[6] See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No 01-338, dated February 20, 2003 and released August 21, 2003 ("*TRO*")

> It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.

TRO at ¶¶ 194, 195. The FCC's reasoning flatly contradicts the Joint Petitioners' expected position that the Authority should require BellSouth to adhere to state-imposed unbundling requirements, regardless of whether such requirements violate or are inconsistent with federal law.

Finally, any state commission order requiring additional unbundling obligations under state law would be invalid without the state commission performing an impairment analysis. This analysis cannot be conducted in the context of a Section 252 arbitration proceeding that addresses BellSouth's federal obligations under the Act. Consequently, the Authority should reject the Joint Petitioners' attempt to convert this Section 252 arbitration into an impairment proceeding under state law and find simply that only an intervening FCC order should be automatically incorporated into the parties' Agreement.[7]

Q. DO YOU HAVE ANY PRACTICAL CONCERNS WITH THE JOINT PETITIONERS' ISSUE?

A. Yes. Practically speaking, BellSouth would be unable to comply with FCC rules and orders and any contradictory state commission rules and orders for the same subject matter. It is not sound public policy to have competing

[7] Pursuant to the *Interim Rules Order*, if the Authority issues an order increasing rates for frozen elements during the *Interim Period*, this order should be automatically incorporated into the Agreement as well

requirements for the provision of telecommunication service as it would result in a patchwork regulatory environment consisting of potentially ten different rules pertaining to the same services. Such an inefficient environment not only conflicts with the Act and the FCC's express findings but also results in state commissions frustrating the national regulatory scheme implemented by Congress through the Act.

Item 109, Issue S-3: If FCC 04-179 is vacated or otherwise modified by a court of competent jurisdiction, how should such order or decision be incorporated into the Agreement?

Q. WHAT DOES THIS ISSUE ADDRESS?

A This issue addresses the possibility that the D.C. Circuit or another court of competent jurisdiction invalidates or vacates the *Interim Rules Order* as a result of the Mandamus Petition filed by the United States Telecommunications Association ("USTA") and certain Regional Bell Operating Companies ("RBOCs").

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. In the event a court of competent jurisdiction vacates all or part of the *Interim Rules Order*, there will be no valid impairment findings with respect to the vacated elements. Accordingly, the parties' Agreement should automatically incorporate the status of the law on the date the order or decision invalidating

all or part of the *Interim Rules Order* becomes effective and the parties should invoke the transition process identified in Item No. 23 to convert vacated elements to comparable, non-UNE services. As set forth in my testimony regarding Item No. 23, this transition process maintains the status quo for a minimum of 30 days, rather than disconnecting such services at the end of the Transition Period, and provides for an orderly transition of those elements to comparable services pursuant to BellSouth's tariffs or a commercial agreement. Such a result benefits all parties as it updates the Agreement to incorporate the current status of the law while at the same time providing the Joint Petitioners with a meaningful opportunity to continue receiving the affected services.

Item 110, Issue S-4: At the end of the Interim Period, assuming that the Transition Period set forth in FCC 04-179 is neither vacated, modified, nor superceded, should the Agreement automatically incorporate the Transition Period set forth in the Interim Order?

Q. WHAT IS THE TRANSITION PERIOD?

A. The Transition Period, as defined in the *Interim Rules Order*, is the six month period following the expiration of the Interim Period (*i e* March 12, 2005 or earlier in the event the FCC issues its Final Unbundling Rules prior). The Transition Period only applies if the Final FCC Unbundling Rules are not in effect at the end of the Interim Period or if the Final FCC Unbundling Rules do not find impairment with respect to one ore more of the frozen elements.

During the Transition Period, vacated elements for which there has been no finding of impairment will be available to CLECs for their existing customer base but at higher prices. *See* Interim Rules Order at ¶¶ 1, 29. However, during the Transition Period, CLECs are prohibited from adding any new customers at the rates, terms, and conditions set forth in the Transition Period. *Id.* at ¶ 29.

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. For the reasons identified in response to Item 107, if the Final FCC Unbundling Rules are not in effect at the expiration of the Interim Period, the FCC's Transition Period should automatically be incorporated into the parties' Agreement. Again, the FCC's intent in establishing the two-phase, 12 month approach was to stabilize the market while preparing its Final Unbundling Rules. As found by the FCC, the "twelve-month transition described [in the Interim Rules Order] is essential to the health of the telecommunications market and the protection of consumers." *Id.* at ¶ 17. Additionally, in describing the Transition Period, the FCC stated that it has a "commitment to provide certainty and steadiness in the market . . . beyond the six-month interim period . . . ." *Id.* at ¶¶ 17, 29. Refusing to find that the Transition Period is automatically incorporated into the parties' Agreement upon it becoming effective and instead requiring negotiation and the resulting dispute resolution frustrates this intent as it effectively prohibits the parties' from operating under the Transition Period. In fact, it is quite possible that the Transition Period will expire prior to the time any change of law

negotiations/proceedings would be concluded, which is clearly not what the FCC intended.

Q. DO YOU AGREE WITH THE JOINT PETITIONERS' POSITION THAT THE TRANSITION PERIOD IS NOT BINDING ON THE PARTIES?

A. No. While the FCC's NPRM requests comments regarding the need for additional transitional requirements, there can be no doubt that the FCC contemplated and intended for the Transition Period to apply at the expiration of the Interim Period if there were no Final FCC Unbundling Rules at that time, or if there was otherwise no finding of impairment for the vacated elements. The fact that the FCC asked for comments regarding what additional transition requirements should be implemented in the Final FCC Unbundling Rules does not negate that fact that the Transition Period was ordered in the *Interim Rules Order* and is an essential component of the FCC's plan to provide stability and market certainty during its twelve month transition plan.

Further, it is unclear why the Joint Petitioners oppose the automatic incorporation of the Transition Plan in the absence of Final FCC Unbundling Rules. Indeed, without it, the Joint Petitioners will have no legal right to obtain new vacated elements after March 12, 2005.

Item 111, Issue S-5: (A) What rates, terms, and conditions relating to switching, enterprise market loops, and dedicated transport were "frozen" by FCC 04-179? (B) How should these rates, terms and conditions be incorporated onto the Agreement?

Q. WHAT DOES THIS ISSUE ADDRESS?

A. The *Interim Rules Order* requires BellSouth to (1) continue to provide unbundled access to mass market switching, enterprise market loops, and high capacity dedicated transport under the same rates, terms, and conditions that applied to the Joint Petitioners' Agreement as of June 15, 2004 for the Interim Period (unless superceded by a voluntary negotiated agreement, an intervening FCC order, or a state commission order increasing rates) (referred to as the "Frozen Rates, Terms, and Conditions"); and to (2) continue to make those elements available during the Transition Period for the Joint Petitioners to serve existing customers (subject to the conditions set forth in the *Interim Rules Order*). *See Interim Rules* Order at ¶ 1. This issue addresses what specific rates, terms and conditions were frozen by the FCC in the *Interim Rules Order*.

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE.

A. The rates, terms, and conditions for the following defined elements were frozen by the FCC in the *Interim Rules Order*.

Mass Market Switching should be defined as mass market switching and all elements that must be made available when switching is made available. *See Interim Rules Order* at n.3. Mass market switching includes unbundled access to switching except when the CLEC: (1) serves an end user with four (4) or more voice-grade (DS0) equivalents or lines served by the ILEC in Density Zone 1 of the top 50 MSAs; or (2) serves an end user with a DS1 or higher-capacity service or UNE Loop. Examples of elements or services that must be made available when switching is made available include, but are not limited to, common transport, databases required to be provided when switching is unbundled, the function of combining a switch port with a loop, the provision of DUF records, and signaling. Accordingly, the corresponding rates, terms and conditions for these services would be frozen subject to the conditions and requirements set forth in the *Interim Rules Order.*

Enterprise Market Loops should be defined as those transmission facilities between a distribution frame (or its equivalent) in the ILEC's central office and the loop demarcation point at an end user customer premises at the DS1 and DS3 level, including dark fiber loops. *TRO* at ¶ 249. The corresponding rates and the technical terms and conditions that are specific to these would be frozen subject to the conditions and requirements set forth in the *Interim Rules Order.*

Dedicated Transport should be defined as the transmission facilities connecting ILEC switches and wire centers in a LATA at a DS1 and DS3 level, including dark fiber transport. *TRO* at ¶ 359. The corresponding rates

and the technical terms and conditions for these elements would be frozen subject to the conditions and requirements set forth in the *Interim Rules Order.*

Item 112, Issue S-6: Did USTA II vacate the FCC's unbundling requirement, if any, relating to high-capacity loops and dark fiber?

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. *USTA II* vacated the FCC's impairment finding for DS1, DS3 and dark fiber elements. As a result, BellSouth has no 251 obligation to offer these elements including high-capacity loops, high-capacity transport and dark fiber. Notwithstanding any dispute the parties may have on this issue, the issue has been addressed by the *Interim Rules Order* and BellSouth will provide the subject elements pursuant to that Order until the Final FCC Unbundling Rules become effective.

Q. DO YOU HAVE COMMENTS REGARDING THE JOINT PETITIONERS' ISSUE STATEMENT AND POSITION?

A. Yes. The Joint Petitioners' position is that neither *USTA II* nor *the Interim Rules Order* affects their right to receive high-capacity loops, high-capacity transport and dark fiber on an unbundled basis. This position requires the Authority to disregard binding federal and FCC authority, is untenable, and is not supported by either *USTA* II or the *Interim Rules Order.* The simple fact is that *USTA II* vacated any requirement for BellSouth to unbundled and provide

these high capacity transmission facilities at TELRIC prices and the *Interim Rules Order* addresses how these facilities will be provisioned for a twelve-month transition period for existing CLEC customers. The refusal of the Joint Petitioners to recognize the straightforward and clear wording of the *Interim Rules Order* reveals that their strategy is to use the Authority to circumvent orders of the FCC.

Further, for the reasons discussed in support of Item 108, the Authority is prohibited from establishing a "new" pricing regime for these elements that contradicts the *Interim Rules Order*. Thus, the Joint Petitioners' position cannot be supported by the law and should be rejected as it is an attempt to convert this Section 252 arbitration into a state cost proceeding for UNEs that no longer exist and cannot be reinstated by a state commission.

Item 113, Issue S-7 <<CLEC ISSUE STATEMENT>>: (A) Is BellSouth obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport? (B) If so, under what rates, terms and conditions? :

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. With their issue statement, the Joint Petitioners' are improperly expanding the scope of this issue to include consideration of an intervening, potentially conflicting state commission order.[8] The Authority should refuse to consider

[8] Based on the Joint Petitioners' position statement, it appears that the Joint Petitioners intend to ask the Authority to issue an order invoking state law or interpreting federal law as part of this issue

the issue because it exceeds the parties' agreement regarding the type of issues that could be raised after the 90-day abatement period. Specifically, the parties agreed to only add to the arbitration new issues related to *USTA II* and the *Interim Rules Order*. The Joint Petitioners' issue regarding BellSouth's obligation to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport is beyond the scope of this arbitration.

Even if the Authority considers this issue, which it should not, the Authority should reject the Joint Petitioners' attempt to manipulate the Authority into addressing issues that have already been decided by *USTA II* or the *Interim Rules Order*. In fact, there can be no question that *USTA II* extinguished BellSouth's obligation to provide high-capacity transport.

Moreover, the Joint Petitioners' arguments regarding alternative sources of unbundling obligations cannot be supported by a cursory review of the authority they cite. For instance, contrary to the Joint Petitioners' position, there is no independent Section 251 obligation to specifically provide high capacity transport on an unbundled basis. Rather, Section 251 simply addresses BellSouth's obligation to provide interconnection and unbundled network elements under the Act. Likewise, BellSouth has no 271 obligation to unbundle the subject elements at TELRIC and the Authority is prohibited from ordering anything to the contrary. Again, this issue and the Joint Petitioners' positions in general are nothing more than the Joint Petitioners' attempt to

circumvent the D.C. Circuit and the *Interim Rules Order* so that they can prolong an inapplicable pricing regime.

UNRESOLVED ISSUES

Item 2; Issue G-2: How should "End User" be defined? (Agreement GT&C Section 1.7)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. As an initial matter, because the issue as stated by the Petitioners and raised in the General Terms and Conditions section of the Agreement has never been discussed by the Parties, the issue is not appropriate for arbitration. The only discussion between the parties regarding the definition of "end user" has been in the context of high capacity EELs. When the parties agreed to extend the arbitration window, it was also agreed that the scope of those negotiations included only issues that arose from the *TRO*. The language addressing "end user" in the General Terms section has been in the Agreement since the parties began negotiations. This language applies to every single use of the term "end user" throughout the entire agreement, which includes eleven attachments, and was not introduced as a result of the *TRO*. The Petitioners have only become interested in the General Terms language since they reviewed the EELs provisions of the *TRO*. It is not appropriate now, particularly based on the parties' agreement otherwise, to go back and address the term "end user" as used in the General Terms section of the Agreement. Indeed, to do so would

require the parties to negotiate, for the first time, the definition of end user as it applies throughout the agreement. If the parties must go through the entire agreement to negotiate each instance the term "end user" appears, there are approximately 300 references that would have to be addressed. Since this has never been negotiated in the more than 18 months that the parties have been meeting to discuss the interconnection agreement, it is not appropriate for the Authority to address the issue as it has been raised by the CLECs.

Q. WHAT IS BELLSOUTH'S PROPOSED DEFINITION OF "END USER"?

A. Notwithstanding the controversy about the appropriateness of addressing this issue, the term end user should be defined as it is customarily used in the industry; that is, the ultimate user of the telecommunications service.

Q. PLEASE EXPAND ON BELLSOUTH'S DEFINITION.

A. BellSouth's language makes clear that an end user is not an intermediary user of the service, such as an Internet Services Provider ("ISP"). Webster's Dictionary defines "end" as "...the last part of a thing, i.e., the furthest in distance, latest in time, or last in sequence or series... ." In this instance, the "end user" is not necessarily the CLEC's customer, as the Petitioners' language suggests, because that customer may or may not be the end of the sequence or series. In other words, no matter how many wholesalers, enhancers, etc., are in the chain, the "end user" is the ultimate user of the service. For example, a manufacturer of breakfast cereal may have a grocery

store chain as its customer, but the end user is the little boy eating his Wheaties at his breakfast table. In contrast, the Petitioners' language creates uncertainty. By defining an end user as any customer, even one who subsequently repackages the service to sell it to another, the Petitioners contradict the commonly understood meaning of the word "end." Put differently, under their definition, end user means every user, not just the one at the end of the process.

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

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The limitation on each Party's liability in circumstances other than gross negligence or willful misconduct should be the industry standard limitation, which limits the liability of the provisioning party to a credit for the actual cost of the services or functions not performed or improperly performed.

Q. PLEASE COMMENT ON THE PETITIONERS' PROPOSAL.

A. First, the Petitioners' proposal makes no sense. They propose that liability be 7.5% of whatever has been billed as of the Day on which the claim arose.[9]

[9] Originally, the Joint Petitioners proposed that liability be capped at 7.5% of whatever has been billed in total since the beginning of the Agreement The Joint Petitioners' current proposal, however, does nothing to cure the absurdity of the Joint Petitioners' position

Under the Petitioners' language, at the beginning of the Agreement, the limitation would function (because nothing would have been billed) to limit liability to $0.00. By the end of the three-year contract term, the potential liability would be massive. There is no rational basis for such a liability clause. In this instance, the limit is, by description, completely unrelated to the severity of the damage or to any other rational basis for limiting damages. Instead, the Petitioners propose an arbitrary approach that would limit damages based on the happenstance at the point during the contract at which the event in question occurs.

Further, the language proposed by the Petitioners would provide incentive to the Joint Petitioners to inappropriately delay the filing of a claim or inappropriately argue that the "day the claim arose" was at the end of the Agreement. Based on the amount of billing between the parties, depending on the day the Joint Petitioners assert "the claim arose" could result in only a few dollars or result in several million dollars. The Joint Petitioners' proposal serves only to encourage CLECs to game the claims and litigation process to increase BellSouth's potential liability. It is important to recognize that these are not commercial agreements but are instead interconnection agreements mandated under Section 252 of the 1996 Act.

BellSouth is asking no more than the industry standard limitation. For the foregoing reasons, BellSouth requests the Authority adopt BellSouth's proposed language containing industry standard limitations on liability and reject the Petitioners' proposed language.

Q. DO YOU HAVE ANY GENERAL COMMENTS ABOUT ITEMS 4-7 (ISSUES G-4 THROUGH G-7)?

A. Yes. It is important to note in addressing Items 4 through 7 that these issues are all integrally related and should be considered together. It is BellSouth's belief that, by attempting to increase BellSouth's exposure to liability through decreased limitations of liability and expanding BellSouth's indemnification obligations to essentially cover all failures by BellSouth to perform exactly as the contract requires, Petitioners are attempting to have BellSouth incur the Petitioners' cost of doing business and have BellSouth bear the risk of the business decisions that Petitioners choose to make.

When viewed in a vacuum, some of Petitioners' positions may seem to be reasonable; even more so when viewed in the context of a truly commercially negotiated agreement free from regulation, where prices can be increased to account for increased liability exposure. However, such is not the case here. BellSouth is bound by the cost-based pricing standards of the 1996 Act and cannot change such prices at will to cover the additional costs that would be incurred should the Petitioners' language be adopted. In a legally mandated context, where prices are set based on TELRIC principles, and when taken together and viewed in the context of the Petitioners' end users being able to recover damages from BellSouth even when BellSouth has no relationship with the Petitioners' end users, it is clear that all the Petitioners' seek to do is put themselves at a competitive advantage over BellSouth and all other carriers

by having BellSouth assume the risk of their business decisions.

Added to the Petitioners' desire to have all disputes handled by a court of law and the Petitioners' inclusion of several extremely broad provisions that no carrier could ever comply with in every case for the life of the contract (e.g., Item 12), it is clear the Petitioners have no intention of competing with BellSouth or any other carrier on a level playing field. There is no obligation under the 1996 Act for BellSouth to subsidize the Petitioners' business plan, which would be the effect of the Petitioners' proposed language on these issues.

Item 5; Issue G-5: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks? (Agreement GT&C Section 10.4.2)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth believes that if a CLEC elects not to limit its liability to its end users/customers in accordance with industry norms, the CLEC should bear the risk of loss arising from that business decision. Further, if a CLEC wants to make a product more attractive by offering a service guaranty, there is nothing to stop the CLEC from doing so. It is not appropriate, however, to offer a product under terms that differentiate it from other providers' products and expect BellSouth to pay when BellSouth does not meet the service date the CLEC promised in its service guaranty.

Q. PLEASE PROVIDE AN EXAMPLE OF WHAT THE PETITIONERS ARE REQUESTING.

A. The Petitioners appear to be giving to their end users on the one hand, and taking from BellSouth on the other. For example, under the Petitioners' language, a CLEC could offer its end user $1,000.00 per loop if the CLEC does not deliver the loop within the interval promised. If, for whatever reason, BellSouth were unable to deliver a loop within the stated interval, the CLEC would then pass on to BellSouth the CLEC's self-created liability to its customers. This approach is not only obviously unfair; it violates the spirit of the 1996 Act. BellSouth is required to provide service to the CLEC at parity to what it provides to its retail customers. Under the Petitioners' approach, the CLEC could promise its customer perfection to make the service more attractive, then hold BellSouth financially accountable if the wholesale input provided by BellSouth falls short of the perfect performance needed to meet the CLEC's guaranty to its customer.

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

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Indirect, incidental or consequential damages should be defined according to the pertinent state law. Although I am not an attorney, it is generally known that, in every state, there is a body of law that has developed as the courts have

defined the parameters of what constitutes "indirect, incidental or consequential damages." This definition should control, not some different definition created by the Petitioners.

In contrast, the Petitioners have agreed that the contract should provide that there will be no liability for incidental, indirect or consequential damages, but they also attempt to define these terms in a way that contradicts that agreement. In other words, both parties agree that there should be no liability for these particular types of damages. The Petitioners, however, have proposed to write into the contract a lengthy and confusing set of circumstances under which liability would attach, even if the damages for which there would be liability are "indirect, incidental or consequential." Again, the result is that the agreed upon limitation of liability would be eviscerated.

If the parties agree that, for example, consequential damages should not be recoverable, then this agreement can really only be given full effect if all damages of this sort are excluded. However, it makes no sense to agree that there should be no liability for damages of a particular type, and then qualify that agreement to such an extent that it effectively ceases to exist. This, however, is exactly what the Petitioners are attempting to do.

Q. ARE YOU OPPOSED TO THE PETITIONERS' APPROACH FOR ANY OTHER REASON?

A. Yes, BellSouth is also opposed to the "qualifying" language proposed by the Petitioners because it is extremely vague and would be extremely difficult to implement. The Petitioners have proposed to add a single clause of more than 100 words to this section of the Agreement that is so convoluted that it is virtually indecipherable. The result of this addition would be to create considerable confusion as to when the limitation of liability that the parties have otherwise already agreed upon would, or would not, apply.

Item 7; Issue G-7: What should the indemnification obligations of the parties be under this Agreement? (Agreement GT&C Section 10.5)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, except to the extent caused by the providing Party's gross negligence or willful misconduct, defended and held harmless by the Party receiving services hereunder against any claim, loss or damage arising from the receiving Party's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications, or (2) any claim, loss or damage claimed by the End User of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions,

duties, or obligations arising out of this Agreement.

Q. PLEASE FURTHER EXPLAIN BELLSOUTH'S POSITION.

A. Although it is appropriate for the receiving party to indemnify the providing party, it is not appropriate for the party providing the services to indemnify the party receiving services in this instance as the Petitioners are suggesting. It is important to consider that interconnection agreements mandated by Sections 251 and 252 of the 1996 Act are not commercial agreements. Contracts achieved through Sections 251 and 252 have a long history beginning with the 1996 Act and continuing through individual arbitration proceedings resolved in each of the states. What must be offered and the standards that apply to those offerings is, in part, drawn from the language of the 1996 Act, and in part, the result of eight years of decisions by the FCC and various state commissions. As noted under Issue G-4, the services included in a Section 251 agreement are provided on the basis of TELRIC pricing and TELRIC pricing does not include the cost of open-ended indemnification of the party receiving services. If one of the costs of providing UNEs and interconnection is damage payments that the Petitioners seek through their language, then those damages should also be recovered through the cost of UNEs and interconnection. However, this is not the case.

Further, although BellSouth is not dictating a course of action for the Petitioners, simply stated, if the Petitioners would limit their liability to their end users through their tariffs or contracts as telecommunications carriers,

including the Petitioners, typically do, there would be no issue here to resolve.

Item 8; Issue G-8: What language should be included in the Agreement regarding a Party's use of the other Party's name, service marks, logo and trademarks? (Agreement GT&C Section 11.1)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth's position is that the CLECs' use of BellSouth's name should be limited to (1) factual references that are necessary to respond to direct inquiries from customers or potential customers regarding the source of the underlying services or the identity of repair technicians; and (2) truthful and factual comparative advertising that does not imply any agency relationship, partnership, endorsement, sponsorship or affiliation with BellSouth and that uses the name solely in plain-type, non-logo format. CLECs should not otherwise be entitled to use BellSouth's name, service mark, logo or trademark.

Q. WHY ARE YOU OPPOSED TO THE APPROACH PROPOSED BY THE PETITIONERS?

A. The Petitioners propose to add to the Agreement a provision saying, in effect, that trademark law, whatever it may be, would apply. While in concept this appears reasonable, BellSouth believes that this general citation to law would be insufficient in this particular instance. Based on past, real world experience,

BellSouth believes that the Agreement should specifically spell out the limited circumstances under which the CLECs may use BellSouth's name.

Over the last several years, this area is one that has proven to be fraught with disagreement between BellSouth and CLECs as to what sort of comparative advertising, and the specific use of BellSouth's name in that advertising, should be allowed. Although BellSouth does not object to its name being used in plain-type, non-logo format for the purposes of truthful, comparative advertising, its experience has been that some CLECs use BellSouth's name in their advertising in a way that does not meet this standard, that is, in a way that is not entirely truthful. The CLECs in these instances have, as one might suspect, asserted that their use of BellSouth's name is appropriate. The result is that there is a dispute that must be resolved, or in some cases, litigated. Given BellSouth's experience in this area, it only makes sense to utilize this experience to try to pro-actively avoid as many disputes as possible. Therefore, throughout negotiations, BellSouth has tried to reach an agreement with the Petitioners as to the parameters of acceptable comparative advertising. The Petitioners ultimately, have declined to accept these parameters, and want to revert back to the general language that trademark law applies, whatever it is. Again, BellSouth believes that, to avoid subsequent disputes (over interpretation of the law, or otherwise) it is important that the Agreement specifically spell out the circumstances under which the Petitioners may use BellSouth's name.

Item 9; Issue G-9: Under what circumstances should a party be allowed to take a dispute concerning the interconnection agreement to a Court of law for resolution first? (Agreement GT&C Section 13.1)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth's position is that the Authority or the FCC should resolve disputes as to the interpretation of the Agreement or as to the proper implementation of the Agreement. However, BellSouth has, in an effort to accommodate the Petitioners' desire to broaden the venues available to them, proposed language that would enable the Joint Petitioners to petition another dispute resolution venue for matters that lie outside the jurisdiction or expertise of the Authority or the FCC.

Q WHAT IS THE RATIONALE FOR BELLSOUTH'S POSITION?

A. Interconnection agreements achieved through either voluntary negotiations or through compulsory arbitration are bound by Section 252 of the Act. Specifically, Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the state commission for approval. As such, having approved an agreement, the state commission should also resolve any dispute regarding the agreement. The FCC, having regulatory oversight over ILECs and CLECs and their obligations under the Act, may also act in its regulatory capacity to resolve disputes resulting from interconnection agreements. It is the state commissions and the FCC that have

the expertise in these matters. In contrast, other courts generally lack the technical expertise or background necessary to be the initial venue for a dispute resolution. Should the issue eventually go to a court of law, the Parties, the state commission and/or FCC would be able to supply a full record of the dispute to the court to use during its deliberations.

BellSouth is not excluding courts of law "from the available list of venues available to address disputes under this agreement" as Petitioners' state. BellSouth's position is that courts of law should not be the first step in resolving a dispute arising out of these regulatory obligations when the state commission or the FCC possess the expertise to decide the matter. In fact, BellSouth's position is that, for those matters which lie outside the jurisdiction or expertise of the Authority or the FCC, the parties would be entitled to seek resolution of the dispute through another venue, such as a court of law.

Q. HAS THE AUTHORITY PREVIOUSLY DEALT WITH A SIMILAR ISSUE?

A. Yes. In a previous arbitration proceeding involving BellSouth and AT&T (Docket No. 00-00079), in its Final Order of Arbitration Award, dated November 29, 2001 the Authority addressed its role in resolving agreement disputes. The issue being arbitrated regarded whether or not a third party commercial arbitrator should be used to resolve disputes under the interconnection agreement. In ruling that the Authority should resolve all disputes that arise under the agreement, the Authority stated as follows:

"Resolution of interconnection agreement disputes by the Authority is necessary to ensure consistent interpretation of interconnection agreements and application of public policy. Moreover, consideration by the Authority will ensure compliance with applicable state law and Authority rulings." [Page 32].

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

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. No, such an explicit statement in the Agreement is not necessary. Although the Petitioners' position appears reasonable on its face, it is important to understand how this issue has arisen, as well as the subtext of the Petitioners' proposal.

Q. PLEASE FURTHER EXPLAIN BELLSOUTH'S POSITION.

A. It appears that the Petitioners' purpose with this issue is to insure that they get at least two opportunities to negotiate and/or arbitrate the terms of the contract. Once the initial terms of an agreement are settled and the parties sign the Agreement, the Agreement should control on all negotiated items. In an attempt to resolve this issue, BellSouth has offered to include the following language in the General Terms and Conditions of the parties' Agreement:

> This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right or other requirement not expressly memorialized in the agreement is applicable to the Parties by virtue of a reference to an FCC or Commission rule or order or Applicable Law in the Agreement, and such obligation, right or other requirement is disputed by the other Party, the Party asserting that such obligation, right or other requirement is applicable shall petition the Commission for resolution of the dispute and the Parties agree that any finding by the Commission that such obligation, right or other requirement exists shall be applied prospectively by the Parties upon amendment of the Agreement to include such obligation, right or other requirement and any necessary rates, terms and conditions. The Party that failed to perform such obligation, right or other requirement shall be held harmless from any liability for such failure until the obligation, right or other requirement is expressly included in this Agreement by amendment hereto.

The Joint Petitioners' proposed language provides them with the ability to search an order after finalizing the agreement to find language different from that in the agreement, and to use that difference to reopen negotiations or to assert a complaint even if the language that is in the agreement reflects the parties' attempt to implement the requirements of the order. In this manner, nothing is truly settled and the initial contract language is meaningless. The Petitioners should not be able to use this issue to get "two bites at the apple."

Q. PLEASE PROVIDE SUPPORT FOR BELLSOUTH'S POSITION.

A. There are sometimes instances in which, for example, there is a question of how to implement an FCC rule, and especially in light of language that appears

in the order that first sets forth the rule. In this instance, the parties would normally review the ordering paragraphs and enter into discussions in an attempt to clarify the meaning of the rule and subsequently develop contract language. Although the Petitioners spent approximately 18 months fully negotiating every aspect of this Agreement, they still want additional language in the General Terms as a "catch-all" for anything they did not negotiate specifically.

There are countless examples of language in the Agreement where the parties have disagreed on the meaning of a rule and, in an effort to negotiate mutually agreeable, contractually binding provisions, the parties have looked to the order for clarification. In some instances, the parties have reached agreement and have drafted mutually agreeable contract provisions. In other cases, the parties were unable to agree and are now arbitrating the issue. Examples of those two scenarios where the Parties are either agreeing to language different from the rule or arbitrating the meaning of the rule based on the *TRO*, include language relating to the definition of interoffice transport, line conditioning, co-carrier cross connects, dedicated transport as it relates to reverse collocation, fiber to the home, and conversions from unbundled network elements to wholesale services.

What the Petitioners seek to do is create a third category, contract language that has been agreed to and that set forth the respective obligations of the parties and yet may later be challenged by a Petitioner as not truly reflecting what the Parties had agreed to. In that manner, as explained above, the

Petitioners would always get "two bites at the apple" - the first bite during contract negotiations and the second bite at some later, unspecified time, when they would seek out some aspect of an order and, based on their interpretation at that point in time, they would allege that BellSouth had violated its obligations under the Agreement. This would put BellSouth in the intolerable position of not knowing exactly what its contractual obligations are until the Petitioners alleged they had violated them. The main purpose of negotiation and arbitration is to resolve such issues at the initiation of the contract so that the parties can live up to its terms for the life of the contract.

In contrast to the Joint Petitioners' language, BellSouth's proposed language acknowledges an underlying obligation to provide services in accordance with applicable rules, regulations, etc. and that the parties have negotiated what those obligations are. However, in the unlikely event that an issue arises in the future wherein a party asserts that there is an obligation that has not been included in the agreement based on the law at the time the agreement was entered into, and the parties had not otherwise negotiated their obligations with respect thereto, then the parties will attempt to resolve that issue by amending the agreement to include such obligation. In the event that the parties cannot agree on what the obligation is, or if there even is an obligation, then the commission should resolve that dispute. In the event that an obligation exists that was not previously included in the interconnection agreement, the parties should then amend the agreement *prospectively* to include such an obligation. To require either party to comply with an obligation that was not known, due to differing interpretations of the order, for example, would be unconscionable.

BellSouth is not attempting to avoid its obligations under the law; it is simply trying to ensure that it knows what those obligations are so that it can comply with them.

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

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. If the Joint Petitioners fail to transition Mass Market Switching, Enterprise Market Loops or Dedicated Transport or high-capacity transport (as those terms are defined in Item 111) (collectively referred to as the "Eliminated Elements") prior to the expiration of the Transition Period (as defined in the *Interim Rules Order*) and the Joint Petitioners have not entered into a separate commercial agreement providing otherwise, BellSouth's position is as follows:

Eliminated Elements including Mass Market Switching Functions ("Switching Eliminated Elements")

If the Joint Petitioners submit an order to transition Switching Eliminated Elements to a comparable resale service within 30 days of the expiration of the Transition Period, the applicable nonrecurring and recurring charges set forth in BellSouth's tariff, subject to the appropriate resale discounts, would apply for such a transition. If instead, the Joint Petitioners choose to disconnect the Switching Eliminated Element within this same time period, the applicable

disconnect charge from the parties Agreement for the eliminated element for the end user in question would apply.

If the Joint Petitioners fail to submit an order to either transition or disconnect a Switching Eliminated Element within 30 days of the expiration of the Transition Period, BellSouth will transition the elements to a comparable resale service on behalf of the Joint Petitioners. In this situation, the Joint Petitioners will be charged the applicable nonrecurring and recurring charges set forth in BellSouth's tariff, subject to the appropriate resale discounts. In addition, the Joint Petitioners would be charged BellSouth's labor costs in identifying and processing the transition of the Switching Eliminated Elements to resale.

In the unlikely event that a comparable resale service is not available, BellSouth may disconnect the Switching Eliminated Elements and charge the applicable disconnect charge. BellSouth, however, is currently not aware of any existing Switching Eliminated Element that does not have a comparable resale service.

In all cases, until Switching Eliminated Elements have been transitioned or disconnected, the applicable recurring and nonrecurring rates for Switching Eliminated Elements shall apply as set forth in the Agreement.

Eliminated Elements Other than Switching Eliminated Elements ("Other Eliminated Elements")

If the Joint Petitioners submit an order to transition Other Eliminated Elements to a comparable service within 30 days of the expiration of the Transition Period, the applicable nonrecurring and recurring charges set forth in

BellSouth's FCC No. 1 Tariff would apply. If instead, the Joint Petitioners choose to disconnect the Other Eliminated Elements within this same time period, the applicable disconnect charge from the parties' Agreement for the eliminated element for the end user in question would apply. Until such time as the Other Eliminated Elements are transitioned or disconnected, the rates, terms, and conditions set forth in the Agreement for the transitioned elements during the Transition Period will apply.

If the Joint Petitioners fail to submit an order to either transition or disconnect an Other Eliminated Element within 30 days of the expiration of the Transition Period, BellSouth may transition the elements to a comparable service on behalf of the Joint Petitioners. In this situation, the Joint Petitioners would be charged the applicable nonrecurring and recurring charges set forth in BellSouth's FCC No. 1 Tariff in addition to BellSouth's labor costs in identifying and processing the transition of the Other Eliminated Elements to a comparable service. The rates, terms and conditions for the comparable service will apply as of the date following the expiration of the Transition Period.

In the unlikely event a comparable service is not available, BellSouth may disconnect the Other Eliminated Element and charge the applicable disconnect charge. BellSouth, however, is currently not aware of any existing Other Eliminated Element that does not have a comparable service.

Vacatur of *Interim Rules Order*

In the event a court of competent jurisdiction modifies or vacates the *Interim Rules Order*, the Joint Petitioners shall immediately transition Switching Eliminated Elements and Other Eliminated Elements pursuant to the above process applies from the effective date of such vacatur or modification.

Final FCC Unbundling Rules

If the Final FCC Unbundling Rules do not require the unbundling of Mass Market Switching, Enterprise Market Loops or High Capacity Transport, the Joint Petitioners would be required to transition such elements pursuant to the process set forth above, subject to any modifications to the transition requirements set forth in the Final FCC Unbundling Rules; provided however, that if the Final FCC Unbundling Rules modify, are in conflict with, or are otherwise different from the rates, terms and requirements set forth in the Agreement, the Final FCC Unbundling Rules shall supercede the Agreement.

To the extent that BellSouth is no longer required to provide access to any network element on an unbundled basis pursuant to Section 251 of the Act, the Joint Petitioners would be required to follow the above transition process applied as of the effective date of the order eliminating such obligation

Item 26; Issue 2-8: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act? (Attachment 2, Section 1.7)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Consistent with the FCC's errata to the *Triennial Review Order*, there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the 1996 Act. Unbundling and commingling are Section 251 obligations. Services not required to be unbundled are not subject to Section 251. When BellSouth provides an item pursuant only to Section 271, BellSouth is not obligated by the requirements of Section 251 to either combine or commingle that item with any other element or service. If BellSouth agrees to do so, it will be done pursuant to a commercial agreement.

Q. PLEASE EXPLAIN YOUR REFERENCE TO THE FCC's *TRIENNIAL REVIEW ORDER* ERRATA.

A. In its original *TRO* at paragraph 584, the FCC stated: "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act." However, in its errata released September 17, 2003, the FCC specifically amended paragraph 584 to delete any reference to section 271. The amended sentence now reads as follows: "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to section 251

(c)(4) of the Act."

In making this change, the FCC correctly noted that there are network elements identified in section 271 that are no longer subject to section 251 unbundling requirements. The FCC has clarified that BellSouth is only obligated to permit commingling between UNEs and UNE combinations (subject to section 251) and wholesale facilities and services.

Q. DID THE D.C. CIRCUIT'S DECISION, ISSUED ON MARCH 2, 2004, SUPPORT BELLSOUTH'S POSITION ON THIS ISSUE?

A. Yes. In its discussion of "Section 271 Pricing and Combination Rules", the D.C. Circuit agreed with the FCC's determination for checklist items four (loops), five (transport), six (switching) and ten (call-related databases) regarding TELRIC pricing and the duty to combine. First, the Court stated

> ...The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-252. ...
>
> But the FCC also found that the BOCs' unbundling obligations under the independent checklist items differed in some important respects from those under §§ 251-252. Two such differences are salient here. First, the Commission determined that TELRIC pricing was not appropriate in the absence of impairment; for elements for which unbundling was required only under § 271, the ruling criterion is the §§ 201-02 standard that rates must not be unjust, unreasonable, or unreasonably discriminatory. Order ¶¶ 656-64. Second, the Commission decided that, in contrast to ILEC

> obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements.

USTA, 359 F.3d at 588-589.

Further, the D.C. Circuit stated: "We agree with the Commission that none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist. Of course, the independent unbundling under § 271 is presumably governed by the *general* nondiscrimination requirements of § 202." *Id.* at 589. Therefore, it is clear that both the FCC and D.C. Circuit have determined that there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the 1996 Act.

Item 27; Issue 2-9: When multiplexing equipment is attached to a commingled circuit, should the multiplexing equipment be billed under the jurisdictional authorization (Agreement or tariff) of the lower or higher bandwidth service? (Attachment 2, Section1.8.3)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. When multiplexing equipment is attached to a commingled circuit, the multiplexing equipment should be billed from the same jurisdictional authorization (Agreement or tariff) as the higher bandwidth service. Further, the Central Office Channel Interface (COCI), necessary for the lower level service, will be billed from the same jurisdictional authorization (tariff or

Agreement) as the lower bandwidth service.

Multiplexing (e.g., 3/1) is required to aggregate lower-level bandwidth circuits (DS1s) upon a higher-level bandwidth circuit (DS3) or voice grade/digital service upon a DS1. Multiplexing is an option of the higher-level bandwidth circuit and is ordered with it. It is necessary in order to channelize the DS3 for use with lower-level circuits, which is at parity with how retail services are provisioned. Further, each lower-level bandwidth circuit requires a COCI in order to interface with the multiplexer. Therefore, the COCI is ordered with the lower-level bandwidth circuit, which is also at parity with how retail services are provisioned. Thus, the COCI is an option associated with the lower-level bandwidth.

Item 50; Issue 2-32: How should the term "customer," as used in the FCC's EEL eligibility criteria rule, be defined? (Attachment 2, Section 5.2.5.2.1-7)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Because BellSouth is not obligated to provide new high-capacity EELs after the Interim Period and must maintain existing high-capacity EELs during the Transition Period (as set forth in Items 111 and 112), this issue is only relevant during this twelve-month time period, and the Authority should find as follows:[10]

[10] To the extent the Final FCC Unbundling Rules require BellSouth to continue to provide DS1 or DS3 loops or transport and to the extent the Final FCC Unbundling Rules do not change the EELs eligibility criteria, this issue would be relevant for the time period following the Final Unbundling Rules

The term "customer" as used in the FCC's EEL eligibility criteria should be defined as the end user of an EEL. The high capacity EEL eligibility criteria apply only to End User circuits since a loop is a component of the EEL and the FCC definition of a loop requires that it terminate to an "end-user" customer premises.

Q. WHAT IS BELLSOUTH'S RATIONALE FOR ITS POSITION?

A. Again, an EEL is a loop-transport combination as specified in paragraph 575 of the *TRO*. Defining a loop, the FCC stated, "Specifically, the local loop network element is a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an *end-user* customer premises." *TRO* at n. 620 (emphasis added). An EEL, therefore, must terminate to an end user's customer premises.

BellSouth understands that the Joint Petitioners' concern with this issue is that they believe BellSouth's definition would prohibit an ISP customer from being considered an end user. While ISP providers are not end users, as that term is typically used in the industry, BellSouth has agreed to include language specifically stating that the Joint Petitioners may use loops, and therefore EELs to serve ISP customers. Additionally, BellSouth has proposed language to clarify that the EEL eligibility criteria apply to the use of EELs for both wholesale and retail purposes. With the concessions that BellSouth has made to the Joint Petitioners on this language, BellSouth is unsure why the Joint Petitioners are unwilling to resolve it.

Item 51; Issue 2-33: (B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed? (Attachment 2, Sections 5.2.6, 5.2.6.1, 5.2.6.2, 5.2.6.2.1 & 5.2.6.2.3)

Q. WHAT IS BELLSOUTH'S POSITION ON ITEM 51B?

A. Because BellSouth is not obligated to provide new high-capacity EELs after the Interim Period and must maintain existing high-capacity EELs during the Transition Period (as set forth in Issues 111 and 112), this issue is only relevant during this twelve-month time period, and the Authority should find as follows:[11] BellSouth will provide notice to CLECs stating the cause upon which BellSouth rests its allegations of noncompliance with the service eligibility criteria at least 30 calendar days prior to the date of the audit.

Q. WHAT IS BELLSOUTH'S POSITION ON ISSUE 51C?

A. The audit shall be conducted by an independent auditor and the auditor must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA). The auditor will perform an "examination engagement" and issue an opinion regarding the

[11] To the extent the Final FCC Unbundling Rules require BellSouth to continue to provide DS1 or DS3 loops or transport and to the extent the Final FCC Unbundling Rules do not change the EELs eligibility criteria, this issue would be relevant for the time period following the Final Unbundling Rules

CLEC's compliance with the qualifying service eligibility criteria. The independent auditor's report will conclude whether the CLEC has complied in all material respects with the applicable service eligibility criteria. Consistent with standard auditing practices, such audits require compliance testing designed by the independent auditor, which typically include an examination of a sample selected in accordance with the independent auditor's judgment.

BellSouth will select the auditor. As paragraph 627 of the *TRO* states, "In particular, we conclude that incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." (emphasis added). Paragraph 627 goes on to describe the situation in which the CLEC would be responsible for the cost of the audit.

Q. THE PETITIONERS' PROPOSED LANGUAGE ATTEMPTS TO ADD ADDITIONAL REQUIREMENTS. PLEASE RESPOND.

A. The Petitioners language attempts to add four requirements: 1) a third-party, mutually agreed-upon auditor; 2) a mutually agreeable location and timeframe; 3) "other requirements" for establishing the independence of the auditor; and, 4) a redefinition of "materiality." None of these supposed requirements appear in the *TRO*.

Q. PLEASE ADDRESS EACH OF THE PETITIONERS' ADDITIONAL REQUIREMENTS.

A. First, I address the Petitioners' request for a "third-party, mutually agreed-upon auditor." Next, because they are interrelated, I address as a group the "other requirements" for establishing the independence of the auditor. At Section 5.2.6.2, the Petitioners' proposed language advocates a third-party, mutually agreed upon auditor. This is a pointless step designed only as a delaying tactic Because the *TRO* requires, and the parties agree, that the audit should be conducted according to AICPA standards, neither the specific auditor nor the independence of the auditor should be a factor. AICPA standards govern each of these areas. No other requirements are needed. If a CLEC is abusing the service eligibility requirements, these objections provide a simple path to delay the audit indefinitely.

Second, the Petitioners also call for a mutually agreeable location and timeframe. Again, these provide convenient "outs" for the CLEC to delay an audit, and BellSouth should not be required to expend the resources to force an audit to which it has an unqualified annual right. In addition, the AICPA standards provide widely agreed upon and used procedures for conducting audits. Further specifications here are pointless.

Finally, the Miriam-Webster Online Dictionary (http://www.miriamwebster.com/cgi-bin/dictionary) defines "comply" as, "to conform or adapt one's actions to another's wishes, to a rule, or to necessity" and "material" as, "having real importance or great consequences." So, read another way, the FCC said the auditor "will conclude whether the competitive LEC [has conformed to the rule] in all [important] respects ..." *TRO* at ¶ 626. The CLEC will have either conformed to the rules in all the important respects

or it will not. The Petitioners' proposal would rewrite the FCC's statement in a way that simply doesn't make sense. It would state that if some non-compliance is found, the auditor "will conclude [the extent to which] the competitive LEC [has conformed to the rule] in all [important] respects ..." *Id.*

Item 57; Issue 2-39: (A) Should the parties be obligated to perform CNAM queries and pass such information on all calls exchanged between them, including cases that would require the party providing the information to query a third party database provider? (B) If so, which party should bear the cost? (Attachment 2, Section 7.4)

Q. WHAT IS BELLSOUTH'S POSITION ON ITEM 57A?

A. First, this issue (including all subparts) is not appropriate for arbitration in this proceeding because it involves a request by the Petitioners that is not encompassed within BellSouth's obligations pursuant to Section 251 of the 1996 Act. BellSouth is only legally obligated to provide access to its CNAM database as required by the FCC. There is no legal obligation on either Party's part to query other such databases. If BellSouth does query a third party database, it will only be done pursuant to a separate agreement. If BellSouth terminates an agreement with a third party provider, BellSouth will provide notice to CLECs via a Carrier Notification Letter. Importantly, CLECs will be provided with the same Caller ID information that BellSouth provides to its retail customers. If BellSouth no longer queries a third party database for CNAM information, BellSouth's retail customers are impacted as well as

CLECs.

Q. WHAT IS BELLSOUTH'S POSITION ON ITEM 57B?

A. If BellSouth elects to perform this function for the CLECs, it should be pursuant to separately negotiated rates, terms and conditions. Again, this request is not appropriately raised as an issue in a section 251 arbitration.

Item 63; Issue 3-4: Under what terms should CLEC be obligated to reimburse BellSouth for amounts BellSouth pays to third party carriers that terminate BellSouth transited/CLEC originated traffic? (Attachment 3, Sections 10.10.6 – KMC; 10.8.6 – NSC & NVX; 10.13.5 – XSP)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Both BellSouth and the Petitioners appear to agree that the CLECs should reimburse BellSouth for third party charges when such charges are covered by the agreement between BellSouth and the terminating carrier. However, BellSouth's position is that there may be instances where the CLECs need to pay third party charges for which there are no specific obligations in the agreement. In the event that a terminating third party carrier imposes on BellSouth any charges or costs for the delivery of Transit Traffic originated by a CLEC, the CLEC should reimburse BellSouth for all charges paid by BellSouth.

Q. PLEASE PROVIDE THE RATIONALE FOR BELLSOUTH'S POSITION.

A. In instances where a CLEC originates a call and BellSouth, as the transit provider, delivers that call to an Independent Company ("ICO"), certain ICOs charge BellSouth terminating access even though BellSouth is not the toll provider for the originating CLEC's end user and is not receiving toll revenue from that end user. Some ICOs have "Primary Carrier Plan" agreements with BellSouth for jointly provided intraLATA toll services, which were executed prior to the 1996 Act and, thus, do not address transit traffic because none existed at that time. BellSouth has attempted to renegotiate these agreements and, in some cases, BellSouth has requested that the ICOs cease billing BellSouth for such traffic because "transit traffic" is not covered by the agreement between the ICO and BellSouth.

Q. PLEASE EXPLAIN WHY BELLSOUTH IS NOT REQUIRED TO ACT AS A TRANSIT SERVICES PROVIDER FOR CLECS OR ANY OTHER CARRIERS.

A. Although BellSouth clearly has an obligation to interconnect with other carriers under section 251(c)(2) of the 1996 Act, it is BellSouth's position that ILECs do not have a duty to provide transit services for other carriers Indeed, in its *Virginia Opinion and Order*[12] released July 17, 2002, the FCC supported

[12] See *In the Matter of Petition of WorldCom, Inc Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc, and for Expedited Arbitration,* CC Docket No 00-218, *In the Matter of Petition of Cox Virginia Telecom, Inc Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State*

BellSouth's position by stating as follows:

> We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.

Id. at ¶ 117 (emphasis added).

Although the FCC made a similar finding at ¶ 119 of the *Virginia Opinion and Order* regarding WorldCom, the FCC made an additional finding regarding Verizon's duty to serve as a billing intermediary, stating as follows:

> WorldCom's proposal would also require Verizon to serve as a billing intermediary between WorldCom and third-party carriers with which it exchanges traffic transiting Verizon's network. We cannot find any clear precedent or Commission rule requiring Verizon to perform such a function. Although WorldCom states

---

Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Arbitration, CC Docket No 00-249, and *In the Matter of Petition of AT&T Communications of Virginia Inc Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc* CC Docket No 00-251 Memorandum Opinion and Order dated July 17, 2002 (*Virginia Opinion and Order*)

> that Verizon has provided such a function in the past, this alone cannot create a continuing duty for Verizon to serve as a billing intermediary for the petitioners' transit traffic. We are not persuaded by WorldCom's arguments that Verizon should incur the burdens of negotiating interconnection and compensation arrangements with third-party carriers. Instead, we agree with Verizon that interconnection and reciprocal compensation are the duties of all local exchange carriers, including competitive entrants.

Id. at ¶ 119.

Consistent with the 1996 Act and the FCC's *Virginia Opinion and Order*, BellSouth is only willing to agree to provide a transiting function where it can recover its costs for the use of its network in switching and transporting the CLEC's traffic, and where BellSouth is not responsible for any compensation to the terminating carrier.

Q. HAS A SIMILAR ISSUE ARISEN IN TENNESSEE WITH RESPECT TO COMMERCIAL MOBILE RADIO SERVICE ("CMRS") PROVIDERS?

A. Yes. BellSouth has been forced to litigate regarding the payment of charges for the ICOs' terminating CMRS-originated transit traffic under a similar situation in Tennessee. Traffic originated by CLECs that transits BellSouth's network creates the same issues as that originated by CMRS providers. Indeed, in its *Order Denying Motion*[13] dated April 12, 2004, the Authority found that BellSouth is not a necessary and indispensable party to the arbitration because:

[13] See *Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless, etc* , Consolidated Docket No 03-00585 *Order Denying Motion*, 04/12/04, pp 7-8

> [w]hether the exchange of traffic between two such carriers is direct or indirect via the BellSouth network, explicit in federal law is the duty of each Coalition member to each CMRS provider, as the requesting carrier, to arrange for reciprocal compensation. To this end, federal law imposes no compensation obligations on any third party, including BellSouth over whose network the traffic is being exchanged.

BellSouth is not the originating carrier for this transit traffic; therefore there is no basis to hold BellSouth responsible for charges for termination of such traffic. However, because the ICOs have not yet executed agreements with the originating carriers, the ICOs have taken the position that BellSouth must pay for termination of the traffic transited by BellSouth. While BellSouth believes the ICOs' position to be inconsistent with the 1996 Act, BellSouth is aware that the ICOs have raised these claims, at least with respect to CMRS providers, and that they have not yet been finally resolved.

Consequently, BellSouth is aware of this issue with the ICOs, and BellSouth must ensure that its new contracts protect it against being drawn into the middle of a dispute between the ICOs and any carrier sending traffic to the ICOs' end users over BellSouth's network. Such protection ensures that BellSouth will not be financially penalized for its good business practice of delivering – not blocking – transit traffic. It is the responsibility of each carrier, pursuant to Section 251(a) of the Act, to interconnect directly or indirectly with all other carriers. The CLECs certainly may opt to interconnect with the ICOs indirectly if an intermediary carrier, such as BellSouth, is

willing to provide transiting functions. However, it is still the obligation of the originating carrier to make arrangements with the terminating carrier with respect to delivery of and compensation for such transit traffic. BellSouth is unwilling to provide a transit function and to accept the financial obligation of compensating the terminating carrier. Such an outcome is not required by the 1996 Act, and is clearly contrary to reasonable business practices. Furthermore, although it has been suggested that BellSouth should simply refuse to pay ICOs for such traffic, this solution is not reasonable.

Q. DOES BELLSOUTH REVIEW AND DISPUTE THIRD PARTY BILLS IN THE SAME MANNER THAT IT REVIEWS AND DISPUTES BILLS FOR ITS OWN TRAFFIC FROM THE SAME PARTY?

A. Yes. BellSouth reviews, disputes and pays third party invoices in a manner that is at parity with its own practices for reviewing, disputing and paying such invoices. If BellSouth believes the ICO has inappropriately billed BellSouth for calls, BellSouth will dispute such charges and seek reimbursement from the ICO. BellSouth does review, dispute and pay ICO bills for the CLECs' transit traffic in the same manner as it does for its own traffic in Tennessee. However, by insisting that BellSouth be responsible for disputing bills of all ICOs for all CLEC and CMRS transit traffic, the CLECs are attempting to impose on BellSouth the obligation to become embroiled in the middle of disputes between CLECs and ICOs – disputes that would never occur if the CLECs would make arrangements with terminating ICOs for termination of the CLEC originated traffic, as the 1996 Act requires.

Item 65; Issue 3-6: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic? (Attachment 3, Sections 10.10.1 – KMC; 10.8.1 – NSC; 10.13 - XSP)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. First, BellSouth is not required to provide a transit traffic function because it is not a Section 251 obligation under the 1996 Act. Therefore, should BellSouth agree to provide the transit traffic function, it should be at rates, terms and conditions contained in a separately negotiated agreement. However, if BellSouth agrees to include this function in its Agreement, that fact should not be used to penalize BellSouth and impose rates for a service that, pursuant to a separate agreement, the Authority would not even be privy to. BellSouth should be able to impose upon a CLEC a Tandem Intermediary Charge for local transit and ISP-bound transit traffic because BellSouth: (1) is not obligated to provide the transit function to a CLEC; and (2) the CLEC has the ability, and, indeed, the right pursuant to Sections 251(a) & (b) of the 1996 Act, to request direct interconnection to other carriers. Interestingly, many CLECs use the transit function because they find it more efficient and economical than direct trunking. However, they want this more efficient, more economical alternative at a cheaper rate, like TELRIC, or at no rate at all. Additionally, BellSouth incurs costs beyond those for which the Authority ordered TELRIC rates were designed to address, such as the costs of sending

records to the CLECs identifying the originating carrier. BellSouth does not currently charge the CLECs for these records and does not recover those costs in any other form.

Q. DOES THIS CONCLUDE YOUR SUPPLEMENTAL DIRECT TESTIMONY?

A. Yes.