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**BEFORE THE**
**TENNESSEE REGULATORY AUTHORITY**

2005 APR 15 PM 1:55

**Docket No. 04-00046**

T.R.A. DOCKET ROOM

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| In the Matter of | ) | |
| | ) | |
| Joint Petition for Arbitration of NewSouth | ) | **JOINT PETITIONERS'** |
| Communications Corp., *et al.* with | ) | **POST-HEARING BRIEF** |
| BellSouth Telecommunications, Inc. | ) | |


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## INTRODUCTION

Joint Petitioners' aim in this arbitration, as well as negotiations, is to obtain an Interconnection Agreement ("Agreement") that comports with prevailing law and preserves the rights already guaranteed to them by the Federal Communications Commission ("FCC") and the Tennessee Regulatory Authority ("Authority"). Throughout this case, Joint Petitioners have stressed several common themes. We want the Agreement to reflect, in each arbitrated provision, the law that governs it, whether it is a question of general contracts liability or the FCC's commingling obligation. We also want provisions that are reasonable, fair, and less likely to lead to disputes and litigation. We seek to avoid provisions that are lopsided on their face or in their application. Given that this Agreement will be in place until at least 2009, Joint Petitioners believe that it is important to get all of this right.

Prevailing law lies in favor of the Joint Petitioners for many items. These items include Item 51, in which Joint Petitioners want language that ensures that audits are conducted in accordance with the FCC's "for cause" standard. In Item 12, prevailing law dictates that laws of general applicability existing at the time of contracting are deemed incorporated into this Agreement in the absence of an express exception or conflicting terms. In Item 9, Joint Petitioners seek to preserve their right to avail themselves of dispute resolution before any court of competent jurisdiction, without having to seek BellSouth's permission, in addition to preserving their right to seek dispute resolution at the Authority and at the FCC. In Item 26, Joint Petitioners wish to preserve the commingling rights already established by the FCC in Rule 51.309. And in Items 36 to 38, Joint Petitioners wish to incorporate, expressly, the FCC's rules on Line Conditioning, which require BellSouth to perform the work necessary, if requested, to ensure that a loop is free of accreted devices and to do so at TELRIC-compliant rates.

Other Items regard BellSouth's attempt to extract non-TELRIC charges from Joint Petitioners that are plainly usurious and bear no relation to costs. Here, too, prevailing law is on the side of the Joint Petitioners. First, Item 88 regards BellSouth's proposed Service Date Advancement ("expedite") fee of $200 per circuit, per day for loop and transport UNEs — BellSouth has provided no information whatsoever about the costs it seeks to recover with this charge, which must be set at TELRIC consistent with the FCC's UNE pricing rules. Second, in Item 65, BellSouth asks for the first time that Joint Petitioners pay a Transit Intermediary Charge or "TIC" for transiting traffic on its network — in addition to the Authority-approved TELRIC tandem switching and common transport charges that Petitioners have long paid to BellSouth. These items represent clear instances of BellSouth's desire to demand monopoly rents from Petitioners and artificially boost its revenues at their expense. These charges therefore violate the bedrock concepts of parity and cost-based network access that Congress established in the 1996 Act and that is reflected in the FCC's unbundling and TELRIC pricing rules.

BellSouth has attempted to rewrite the FCC's rules in its own image, and that attempt must be rejected. The law in these areas is clear, and Joint Petitioners are not willing to adopt BellSouth's improperly limited view of what the law requires.

Joint Petitioners also request that the terms in this Agreement related to liability be more in keeping with generally applicable principles of contracting. In the past, BellSouth has imposed all risk associated with BellSouth negligence on CLECs. Joint Petitioners, embarking on what is a "third-generation" agreement nine years after enactment of the 1996 Act, wish to correct this imbalance. For example, in Item 4, Joint Petitioners wish to replace BellSouth's "elimination of liability" language with a provision that entitles a modest and incremental measure of relief — up to a 7.5% cap based on billed revenue — when one party's negligence causes the other to incur damages. Similarly, in Item 7, Joint Petitioners seek indemnification language that provides coverage to a party — again up to a 7.5% cap for negligence but with no cap for acts of willful misconduct or gross negligence — when it is found liable based on the negligence of the other party. In Item 5, Joint Petitioners seek language that will not force them to mirror the liability language in BellSouth's own tariffs, on pain of incurring the penalty of incurring additional indemnification obligations. In a competitive marketplace, Joint Petitioners expect that they will continue to, and must be able to, negotiate commercially reasonable limitation-of-liability provisions that depart in some respects from the legacy language that is found in BellSouth's tariff (but may not be in its own custom service agreements). Finally, in Item 6, Joint Petitioners wish to ensure that the definition of "indirect, incidental and consequential" damages comports with relevant legal precedent and statutory definitions in Tennessee, in order that no entity is deprived of relief when BellSouth or Joint Petitioners cause direct and reasonably foreseeable damages through their negligence or willful misconduct. Simply put, for Items 4, 5, 6 and 7, Joint Petitioners do not want to be "left holding the bag" when BellSouth's own negligence causes injury.

Finally, several items in this arbitration deal with BellSouth's insistence that it must retain the discretion to coerce with threats, or actually claim a right, to terminate all services to Joint Petitioners and their customers in Tennessee. In Item 86, BellSouth wants the unilateral right to terminate service to a Joint Petitioner – and all of its Tennessee customers — if it suspects that the Petitioner has obtained unauthorized access to customer service record ("CSR") information and it is somehow unsatisfied with a Petitioner's response to such allegations. In

Item 100, rather than simply setting forth the amount due to avoid suspension or termination, BellSouth seeks language entitling it to pull-the-plug on Joint Petitioners if they fail to calculate properly, time posting of disputes and receipt of payment of all amounts owed (on a thousand or more bills that could fill a good size truck if printed) to BellSouth that become past due in a designated timeframe. In Item 103, BellSouth requests the right to terminate service to Joint Petitioners if they do not capitulate and remit the deposit amount demanded of them — even if that amount is subject to legitimate dispute — within 30 days. And in the closely related Item 104, BellSouth seeks the right to terminate service to Joint Petitioners for failure to provide a requested deposit unless Joint Petitioners first file complaints with this Authority (and up to eight others) ***and*** post a bond for half the requested amount — even when that amount is subject to legitimate dispute (and even if all invoiced amounts have been paid). None of these circumstances warrant giving BellSouth discretion to pull the plug or to even threaten to do so. Indeed, the ability to impose such a remedy must be granted sparingly and with terms that eliminate the potential for error and preserve the resolution of disputes by qualified independent decision makers, such as the Authority.

## STANDARD OF REVIEW AND STATEMENT OF JURISDICTION

The 1996 Act empowers the Authority to arbitrate interconnection agreements on the petition of one party. 47 U.S.C. § 252(b)(1). The Authority has jurisdiction over every issue raised in the petition. *Id.* § 252(b)(4)(A). These issues may not always relate directly to a Section 252 obligation, but rather may include any term or condition that the parties had attempted to negotiate. *Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 487 (5th Cir. 2003) ("If the voluntary negotiations result in only a partial agreement, or in no agreement at all, either party can petition for compulsory arbitration of any open issue"). In addition, the Authority has jurisdiction over disputes regarding terms and conditions necessary for implementing or performing the agreement, including liability-related terms and enforcement mechanisms. 47 U.S.C. § 252(b)(4)(C) (state commission may "impos[e] appropriate conditions as required to implement subsection [251] (c)"); *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) ("Clearly, enforcement and compensation provisions, including the liquidated damages provision desired by MCI, fall within the realm of 'conditions ... required to implement' the agreement.").

In resolving the disputed items of this arbitration, the Authority must ensure that the outcome meets "the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(c)(1). The Authority also has jurisdiction to review any rates proposed within the arbitration. *Id.* § 252(c)(2). Finally, the Authority shall ensure that the resulting agreement "provide[s] a schedule for implementation of the terms and conditions." *Id.* § 252(c)(4).

## I. THE AGREEMENT MUST PRESERVE JOINT PETITIONERS' RIGHTS UNDER APPLICABLE FEDERAL AND STATE LAW

Several of the items before the Authority involve Joint Petitioners' request to avail themselves of, or preserve, legal rights and network facilities already provided to them. These items are:

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| **Item 2** | The right to serve customers of Petitioners' choice. |
| **Item 9** | The right to seek dispute resolution in a court of law. |
| **Item 12** | The right to rely on relevant applicable law unless expressly agreed otherwise. |
| **Item 26** | The right to commingle and to obtain commingled circuits in accordance with FCC Rules. |
| **Item 36** | The right to obtain line conditioning in accordance with FCC Rules. |
| **Item 37** | The right to request removal of load coils from loops at Authority-approved TELRIC-compliant rates. |
| **Item 38** | The right to request removal of bridged taps from loops at Authority-approved TELRIC-compliant rates. |
| **Item 51** | The right to insist that the FCC's "for cause" auditing standard be given proper meaning. |
| **Item 65** | The right to continued access to BellSouth's transiting service at Authority-approved TELRIC-compliant rates and without imposition of a Transit/Tandem Intermediary Charge ("TIC") that is not Authority-approved and TELRIC-compliant, and does not recover any identified or legitimate BellSouth costs. |
| **Item 88** | The right to obtain Service Date Advancements (a/k/a "expedites") on UNEs at Authority-approved TELRIC-compliant rates.[1] |

[1] The Authority also heard evidence at the hearing regarding Item 23 — "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?" The Parties have since filed, on April 14, a joint motion to move this issue to the Authority's Generic proceeding, Docket No. 04-00381, *Petition to Establish Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*. Accordingly, Joint Petitioners do not discuss Item

The language that Joint Petitioners have proposed for these items simply effectuates existing law. For example, Georgia law, which the parties have already agreed will govern the Agreement, provides that the laws and regulations in effect at time of contracting must be deemed incorporated into the contract absent an express exclusion or other contract language that conflicts with and thereby displaces the requirements set forth in applicable law. Petitioners' language for that section of the Agreement — Section 32.2 of the General Terms and Conditions — simply expresses this principle. Consistent with governing Georgia law and fundamental principles of contracting, Joint Petitioners negotiated based on the premise that exclusions from or an intent to displace relevant requirements of applicable law – including substantive telecommunications law – would need to be bargained for and would not be implied. Likewise, FCC Rule 51.319(a) includes a provision that ILECs must remove accreted devices from copper UNE loops at the request of a CLEC; it includes no caveats or limitations. FCC Rule 51.319(a) also requires that line conditioning and other section 251(c) unbundling obligations be performed at Authority-approved-TELRIC-compliant rates. Accordingly, Petitioners' proposed language for Sections 2.12.1 through 2.12.4 of Attachment 2 incorporates these obligations. In rejecting Joint Petitioners' language on these items, BellSouth is simply refusing to comply with federal law. The standard under which this Authority must approve arbitrated interconnection agreements, 47 U.S.C. § 252(c), does not permit the Authority to grant BellSouth any of the full array of exceptions it seeks.

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

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23 in this brief. In the event that the Authority denies the Parties' motion, Joint Petitioners respectfully reserve the right to submit supplemental briefing in this arbitration regarding Item 23.

**The 1996 Act Entitles Joint Petitioners to Use UNEs to Serve Customers of Their Choice, Including Wholesale Customers.**

The term "End User" should be defined in a manner that enables Joint Petitioners to serve the broadest legally permissible possible spectrum of customers. Accordingly, Joint Petitioners' proposed language for Section 1.7 of the General Terms and Conditions states that "End User means the customer of a Party." Exh. A at 1.[2]

At the outset, Joint Petitioners wish to make clear that they intend to use all UNEs in accordance with the applicable guidelines set forth by the FCC. Thus, to the extent that eligibility requirements apply, such as EEL restrictions, Joint Petitioners will comport with them. This point has been clear from the beginning — Joint Petitioners' Direct Testimony states that they will "comply with the contractual provisions regarding resale, UNEs and Other Service (defined in Attachment 2)." Joint Petitioners' Supplemental Direct Testimony at 20:11-14 (Oct. 29, 2004) ("JP Suppl. Direct Test."). In addition, at hearing, Ms. Johnson affirmed that "we're not purporting to request to use UNEs for any use other than what the law provides." Tr. at 189:5-6. Although certain aspects of Attachment 2 need to be re-negotiated as part of the parties' efforts to implement the changes of law adopted by the FCC in the *Triennial Review Remand Order* ("*TRRO*") (or, pursuant to section 252(a)(1), to negotiate terms without reference to those requirements), Joint Petitioners will agree to incorporate *TRRO* changes of law, to the extent that they are unable to negotiate alternative arrangements with BellSouth. Notably, the

2 Joint Petitioners have attached the latest version of Joint Petitioners' Exhibit A, which is the document that sets forth by issue all disputed language corresponding to each Matrix Item, to this brief and file it, with BellSouth's consent as to the representations of its language proposals, contemporaneously with the Authority. The parties have engaged in substantial negotiations since the hearing and thus have amended much of their proposed language on several Items to either reflect partial agreement or to make the basis of disagreement more clear.

relevant changes impact how CLECs can use UNEs and not which customers CLECs can serve. *TRRO* ¶ 34 (prohibiting use of UNEs for long distance and wireless services); 47 C.F.R. § 51.309(b) (as amended) (prohibiting same). There can be no legitimate argument that Joint Petitioners are attempting to define "End User" in a manner that would enable them to violate federal unbundling laws.

BellSouth's initial proposed definition of End User was "the ultimate user of the Telecommunications Service." This language necessitated dizzying colloquies on what was an "ultimate" user. Moreover, it was so restrictive as to preclude Joint Petitioners from serving entities — *existing customers* — that were patently the consumers of telecommunications service yet likely failed BellSouth's "ultimate user" test. For example, BellSouth is aware that Petitioner NuVox provides universities with telecommunications services that they provide to their students. Tr. at 748:14-22 (Blake). Under this arrangement, the university pays for the services but its students are actually using the phone. These are among the types of arrangements that Joint Petitioners must have the flexibility to provide through the lawful use of UNEs.

Under BellSouth's "ultimate user" language that flexibility was precluded. Indeed, that language was so vague and badly explained that it was unclear which entities Joint Petitioners would have been able to serve at all. At hearing, BellSouth corporate witness Kathy Blake was not able to state that NuVox's whether service would be prohibited:

> Q. What about universities? You've been present during some testimony when Mr. Russell, for example, explained that NuVox serves some universities. * * * **In that case, is the university not the ultimate user of telecommunications service?**
>
> A. **It could be.** * * * We're not trying to prevent or limit how the joint petitioners can use UNEs and UNE combinations. We want to make sure they're using them consistent with the rules

> of the FCC of how a loop can terminate. * * * If that university is the joint petitioner's customer end user of that service, whether they terminate it to the dorm or that's ultimately provided there, they're the customer or end user.
>
> Q. So the university has to be both our customer and our end user?
>
> A. If you're providing a UNE loop to that university, **that loop would need to terminate at that end user customer premises.**

Tr. at 748:14 – 749:14. In other words, BellSouth's corporate witness for Item 2 could not explain the application of the definition of "End User" it proposed, but expected Joint Petitioners to figure that out and abide by it. Moreover, Ms. Blake's pre-filed direct testimony, and her subsequent abandonment of it at the hearing, make it clear that BellSouth indeed had intended to use its proposed definition to restrict Joint Petitioners' lawful rights to use UNEs. That is, in her Supplemental Direct Testimony filed October 29, 2004, Ms. Blake was adamant that an End User could not be "any customer," yet at hearing she testified that "[w]e're not trying to prevent or limit how the joint petitioners can use UNEs and UNE combinations." Tr. at 748:25 – 749:2. Joint Petitioners have no confidence from Ms. Blake's befuddling testimony that BellSouth would permit them to use UNEs in the manner in which they are entitled.

BellSouth has recently revised its "End User" definition twice. The most recent proposal ***contains three different definitions***. BellSouth defines three terms: "End User"; "Customer"; and "end user."[3]

An "End User" is

[3] It is curious for BellSouth to propose that an uncapitalized term should nonetheless be a defined term. This proposal now raises the possibility that any uncapitalized term should be given a definition, and calls into question whether the parties may continue to rely on the principle that undefined terms in a contract should be given their common and ordinary meaning.

> [T]he retail customer of a Telecommunications Service, excluding ISPs/ESPs, and does not include Telecommunications carriers such as CLECs, ICOs and IXCs.

A "Customer" is

> [T]he wholesale customer of a Telecommunications Service that may be an ISP/ESP, CLEC, ICO or IXC.

Finally an "end user" (lower case)

> [M]eans the End User or any other retail customer of a Telecommunications Service, including ISPs/ESPs, CLECs, ICOs and IXCs, that are provided the retail Telecommunications Service for the exclusive use of the personnel employed by ISPs/ESPs, CLECs, ICOs and IXCs, such as the administrative business lines used by the ISPs/ESPs, CLECs, ICOs and IXCs at their business locations, where such ISPs/ESPs, CLECs, ICOs and IXCs are treated as End Users.

Exh. A at 1.[4] This new definition — or set of definitions — is unacceptable for two reasons. First, on their face they contain restrictions that are in contravention of FCC rules, particularly in the fact that it designates "retail service" as the category of permissible service. Second, they are extremely, and unnecessarily, complex, thus rendering the Agreement — dozens of whose terms rest on this definition (or definitions) — unclear. The most notable deficiency is that the purported definition of "end user" contains the term "End User" twice, which likely creates a mere tautology. Further, this language appears to list specific entities that Petitioners are allowed to serve under the Agreement, creating the risk that the list is underinclusive and accordingly limits Petitioners' choice of customer. At a minimum, the complexity and detail of this proposed definition requires close analysis of every use of the terms "End User" and "end user"

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4 BellSouth proposed this language on Wednesday, March 31. Previously, its proposal was "End User means the retail customer of a Telecommunications Service, excluding ISPs/ESPs, and does not include Telecommunications carriers such as CLECs, ICOs, and IXCs." Along with its latest proposal, BellSouth proposes definitions for a new term "end user" "Customer." These additional new definition proposals have not been agreed to and are not subject to this arbitration.

throughout its 500 pages in order to ensure that BellSouth's complex verbiage makes sense in every context.[5] Joint Petitioners' definition, being very clear and easily applied, should therefore be adopted.

BellSouth's newly proposed definition continues to have the potential to limit the manner in which Petitioners use UNEs. ILEC-imposed use restrictions on UNEs are unlawful, with the exception of the local-service requirements for EELs. From the inception of unbundling, the FCC has held that UNEs may be used by CLECs without limitation. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 14599, 15679 ¶ 356 (1996) ("*Local Competition First Report and Order*"). In 1996, the question centered on whether CLECs may use UNEs to provide interexchange service; the FCC held that the "plain meaning" of Section 251 —"carriers may seek access to unbundled elements to provide a 'telecommunications service'" — requires that CLECs be able to do so. *Id.* (quoting 47 U.S.C. § 251(c)(3)). "There is no statutory basis upon which we could reach a different conclusion." *Id.* FCC Rule 51.309 codifies that holding, stating that an ILEC "shall not impose limitations, restrictions or requirements on requests for, or the use of, unbundled network elements." 47 C.F.R. § 51.309(a). That same rationale requires that Joint Petitioners be permitted to choose their customers and serve them with facilities obtained under this Agreement.

BellSouth's contrary argument seems to be placed in the notion of "qualifying services." BellSouth witness Kathy Blake's prefiled testimony on Item 2 argued that "[t]he issue is not who

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5 Joint Petitioners actually had commenced such a process with BellSouth with respect to earlier revised definition proposed by BellSouth. The subsequent change proposed has created the need to restart the process from scratch. Joint Petitioners, however, remain committed to negotiations and will continue to work with BellSouth in an effort to settle this and other issues.

CLECs serve, but rather what service qualifies for UNEs and UNE prices." Kathy Blake Rebuttal Testimony at 21:11-12 (Nov. 19, 2004) ("Blake Rebuttal Test."). When asked during her deposition what this statement means, Ms. Blake answered "[y]ou have to be able to use — **to provide the qualifying service** ... so the standards or the ability to — for a CLEC to use a UNE to provide service is set forth on how UNEs can be used and why." Deposition of Kathy Blake, Transcript at 228:16-23 (Dec. 8, 2004) (emphasis added). Although unclear, it seems that BellSouth's definition relies on "qualifying services" restrictions for support.

The D.C. Circuit Court of Appeals vacated the "qualifying services" restrictions. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 594 (D.C. Cir. 2004) ("*USTA II*"). The FCC's *Triennial Review Order* ("*TRO*"), had included these restrictions, seeking to limit the use of UNEs to "telecommunications services offered by requesting carriers in competition with" ILEC services. *TRO* ¶ 140. The D.C. Circuit found this concept to be out of keeping with the mandate of Section 251 as to what is a "telecommunications service." The Court therefore held that "[w]e vacate the Commission's distinction between qualifying and non-qualifying services." 359 F.3d at 594.[6] Accordingly, BellSouth has no justification for its proposed definition of "End User," which seems to suggest or could be used in a manner so as to suggest that UNEs could not be used to serve certain types of customers or an entire class of customers: wholesale customers. Although BellSouth has expressed an intention not to use its definition in such a manner, Joint Petitioners have little comfort that present assurances will not dissipate next week or next year.

Nor does BellSouth's definition make practical sense. As Ms. Blake noted, the term End User is used hundreds of times throughout the Agreement, and thus BellSouth's proposed definition must be applied and analyzed *for each use* in order to determine whether any

6 The Court remanded, but did not vacate, the restrictions on use of EELs. *Id.*

discrepancies or confusion will arise from its use in any given context. In such cases, the use of alternative terms, such as end user or customer, must be negotiated. Although this type of unneeded complexity should be avoided in any contract, and especially in this Agreement that by its nature is already complex, Joint Petitioners are reviewing BellSouth's proposals in this regard.

Joint Petitioners' definition that an End User is the "customer of a party" is clear, direct, easily applied, and comports with all relevant guidelines on how CLECs may use UNEs. Accordingly, the Authority should adopt this definition for Section 1.2 of the General Terms and Conditions.

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| *Item No. 9, Issue No. G-9 [Section 13.1]: Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the Interconnection Agreement?* |

**<u>Joint Petitioners Should Not Be Forced to Contract Away Their Legal Right to Go to Court.</u>**

The right to resolve disputes in a court of law belongs to everyone. Joint Petitioners are unwilling to give up that right, and they should not be forced to do so. Moreover, this Authority should decline BellSouth's invitation to strip federal and state courts of jurisdiction in any respect, as it is unlikely that the Authority may lawfully do so.

Joint Petitioners' existing agreements afford them the right to go to court, as BellSouth concedes. Tr. at 837:15-21 (Blake) (though she is "not certain it's in all of them"). BellSouth's proposed language curtails that right, permitting the parties to go to court only "for such matters which lie outside the jurisdiction or expertise of the Authority or FCC." Exh. A at 5-6. Thus, prior to filing any action, the parties must agree on the forum. *Id.* If the parties cannot reach agreement on the forum, BellSouth's language would force the parties to come to either this Authority or the FCC to resolve a dispute over the appropriate dispute resolution forum. *Id. See also* Tr. at 842:11 - 843:8 (Blake) ("The parties would have to agree on whether it was obvious that neither the TRA nor the FCC had expertise or jurisdiction"). In so doing, BellSouth proposes to invent an entirely new layer of disputes and litigation that will needlessly consume the resources of the Joint Petitioners and the Authority. Tr. at 261:13-14 (Falvey) ("We simply don't need to create opportunities in this agreement for disputes over dispute resolution venues.").

Unbelievably, BellSouth maintains that its proposed language is not curtailing Petitioners' rights at all. Ms. Blake, despite agreeing that in the event of a forum dispute the parties "would have to come to the TRA," Tr. at 43:5-7, asserted that "I don't think we're precluding any rights for either party in this agreement." *Id.* at 845:13-15. Rather, the parties would undergo a forum selection "process that ***would work itself out***." *Id.* at 845:23-24 (emphasis added). Joint Petitioners are not willing to adopt language for this Agreement that "would work itself out." Moreover, it is by now undisputed that if BellSouth refuses, during that "process," to consent to a court's jurisdiction, a claim *must* be brought to a Commission.

In effect, BellSouth's language would deprive Joint Petitioners of their right to seek adjudication by a court of law. It is already clear that the parties do not agree on which forums are appropriate for dispute resolution, given that this issue was and continues to be submitted for arbitration. Thus, BellSouth's proposal gives itself the power to deny Joint Petitioners their day in court: all BellSouth needs to do is disagree and persist in that position. This result, obtained unilaterally by an interested party, even if it is in fact "standard,"[7] would not be fair or equitable.

Moreover, this result is unlawful. The jurisdiction of courts in this state is set by Article VI of the Tennessee Constitution, which provides that "[t]he judicial power of this State shall be vested in a Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall, from time to time, ordain and establish. TN Const. Art. VI § 1.[8] Tennessee courts of law in fact have supervisory power over this Authority. Tenn. Code Ann. § 65-4-121. Federal court jurisdiction is similarly secured by Article III of the United States Constitution. U.S. Const. Art. III § 1. Thus, the TRA does not have the authority to strip or impede in any way the jurisdiction of federal or Tennessee state courts. Because BellSouth's proposed language essentially asks the Authority to do that, it must be rejected.

Adjudication in a court of law may also, in certain circumstances, be more efficient. By in effect requiring disputes to be brought to a state commission such as the Authority or the FCC, BellSouth imposes the burden of "litigating before up to 9 different state commissions or to

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7 BellSouth's assertions regarding and reliance on what is "industry standard" is both self-serving and misplaced. According to BellSouth, when BellSouth makes a change to its "template" interconnection agreement, that modification immediately becomes "standard." Yet, when Joint Petitioners seek to negotiate a change to BellSouth's "template," BellSouth asserts that such efforts represent a sea change that contravenes "industry standards." BellSouth is not an industry standards-setting body and, for as long as there are wireline service competitors, it has no right to proclaim what is standard for anybody other than itself.

8 A bill is presently under consideration, SB 182/HB593, in the Tennessee legislature that would strip the Authority of jurisdiction to regulate several retail products and services. Another bill, SB 606/HB600, would eliminate the requirement to file off-tariff contracts with the Authority. BellSouth's legislative initiatives in other states suggest more of the same is in the offing here in Tennessee. This diminishing of the Authority's jurisdiction renders very real the possibility that Joint Petitioners may be faced with a situation where even this Authority will not be an available venue for dispute resolution. In light of BellSouth's legislative assault on this Authority and others, and based on a long history in which dispute resolution under interconnection agreements has been a difficult endeavor, Joint Petitioners' position is that no viable dispute resolution venue with innate jurisdiction should be proscribed or circumscribed in any way.

waiting for the FCC to decide whether it will or won't accept an enforcement role[.]" JP Suppl. Direct Test. at 36:14-15. Because of the delay and cost inherent in dispute resolution that involves up to 9 different regulatory body or an often reluctant and sometimes unwilling FCC, BellSouth "often is able to force carriers into heavily discounted, non-litigated settlements." *Id.* at 38:2. Mr. Falvey of Xspedius described his own actual experience with litigating unpaid reciprocal compensation — $25 million worth — against BellSouth. Though "[w]e won in AAA arbitration … we kept winning … 100 cents on the dollar plus charges past due," his company incurred significant costs in having to pursue that claim "in Georgia, a complaint in Florida … in Kentucky, [and in] a AAA arbitration that spanned three states, Alabama, South Carolina, and Louisiana." Deposition of James Falvey at 94:3-6, at 93:20-23 (Dec. 15, 2004). These costs can "bleed[] the new entrant dry." *Id.* at 94:23-24. Notably, BellSouth has refused proposals to include alternative dispute resolution in the Agreement.

BellSouth's professed worry regarding Joint Petitioners' language is that it may entitle a party "[t]o prematurely bring a dispute to a court of law" and "risk that the court will remand the case to the appropriate body." Blake Rebuttal Test. at 30:12-14. Primary jurisdiction referrals are no indication that a matter has been brought "prematurely" to a court and they are not akin to a "remand." Moreover, BellSouth's hollow concern does not entitle it to curtail, at the outset, Joint Petitioners' rights. It is not for BellSouth to rule *a priori* that Petitioners' claims cannot be heard in court. That is a matter to be determined by a court of law, were any claim to be filed. And the fact that, as BellSouth has stated, Joint Petitioners have not "exercised that right within their contract up to this point" (Tr. at 838:4-5 (Blake)) demonstrates that Petitioners are not overly litigious and do not raise frivolous claims. Moreover, it certainly does not constitute waiver of the right to go to court.

BellSouth's proposed language deprives both state and federal courts of the jurisdiction to hear certain disputes under the Agreement. With due respect, this Authority does not have authority to impose that result on Joint Petitioners, who seek to retain the right to take disputes to a court of competent jurisdiction. Accordingly, Joint Petitioners' proposed language for Section 13.1 of the General Terms and Conditions should be adopted for this Agreement.

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

**The Agreed-Upon Governing Law of the Agreement Is Clear that All Laws of General Application in Existence at the Time of Contracting Are Incorporated Unless Expressly Excluded or Displaced by Conflicting Requirements Negotiated by the Parties.**

Under Georgia law, which the Parties have already agreed will govern the Agreement (GT&C, Section 22.1), all laws of general applicability that exist at the time of contracting will apply to the contract unless expressly repudiated via an explicit exception or displaced by conflicting requirements. Joint Petitioners' proposed language for Section 32.2 of the General Terms and Conditions simply incorporates this principle into the Agreement.

As the parties have agreed to Georgia law as the governing body of law, it is important to recognize that the Supreme Court of Georgia has held that "[l]aws that exist at the time and place of the making of a contract, enter into and form a part of it ... and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter." *Magnetic Resonance Plus, Inc. v. Imaging Systems, Int'l*, 273 Ga. 525, 543 S.E.2d 32, 34-35 (2001). This holding comports with doctrine from the United States Supreme Court, which has held that "[l]aws which subsist at the time and place of the making of a contract ... **enter into and form a**

**part of it** …; this principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Farmers' & Merchants Bank of Monroe, N.C. v. Federal Res. Bank of Richmond*, 262 U.S. 649, 660 (1923) (emphasis added). And as the Court later held, "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if fully they have been incorporated in its terms[.]" *Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991) (holding post-merger rail company was exempt by statute from pre-existing collective bargaining agreement with labor union). Moreover, "[a] contract **has no legal force** apart from the law that acknowledges its binding character." *Id.* at 130 (emphasis added).

Parties are "**presumed to have contracted with reference to such laws.**" *Magnetic Resonance Plus*, 543 S.E.2d at 35. Due to this presumption, contracts are not deemed to exclude any tenet of applicable law unless done so expressly. A "contract may not be construed to contravene a rule of law." *Van Dyck v. Van Dyck*, 263 Ga. 161, 429 S.E.2d 914, 916 (1993). Parties have the right to waive or repudiate elements of applicable law, "however, these **must be expressly stated** in the contract." *Jenkins v. Morgan*, 100 Ga. App. 561, 112 S.E.2d 23, 24 (1959) (emphasis added). Stated differently, parties are "presumed to contract under existing laws, and no intent will be implied to the contrary unless so provided by the terms of their agreement." *Jenkins*, 100 Ga. App. at 562.

Not only is this principle a tenet of law, but it also makes practical sense. Parties to a contract — particularly this Agreement, which regards highly complex duties like interconnection and unbundling — could not be expected to expressly include all elements of generally applicable law into one contract. That contract would be tens of thousands of pages long. The FCC's *Local Competition First Report and Order* alone is more than 700 pages long.

The basic concept that silence implies incorporation and an affirmation of willingness to abide by the law is thus a means of ensuring that contracts are of manageable size.

BellSouth's oft-heard but hollow retort — "[i]f that's the case, why do we even need an interconnection agreement?" — is frivolous. As an initial matter, sections 251 and 252 of the Act require interconnection agreements to be approved by state commissions. There must be something in writing for the parties to file and for the Authority to approve. As a practical matter, additional language is often needed to implement legal requirements and processes may need to be agreed upon to ensure proper conduct and operations by the parties.

Moreover, the statute of frauds requires that this agreement be in writing. U.C.C. § 2-201(1) (sale of goods). Even laying the statute of frauds aside, however, this Agreement already contains concessions and express waivers of generally applicable law. For example, NuVox, Xspedius and KMC have, with BellSouth, voluntarily agreed in Attachment 3 to interconnection point and compensation terms that deviate from the requirements set forth in applicable law. *See, e.g.*, Attachment 3, Section 3.2.3, 3.3.2, 3.3.3, 10.1 (KMC); *id.* Section 3.3.2, 3.3.3, 10.1 (NuVox); *id.* Section 3.3.1, 3.3.2, 10.1 (Xspedius). These concessions in fact prove Joint Petitioners' point: parties can give up rights to which they are entitled if there is a clear bargain memorialized in the plain terms of the contract. Absent plain language setting forth an agreement to abide by standards other than those set forth in applicable law, no party should be deemed to have given up their rights. To find otherwise would be unlawful, grossly unfair and contrary to the public interest.

BellSouth's proposed language for Section 32.2 of the General Terms and Conditions is both contrary to prevailing law and unfair. BellSouth initially proposed that if Joint Petitioners contend that an element of existing law applies to the Agreement, they must request a ruling of the Authority to that effect. If the Authority agreed that the element of law in fact applies, it would apply only *prospectively*. Exh. A at 7.

BellSouth's more recent proposal would apply only to "substantive Telecommunications law." Exh. A. at 7. Thus, for an element of telecommunications law, Petitioners would have to obtain a ruling from this Authority in order to make it apply to the Agreement. And even after getting a ruling from this Authority that the law says what it says, BellSouth seeks to abide by that law ***on a prospective basis only***.[9] This new language represents a partial concession by BellSouth — it has conceded that non-telecommunications law that existed at the time of contracting, will in fact be deemed incorporated into the Agreement unless expressly exempted or displaced with conflicting requirements Unfortunately, non-telecommunications law represents a small portion of the body of law that will apply to this Agreement, because at bottom this contract is largely about the implementation of telecommunications laws and regulations designed to facilitate a replacement of monopolies with competition.

Even as now limited by its new language, BellSouth's proposal turns the longstanding legal doctrine of contracts, summarized above, on its head. *See Farmers' & Merchants Bank of Monroe*, 262 U.S. at 660; *Magnetic Resonance Plus*, 543 S.E.2d at 34-35. Or, as Mr. Russell put it, "that's backwards." Tr. at 81:25 – 82:1. It means that federal or state unbundling law that existed at the time of contracting would for all practical purposes be ignored by the Parties if Joint Petitioners or BellSouth forgot to reproduce it in the Agreement. In that event, the non-reproduced applicable law would have no bearing on the Agreement, not only until it was invoked, but until after *a dispute as to its applicability is resolved*. So a rule or aspect of an

9 It is impossible to square BellSouth's proposal with the parties' already agreed-upon language for section 32.1 of the General Terms and Conditions, wherein the parties define and agree to comply with "Applicable Law."

order of the FCC or this Authority would go unenforced and unfollowed for possibly years under BellSouth's proposal, despite the fact that the parties never negotiated an exception to or a deviation from such legal requirements.

BellSouth's position on this item even injures its own interests. For example, Attachment 6 of this Agreement, which relates to ordering, includes provisions to govern redress for unauthorized access to Customer Service Records ("CSRs"). BellSouth seeks stringent language on that topic, in order "to protect CPNI." Deposition of Scot Ferguson at 185:16 (Dec. 7, 2004). Yet the term "CPNI" is neither defined nor mentioned in Attachment 6, nor is there a reference to the statute that regards CPNI, 47 U.S.C. § 222, or the FCC's CPNI rules. *See* Tr. at 775:22 – 776:10 (Blake). According to BellSouth's position on this Item 12, nothing in that important body of law has any place in the performance of the Agreement, and the parties are not bound by it. That cannot be the right result.

Finally, BellSouth is incorrect in arguing that it would be "in the intolerable position of not knowing exactly what its contractual obligations are[.]" Blake Suppl. Direct Test. at 55:24-25. This claim is in fact hollow. Joint Petitioners note that their proposal for Section 32.2 does not require that **all decisions** and orders of the FCC and this Authority apply to this Agreement. Rather, it requires that decisions of **general applicability**, as well as statutes, shall apply. Thus, for example, an existing order from an arbitration or adjudication between BellSouth and another CLEC **would not apply** to this Agreement **unless expressly incorporated**. Nor would a decision by the FCC Enforcement Bureau that involves other parties. Nor would the result in a case brought before this Authority regarding the interpretation of another CLECs' interconnection agreement. Only statutes and rules and orders resulting from general rulemakings of the FCC and this Authority that existed at the time of contracting apply —

BellSouth, which seeks to comply with the law (Blake Depo. Tr. at 369:16-23) — is presumed to know what these legal requirements are. Thus, BellSouth can expect to comply with all applicable law, except to the extent that it has negotiated language with Joint Petitioners that expresses a clear intent to exclude particular requirements as between the parties or to displace particular requirements with conflicting ones that were freely negotiated.

For all these reasons, the Agreement should state that applicable law that exists at the time of contracting will govern the Agreement unless expressly waived or repudiated.[10] Joint Petitioners' proposed language for Section 32.2 of the General Terms and Conditions should therefore be adopted.

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

**Commingling of Section 251 Elements With Any Wholesale Facility and Service, Including Section 271 Elements, Is Required Under the *TRO* and FCC Rules.**

The FCC requires all ILECs to connect UNEs, combinations of UNEs, and all other wholesale elements. 47 C.F.R. §§ 309(e), (f); *TRO* ¶¶ 579-84. BellSouth's proposed language for Section 1.7, which unlawfully limits this right is based on a flawed, and incomplete, reading of the *TRO*, should therefore be rejected.

FCC Rule 51.309(e) states that "an ***incumbent LEC shall permit*** a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting

10 Changes of law that occur between the time of negotiations and finalization of the agreement should be addressed via the modification of agreement provisions of the Agreement, wherein the parties agreed to renegotiate and amend the Agreement in the event of a change of law.

telecommunications carrier ***has obtained at wholesale*** from an incumbent LEC." 47 C.F.R. § 51.309(e) (emphasis added). Rule 51.309(f) further provides that "[u]pon request, an incumbent shall perform the functions necessary to commingle [a UNE or UNE Combination] with one or more facilities or services ... ***obtained at wholesale*** from an [ILEC]." *Id.* § 51.309(f) (emphasis added).

The text of the *TRO* is exactly in keeping with the language of Rules 51.309(e) and (f). it states that "we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services." *TRO* ¶ 584. It "includes" resale and Section 271 as examples of "wholesale facilities and services." These are mere examples. For "special access" is not listed in paragraph 584, yet BellSouth has never attempted to argue that special access is not wholesale.

Joint Petitioners have recently revised their proposed language for Section 1.7 to adopt these rules expressly, thus making more clear their intent that the Agreement will provide them the rights already granted by the FCC:

> BellSouth shall permit <<customer_short_name>> to commingle a UNE or Combination of UNEs with any wholesale service, consistent with 47 C.F.R. 51.309(e). BellSouth shall perform the functions necessary to commingle a UNE with any wholesale service, consistent with 47 C.F.R. 51.309(f).

BellSouth would like to preclude commingling, and refuse to perform commingling, of a Section 251 UNE with a Section 271 element. Its proposed language states that it "will not commingle or combine UNEs or Combinations with any service, Network Element or other offering that it is obligated to make available only pursuant to Section 271 of the Act" Exh. A at 10. BellSouth's sole argument in favor of this language is that the FCC changed the substance of Rules 51.309(e) and (f) by issuing an "Errata." This argument, through which BellSouth seeks to render section 271 elements useless by isolating them, is incorrect as a matter of fact and meritless as a matter of law.

The *TRO* states in Paragraph 584 that ILECs are required to "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."[11] This language, which appears in a paragraph that speaks to a particular form of wholesale services known as resale. Section 271 UNEs are not resale services.

The Errata upon which BellSouth relies removed the stray reference to Section 271 in paragraph 584. BST Cross Exh. 10. See JP Suppl. Direct Test. at 42:17 (the Errata was "an attempt to clean-up stray language"). BellSouth interprets this Errata to mean that Section 271 elements are now ineligible for commingling. Blake Suppl. Direct Test. at 63:22-24 (Nov. 12, 2004). In other words, BellSouth is asserting that the *implied* meaning of the FCC's Errata and subsequent revision of Paragraph 584 is that Section 271 elements are somehow not wholesale items. Yet at hearing, Ms. Blake admitted that switching, which is "only available as a 271 element," is indeed "one of those wholesale services." Tr. at 781:24, at 782:17 (Blake).[12] Accordingly, BellSouth refuses to connect, or permit connection of, 271 switching with 251 UNEs. *Id.* at 783:9-11 (Blake).

But BellSouth's position is not consistent. It is willing to commingle 271 *transport* with 251 UNEs. At hearing, Ms. Blake admitted that transport is a 271 element. *Id.* at 784:1 ("Transport is a 271 checklist item, yes."). So, applying BellSouth's "logic," transport is not

11 The *TRO* also states that ILECs must "perform the necessary functions to effectuate such commingling upon request," which reflects the substance of Rule 51.309(f). *TRO* ¶ 579.

12 This testimony represents a change in Ms. Blake's understanding. In North Carolina, she testified on January 14 that switching is neither a retail nor wholesale service — "it's kind of in its own category." **Attachment 1** (NC Tr. v. 6 at 305).

eligible for commingling. Not so — when asked whether BellSouth will "commingle section 271 transport with 251 elements," Ms. Blake said "Yes." Tr. at 784:8-10. Thus, to review, 271 switching cannot be commingled but 271 transport can be commingled. Ms. Blake attempted to reconcile these diametrically opposite conclusions by explaining that

> **[T]he way we offer 271 transport is through our special access tariff.** There is not a distinct or separate offering of a 271 transport service. If you want 271 transport, we make it available under the same terms and conditions as we do to anybody else that buys out of our special access tariff.

Tr. at 784:10-16. Thus, it appears that, , provided it is able to render its section 271 transport unbundling offering satisfied through the offering of tariffed special access available to "anybody else,"[13] BellSouth is willing to commingle special access with Section 251 UNEs. In other words, because BellSouth has declined to establish a section 271 tariff with just and reasonable rates for each checklist item, BellSouth will not commingle such elements unless there is a high-priced special access service offering that can serve a substitute. The inanity of Ms. Blake's testimony only demonstrates that BellSouth's position on Item 26 is unsupportable.

Significantly, there is another part of the Errata that is fatal to BellSouth's self-serving attempt to exclude Section 271 elements from the commingling rule. The Errata removed one sentence, largely dictum, from Footnote 1990 of the *TRO*. Footnote 1990 previously had said (with emphasis added):

> We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). **We also decline to apply our commingling rule, set forth in Part VII.A.**

13 BellSouth provides no support as to why that should be the case.

**above, to services that must be offered pursuant to these checklist items.**

Paragraph 31 of the Errata states: "In footnote 1990, **we delete the last sentence**." BST Cross Exh. 10 (emphasis added). In purposefully removing that sentence, the FCC avoided any misunderstanding that Section 271 elements are not eligible for commingling. Thus, the plain language of Rule 51.309(e) and (f), that ILECs must commingle UNEs and UNE Combinations with any facility "obtained at wholesale" has been, as Mr. Meza postulated and Ms. Johnson agreed, "cleaned up." Tr. at 212:6-8.

Section 271 elements are patently wholesale; they are provided to CLECs under a federal obligation enforceable by the FCC and the states. These elements are not "retail," and there plainly is no yet-unnamed third category of service offerings (claimed, sometimes, by Ms. Blake) into which Section 271 offerings fall. As such, Section 271 elements are covered by the plain language of FCC Rules 51.309(e) and (f), as well as the *TRO* — even as amended by the Errata — and must be commingled with UNEs and UNE Combinations.

The factual inaccuracy of BellSouth's position aside, it must also be noted that, as a matter of law, the FCC could not have substantively amended Rules 51.309(e)and (f) via Errata, even if that had been its intention. As Ms. Johnson aptly put it, "[y]ou cannot change or alter rules ... via an errata." Tr. at 211:24 – 212:2 (Johnson) All substantive agency rules must be promulgated in accordance with the procedures set forth in the Administrative Procedures Act. *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (reversing payphone compensation rules for failure to provide proper notice of proposed rule); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 249 (2d Cir. 1977) (informal rulemaking permissible under APA but must be properly opened to comment and decided on the record). Thus, the manner in which

BellSouth is attempting to implement the *TRO* contravenes settled administrative law, and it is doubtful that the FCC would, or could, endorse it.

At bottom, the FCC's commingling rules were not changed by the Errata. Neither the rules nor the text of the *TRO* contain the exception BellSouth claims. Joint Petitioners' language properly implements Rule 51.309(e) and (f) by ensuring that they can commingle, or the request the commingling of, UNEs and UNE Combinations with Section 271 elements, and thus should be adopted for Section 1.7 of Attachment 2 of this Agreement.

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

**Line Conditioning Should be Defined by Reference to FCC Rule 47 C.F.R. 51.319(a)(1)(iii)(A), and BellSouth Should Perform Line Conditioning in Accordance With the Rule.**

1. BellSouth is Obligated By Law to Condition Copper Loops at TELRIC Rates.

Line conditioning is a section 251(c)(3) obligation of ILECs. In its *UNE Remand Order*, the FCC clarified its unbundling rules to require that ILECs condition copper loops to provide advanced services.[14] FCC Rule 51.319(a)(3) was promulgated with the *UNE Remand Order* to effect the clarification stated in the Order. *See* JP Cross Exh. 18. As required by the rule, BellSouth signed interconnection agreements containing rates, terms and conditions for conditioning copper loops. These agreements provided for conditioning copper loops of any length and removing bridged tap without length restrictions at TELRIC rates. *See* JP Cross Ex.

14 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 ¶ 172 (rel. Nov. 4, 1999) ("*UNE Remand Order*").

19; Tr. at 606:25 – 607:2 (load coil removal at TELRIC rates is "in the current agreements"), at 620:16 – 622:17 (NewSouth/BellSouth Agreement) (Fogle). BellSouth has sought to limit the line conditioning obligations imposed by the *UNE Remand Order* only after the *TRO* was issued. Tr. at 618:10-13 (Fogle).

2. <u>BellSouth's Line Conditioning Obligations Were Not Circumscribed by the *TRO*</u>.

ILEC line conditioning obligations were not circumscribed by the *TRO*. The FCC readopted its line conditioning rules in the *TRO*. Indeed, the FCC took this opportunity to *expand* its statement of the ILEC obligation and to completely rewrite subsections (D) and (E) of the rule. *See* JP Cross Exh. 18. However, the FCC chose not to materially change the Rule's definition of line conditioning at subsection (A). BellSouth witness Fogle conceded this fact on cross-examination. Tr. at 617:13-19.

Nothing in the text of the *TRO* itself suggests that ILEC conditioning obligations were limited by that Order. Instead, the FCC reaffirmed that ILECs must condition copper loops: "Competitors cannot access the loop's inherent 'features, functions and capabilities' unless it has been stripped of accretive devices. ***We therefore view loop conditioning as intrinsically linked to the local loop*** and include it within the definition of the loop network element." *TRO* ¶ 643 (emphasis added). Had the FCC intended to limit ILEC conditioning obligations as BellSouth suggests, surely the FCC would have worded this section of the *TRO* differently. However, there are no words of limitation in this paragraph. Indeed, the FCC reiterated in the *TRO* the absence of loop length limitations on ILEC conditioning obligations. *Id.* n.1947. And, in this very paragraph, the FCC "reject[ed] Verizon's renewed challenge that the Authority lacks authority to require line conditioning." *Id.*

BellSouth argues that the FCC "clarified" its line conditioning rules in the *TRO* so as to limit ILEC obligations. However, neither the line conditioning rules nor the text of the *TRO* contain any such limitation. This situation is in sharp contrast to the FCC's revision of its dedicated transport rules.

The FCC knows how to change its rules when it wishes to do so. For example, in the *TRO*, the FCC limited its definition of dedicated transport to transmission facilities connecting ILEC switches and wire centers, thereby excluding dedicated transport facilities known as entrance facilities. *Id.* ¶ 365. "We conclude that our previous definition of dedicated transport was overly broad." *Id.* The FCC then changed the definition contained in the rule itself and promulgated with the *TRO*. In short, the FCC expressly stated in the text of the *TRO* its intent to limit the rule and then changed the rule itself to reflect the FCC's intent. Nothing of the kind occurred with respect to the line conditioning rule. The FCC expressed no intent to circumscribe the requirements of the rule, and no such change to the rule was made. BellSouth would have the Authority divine an intent on the part of the FCC for which there is no basis. Indeed, all the evidence is to the contrary.

3. <u>ILEC Line Conditioning Obligations Are Not Limited by the Routine Network Modification Rules</u>.

BellSouth argues that its line conditioning obligations are somehow modified and limited by the FCC's separate rules on routine network modifications (one of which has nothing to do with copper loops). However, neither the line conditioning rule, 47 C.F.R. § 51.319(a)(1)(iii), nor the routine network modification rule, *id.* § 51.319(a)(8), contain any such modification or limitation. BellSouth witness Fogle conceded on cross examination that the line conditioning rules "are definitely discussed in separate sections." Tr. at 619:17 – 620:2.

The FCC defines routine network modifications as "an activity the incumbent LEC regularly undertakes for its own customers." 47 C.F.R. § 51.319(a)(8). BellSouth argues that its obligations to provide line conditioning at TELRIC rates are limited to those functions that fit the definition of routine network modification. For example, Mr. Fogle testified that BellSouth does not remove load coils for its ADSL retail customers served by loops over 18,000 feet. Tr. at 608:18-23 ("in areas where we have load coils on loops over 18,000 feet, BellSouth doesn't offer any DSL services at that point"). Since BellSouth does not condition loops of this length for its customers, BellSouth contends the activity is not a routine network modification. Therefore, under BellSouth's rationale, this activity is not a form of line conditioning mandated by section 251(c)(3) of the Act. While BellSouth will condition such loops, it will not do so at TELRIC rates. *Id.*

BellSouth seizes on a single sentence from the *TRO*'s discussion of line conditioning as the basis for its position. At paragraph 643 of the *TRO*, the FCC outlines the rationale for its rejection of claims that line conditioning constitutes creation of a superior network for CLECs. In its explanation, the FCC analogizes line conditioning to routine network modifications: "Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL service to their customers." *Id.* ¶ 643. The *TRO* text and rules on line conditioning do not limit ILECs' obligations to perform conditioning to those instances where the requested removal of accretive devices also happens to qualify as a routine network modification under the FCC's separate routine network modification rules. Indeed, the text of the *TRO's* discussion of line conditioning does not even reference those rules. Likewise, the *TRO* text and rules on routine network modification impose no such limitation on line conditioning. Nor do they even reference the subject.

What the FCC describes in the quoted sentence from paragraph 643 is the intersection of two separate obligations. BellSouth witness Fogle testified that BellSouth regularly conditions loops for retail customers served by loops less than 18,000 feet in length. Tr. at 596:15-17. Since this is an activity BellSouth regularly undertakes for its own customers, it fits the definition of routine network modification. However, this activity also squarely fits the definition of line conditioning. Specifically, the activity entails removal from a copper loop of a load coil that could diminish the capability of the loop to high-speed switched telecommunications service. *See* 47 C.F.R. § 51.319(a)(1)(iii)(A). The relationship between the two rules was illustrated with Joint Petitioners' Cross Exhibit 17 which showed two intersecting circles. Each circle represents the activities defined by the respective rule. The intersection of the circles represents those activities common to both definitions.

BellSouth's interpretation of the rules would give it the sole discretion to determine when line conditioning would be performed. Mr. Fogle made this clear in response to questioning:

> Q. So if BellSouth decided not to do any line conditioning for itself and not provide any advance services to Tennessee customers, everyone would be stuck in the same boat. Right? **Nobody could have line conditioning.**
>
> A. **Everybody would, based on that definition and your perspective, be in that same boat.**

Tr. at 592:19-25. In other words, as Mr. Heitmann asked, "nobody could have line conditioning." This result could have severe consequences for competition in Tennessee. Note the following colloquy about what happens when a CLEC's ability to obtain line conditioning on long loops is constrained:

> Q. Could the CLECs provide broadband to those customers?
>
> A. CLECs could provide broadband just not over BellSouth's network.

Tr. at 604:18-21 (Fogle). Thus, BellSouth seek to ensure that the customers served by 20% of BellSouth loops (*id.* at 602:18) definitely cannot get broadband from BellSouth and thus cannot get it from any wireline competitor seeking to use BellSouth's bottleneck UNE facilities.

BellSouth's interpretation effectively would give it the power to write line conditioning out of the FCC's rules. This strained interpretation cannot be reconciled with the conclusion that conditioning is "intrinsically linked to the local loop" and part and parcel of the definition of the loop network element. *TRO* ¶ 643. The FCC certainly did not delegate to BellSouth (or any other entity) the authority to redefine the loop network element.

This Agreement should define line conditioning by reference to the FCC rule. This convention is regularly used by BellSouth in its interconnection agreements. *See*, *e.g.*, Exh. KKB-1 to Blake Rebuttal Test. at 3 (several terms are "as defined in the FCC's rules"). Joint Petitioners want only what the rule requires, and they are entitled to all that the rule permits.

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

**The Agreement Should Not Contain Specific Provisions Limiting The Availability Of TELRIC-Rated Line Conditioning To Copper Loops Of 18,000 Feet Or Less.**

The question posed by this matrix item is answered in the *negative* by the proper resolution of Item 36. BellSouth should not be permitted to impose artificial restrictions on its obligation to provide line conditioning at Authority-approved TELRIC-compliant rates.

BellSouth should be required to remove load coils at TELRIC rates on loops of any length as required by the FCC's line conditioning rules. BellSouth has refused to remove load coils on loops greater than 18,000 feet at TELRIC rates because this activity is not *for BellSouth* a routine network modification as defined by the FCC. BellSouth's refusal to condition these loops at TELRIC rates is tied to its flawed interpretation of the FCC line conditioning rules.

As demonstrated above with respect to Item 36, BellSouth's line conditioning obligations are not constrained by the routine network modification rule. The Authority therefore should order that this Agreement should in no way preclude or impede, through prohibitively high and unpredictable prices, the availability of line conditioning to copper loops 18,000 feet or less.[15]

A note about the concept of "business impacting" issues is warranted here. BellSouth's argument throughout this arbitration has been that "[t]he majority of the issues that we're fighting about are simply not business impacting." Tr. at 16:809 (Meza Opening Statement). The implication being that litigating this case is a waste of time. Yet in this Issue 37, BellSouth is refusing to adopt language that reflects federal law even though BellSouth does not expect ever to have to fulfill it. Mr. Fogle explained at hearing that BellSouth has received only **2 requests** for load coil removal on loops longer than 18,000 feet. Tr. at 610:7-9. He also opined that long loops are by far the minority of loops in BellSouth's region: roughly 20% are over 18,000 feet and "down to 5 or 10 percent" of BellSouth loops are over 21,000 feet. *Id.* at 602:17-20. Thus, BellSouth has no reason to think that Joint Petitioners will inundate it with line conditioning requests. As Director Jones aptly observed, "if BellSouth received so few requests

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15 Mr. Fogle attempted to assert that even the relatively high Authority-approved TELRIC rates for line conditioning on long loops effectively preclude a carrier from providing service: "I'd venture to say **if you have a $700 cost** for line conditioning … there's not many services you're going to sell. … To me, **that's typically a nonstarter in terms of economics**[.]" Tr. at 607:9-15. Yet Mr. Fogle was unable to deny that such a price could be factored into a term service offering or that it could in any event be palatable to doctors and others who might want to practice or conduct business from home via the Internet. Mr. Fogle also was unable to explain how individual case basis "special construction" pricing, untethered to the TELRIC pricing standard, would produce rates that were predictable or palatable or how such rates would make it virtually impossible for CLECs to explore the opportunities of providing broadband over the UNE loops that BellSouth elects not to use to their full potential. Tr. at 609:1-20

to remove load coils off of long loops … **why is this such an issue for you?**" Tr. at 634:14-10 (emphasis added).

BellSouth's other purported concern is that if this Agreement comports with the FCC's definition of Line Conditioning, "then we're going to have to create the ability to order it, the USOCs and the rates and those types of things." Tr. at 634:25 – 635:2 (Fogle). But that work is not optional at this point and has in fact already been done. The Authority has already set TELRIC rates for load coil removal on loops of all lengths. At hearing Mr. Fogle was shown an excerpt of BellSouth's current agreement with NewSouth, which includes a detailed table of the rates applied to and USOCs used for load coil removal. JP Cross Exam. Exh. 19. Mr. Fogle recognized that these rates are TELRIC-compliant and had been set by the Authority. Tr. at 622:5-10 (Fogle). Yet Mr. Fogle stated that BellSouth wishes to stop, via this Agreement, offering those rates to Joint Petitioners. Tr. at 622:11-17. Thus, in seeking to impose unpredictable, individual-case-basis FCC tariff Special Construction[16] rates for load coil removal on long loops, BellSouth is attempting to circumvent the rates set by order of this Authority. Joint Petitioners are not willing to waive the application of these rates, and have proposed the rejection of BellSouth's proposed language for Section 2.12.2 that would exclude their application. The Authority should accordingly adopt Joint Petitioners' language to ensure the continuing applicability of its TELRIC rates for load coil removal on loops, including those that are greater than 18,000 feet in length.

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16 Load coil removal is not "Special Construction." *Compare TRO* ¶¶ 645-648 (Special Construction of Transmission Facilities), *with id.* ¶¶ 642-644 (Line Conditioning).

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

**BellSouth Should Be Required to Remove Bridged Tap of Any Length at TELRIC Rates.**

Like Item 37, this issue is resolved in Joint Petitioners' favor with the proper resolution of Item 36. BellSouth has refused to remove bridged tap less than 2500 feet in length from copper loops at TELRIC rates. As with Item 37, BellSouth is relying on its incorrect interpretation of the routine network modification rule for its refusal.

First, BellSouth argues that since it does not remove bridged tap less than 2500 feet in length from copper loops serving its retail customers, this activity is not a routine network modification. Because BellSouth incorrectly equates line conditioning with routine network modification, it maintains that this type of bridged tap removal does not constitute line conditioning and need not be done at TELRIC rates. However, as demonstrated above the FCC does not equate line conditioning and routine network modifications. **They are separate and distinct rules.** ILEC line conditioning obligations are not modified or limited by the routine network modification rules. There was no length limitation in the FCC line conditioning rules before the *TRO*, and there is none now. BellSouth remains obligated to remove bridged tap from loops of any length pursuant to Section 251(c)(3) of the Act and 47 C.F.R. § 51.319(a)(1)(iii)(A).

Second, BellSouth proposes to limit bridged tap removal to that which "serves no network design purpose." Fogle Suppl. Direct Test. at 9:1-2. There is no legal basis for this purported standard. Moreover, such a "standard" would have the same effect as described above in item 36. This standard would give BellSouth the sole discretion to determine when bridged tap would be removed.

Finally, BellSouth recites the tired argument that requiring it to remove bridged tap of this length would create a "superior network" for Joint Petitioners. The FCC has expressly stated that "[l]ine condition does not constitute the creation of a superior network as some incumbent LECs argue. *TRO* ¶ 643. As such, Joint Petitioners' proposed implementation of Rule 51.319 as to line conditioning does not violate any precept of parity, but rather comports exactly with the FCC's own interpretation of ILEC conditioning responsibilities.

Again, as with load coils, the Authority has set rates for bridged tap removal on loops of all lengths. Cross Examination Exhibit 4 includes rates for removing bridged taps for all loops, and Mr. Fogle again recognized that these rates were set by this Authority under the TELRIC methodology. Tr. at 623:12-16 (Fogle). Again, BellSouth wants to cease complying with those rates. *Id.* at 623:17-23. BellSouth should not be permitted, above Joint Petitioners' objection, to impose other rates — particularly "Special Construction" rates — in contravention of the Authority's decision.

This conclusion must hold true regardless of any voluntary agreement that CLECs may have made to accept less. Thus, the fact that BellSouth got CLECs to agree in the Shared Loop Collaborative to accept grossly inflated pricing for line conditioning, Tr. at 623:20 – 624:1, does not diminish Joint Petitioners' right to enforce and adopt FCC Rule 51.319(a) in this Agreement. And this Authority is not required to impose the Shared Loop Collaborative result in this arbitration, but rather must adhere to the mandates of Section 251(c) and the FCC's rules. 47 U.S.C. § 252(c)(1).

The Authority should accordingly adopt Joint Petitioners' language for Sections 2.12.3 and 2.12.4.

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

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

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

**All EEL Audit Notices Should Demonstrate Cause and Include Supporting Documentation.**

BellSouth does not have carte blanche to conduct unlimited EEL audits at its own discretion. The FCC has held that ILECs may only conduct EEL audits "based upon cause." *TRO* ¶ 622; *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd. 9587, 9603 ¶ 29 n.86 (audits should "only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria"); *TRO* ¶ 621. The *TRO* grants ILECs only a "limited right to audit" EEL circuits. *TRO* ¶ 626. Joint Petitioners simply seek to incorporate this "for cause" standard into the Agreement in a manner that gives the standard meaning and that should avoid protracted litigation that has surrounded the EEL audit issue.

Only after Joint Petitioners filed for arbitration did BellSouth nominally agree to incorporate the "for cause" standard for EEL audits into the Agreement. Its proposed language for Section 5.2.6 now states that it will "send a Notice of Audit ... identifying the cause upon which BellSouth rests its allegations." Exh. A at 14. Yet the manner in which BellSouth is prepared to show cause (if at all) is designed to render meaningless the "for cause" auditing standard established by the FCC. To wit, BellSouth refuses to agree that it will identify the circuits for which it has cause to suspect a compliance issue and it refuses to provide any supporting documentation to demonstrate that it has such cause.

Joint Petitioners already have agreed that they will use EELs in a manner that complies with FCC regulations. Mr. Russell, the Joint Petitioners' designated witness for this Issue, affirmed that promise at hearing. Tr. at 87:15-24 (Russell) ("we have to certify under the agreement that we comply with [EELs] eligibility criteria"), at 91:12-14 ("yes, we've certified compliance"). Having obtained that promise, BellSouth should not be permitted to exploit its audit right to demand an audit for no cause or even for a cause it prefers to keep secret (likely because it is no cause at all).

BellSouth has admitted that it wants the right to audit 100% of Petitioners' EELs in Tennessee every single year and has essentially asserted that it will have cause to audit every circuit every year. Tr. at 796:23 – 797:16 (Blake). Indeed, Ms. Blake asserted that if BellSouth had cause with respect to a single circuit, that would, in its opinion, justify an audit of all EEL circuits in the state. *Id.* In her words,

> If we have indication there's no local traffic or very small volumes considering the number of circuits that are involved in that, that would be a **cause to say something doesn't look right**; let's identify. **That's our cause. We need to evaluate those circuits that the CLEC has designated as using in compliance for the EEL criteria.**

Tr. at 797:10-16. And because all CLECs are required to "designate" EELs as being compliant with the eligibility criteria, this is another way of saying that BellSouth "needs to evaluate" every single EEL. In fact, Ms. Blake later testified that "**[w]e don't want to have a limit** of what we identify limit us of what we can audit to ensure compliance." *Id.* at 799:7-9.

Such broad audits would render the FCC's "limited right to audit" and "for cause" auditing standards meaningless. BellSouth must have more grounds for an audit than "something doesn't look right" on one of these circuits or "we just want to check." There must be a higher standard, because the FCC adopted one and because audits by your competitor are intrusive and enormously disruptive to Petitioners' operations. As Mr. Russell stated, "it is a business disruption and having basically your biggest competitor come in, one of their agents, essentially, and review your business records." Tr. at 97:13-16. Hence the Joint Petitioners have maintained that

> If the CLECs are going to have to endure the time and expense necessary to comply with a BellSouth audit request, at the very least, BellSouth can provide adequate notice to CLECs setting forth the scope of and cause upon which the audit request is based along with supporting documentation.

JP Suppl. Direct at 72:14-17. The FCC's "for cause" standard is the means by which this bargain is struck and enforced.

It bears emphasis that Joint Petitioners do not seek to curtail BellSouth's right to pursue legitimate concerns about EEL compliance. At hearing Mr. Russell fully recognized that BellSouth has a right to audit a CLEC's EELs if it has cause to believe there is non-compliance. For example, if a CLEC received an audit notice and then quickly tried to convert them to special access, Mr. Russell stated that "I would think that an additional audit request would be warranted and hard to defend." Tr. at 94:9-13. Moreover, if an audit revealed that certain EELs were out of compliance, Mr. Russell agreed that an additional audit might be justified. *Id.* at 93:5-10. Thus, it may be the case that an audit of limited scope may later be expanded, if the results of the initial audit create cause to expand the scope. Any expansion of the scope should be agreed to by the parties or ordered by the Authority, if no agreement is reached.

For these reasons, the FCC's for cause standard for audits should be incorporated into the Agreement with notice and disclosure requirements that ensure that the standard is not rendered meaningless. Joint Petitioners' language, which requires BellSouth to articulate its cause and provide supporting documentation, reasonably implements these requirements. Given the burden that audits impose, and the need to limit their scope appropriately, this proposed documentation requirement is a necessary and minimal obligation for BellSouth to perform. Moreover, this Authority certainly has jurisdiction to order and adopt reasonable provisions for implementing the auditing requirements set forth in the *TRO*. *TRO* ¶ 625 (deferring to state commissions to address implementation). *See also* 47 U.S.C. § 252(b)(4)(C). Accordingly, Joint Petitioners' language for Section 5.2.6.1 of Attachment 2 should be adopted.

**Ensuring the Independence of an Auditor In Any Specific Case Requires Mutual Consent.**

The FCC has held that audits must be conducted by an independent person or entity. *TRO* ¶ 626. Joint Petitioners' proposed language for Section 5.2.6.2 of Attachment 2 properly implements this requirement in a manner designed to avoid the protracted litigation that has ensued over this issue by ensuring that all auditors must be "mutually agreed-upon by the Parties." Exh. A at 14.

BellSouth's position on this issue is to assure Petitioners that any auditor it chooses will comply with American Institute for Certified Public Accountants ("AICPA") standards. Blake Suppl. Direct Test. at 50:19-21. BellSouth argues that "AICPA standards govern each of these areas. No other requirements are needed." *Id.* at 52:8-9. Thus, per BellSouth, any auditor that BellSouth chooses will be, *ipso facto*, independent. The fact that it is not willing to permit Petitioners the opportunity to test that assertion is troubling. Indeed, BellSouth attempts to circumvent any due diligence regarding conflicts or the relationships that particular auditors develop with BellSouth or any of the Joint Petitioners.

What is most curious is that BellSouth elsewhere insists on mutual consent for independent auditors in other contexts. Indeed the Parties have agreed to a provision in Attachment 3 of the new interconnection agreement that Percent Local Usage/Percent Interstate Usage ("PLU/PIU") audits must be conducted by a mutually agreed-upon third party auditor. Tr. at 793:2-11 (Blake). *See also* Agreement, Attachment 3, Section 10.8.5 (KMC), 6.5.5.3 (NewSouth), 10.5.7 (NuVox), and 10.8.5 (Xspedius). It is difficult to understand why mutual agreement is not appropriate for EEL audits when it is appropriate for PLU/PIU audits. Moreover, this Authority certainly has jurisdiction to order and adopt reasonable provisions for implementing the auditing requirements set forth in the *TRO*. *TRO* ¶ 625 (deferring to state Authority's to address implementation). *See also* 47 U.S.C. § 252(b)(4)(C).

Joint Petitioners' concern that auditors must be independent is not simply academic. NuVox, for example, has significant experience with EEL audits and has been "uncomfortable" with BellSouth's choice of auditor. Tr. at 100:17-18 (Russell). More specifically, NuVox has faced situations in which "BellSouth has picked an auditor that we can't find any information on, that we don't have any familiarity with, and appears to be behold[en] to BellSouth for some of its business[.]" Tr. at 101:7-10. Again, as Mr. Russell had earlier stated, audits involve "having basically your biggest competitor come in, one of their agents, essentially, and review your business records." Tr. at 97:13-16. Thus, NuVox understandably was concerned "with whether or not that auditor is independent." *Id.* at 101:11-12.

Indeed, as Petitioners' counsel discussed with Ms. Blake at hearing, the Georgia Public Service Commission also has concerns as to whether BellSouth's chosen EEL auditors have been independent. **Attachment 2** (*Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc., Order Adopting in Part and*

*Modifying in Part the Hearing Officer's Recommended Order* at 1, 12-14 (Ga. P.S.C. May 18, 2004). Ms. Blake acknowledged that the Georgia Commission, in connection with an audit of NuVox EELS, rejected BellSouth's choice of auditor, ACA, despite BellSouth's offer to hire another unknown entity to certify that ACA complies with AICPA standards (ACA could not make such certification itself). Tr. at 794:12 – 795:10 (Blake). If AICPA standards were insufficient to allay the Georgia Commission's concerns, then Joint Petitioners' shared concern should be given weight.

Accordingly, Joint Petitioners' language for Section 5.2.6.2 of Attachment 2, which requires mutual agreement on any auditor, should be adopted for this Agreement.

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

**Joint Petitioners Should Not Be Required to Pay the TIC, Which BellSouth Concedes Does Not Comply with TELRIC and for Which No Cost Support Has Been Provided.**

BellSouth has proposed language for Attachment 3 that requires Joint Petitioners to pay a Transit Intermediary Charge, or "TIC," for transited traffic. This new charge does not compensate BellSouth for any legitimate costs it incurs in providing the service to Joint Petitioners. It is thus a purely additive charge associated with the transiting of traffic across the BellSouth network, which is a service that this Authority — as well as the Agreement — already require BellSouth to perform. In essence it is a fee that BellSouth seeks to extract from Petitioners simply by virtue of their ownership of the legacy network over which telecommunications traffic must travel in order to ensure completion of calls between consumers in this state. Accordingly, BellSouth should be prohibited from charging the TIC to Joint Petitioners.

It is not in dispute that BellSouth will transit traffic between Joint Petitioners and other carriers. Tr. at 821:11-16 (Blake) ("Yes, we've agreed to provide it."). This obligation is already in the Agreement. Agreement Attachment 3, Section 10.11.1 (KMC/XSP), Section 10.8.1 (NVX). For this reason, BellSouth's continued resort to the argument that Joint Petitioners can avoid the TIC and "<u>connect directly with other carriers in order to exchange traffic</u>" is irrelevant. Blake Rebuttal Test. at 47:14-15 (emphasis in original). Consistent with section 251 of the Act, BellSouth has already agreed to transit traffic. Moreover, Ms. Blake acknowledged that requiring all carriers in Tennessee to interconnect directly would "be a dramatic change in the way carriers have connected ... since the 1996 Act and before." Tr. at 823:9-11. If anything, BellSouth's repeated reference to (typically uneconomic) direct interconnection only further demonstrates that it is using the TIC as a means to extract monopoly rents, or perhaps to punish CLECs, for electing to efficiently passing traffic over BellSouth's legacy tandem interconnection facilities.

And indeed the North Carolina Utilities Commission has held that an ILEC — Verizon — is obligated to transit traffic "as a matter of law." **Attachment 3** (*Verizon Petition for Declaratory Ruling*, Docket P-19, Sub 454, Order Denying Petition). The North Carolina Commission agreed with the position of the Public Staff, AT&T, Sprint and US LEC that "the transiting obligation follows directly from the obligation to interconnect and the right of non-incumbent carriers to elect indirect interconnection." *Id.* at p. 4.

BellSouth continues to dispute that this Authority has the jurisdiction to include the TIC in this Agreement, Blake Suppl. Direct Test. at 60:12-14, and wants to pull the TIC out and place it in a separate agreement. Tr. at 835:19-23; Blake Depo. Tr. at 497:17-18 (Dec. 8, 2004). It is nonsensical for BellSouth to maintain that this Authority has the authority to impose or approve a contractual obligation but not to consider the appropriateness of the rate that BellSouth wants to charge for it. *E.g.*, *MCI*, 298 F.3d at 1274 ("[c]learly, enforcement and compensation provisions ... fall within the realm of 'conditions ... required to implement' the agreement."). In any event, the obligation to provide transit service will remain in the Agreement, as already agreed. If BellSouth believes that the Authority lacks authority to set a rate, it surely lacks the authority to bless and approve the $0.0015/mou rate[17] proposed by BellSouth in this docket. Thus, it should remain the case (as it has been for years) that the Agreement should only include and transit service under the Agreement should be performed at the Authority-approved, TELRIC-based rates for the functionalities actually performed (tandem switching, and, in some cases, common transport).

BellSouth's written testimony asserts that the TIC charge covers the costs of "sending records **to the CLECs** identifying the originating carrier." Blake Suppl. Direct Test. at 60:25 – 61:1. In other words, BellSouth would send records to NuVox informing NuVox of the traffic NuVox had originated. Having realized that assertion makes no sense,[18] Ms. Blake changed this testimony at hearing. BellSouth's new position is that it must send records identifying the

17 Ms. Blake could not testify as to whether BellSouth is seeking a $0.0015/min. rate or a $0.0025/min. rate. Tr. at 827:20-22. Nevertheless, BellSouth is certain to point toward a $0.0025 rate recently adopted by the Georgia Public Service Commission for transit traffic. It is important to note that the Georgia Commission's rate is not a TIC. It is instead a composite or single rate for the transit function performed by BellSouth. It is interim and subject to true-up. In any event, the Parties already have agreed to continue the long-established (and, in our view, legally required) practice of applying to transit traffic the Authority-approved TELRIC rates for tandem switching and common transport (if needed). Here in Tennessee, in this arbitration, the Parties' dispute is limited to whether or not BellSouth can tack-on to those rates a TIC for which it provides absolutely no cost support.

18 At hearing in North Carolina, Ms. Blake acknowledged that "I think you know who you are." **Attachment 4** (North Carolina Tr. v. 6 at 343:11.

**originating** carrier to the carrier that **terminates** the traffic, in order that **terminating** carrier knows who sent it. Tr. at 831:7-13 (Blake). Yet if the party that terminates traffic requires, as Ms. Blake opines, "records to seek reciprocal compensation from the originating carrier," Tr. at 831:9-10, then that terminating party should pay the cost of producing those records. Joint Petitioners should not pay for records that another party requests.

It must also be noted that **none** of Joint Petitioners' existing agreements include a TIC charge — this fee is entirely new. JP Suppl. Direct Test. at 81:18-19. Ms. Blake, BellSouth's corporate witness for this issue, inexplicably does not know this. Tr. at 836:4-15 ("I can't recall it right now if we do or not."). Yet BellSouth has been transiting traffic for the Joint Petitioners since each of them (or a predecessor company) began interconnecting with BellSouth in the mid-to-late 1990s. That the TIC has never been imposed on Petitioners only further demonstrates that it is unnecessary and unjustified.

In connection with BellSouth's transiting of traffic, Joint Petitioners already pay, and have always paid TELRIC rates, for the tandem switching function, and to the extent utilized, common transport, associated with transiting traffic. Tr. at 230:9-11 (Johnson); Tr. at 821:17-25 (Blake); JP Suppl. Direct Test. at 81:24 – 82:2. These are Authority-approved TELRIC rates. Tr. at 822:4-7 (Blake); JP Suppl. Direct Test. at 82:2-4. Up to now, BellSouth has been satisfied that these charges adequately cover BellSouth's costs. This new TIC charge, having no cost support or justification, should be rejected by the Authority at this time.[19]

19 BellSouth provided late-filed exhibits in support of its TIC on February 11, 2005. Joint Petitioners requested and were granted the right to review and respond and we do that here. Tr. at 873:24 – 874:4 (Blake) (agreeing to provide exhibit), at 874:11-16 (Heitmann) (requesting right to respond). First, with respect to the list of interconnection agreements provided by BellSouth containing some sort of TIC, only three have been approved by the Authority. The inclusion of an undisclosed TIC of some sort in each of these agreements was negotiated voluntarily by those parties. It is not evident from BellSouth's filing as to whether the

Should BellSouth later present evidence that identifies and quantifies legitimate costs associated with transiting traffic — costs not already covered by the tandem switching or common transport charges that Joint Petitioners already pay — then it would be appropriate for the Authority to initiate a separate proceeding to investigate and set an appropriate TELRIC-compliant rate.[20] With the establishment of a new rate, Petitioners and BellSouth would then

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imposition of the TIC was accepted in exchange for some concession from BellSouth or whether it was merely accepted because the particular CLECs at issue had neither the will nor the resources to arbitrate the issue. In any event, the fact that some CLECs voluntarily have agreed to move from TELRIC rates for transit traffic to an agreement that provides for TELRIC plus a TIC tax is of no import, as the negotiated agreements of others are not binding on the parties to the Agreement that will result form this arbitration. Second, with respect to the "slides" prepared by BellSouth, the first two slides are non-responsive and should be stricken or discarded. Nevertheless, they each present merely a single scenario and offer nothing more than BellSouth's myopic view point on them.

With regard to the third slide, it is critical to note that diagram is set-up to depict a scenario where a facilities-based CLEC ("FB-CLEC A"), such as one of the Joint Petitioners, is using the BellSouth transit function to get traffic to another facilities-based CLEC ("FB-CLEC B"). The recipient can also be and often is an independent telephone company or cooperative. Not surprisingly, the chart does no better at explaining who gets what and who has to pay for it than Ms. Blake did at the hearing. Rather than clarify that it is "FB-CLEC B" that gets the records, while it is "FB-CLEC A" that BellSouth seeks to charge for those records (which, if FB-CLEC A, is one of the Joint Petitioners, it neither wants nor needs), BellSouth generically refers to "a FB-CLEC" when trying to explain what a carrier receives in exchange for a TIC. The more straight-forward answer would have been to simply confess that when BellSouth transits a call for FB-CLEC A, FB-CLEC A receives (in exchange for a TELRIC rate) tandem switching functionality and common transport functionality (for another TELRIC rate, if such functionality is required – typically, it is not). *FB-CLEC A receives no records associated with that call*, as that carrier clearly needs none. And so, the records, for which BellSouth seeks to recover a TIC, actually go to a third party, FB-CLEC B. Joint Petitioners respectfully submit that, if the third party asked for such records (we do not believe that even they would need them but for switch and signaling record failure) *that third party should pay for them.*

In the fifth slide, BellSouth points to the fact that KMC had at one point considered providing a competitive transit service. BellSouth fails to disclose that KMC determined that such a competitive service was not economically feasible. Tr. at 231:21 – 232:7 (Johnson) (explaining why "we haven't launched full scale").

BellSouth's other slides say nothing new that has not been addressed already.

20 The Public Utilities Commission of Texas has long required SBC, an ILEC and RBOC like BellSouth, to provide its transit services at TELRIC rates. *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Arbitration Award – Track 1 Issues, PUCT Docket No. 28821, at 23. "Consistent with prior Commission decisions in the Mega-Arbitrations, Docket No. 21982 and the predecessor T2A agreement, the Commission finds that SBC Texas shall provide transit services at TELRIC rates. The Commission notes that

amend their agreements to incorporate the new rate element on a prospective basis. Until that time, the TIC should not be included in this Agreement.

*Item No 88, Issue No. 6-5 [Section 2.6.5]: What rate should apply for Service Date Advancement (a/k/a service expedites)?*

**Service Date Advancements Are a Key Component of UNE Provisioning and Thus Must Be Priced at Authority-Approved TELRIC-Compliant Rates.**

All UNEs and UNE Combinations must be priced at TELRIC. 47 U.S.C. § 252(d)(1); 47 C.F.R. § 51.501 *et seq.*. Service Date Advancements (a/k/a expedites) are part and parcel of UNE provisioning and thus must also be priced at TELRIC. This result is required as both a matter of non-discriminatory access to UNEs and Congress's mandate for cost-based UNE pricing.

BellSouth has lodged an objection to this Item on the ground that this Authority has no jurisdiction to review it. Morillo Suppl. Direct Test. at 4:14-24. Yet, Section 252 expressly requires this Authority to review all rates, terms and conditions of interconnection agreements and ensure that they comply with non-discriminatory access requirements of Section 251 and the pricing requirements of Section 252(d). 47 U.S.C. § 252(e)(2). BellSouth has already agreed to

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there has been no change in law or FCC policy to warrant a departure from prior Commission decisions on transit service…. Furthermore, a federal court found that a state Commission may require an ILEC to provide transiting to CLECs under state law." *Id.* (citing *Michigan Bell Te. Co. v. Chappelle,* 222 F. Supp. 2d 905, 918 (E.D. Mich. 2002)). The Texas PUC went on to say that "[g]iven SBC Texas's ubiquitous network in Texas and the absence of competitive transit providers in Texas, the Commission concludes that requiring SBC Texas to provide transit services at cost-based rates will promote interconnection of all telecommunications networks. In the absence of alternative transit providers in Texas, the Commission finds that SBC Texas's proposal to negotiate transit services separately outside the scope of an FTA § 251/252 may result in cost-prohibitive rates for transit service." Excerpt of this order attached hereto to **Attachment 5**.

BellSouth's Tennessee network is similarly ubiquitous to that of SBC in Texas. The record in this proceeding also contains no evidence regarding the presence of alternative competitive transit providers in Tennessee.

perform Service Date Advancements for Petitioners under the Agreement. Exh. A at 20 (indicating that the dispute is limited to the rate). As such, it has conceded that this Authority has jurisdiction to consider Service Date Advancements, which perforce includes the rates to be charged. In addition, the prices of UNEs are committed to the jurisdiction of this Authority, 47 U.S.C. § 252(d), which again includes Service Date Advancement rates. Item 88 is therefore a proper arbitration issue and is well within this Authority's jurisdiction to resolve.

The dispute in this item is that BellSouth seeks to impose an exorbitant Service Date Advancement charge of $200 for each facility, per each day that the provisioning is expedited. Thus, for example, a request to expedite by 2 days an order to a small business requiring 8 lines would cost Joint Petitioners (and, if passed through, would cost the small business owner) $3200. BellSouth cannot state that it has studied the cost components justifying this charge. Tr. at 683:24 – 684:2 ("As far as the cost that formed the basis for the FCC charge, I'm not familiar with that cost study or any pricing that was done to establish that rate."). *See also* 689:13-17 (Blake); Deposition of Carlos Morillo at 74:21-25 ("I don't know of any specific [cost study]. I'm not aware of one." (Mr. Morillo was offered by BellSouth in response to a deposition notice issued pursuant to North Carolina Rule of Civil Procedure 30(b)(6) as the person most knowledgeable about this issue). Because BellSouth is unable to identify in this case what costs are recovered by its proposed Service Date Advancement fee, it is impossible that it was created in accordance with TELRIC principles. See Tr. at 673:16-20 (Blake) (stressing that an expedite "needs to be an non-TELRIC rates").

All UNEs must be priced in accordance with TELRIC. Section 251 of the 1996 Act states that

> [T]he just and reasonable rate for network elements for purposes of subsection (c)(3) of [section 251] **shall be based on the cost** (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) **nondiscriminatory**, and may include a reasonable profit.

47 U.S.C. § 252(d)(2) (emphasis added). This mandate applies to all UNEs; FCC Rule 51.501 — the first of the TELRIC rules — states, "[t]he rules in this subpart apply to the pricing of network elements, interconnection, and methods of obtaining access to unbundled elements, including collocation and virtual collocation." 47 C.F.R. § 51.501. *See also Local Competition First Report and Order*, 14 FCC Rcd. at 15812-14 ¶¶ 618-24.

A Service Date Advancement is part of the provisioning UNE known as OSS and is patently a method of obtaining access to loop and transport UNEs, and thus falls within this rule. As Joint Petitioners have stated,

> Unbundled Network Elements must be provisioned at TELRIC-compliant rates. BellSouth does not dispute this fact. An expedite order for a UNE should not be treated any differently.

Joint Petitioners' Rebuttal Testimony at 80:8-10 (Nov. 19, 2004) ("JP Rebuttal Test.").

BellSouth's proposed Service Date Advancement fee is an additional charge over and above the recurring and non-recurring charge of a UNE. Yet there is no additional installation work involved for BellSouth to perform a Service Date Advancement. As Mr. Falvey, the designated witness for Joint Petitioners on this issue, testified, "there's no difference in the provisioning itself, the physical provisioning of the UNE circuit that differs." Tr. at 329:6-9. In other words, installing a loop is installing a loop, regardless of the day on which the installation takes place. Thus, this charge is purely "additive," **Attachment 6** (BellSouth Response to

Interrogatory 6-5-1), and has no justification other than BellSouth's desire to extract additional charges from and raise the costs of Joint Petitioners.

Nor would a Service Date Advancement impose any opportunity cost — even if opportunity costs were a permissible element of pricing[21] — to BellSouth, because the Agreement already states that BellSouth can refuse to do an advancement where circumstances require. Exh. A. at 20; Tr. at 680:24 – 681:7 (Blake); Morillo Depo. Tr. at 54:11-15, at 59:4-9. At hearing, when asked "[w]hen a joint petitioner puts in an expedite order, does it always get the expedite it wants?," Ms. Blake responded "[n]ot necessarily." Tr. at 680:24 – 681:1.

The fact that BellSouth need not, under the non-disputed language of this Agreement, grant any or all expedite requests, bears repeating (with the caveat that it must grant or deny on a non-discriminatory basis). In defense of the usurious $200 charge that BellSouth has requested, it has argued that it must price expedites prohibitively high, or Joint Petitioners "orders could jump in front of other orders and cause us to miss measurements and cause SEEMS penalties." Tr. at 680:19-23 (Blake). Similarly, at his deposition, BellSouth witness Carlos Morillo stated that "if there was no charge or a very insignificant charge to expedite the service request, most people would potentially request expedited services." Morillo Depo. Tr. at 56:21-24. But when asked whether BellSouth had "**conducted any analyses** as to the effect that price has on the likelihood that a [CLEC] would request a service date advancement," Mr. Morillo could only respond "**I don't know**." *Id.* at 67:10-3. Again, Mr. Morillo is the person designated by BellSouth as the person with the most knowledge as to this issue which is all about that proposed rate. Nor could Mr. Morillo state the proportion of orders that (1) include an expedite request or

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21 The FCC held in the *Local Competition First Report and Order* that opportunity cost is not a valid cost component under Section 252. 14 FCC Rcd. at 15859-60 ¶ 709.

(2) are actually expedited. *Id.* at 56:6-13. Thus, BellSouth's $200 proposed charge has neither cost support nor experiential support, even if it were lawful for an ILEC to price elements at intentionally prohibitive levels (which, of course, it is not).

It is possible that BellSouth may later identify costs associated with a Service Date Advancement — perhaps it incurs back-office costs related to OSS management and service order queuing. To date, such additional OSS UNE related costs have not been identified. If BellSouth is able to identify such costs, the Authority should review those costs and establish in a future TELRIC docket a Service Date Advancement rate that complies with TELRIC. Again, as stated above with respect to the TIC, Joint Petitioners would by change of law amendment adopt any new Authority-approved rate elements into the Agreement going forward. The $200 per circuit/per day charge presently proposed, however, is usurious, unsupported and unacceptable.

In addition, this charge violates the parity mandate of Section 251. It is likely that BellSouth's retail division does not incur costs of $200 per circuit per day for Service Date Advancements, although they are routinely provided to BellSouth's retail division for the benefit of BellSouth's retail customers. Ms. Blake, BellSouth's designated witness for this Item 88, was not able to answer questions as to whether the retail division of BellSouth must pay the wholesale/network division any additional fee for expediting orders for BellSouth retail customers. Tr. at 675:5-12, at 683:17-24 (Blake). She could only repeat (repeatedly) that expedite charges are in BellSouth's retail tariff. *Id.* at 683:24 – 684:2. Thus, although BellSouth may impose some kind of expediting fee on retail customers, *id.* at 683:14-16, the record does not show that the retail services arm of BellSouth incurs cost for performing this service. Even if such costs were passed from BellSouth's network services arm to its retail services arm, it is a virtual certainty that such costs would be well below the retail rate which BellSouth seeks to foist on the Joint Petitioners. And in fact a waiver of that charge "could occur as well." Tr. at 678:24 – 679:1 (Blake).

The Act's non-discriminatory access requirements require that Joint Petitioners have access to UNEs at cost-based rates closely tethered to the ILECs' costs – not its retail rates. 47 U.S.C. 251(c)(3); 47 C.F.R. 51.307(a). The principle embodied in this requirement is that the Joint Petitioners are supposed to have access akin to BellSouth's wholesale/network services arm, so that they compete with BellSouth's retail arm. Thus, what matters for purposes of non-discriminatory access is not how BellSouth treats customers, but how its retail division is treated. Again, Joint Petitioners are not BellSouth retail customers, which Ms. Blake recognizes. Tr. at 676:17-25. Indeed, they compete with BellSouth's retail services unit for those retail customers. There being no evidence that BellSouth's retail entity pays a Service Date Advancement fee, BellSouth is prohibited from charging one to Joint Petitioners.

BellSouth has provided neither a cost nor a legal justification for its proposed Service Date Advancement charge. Accordingly, Joint Petitioners should not pay any fee for advancements until a suitable TELRIC-compliant charge is established.

## II. PROTECTING JOINT PETITIONERS FROM COERCIVE CONDUCT AND UNILATERALLY IMPOSED BUSINESS DESTROYING REMEDIES MADE POSSIBLE BY ONLY BY BELLSOUTH'S CONTROL OF BOTTLENECK FACILITIES AND DOMINANT MARKET POSITION

Several Items in this arbitration involve the ability of BellSouth, by virtue of its control over the local network and dominant market share, to shut down or impede Joint Petitioners' service for a number of reasons. These issues are:

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| **Item 86** | Whether BellSouth may suspend or terminate Joint Petitioners' service based on mere allegations of improper CSR access. |
| **Item 100** | Whether BellSouth may suspend or terminate Joint Petitioners' service based on their failure to calculate precisely the amounts outstanding on all of their accounts or failure to accurately predict timing of dispute posting and payment receipt. |
| **Item 101** | Whether BellSouth should be permitted to require a full two-months' deposit in light of the Petitioners' well established business relationships with BellSouth and BellSouth's recent agreements to accept less. |
| **Item 102** | Whether a deposit "offset" should be based on all amounts withheld and whether such offset should be restored based on BellSouth's meeting the same "good payment history" standard that applies to Joint Petitioners. |
| **Item 103** | Whether BellSouth may suspend or terminate Joint Petitioners' service if they do not remit a requested deposit within 30 days and do not otherwise post bond and file complaints with the Authority and other commissions. |
| **Item 104** | Whether, in cases where there is a dispute over the appropriate amount of a requested deposit, BellSouth may suspend or terminate Joint Petitioners' service unless Joint Petitioners post bond and file complaints with the Authority and other commissions. |

Each of these items is predicated on the fact that BellSouth seeks the ability to coercively threaten and to actually "pull the plug" on Joint Petitioners' operations. This capability places Joint Petitioners at an extreme disadvantage in this relationship, and moreover endangers the services they provide to Tennessee consumers. Accordingly, Joint Petitioners have sought to constrain BellSouth's rights under this Agreement to exercise that power, and instead abide by the normal means of resolving disputes in an equitable and efficient manner (as set forth in the Dispute Resolution provisions of the Agreement). For example, in Item 100, Joint Petitioners should not be subject to service termination for a mathematical error when calculating amounts owed to BellSouth, especially where BellSouth has refused to consolidate these amounts and print them out in dollars and cents in their suspension and termination notices.[22] The provisions Joint Petitioners propose are necessary to ensure the integrity of Joint Petitioners' service and to remove the significant and coercive leverage that the threat of suspension of order processing, access to ordering systems and outright termination of services carries.

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| *Item No. 86, Issue No. 6-3 [Sections 2.5.6.2, 2.5.6.3]: (A) This issue has been resolved. (B) How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?* |

**Disputes Over Unauthorized Access to CSR Information Should be Subject to the Dispute Resolution Provisions of the Agreement.**

Disputes over unauthorized access to CSR information should be handled in the same manner as other disputes arising under the Agreement. The party alleging non-compliance should notify the other party of the issue. If the parties are unable to resolve the dispute themselves, they should resort to the dispute resolution provision in the General Terms and Conditions section of the Agreement. BellSouth's proposed "self-help" remedies are inappropriate and coercive. JP Suppl. Direct Test. at 85:16 – 86:1.

BellSouth proposes a menu of debilitating and extremely disruptive sanctions for any allegation by BellSouth of unauthorized access to CSR information. Under its proposal, BellSouth could refuse to accept new orders. It could also suspend any pending orders, and access to ordering and provisioning systems (thus, closing off Joint Petitioners' ability to serve the needs of existing customers, as well as potential new ones). Ultimately, BellSouth could terminate all services provided to Joint Petitioners, no matter how unrelated to the unproven

22 BellSouth has recently proposed new language stating that it "will provide information to [Petitioner] of the Additional Amounts Owed that must be paid[.]" Exh. A at 18. The language does not fully address Joint Petitioners' concern in Item 100, as will be explained herein.

allegations of unauthorized access to CSRs. *See* BST Cross Exh. 13 at p.7. Under BellSouth's proposal, it has the sole discretion to impose these sanctions, which impact both CLECs and consumers, and which BellSouth witness Scot Ferguson agreed were "an ultimate remedy." Tr. at 428:11-12. At hearing, Mr. Ferguson acknowledged that suspension or termination has "a disruptive nature … to everyone involved." Tr. at 428:18-19. In addition, counsel for Petitioners elicited the following response from Mr. Ferguson:

> Q: [] Do you understand the issue is not that they fear that you are going to use this suspension or termination power on a daily basis? It is that you could use it, and once **could be deadly**?
>
> A: **I understand that.**

Tr. at 430:13-18 (Ferguson). BellSouth has offered no rationale for such an extreme and one-sided remedy. Nor has BellSouth alleged or shown that any Joint Petitioner has ever misused CSR information in the past.

Since the hearing, BellSouth has revised its proposed language for Item 86(b). While this language appears to accept the precept that disputes should be decided by a neutral decision-maker, such as the Authority, it curiously retains the menu of debilitating pull-the-plug remedies and impossibly short response windows. Thus, BellSouth's proposal remains unacceptable as no one can tell or explain why the inappropriate pull-the-plug provisions remain or when BellSouth might seek to threaten their use or unilaterally avail itself of them.

The Authority should order that the disputes of this type be subject to the same dispute resolution provisions as other disputes in the Agreement. These provisions must preserve authority over critical, consumer-impacting issues at the Authority, where it belongs, and not with BellSouth. Accordingly, Joint Petitioners' proposed language for Sections 2.5.6.2, 2.5.6.3 of Attachment 6 should be adopted.

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

**BellSouth Should Not Be Permitted to Suspend Access or Terminate a Joint Petitioner's Service for Non-Payment for Services Provided Unless It Makes Clear the Exact Amount That Must Be Remitted to Avoid Termination.**

BellSouth seeks in this Agreement the right to terminate Joint Petitioners' service if any of their accounts become past due. Exh. A at 18. Notably, it refuses to accept Joint Petitioners' proposed language that would make the right reciprocal. (Joint Petitioners concede however, that they cannot imagine a scenario where it would make sense to cut off services to BellSouth and as a result cut their customers off from the overwhelmingly dominant share of customers served by BellSouth. The point is, however, that BellSouth finds the prospect of facing such drastic measures by another party to be unacceptable.) It is also notable that this is the sole instance where Joint Petitioners have agreed to incorporate such drastic remedies into the Agreement. That is because Joint Petitioners are committed to paying for the services they order and receive from BellSouth. With such remedies available – and knowing that they not only threaten the very existence of each Joint Petitioner and that they would, if imposed disrupt services to Tennessee consumers served by the Joint Petitioners – it is imperative that all possible guesswork is eliminated from the steps needed to avoid imposition of potentially business destroying remedies.

BellSouth's proposal builds in guesswork and only adds to its ability to use the proposed provisions in a coercive and inappropriate manner. According to BellSouth's proposed language for Section 1.7.2 of Attachment 7, once any account (Petitioners each have several separate accounts with BellSouth[23]) goes unpaid for 31 days, a Petitioner will receive an automatically generated Notice and will have 30 days to pay not only the amount due on that account, but all amounts that may become past due, in order to avoid service termination. Exh. A at 18. The Petitioner would have only 15 days to pay all of these amounts before BellSouth will start rejecting all new service orders, and only 30 days to avoid termination of all services (no matter how related to the services for which payment was not made). *Id.* The catch in this language is that the Notice will not state the full amount that will become due on all accounts, but only the amount due under the initial past due account. As BellSouth's corporate witness Carlos Morillo explained with regard to CABS (Carrier Access Billing System) bills,

> If a notice is sent to a customer for past due balances, and during that treatment process, additional payments become past due, BellSouth will require the customer to pay the amount on the notice, plus any additional amounts that have become past due in order to avoid suspension or termination of services.

Morillo Rebuttal Test. at 14:22 – 15:1. A similar calculation requirement applies to IBS bills:

> If, however, the customer does not comply and access to ordering systems is denied, payment of all additional amounts that have become past due will be required in order to restore access to the ordering systems.

*Id.* at 14:13-16. Thus, this language forces Joint Petitioners to guess at the amount it owes or will owe BellSouth on any given day after receipt of the Notice, or suffer the worst possible consequence — total service shut down. It also involves guesswork as to whether disputes will be properly and timely recognized, and as to when BellSouth will recognize receipt of payment.

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23 Ms. Johnson testified during her deposition that KMC can receive as many as 2,000 BellSouth invoices in one billing cycle. Johnson Depo. Tr. at 291:8-10. And as demonstrated by Mr. Russell at hearing, each of these bills can be massive. JP Exh. 9.

BellSouth's proposal creates an opportunity for error and gamesmanship that is unreasonable, unacceptable and contrary to the public interest.

Service discontinuance is the most serious possible course of action for any utility. It is no hyperbole to say that service discontinuance threatens lives. For these reasons, service discontinuance is governed by both federal and state statutes. Section 214 of the Communications Act states that "[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the [FCC] a certificate[.]" 47 U.S.C. § 214(a). As the FCC has held, "Section 214(a) has an essential role in the Commission's efforts to protect consumers. Unless the Commission has the ability to determine whether a discontinuance of service is in the public interest, it cannot protect customers from having essential services cut off without adequate warning, or ensure that these customers have other viable alternatives." *In re Arbros Communications Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd. 3251, 3254 ¶ 7 (2003).

This state has an analogous service discontinuance rule. Section 1220-4-8-.05 of the Authority's Rules requires any certificated telecommunications provider to give formal notification of intent to discontinue service to both the Authority and to all affected customers "by direct mail **ninety (90) days in advance** of the last anticipated day of service." Even where a customer has failed to pay their bill, all carriers are commanded by statute to ensure that "[a] notice has been mailed to the user stating that service shall be discontinued unless payment is made within a specified time," and "[a] reasonable, good faith effort is made **to notify the user by a utility representative in person** that service shall be discontinued on a date certain." Tenn. Code Ann. § 65-32-104.

Based on these statutory requirements, the underlying public policy considerations, and the potential that application of the remedies proposed in Item 100 could cause discontinuance of services to customers without adequate notice, the Authority may strike the proposal or at the very least the remedies contained therein. *See* 47 U.S.C. § 252(e)(2)(A)(ii). In such instance, disputes would be resolved pursuant to the dispute resolution provisions of the Agreement, which would bring the matter before the Authority, the FCC or a Court of law.

As Joint Petitioners have explained, BellSouth's proposed language for Section 1.7.2 would create "nothing less than a 'fire drill.'" JP Suppl. Direct Test. at 110:7. It would require Petitioners to calculate and pay "the precise amount that BellSouth calculated" as being past due or that may become past due in the future. *Id.* at 111:6-7. Petitioners must engage in this high-stakes exercise despite the fact that "only BellSouth can know (and control) the answer to that calculation." *Id.* at 111:8-9. A "shell game" would ensue "that could easily be rigged or abused by BellSouth." JP Rebuttal Test. at 99:16-17. Even leaving that possibility aside, the calculation that the Petitioner would be forced to perform carries a "substantial risk of calculation errors" (*id.* at 99:2-3) that, under BellSouth's language, could result in termination of service to a Petitioner and the Petitioner's customers. As Mr. Falvey of Xspedius observed from the witness stand, that result "runs directly contrary to that 90-day requirement" in the Authority's rules. Tr. at 348:16-17.

BellSouth initially acknowledged in this case that Petitioners bear the burden of getting this calculation right. During his deposition, Carlos Morillo admitted that BellSouth will not consolidate all amounts due within the Notice of Suspension:

> Q. **Does BellSouth ever consolidate multiple notices of suspension into one notice?**

> A. As I mentioned before, on the IBS system, the notices are generated automatically. **So, in that case, no,** the notices would be generated for every billing cycle that we did not receive payment for.
> And for CABS — in the case for CABS, since we're generating, manually, the notices and then they would get the notices and at the same time, in the case of CABS, **we would ask them to pay on all amounts due before suspension**.

Morillo Depo. at 177:24 – 178:109 (emphasis added). Thus, any one Notice of Suspension would apply to only the account that has not received payment for 31 days from the date of invoice. Yet if there are other accounts in that status, the amounts due on those accounts will not be included on the same Notice. Moreover, there may be Notices sent on different days, none of which will be consolidated. Nonetheless, if Petitioners do not pay all amounts that will become past due on or before the suspension and termination dates in the Notice, they will suffer suspension and possibly termination.

BellSouth has recently proposed new language for Section 1.7.2 that evidences a partial and unsatisfactory attempt to address Joint Petitioners' concerns. This language includes a new sentence at the end of the provision, which reads

> Upon request, **BellSouth will provide information** to [Petitioner] **of the Additional Amounts Owed** that must be paid prior to the time periods set forth in the written notice to avoid suspension of access to ordering systems or discontinuance of the provision of existing services as set forth in the initial written notice.

Exh. A. at 18. Joint Petitioners do not believe that this language solves the problem. BellSouth offers only to "provide information" of other amounts due and only "upon request." It is not offering to consolidate all amounts that must be paid into one Notice in order that Petitioners may simply pay it and avoid suspension or termination. The requests that must be made could pertain to scores of bills and accounts – and BellSouth has made no commitment to provide such information in a timely manner, so as to permit it to short-circuit an appropriate notice requirement with respect to accounts and amounts that subsequently become past due. Thus, BellSouth's new language does not eliminate the "shell game" problem from this dispute. Accordingly, the Authority should reject BellSouth's language, even as amended.

BellSouth has attempted to make much of the fact Joint Petitioners' template contracts and general tariffs include provisions permitting them to terminate end user service for nonpayment. This attempt is fruitless. First, while Petitioners' templates may include such language, their customers rarely accept it — this term is one that often is negotiated away. As Ms. Johnson stated at her deposition, KMC's template contract may allow termination for nonpayment but "they just don't sign it." Johnson Depo. Tr. at 305:21. Second, even if Petitioners' actual contracts still contain that termination right and it is used, only that one end user's service is affected. Moreover, usually only a single bill is involved and it is a relatively simply and concise one at that. If BellSouth, the necessary wholesale provider in this state, terminates service to a Petitioner, it affects every single customer served by the Joint Petitioners. The two situations are not at all comparable.[24]

BellSouth has also attempted to argue around the clear inequity of its position on Issue 100 by stating that its true concern is not nonpayment by Petitioners, but rather by some bad actors that may opt in to this Agreement. At hearing, BellSouth counsel Robert Culpepper questioned Mr. Russell about Delta Phones and EZ Talk, whose certification had been revoked by the Authority. Tr. at 123:22 – 125:24. Delta had failed to pay its regulatory fees and EZ Talk

24 BellSouth has in fact attempted to rely on Joint Petitioners' tariffs and template contracts to defeat several of Petitioners' proposals. Because these documents rarely represent the final bargain that Petitioners strike with their customers, they are not valid comparisons for any provision. *See* Items 4 to 7, *infra*.

was liable for rampant slamming. Mr. Culpepper's point was that this Agreement will be eligible for adoption under Section 252(i) of the 1996 Act, and that "there are CLECs out there that do not have the same business integrity or the same business practice or morals or ethics that NuVox has." Tr. 126:19-22 (Culpepper).

Mr. Culpepper's concern is an empty one. What the Delta Phone and EZ Talk examples demonstrate is that the Authority has the ability and obvious motivation to deal with bad actors in an appropriate manner. Tr. at 172:17-21 (Redirect of Mr. Russell). There is no reason to think that a "rogue" CLEC that adopts this Agreement would be treated differently. And thus there is no reason to give BellSouth the power and the discretion in this Agreement to terminate Petitioners' service so cavalierly as BellSouth's language would do.

The Authority should therefore adopt Joint Petitioners' language for Section 1.7.2. It states quite simply that either party may send a notice of nonpayment to the other, and may require such amounts "as indicated on the notice in dollars and cents" to be paid within 15 days. Failure to pay that amount, again "as indicated on the notice (in dollars and cents)" may result in the discontinuance of service. Exh. A at 17. This language eliminates the shell game, obviates the need for either party to do hurried calculations of amounts owed, and thus safeguards the continuity of service for the parties and for Tennessee consumers.

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

**<u>BellSouth Should Not Request a Deposit Greater Than Is Necessary or That Is More Onerous Than the Requirement Already Adopted by this Authority</u>.**

BellSouth seeks the right to collect a deposit from each Joint Petitioner equal to two months' worth of billing. Exh. A at 26. But the Petitioners' well-established business relationships with BellSouth warrant that a less onerous deposit policy be implemented for this new Agreement.

Joint Petitioners fully appreciate that deposits are a mechanism used to mitigate BellSouth's risk of nonpayment. *See* Tr. at 713:23-25 (Blake) (discussing same). Yet, Petitioners have conducted business with BellSouth now for many years, and BellSouth has not attempted to assert, either in written testimony or at hearing, that they have a poor payment history that somehow aggravated BellSouth's risk. *See* Morillo Rebuttal Test. at 16:21-23; Tr. at 713:22 – 715:17 (Blake). Moreover, Petitioners have already agreed with BellSouth on the individual criteria by which a deposit request may be triggered, including their payment history, liquidity, and bond rating.[25] Agreement, Attachment 7, Section 1.8.5. Petitioners are willing and able to remit reasonable and appropriate deposits when the right to a deposit is triggered under the agreed-upon criteria.

BellSouth's concerns about risk of nonpayment are of somewhat dubious origin. That is, Mr. Morillo has testified that CLECs in the past have declared bankruptcy, including WorldCom, Adelphia, Cable and Wireless and Global Crossing. Morillo Rebuttal Test. at 17:5-7. By this testimony Mr. Morillo seems to be suggesting that BellSouth was not paid for services rendered to these companies. Yet in his deposition Mr. Morillo was not able to testify that BellSouth was denied payment in *any* of these bankruptcies. Morillo Depo. Tr. at 225:22-24. Nor could Ms. Blake, who is now BellSouth's witness for Issue 101, testify that it was never paid via the bankruptcy process. Tr. at 716:8-12 (confessing "no knowledge of that detail."). This kind of

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25 Joint Petitioners note that a 2-month maximum deposit provision ordinarily is attached to provisions requiring full refund of the deposit upon establishment of a good payment history. Since Joint Petitioners already have compromised by agreeing to BellSouth's demands for the inclusion of other factors, it is evident that comparison to "BellSouth standard" two-month deposit provisions is inapposite.

unsupported allegation cannot justify BellSouth's continued demands for unduly large, capital-consuming and business impacting deposits from Joint Petitioners.

For deposits have competitive consequences. Deposits tie up capital that could be used for other purposes, including the deployment of new facilities, expansion of footprint, and improvement of services. JP Suppl. Direct Test. at 113:6-7 (Petitioners "need to limit tying-up capital in such deposits"). As such, deposits should be reasonably curtailed in proportion to the relative risk. In Joint Petitioners' cases, that risk is demonstrably small.

Accordingly, the language in Section 1.8.3 of Attachment 6 should provide for a less onerous deposit than what BellSouth requests. In fact, BellSouth has agreed to accept lesser deposits maximums with other CLECs. ITC^DeltaCom, for example, has secured an agreement for a maximum of one months' deposit for services paid in advance, and two months' deposit for services paid in arrears. JP Cross Exam. Exh. 21 at NVX 000047. Joint Petitioners should be eligible for the same maximum deposit provided for in ITC^DeltaCom's interconnection agreements with BellSouth.

In the alternative, Joint Petitioners ask that the Authority adopt their proposal for Section 1.8.3: Petitioners must remit a deposit equal to one and one-half month's billings, and any new (as opposed to established) CLEC that adopts the Agreement must remit a two-month's deposit.[26] Exh. A. at 16. This bifurcated approach allows Petitioners to enjoy the benefits of the long-term business relationship they already have established with BellSouth, while

26 The FCC has preserved the rule allowing a CLEC to opt into an entire interconnection agreement under Section 252(i) of the 1996 Act, though it has eliminated the right to pick and choose among agreement terms under this provision. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, FCC 04-164 (rel. July 13, 2004). That order, insofar as it abolishes pick-and-choose, is presently on appeal to the Ninth Circuit Court of Appeals. *New Edge Network, Inc. v. FCC*, Case 04-73800.

simultaneously granting BellSouth more risk protection from any new or less established CLEC that is unknown to BellSouth. Accordingly, Joint Petitioners' proposal is the more reasonable of the two and should be adopted by the Authority.

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

**Equity Requires That BellSouth Set Off Outstanding Amounts It Owes to Joint Petitioners from the Deposit It Requests Joint Petitioners to Pay.**

Item 102 presents an issue of simple fairness: when BellSouth owes money to the Joint Petitioners, should it be able to demand a deposit from them up to the limit provided in the Agreement?[27] Joint Petitioners' language would correct this imbalance by requiring a "set off" of the amounts BellSouth owes against the deposit that Joint Petitioners must remit.

BellSouth is far from timely in paying Joint Petitioner invoices. According to BellSouth's own testimony, it has been timely for only 38% of the invoices provided by KMC (as measured 30 days from BellSouth's receipt of KMC's invoices). Morillo Rebuttal Test. at 20:8-9. It claims it has been timely with 91% of Xspedius's invoices (again as measured 30 days from receipt of the bill), but has provided not support for that claim. *Id.* at 20:4-5. Indeed, BellSouth's amounts owed to Xspedius's predecessor e.spire in unpaid reciprocal compensation totaled **$25 million**, which Xspedius only recouped after filing multiple actions across the BellSouth region. Falvey Depo. Tr. at 318:21- 319:21. Thus, BellSouth was "sitting on over $20 million of [e.spire's] revenue" and yet continued to seek a deposit. *Id.* at 319:2-3.

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27 Joint Petitioners do not under the Agreement have a right to collect a deposit from BellSouth to protect them form financial risk and harm created by BellSouth's failure to pay for services provided.

BellSouth has created this unimpressive and unproven payment history as to Petitioners, thus increasing their financial risk, yet it will continue to request a full deposit from Joint Petitioners on the ground that it must mitigate its own financial risk. Tr. at 727:13-16 (Blake). This imbalance is neither fair nor commercially reasonable. It means that Joint Petitioners are out of pocket twice — once in the form of billed revenue not received, and again when the deposit is posted.

Joint Petitioners' proposed language seeks nothing more than to correct this imbalance.[28] It would require BellSouth, when it calculates its requested deposit, to set off the amounts it already owes to Petitioners. This set-off would be revisited on an annual or semi-annual basis, just as Petitioners' deposits are reviewed on an annual or semi-annual basis. Joint Petitioners' language is equitable and simply makes sense; it therefore should be adopted for Section 1.8.3.1 of Attachment 7.

Notably, at least two recent decisions support the Joint Petitioners position that, where BellSouth has not paid its bills to the CLEC — whether disputed or undisputed — this must be taken into consideration as an offset to the deposit required. In a recent Kansas arbitration, the arbitrator found that:

> SWBT's proposal that it be permitted to use its "reasonable judgment" to determine if a CLEC's creditworthiness has been impaired is entirely too vague and subjective to provide CLECs with proper notice of when they become credit-worthy. Furthermore, imposition of a deposit upon a

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28 Since hearing, BellSouth has amended its proposed language in a seemingly dubious manner. BellSouth's exclusion of disputed amounts from the offset would permit it to obviate the provision by simply disputing what it does not wish to pay. The restoration provision proposed works further injustice, as it would require posting of the full amount of deposit originally requested by BellSouth, even if that amount was disputed and even if the parties had subsequently agreed to a lesser amount. Moreover, BellSouth's proposal continues to avoid acceptance of the very same definition of "good payment history" that the Joint Petitioners and BellSouth have agreed to in the criteria used to trigger deposit and deposit refund requests.

> previously creditworthy CLEC due to failure to pay some unquantified level of bill may be so out of balance and so vague as to be unacceptable in any corner of the market. The Arbitrator also disagrees with SWBT that the claim of Xspedius is a red herring that should be determined elsewhere. The Arbitrator finds that Xspedius' testimony is on point. **If its position is accurate [that SWBT owes Xspedius substantial sums at the time the deposit was requested], requiring a deposit of Xspedius would be extremely unfair.**

*In the Matter of the Petition of the CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b) of the Telecommunications Act of 1996*, Arbitrator's Determination of Issues, ¶ 52, Kansas Corporation Authority (Docket No. 05-BTKT-365-ARB) (Feb. 16, 2005) (excerpt appended hereto as **Attachment 7**).

Likewise, an Oklahoma arbitrator recently reached the same conclusion, and ordered the following language: "3.7.1 In no event will Xspedius s be subject to an assurance of payment to SBC OKLAHOMA that exceeds two months' projected average billing by SBC OKLAHOMA to Xspedius, ***less the amount of billings by Xspedius to SBC OKLAHOMA. If SBC owes Xspedius more than $500,000, then a deposit would not be required until such time as the outstanding balance is reduced below this amount.***" Decision of Administrative Law Judge, Oklahoma Corporation Authority Docket No. 2004-493 (emphasis added) (Apr. 12, 2005) (excerpt appended hereto as **Attachment 8**).

These decisions demonstrate that ILECs are demanding unreasonable and one-sided deposits. These commissions have determined that it would not be right to fail to take into account amounts withheld by the incumbent when considering appropriate deposit amounts.

For these reasons, the Authority should adopt Joint Petitioners' proposed language for Item 102.

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

**BellSouth Must Not Terminate a Petitioners' Service Based on a Deposit Dispute Unless the Petitioner Is in Violation of a Deposit Order Issued by the Authority or the Petitioner Has Failed to Abide by an Agreement to Post an Agreed-Upon Amount.**

BellSouth seeks the right to terminate Joint Petitioners' service if they fail to remit the deposit amount that BellSouth requests within 30 days. Hearing Exh. A at 27. This right is far too onerous, and would be a wholly non-proportional response to what it simply a dispute over dollar amounts needed to protect BellSouth from relatively modest financial risk. It has nothing to do with "non-payment" for services provided. Joint Petitioners therefore have proposed language that would require adjudication of a deposit dispute, and grants BellSouth the right to terminate service *only* if Petitioners fail to comply with a resulting order within 30 days. Joint Petitioners also have provided that BellSouth could seek such a remedy if one of them reached an agreement with BellSouth (memorialized in writing) and then simply failed to make good on it.

As explained above, Joint Petitioners are constrained from discontinuing service absent approval of the FCC, or this Authority, as appropriate. 47 U.S.C. § 214(a); TRA Rule 1220-4-8-.05. BellSouth is subject to the same constraints. *Id.* Therefore, BellSouth's demand that it be permitted under this Agreement to terminate service for a mere 30-day failure to remit a deposit is excessive, and likely unlawful. (Joint Petitioners cannot anticipate an instance where they would refuse to abide by any order of this Authority requiring a particular deposit or where they would negotiate and agree upon a particular deposit amount with BellSouth and then refuse to provide it within the agreed-upon timeframe.)

Not only is it improper, BellSouth's proposed language is unnecessary. None of Joint Petitioners' existing interconnection agreements give BellSouth the right to terminate their service over a deposit dispute, and yet BellSouth has secured a deposit from each of them. Tr. at 129:4-15 (Russell).

Deposit disputes should be handled in accordance with the Dispute Resolution provisions already in this Agreement. There is no need to treat deposit disputes any differently than other types of disagreement. Joint Petitioners are not trying to evade their contractual obligations to post deposits upon the triggering of the agreed-upon criteria, but rather want the deposit requirements to be fair and sensible. Obtaining this Authority's decision as to a proper deposit amount is not onerous, untoward or superfluous. Rather, it is the normal course of resolving disputes between BellSouth and CLECs.

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

**Joint Petitioners Should Not Be Forced to File for Adjudication and Post a Bond to Avoid Service Termination Pending a Deposit Dispute.**

BellSouth's proposal for this item again involves the possibility that BellSouth will terminate Joint Petitioners' service over a deposit dispute. Its language would require Petitioners to (1) post a bond for half the deposit amount requested,[29] **and** (2) initiate a proceeding with this Authority in order to avoid termination while the deposit dispute is pending.

These obligations are completely one-sided: if BellSouth demands a deposit that is unnecessarily high, it becomes Joint Petitioners' burden to obtain a decision from this Authority and to purchase a bond. Notably, to avoid termination, complaints would need to be filed with this Authority and up to eight others. And the cost of a bond, in Petitioners' experience, "is essentially the same as paying BellSouth the deposit outright." JP Rebuttal Test. at 107:18-19. Thus, even if Petitioners strongly disagree with BellSouth's deposit calculation, they essentially have to pay anyway. And the threat of suspension and termination continue to loom, which are disproportionate remedies that Section 214 and Rule 1220-4-8-.05 may not permit.

Notably, the same standards that apply to deposit requests also apply to deposit refund requests.[30] Yet, BellSouth had persistently refused to have the provision it proposes for Item 104 apply to deposit refund requests made by Joint Petitioners. Tr. at 742:14-20 (Blake) (agreeing only to consider it at this time). Thus, BellSouth refuses to accept its own burden-shifting proposal (wherein one party must resort to filing complaint at the Authority in order to avoid the other party's request or draconian alternative remedy from being imposed upon them) and it would refuse to provide half the amount of the refund requested in order to avoid the threat of such remedies (which Joint Petitioners, nevertheless would be unable to impose in any meaningful way – even if they were inclined to impose them, which they are not). This alone should be reason enough for the Authority to reject BellSouth's patently unreasonable proposal

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29 Since the hearing, BellSouth modified its "guilty until proven innocent" proposal to be only half as onerous. However, it is still fully unfair and contrary to the manner disputes that arise from the Agreement are resolved.

30 These standards trigger negotiations over the appropriate amount of deposit or refund within the range between zero and the maximum amount at issue in Item 101.

for Item 104. If for, any reason, the Authority is inclined to accept BellSouth's proposal Joint Petitioners respectfully submit that fairness would require that the Authority make the provision equally applicable to deposit refund requests.

Accordingly, Joint Petitioners' language for Section 1.8.7, which enables either party to file for Authority dispute resolution and includes no bond requirement, should be adopted.

## III. THIS AGREEMENT SHOULD REFLECT AND INCORPORATE THE PRACTICAL EXPERIENCE OF THE PARTIES SINCE THE 1996 ACT

This arbitration has the benefit of nine years' experience under the 1996 Act from which to draw. For this reason, the Authority should reject provisions proposed by BellSouth which uniformly are commercially unreasonable, in any context. Several items in this case deal with issues of general contracting, such as limitations on liability, that warrant retooling in order to make them more akin to the terms found in typical commercial contracts. Sections 251 and 252 do not provide BellSouth with the excuse it claims for proposing onerous, heavy-handed and one-sided terms that are not commercially reasonable, even within the context of a Section 252 agreement. These items are:

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| **Item 4** | Whether the parties should be precluded from obtaining *any* relief for damages caused by negligence. |
| **Item 5** | Whether BellSouth may require Joint Petitioners to mirror its limitation-of-liability language in all tariffs and contracts or incur indemnity obligations. |
| **Item 6** | Whether the Agreement should clarify that damages that are direct and reasonably foreseeable should not be considered indirect, consequential or incidental. |
| **Item 7** | Whether the parties should indemnify each other for damages caused by their own negligence or violation of the law. |

**Item 97** Whether it is more reasonable to require set payment due dates as being 30 days from receipt of a bill.

Historically, the terms and conditions that BellSouth has obtained with CLECs, particularly in the liability context, have been extremely biased in BellSouth's favor. This circumstance is due in part to BellSouth's clear negotiating leverage as the monopoly owner of the network, and partly to the relative lack of experience of the parties as to how general contract terms should be crafted. In this Agreement, the parties have the benefit of experience to help them re-shape these terms into something more even-handed, practical and commercially reasonable.

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

**Both Joint Petitioners and BellSouth Are Entitled to a Modest Measure or Relief for Harm Caused by the Other Party's Negligence.**

The dispute in this item is whether the Agreement should provide any remedy for harm caused by the negligence of either party. Joint Petitioners have proposed language for Section 10.4.1 of the General Terms and Conditions that would provide a maximum of 7.5% recovery to an injured party, calculated from the total revenue received and/or billed as of the date the negligence took place ("the day the claim arose"). This provision reflects settled contracts law as well as commercial practice in this industry, and specifically the practice of the Joint Petitioners.

A simple example illustrates how Joint Petitioners' language would operate. Surmise that on Day 61 of the Agreement, a DS3 transport trunk was negligently disconnected, leaving 50 Petitioner customers without service for 24 hours. As of Day 61, that Petitioner had paid $1 million to BellSouth, with another invoice for $500,000 pending. BellSouth would be liable for a maximum of 7.5% of $1.5 million, or $112,500, for that outage, with damages to be proved before a competent tribunal.

Today, Petitioners are not even granted this minimal relief in their interconnection agreements when they suffer harm through BellSouth's negligence. Any harm that BellSouth negligently causes becomes Joint Petitioners' burden, including any liability they incur and any revenue they lose as a result of service degradation or disruption. This inequity does not exist in other commercial contracts — including Joint Petitioners' contracts with customers and vendors — and moreover does not reflect the settled law of contracts. And the fact that BellSouth has always been able to impose such harsh liability terms does not make them any less improper. To resolve this problem, Joint Petitioners have proposed a limited right to damages for negligence, capped at 7.5%, that reflects general principles of contracting as well as an incremental move toward liability terms seen in other contracts between service providers.

Section 373 of the Second Restatement on Remedies states that an "injured party is entitled to restitution for any benefit that he has conferred on the other party by way or part performance or reliance." Rest. II Remedies § 373(1). Thus, money paid by a party to a vendor for services rendered is subject to restitution if the party were injured by the vendor's conduct or performance. BellSouth's "bill credits" proposal comports with the precept that one is not entitled to payment for services not properly rendered. However, this principle does not stand for the notion that liability for additional harms caused by the negligent provision of services should be eliminated (which is the essence of BellSouth's proposal).

BellSouth asserts that its proposed language, which provides no relief for harm caused by negligence, is "industry standard." Blake Suppl. Direct. Test. at 26:22. This assertion is incorrect. Joint Petitioners presently have contracts with telecommunications service providers that provide damages for harm caused by simple negligence. Custom contracts also contain deviations from the standard claimed by BellSouth. Xspedius's template contract, for example, also provides a limitation of liability for "mistakes, omissions, interruptions, delays, errors or defects in the service" that is capped at "$100,000 or five (5) months' worth of paid monthly recurring charges." **Attachment 9** (XSP00004-5) [filed under seal pursuant to Protective Order]. Thus, just as BellSouth is no longer "the [only] phone company", the BellSouth standard is no longer the industry standard.[31]

To the extent that Joint Petitioners' tariffs provide no relief for harm caused by their own negligence, those tariffs are very frequently not incorporated into actual user agreements. Tr. at 40:12-15 (Russell); Johnson Depo. Tr. at 29:22 – 30:6. Mr. Russell explained, for example, that customers "**very rarely**" purchase services out of tariffs, but rather "[c]ustomers buy from customer service agreements." Tr. at 162:7-10. And often NuVox will, with regard to liability clauses, "**provide additional amounts** in terms of greater than the loss service amount or additional type of consideration to [a] customer in order to make that customer happy … you want to make that customer more than whole in order to keep that customer on your service." *Id.* at 163:5-13 (Russell). Thus, it is not the case, as BellSouth seeks to imply, that Joint Petitioners are requesting more beneficial liability language than what they themselves provide to their own customers (even if the comparison of wholesale to retail service offerings is appropriate, which it is not).

It is moreover not appropriate to compare the terms of Joint Petitioners' contracts with the terms that they seek to incorporate into this Agreement. Joint Petitioners are competitive

31 The record contains no evidence that BellSouth does not create custom contracts that deviate from its claimed standard.

providers of retail telecommunications services. BellSouth, by contrast, is the incumbent that acts as a wholesale supplier to Joint Petitioners, and yet competes with them in the retail market. Thus, the terms imposed on Joint Petitioners have a pass-through effect on their customers, which impacts both their customers and the Tennessee telecommunications market generally. If BellSouth imposes liability terms on Joint Petitioners that provide no recompense for damages caused by its own negligence, it will increase Joint Petitioners' costs and imperil their ability to provide competing services. The same is not true of the contracts Joint Petitioners signs with retail customers. Those contracts should therefore not be used as a proxy or a template for the liability terms that should be established for this Agreement.

**The Proposed 7.5% Liability Cap for Negligence Is Appropriate in the Context of this Wholesale Agreement.**

Service contracts generally include liability terms that provide relief for harm caused through negligence. Bo Russell explained at hearing the fact that he has reviewed "agreements with software companies, [and] agreements with other telecommunications carriers like [IXCs]" on behalf of NuVox that impose liability for damages caused by negligence. Tr. at 718:20 – 719:12 (Russell). Joint Petitioners' prefiled testimony discussed these contracts, which often include liability for negligence up to "15% to 30% of the total revenues actually collected or otherwise provided for over the entire term of the relevant contract." JP Suppl. Direct Test. at 23:23 – 24:1.

What Joint Petitioners propose is a hybrid, or compromise, between the liability provisions of these contracts and the present-day terms under which BellSouth has for too long enjoyed a complete elimination of liability for negligence. *See* JP Suppl. Direct Test. at 22:18-

22. This 7.5% cap is a reasonable balance between the risk of incurring harm versus the revenues that will be generated under this Agreement. *See id.* at 23:21 – 24:2.

BellSouth's proposal is not a limitation-of-liability clause, but rather an "elimination of liability" clause. JP Suppl. Direct Test. at 22:21. ***It places the entire risk of BellSouth's own negligence on Petitioners.*** This result is inappropriate in what should be "an arm's-length contract between commercially sophisticated parties." *Id.* at 22:7. Joint Petitioners thus seek "some measure, albeit a modest one relative to universally-regarded commercial practices, of accountability and contractual responsibility." *Id.* at 23:4-5. BellSouth should not be shielded from all liability for its own negligence simply because this is an Interconnection Agreement, or because it has always been shielded in this way.

BellSouth's refusal to provide any relief to Joint Petitioners seems to rooted in its belief that BellSouth must treat Joint Petitioners "in the same manner that it treats its own customers." Tr. at 4:10-12 (Meza). BellSouth presented as an exhibit for this proposition an excerpted decision of the Wireline Competition Bureau — erroneously referred to by counsel as an "FCC Order" — in the WorldCom-Verizon arbitration. BST Cross Exh. 2 (*Petition of WorldCom, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd. 27039 27382 ¶ 709 (2002)) ("*Virginia Arbitration Order*").[32] That order is effective as to only one ILEC – Verizon – and in only one state – Virginia. Moreover, the Bureau's notion of how ILECs must treat competitors contravenes the rules promulgated by the full FCC: ILECs must provide CLECs with arrangements "at least in quality to that which the incumbent LEC provides to itself." 47 C.F.R.

32 BellSouth's reliance on SQM/SEEMs payments is a red herring, as such payments are part of a Section 271 compliance incentive plan and are not in any way related to individual negligent acts and the damages that result therefrom.

§ 51.311(b). Thus, whatever terms BellSouth offers to retail end users has no bearing, as a matter of law, on whether Joint Petitioners' proposed language for this Agreement is appropriate.

Nor has BellSouth demonstrated in this case the terms it offers to other CLECs. At hearing, Mr. Meza introduced as an exhibit a portion of the BellSouth SGAT. Tr. at 38:24 – 39:15. Yet as Director Tate observed, "BellSouth has actually petitioned to withdraw its SGAT." Tr. at 149:20-22. It is disingenuous in the extreme for BellSouth to use its SGAT as a means of rejecting Petitioners' liability proposal when it is seeking to nullify the SGAT altogether.

BellSouth has also objected to Petitioners' 7.5% liability cap on the ground that the revenues it will obtain under this Agreement to not cover that exposure. Blake Suppl. Direct Test. at 27:18-20. Yet BellSouth should not be shielded from its own negligence on the ground that it is obligated to provide certain services at TELRIC prices. According to Mr. Russell of NuVox, joint and common costs such as insurance are likely included in TELRIC cost studies. Tr. at 164:8-13. What the TELRIC pricing rules may not allow for, however, BellSouth to predict the amount of damages it might impose on Joint Petitioners and then seek to recover the costs of accepting liability for negligent acts through TELRIC prices it seeks to impose on Joint Petitioners.

Moreover, the degree of regulation imposed on BellSouth — particularly with respect to pricing — has diminished substantially since passage of the 1996 Act. Previous regulatory theory had advised that utilities were owed a certain degree of freedom from liability in exchange for regulatory constraints. *See* Rendi L. Menn-Stadt, *Limitation of Liability for Interruption of Service for Regulated Telephone Companies: An Outmoded Protection?*, 1993 U. Ill. L. Rev. 629, 640 (1993) (appended hereto as **Attachment 10**). Thus, a regulated telephone company "is charged with the duty of providing service upon application, but in exchange for such responsibility, [it] will not be required to provide completely uninterrupted or perfect quality service." *Id.* That theory no longer obtains, however, in an environment where BellSouth has obtained interLATA relief and considerable pricing flexibility. *See id.* at 644-45. Indeed, BellSouth's relationship with the Joint Petitioners involves significant billings offered pursuant to very relaxed regulation by the FCC. In that environment, a rebalancing of benefit (limitation of liability) and burden (regulatory costs) is warranted. *See id.*

This rebalancing is especially warranted in the case of this Agreement, which will involve provision of elements that are no longer UNEs, and thus no longer at TELRIC prices. And under the FCC's recent *Triennial Review Remand Order*, many more of the elements that Joint Petitioners use could be removed from the UNE list. BellSouth has in fact already conceded that not all items and services that Joint Petitioners will purchase are at TELRIC rates. Tr. at 753:25 – 754:1 (Blake). Having achieved a much less regulated pricing regime for local network elements, BellSouth should be subject to liability terms that operate in less stringently regulated environments.

**"The Day the Claim Arose" Provides a Date Certain for Calculating a Party's Liability.**

Joint Petitioners' proposed language marks liability from "the day the claim arose." This phrase refers to the day on which the negligent act occurred. This concept ensures that the parties can identify a date certain from which to calculate damages.

BellSouth argues that Joint Petitioners' language enables them to engage in "gaming" by deliberately waiting to file claims for damages under Section 10.4.1 until the end of the period of the Agreement. Tr. at 656:1 (Blake Summary). BellSouth is incorrect as a matter of law. The

Uniform Commercial Code states that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." U.C.C. § 2-725(2). Thus, it is recognized that "damages are generally measured as of the date of the breach," though greater damages may be awarded. Samuel Williston, A Treatise on the Law of Contracts, Section 64.4 (4th ed. 2002). Petitioners' language mirrors that rule, and leaves no room for delaying a claim to obtain unfair advantage.

It will be evident, under this Agreement, when a claim arises. This Agreement involves the operation of a closely monitored communications network. In fact, BellSouth is required by law to be actually aware of any network outages and to remedy them quickly. *E.g.*, 47 C.F.R. § 63.100 (federal outage reporting requirements); TRA Rule 1220-4-2-.33 (outage records must be maintained and available to the Authority for inspection). Thus, BellSouth will know when a breach of service has occurred, even if Joint Petitioners do not. BellSouth's objection that Petitioners will or could "game the system" under their proposed language is therefore meritless. Accordingly, the Authority should adopt Joint Petitioners' language for Section 10.4.1 of the General Terms and Conditions.

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| *Item No. 5, Issue No. G-5 [Section 10.4.2]: (A) To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts(past, present and future), should it be obligated to indemnify the other Party for liabilities not eliminated? (B) 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?* |

**<u>Petitioners Should Not Be Required to Mirror BellSouth's Limitation-of-Liability Terms In Order to Avoid Further Indemnification of BellSouth</u>.**

This item arises from BellSouth's insistence that Joint Petitioners include limitation-of-liability language in their contracts and tariffs that is as stringent as BellSouth's. If Joint Petitioners do not include liability language in all of their service arrangements (which predominantly are custom contracts) that virtually mirrors BellSouth's, for the entire duration of this Agreement, then BellSouth will make Joint Petitioners make up the difference should any claim be filed against BellSouth. In short, Joint Petitioners will have to pay out for BellSouth if it is found liable to a customer for *BellSouth's* negligence.

Joint Petitioners presently have commercially reasonable limitation-of-liability terms in their tariffs and customer agreements. Tr. at 58:10-13 (Russell); Johnson Depo. Tr. at 57:15-24 (KMC). Commercial reasonableness depends on the context. NuVox's language in its present tariffs is "the maximum extent permitted by law." Tr. at 58:10-13 (Russell). None of the Petitioners intend to remove their limitation-of-liability language from their tariffs or template contracts altogether. *Id.* at 58:17-20 (Russell). Rather, as Petitioners have explained from the beginning, they will ensure that their terms and conditions of service will "adhere to these existing standards of due care, commercial reasonableness, and mitigation." JP Suppl. Direct Test. at 27:17-18.

Indeed, even without any proposed contract language for this issue, Joint Petitioners' believe that it is incumbent upon them to incorporate "commercially reasonable" limitation of liability terms in all tariffs and contracts. Moreover, Joint Petitioners have made clear to BellSouth that it remains protected by "existing provisions of the Agreement and applicable commercial law stipulating that a Party is precluded from recovering damages to the extent it has failed to act with due care and commercial reasonableness." JP Suppl. Direct Test. at 27:3-16.

Yet limitation-of-liability language is among the terms that Petitioners presently must negotiate in order to win customers. Tr. at 163:3-13 (NuVox will "provide additional amounts … to make that customer happy") (Russell). Whether BellSouth also negotiates such terms in its custom contracts is a well-guarded secret. In any event, what Joint Petitioners seek is merely the flexibility to "offer a measure of *commercially reasonable terms* on liability that they may need in the exercise of their reasonable business judgment." JP Suppl. Direct Test. at 27:5-7 (emphasis added). Joint Petitioners thus request the ability continue to negotiate limitation-of-liability terms with potential and existing customers without facing financial retribution from BellSouth in the form of an indemnity obligation. In sum, BellSouth should not "dictate the terms of CLEC tariffs and customer service agreements" or force Petitioners to "mirror" BellSouth's contracts. Tr. at 26:16-18 (Russell Summary).

Presently Joint Petitioners provide a great proportion of their service via individual agreements, and not tariffs. Tr. at 711:1-17 (Russell) ("very rarely" do customers purchase out of NuVox's tariff or KMC's tariff). Liability terms are frequently negotiated such that they are different from the template liability terms in Joint Petitioners' tariffs. Again, as Mr. Russell explained, "it is common that you provide additional amounts in terms of greater than the loss service amount or additional type of consideration … in order to make that customer happy[.]" Tr. at 163:5-8.

BellSouth's proposed language would punish Joint Petitioners for providing that flexibility. It would require Joint Petitioners to cover BellSouth for BellSouth's own negligent, reckless, or unlawful conduct for failing to "mirror," as Mr. Russell put it, BellSouth's own stringent limitation-of-liability language that it imposes on Tennessee consumers. *See also* JP Suppl. Direct Test. at 28:8-14 (such a requirement is "unreasonable, anti-competitive and anti-consumer"). Joint Petitioners are committed to including **commercially reasonable** limitation-of-liability terms in their tariffs and contracts, and BellSouth should not force them to do more. Joint Petitioners should not be punished for competing with BellSouth.

BellSouth's position is bad for consumers, bad for competitors, and bad for the Tennessee telecommunications market. The Authority should therefore adopt Joint Petitioners' proposed language for Section 10.4.2 of the General Terms and Conditions.

*Item No. 6, Issue No. G-6 [Section 10.4.4]: (A) Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customers/End Users resulting directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance of obligations set forth in the Agreement are not indirect, incidental or consequential damages? (B) How should indirect, incidental or consequential damages be defined for purposes of the Agreement?*

**Damages That Are Reasonably Foreseeable and Direct Are Not "Indirect, Incidental, and Consequential" and Thus Should Not Be Precluded by the Agreement.**

Item 6 is in large measure a definitional issue: how should indirect, incidental, and consequential damages be defined for purposes of the Agreement? These are damages for which neither Party will be liable to the other. Because of this harshly preclusive effect, Joint Petitioners seek to define them in a manner that does not unfairly deprive any party of damages to which they may be entitled. Moreover, Joint Petitioners seek to avoid any misperception or to lend any credence to arguments that BellSouth may make now or in the future that the parties somehow herein agreed in some manner to curtail the legal rights of Joint Petitioners' Tennessee customers. Accordingly, Joint Petitioners insist on this clarification, which reflects the extent and limit of their voluntary agreement with BellSouth to waive certain damages claims: "[d]amages to customers that result directly, proximately, and in a reasonably foreseeable manner from BellSouth's (or a CLEC's) performance of obligations set forth in the Agreement … should be considered direct and compensable[.]" JP Suppl. Direct Test. at 29:6-11.

Joint Petitioners' language for Section 10.4.4 states that indirect, incidental and consequential damages do not include damages that "result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder." Reasonably foreseeable damages are those for which contracting parties are responsible when they act negligently, recklessly, or in a manner that violates the law. Thus, if damages are 'reasonably foreseeable,' they cannot be deemed 'indirect' or 'incidental' or 'consequential.' These damages are "an appropriate risk to be borne by any service provider in a contract that clearly envisions that the effect of performance or nonperformance of such services will be passed through to ascertainable third parties[.]" JP Suppl Direct Test. at 29:19 – 30:1.

Tennessee law provides that sellers are subject to incidental and consequential damages resulting from their breach of contract. Tenn. Code Ann. § 47-2-712. Incidental damages include "any commercially reasonable charges, expenses, or Authority's in connection with effecting cover." *Id.* § 47-2-715(1). 'Cover' is the operation of obtaining replacement goods and services. Incidental damages also include "any other reasonable expense incident to the delay or other breach." *Id.* § 47-2-715(1). Consequential damages include "any loss resulting from general or particular requirements" under the contract, "of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise." *Id.* § 47-2-715(2)(a). *See also First Tenn. Bank Nat'l Ass'n v. Hurd Lock & Mfg.*

*Co.*, 816 S.W.2d 38, 43 (Tenn. Ct. App. 1991) ("If a direct out-of-pocket expense is incurred by a party as a direct and proximate result of a breach of contract, that expense, if within the contemplation of the parties, is a consequential damage."); *Harrington Mfg. Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E.2d 282 (Ct. App. 1979) (vacating and remanding case for new trial on damages).

BellSouth knows the requirements of Joint Petitioners. It knows, by virtue of its experience under the 1996 Act, that Joint Petitioners rely on BellSouth's bottleneck facilities, such as loops and transport, in order to serve customers. 47 U.S.C. §§ 251(c), 251(c). As such, BellSouth's acts and omissions impact Joint Petitioners' ability to do business and serve customers. And thus BellSouth knows that its acts and omissions will impact Joint Petitioners' customers.

Were BellSouth's facilities to go down, Joint Petitioners must obtain alternate services as cover, where possible. They may also be required to give credits to their customers for any outage. If the outage was caused by BellSouth's negligence, recklessness, or willful misconduct, BellSouth should compensate Joint Petitioners for the losses they incur therefrom. Such losses are reasonably foreseeable and flow directly from BellSouth's — not Joint Petitioners' — conduct. Unless BellSouth compensates Joint Petitioners for those losses, it will improperly increase Joint Petitioners' costs and impede their ability to deploy facilities and serve customers.

Joint Petitioners must not be left without relief when BellSouth's conduct results in direct, reasonably foreseeable damages. These are damages that Tennessee law provides. Moreover, they are necessary to preserving competition in this state. Accordingly, Joint Petitioners' language for Section 10.4.4 of the General Terms and Conditions should be adopted for the Agreement.

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

**It Is Reasonable and Appropriate in this Agreement for the Provisioning Party to Bear the Risk of Its Own Services.**

Joint Petitioners' proposed language for Section 10.5 provides that the party providing service must indemnify the other party for damages caused in providing that service. This language comports with industry practice as reflected in Joint Petitioners' own tariffs and contracts, and rests on the same commonsense notion, expressed above with respect to Item 4, that parties must be responsible for damages that they cause by their own acts and omissions. As Joint Petitioners have stated, "[a] Party that fails to abide by its legal obligations should incur the damages arising from such conduct. A Party that is negligent should bear the cost of its own mistakes." JP Rebuttal Test. at 30:11-12.

The parties agree on indemnification to some extent. Their quite similar contract language requires the party receiving service to indemnify the service provider for damages caused by unlawful conduct. Exh. A at 4-5. *See also* JP Rebuttal Test. at 30:3-5. And in fact, Joint Petitioners presently impose such indemnification obligations in their tariffs and contracts. NuVox's tariff in Tennessee states that NuVox will not indemnify its customers for the customers' own wrongdoing (including defamation, libel, and patent infringement). BST Cross Exh. 5 at Orig. Page 2.8.

Similarly, Xspedius's tariffs state that the company does not indemnify customers for damages caused by "the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees" or the customers infringement of patents, copyrights or trade secrets. **Attachment 11** (excerpts of tariffs) (XSP 000023, 39, 48, 56, 64, 72, 81). And

Xspedius's template customer contract requires the customer to indemnify Xspedius for any loss that "arises out of, or is directly or indirectly related to, ... any act or omission of Customer," and also for any loss caused by "facilities or equipment provided by an entity other than Xspedius." **Attachment 9** (XSP 000004-5) [filed under seal].

A sample NewSouth contract produced to BellSouth states that "NewSouth hereby assumes liability for, and shall indemnify, defend, protect, save and hold harmless Customer ... from and against any and all third party liabilities, claims, judgments, damages and losses." **Attachment 12** (NVX 00051) [filed under seal]. In addition, neither the Xspedius tariff nor its template contract requires customers to indemnify the company for damages caused by the company's service. **Attachments 9 and 11.** These examples simply demonstrate what seems axiomatic: a party that provides services cannot expect indemnification from its customers when it was the providing party's conduct that caused the harm. As Joint Petitioners' testimony explains, "in virtually all other commercial-services contexts, the service provider, not the receiving party, bears the more extensive burden on indemnities." JP Suppl. Direct Test. at 32:18-20.

BellSouth's refusal to accept Joint Petitioners' language amounts to their foisting upon these CLECs the obligation to act as BellSouth's insurance carrier. It means that when BellSouth or its service causes harm, Joint Petitioners must pay. This cannot be the right result in any commercial context, even a regulated one.

In addition, forcing Joint Petitioners to indemnify BellSouth for damages that BellSouth causes runs exactly contrary to the longstanding principles discussed above with respect to Item 4. A party that contracts to provide goods or services is responsible for the damages it causes. Thus, just as an injured party is entitled to relief from the causing party, a party that is held liable for damages is entitled to indemnification from the causing party. It would be absurd and anomalous to hold the causing party liable in the first scenario, but not the second. Joint Petitioners do not themselves operate in this fashion. For this reason, Joint Petitioners' proposed language for Section 10.5 of the General Terms and Conditions is appropriate and should be adopted.

**The 7.5% Cap on Damages for Negligence Applies to Indemnification Under Joint Petitioners' Language.**

Joint Petitioners' proposed indemnification language incorporates the 7.5% liability cap discussed above with regard to Item 4. In other words, Section 10.4.1 on limitation of liability and Section 10.5 on indemnification will operate in parallel fashion: there is no cap on liability for gross negligence, or willful misconduct; for simple negligence, the negligent party is subject to liability up to a maximum of 7.5% of the total amounts received or billed from the affected party.

As explained above, unless the provisions are parallel in this way, the Agreement would present an anomaly: a party that was ***injured by*** the other's negligence would be eligible for relief, but a party that was ***held liable for*** the other's negligence would have no relief. Alternatively, the lack of a cap would create an equally absurd result: a party that was ***injured by*** the other's negligence would be eligible for relief up to a 7.5% cap, but a party that was ***held liable for*** the other's negligence would have 100% relief without limitation. These results would be nonsensical. Thus, in order that the Agreement comports with industry practice and remains consistent, Joint Petitioners' language should be adopted for Section 10.5 of the General Terms and Conditions.

| *Item No 97, Issue No. 7-3 [Section 1.4]: When should payment of charges for service be due?* |
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**Payment for Charges Should be Due 30 Calendar Days from Receipt or Website Posting.**

Payment of charges for services rendered under the Agreement should be due 30 calendar days from receipt or website posting of a complete and fully readable bill. JP Suppl. Direct Test. at 104:3-4. Where correction or retransmission of a bill is necessary, the due date should be 30 days from receipt or website posting of the corrected bill. *Id.* at 104:4-5.

Joint Petitioners receive an enormous number of bills from BellSouth monthly which are voluminous and complex. JP Suppl. Direct Test at 104:21. These bills are often incomplete and sometimes incomprehensible. *Id.* at 104:17-18. There is generally a long gap between the bill issue date and the date the BellSouth bill is actually posted or received by Joint Petitioners. *Id.* at 105:5-15. BellSouth takes from 3 to 30 days to deliver its electronic bills. *Id.* at 105:8-10. The average delivery time is 7 days for NuVox's BellSouth bills. *Id.* at 105:21 – 106:2. Xspedius conducted a study of its BellSouth billing and found that on average the bill was received more than 6 days after the bill issue date posted on the BellSouth bill. *Id.* at 105:12-15. Because of the volume and complexity of the BellSouth bills, it often takes nearly three weeks to review and process them for payment. *Id.* at 115:14-16. BellSouth's testimony corroborates these results, as BellSouth explains that it s proposed process starts by designating a bill date on day one and then it takes various steps before sending out electronic and paper bills generally 8 days later (stating that CLECs generally have 22 days to pay their invoices). Morillo Rebuttal Test. at 9:16-18.

Requiring payment in less than 30 days is unacceptable in most commercial settings. JP Suppl. Direct Test. at 106:15-19. The alternative to Joint Petitioners' paying on time is to have valuable capital tied up in additional security deposits or pay substantial late payment penalties.

*Id.* at 106:17-19. Thus, BellSouth's payment requirements abuse "its monopoly legacy and bargaining position to force CLECs to either remit payment faster than almost any other business or in the alternative face substantial late payment penalties and increased security deposits." *Id.* at 106:23 – 107:2.

BellSouth does not itself abide by the payment due date that it seeks to impose on Joint Petitioners. In its written testimony, BellSouth stated that it has never defaulted in paying any Petitioner, because it either pays or disputes bills within 30 days ***of receiving them***. BellSouth's own testimony shows that BellSouth measures timely bill payment based on date of receipt rather than bill issue date. Morillo Rebuttal Test. at 20:4-6. Ms. Blake's attempt at hearing to diminish this clear disparity was nonsensical and unavailing.[33] However, in this arbitration, BellSouth is asking the Authority to apply a higher standard to Joint Petitioners. That is a patent violation of parity — BellSouth is not treating itself the way it seeks to treat Petitioners. *See* 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.311(a).

The Authority should order that the Agreement provide for payment of invoices within 30 days of receipt or website posting of a complete and fully readable bill. In the alternative, the Authority should order that the Agreement contain the same due date provision ordered in the ITC^DeltaCom/BellSouth arbitration in Docket No. 03-00119. In that case, the Authority

33 Ms. Blake stated that this metric "was just the way the calculation was done," but "[i]n no way is this purporting to be BellSouth's position that we want to pay the bills 30 days from receipt." Tr. at 850:22, at 852:12-14. Ms. Blake then stated that Mr. Morillo used the metric of 30 days from receipt because it was "initially in response to a discovery request that had the parameters of that discovery request to calculate it that way." *Id.* at 852:9-11. That statement is inaccurate. The Interrogatory propounded was "Please identify any and all losses, financial or otherwise, that **BellSouth would incur if it received payment thirty (30) calendar days from receipt** or website posting of a complete and readable bill." The question was not "calculate BellSouth's average time to pay a CLEC bill" but rather what harm comes to BellSouth if a CLEC pays a bill late. Thus, the fact that Mr. Morillo measured BellSouth's timeliness based on 30 days from receipt, while it demands Petitioners to pay invoices within 30 days of bill date, demonstrates patent discrimination.

ordered the parties to provide for payment within 25 days of receipt of a bill. Docket No. 03-00119, Transcript of Proceedings at 38:5 – 39:2 (Directors Tate and Jones) (Jan. 12, 2004). There is no reason to impose a different payment deadline for Joint Petitioners.

## CONCLUSION

As Joint Petitioners have demonstrated, the language that they have proposed for this Interconnection Agreement simply incorporates the prevailing law of unbundling and of contracts in a manner that is fair and equitable. This language will correct the prior imbalance in BellSouth's agreements, whereby CLECs have been forced to bear the lion's share of the risk inherent when a competitor must rely on the facilities of an incumbent monopolist. By adopting the Joint Petitioners' language for the items discussed herein, the Authority will craft an agreement that reflects the industry's experience with local competition since passage of the 1996 Act, setting the course for a "third generation" of agreement that will further encourage the development of competition in Tennessee.

Respectfully submitted, this 15th day of April, 2005.

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*Counsel for the Joint Petitioners*

**Certificate of Service**

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via U. S. Mail, first class postage prepaid, facsimile transmission, overnight delivery, or electronic transmission, to the following, this the 15th day of April, 2005.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201

H. LaDon Baltimore

# JOINT PETITIONERS'
# EXHIBIT A

## DISPUTED CONTRACT LANGUAGE BY ISSUE[1]

## GENERAL TERMS AND CONDITIONS

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

1.7 [CLEC Version] **End User** means the **customer of a Party**.

[BellSouth Version] **End User, as used in this Interconnection Agreement,** means the **retail customer of a Telecommunications Service, excluding ISPs/ESPs, and does not include Telecommunications carriers such as CLECs, ICOs and IXCs**.

**Customer, as used in this Interconnection Agreement, means the wholesale customer of a Telecommunications Service that may be an ISP/ESP, CLEC, ICO or IXC.**

**end user, as used in this Interconnection Agreement, means the End User or any other retail customer of a Telecommunications Service, including ISPs/ESPs, CLECs, ICOs and IXCs, that are provided the retail Telecommunications Service for the exclusive use of the personnel employed by ISPs/ESPs, CLECs, ICOs and IXCs, such as the administrative business lines used by the ISPs/ESPs, CLECs, ICOs and IXCs at their business locations, where such ISPs/ESPs, CLECs, ICOs and IXCs are treated as End Users.**

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

10.4.1 [CLEC Version] **With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by either Party, any End User of either Party, or by any other person or entity, for damages associated with any of the services provided pursuant to or in connection with this Agreement, including but not limited to the installation, provision,**

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1 Revised for filing 04/15/05

**preemption, termination, maintenance, repair or restoration of service, and, in any event, subject to the provisions of the remainder of this Section, each Party's liability shall be limited to and shall not exceed in aggregate amount over the entire term hereof an amount equal to seven-and-one half percent (7.5%) of the aggregate fees, charges or other amounts paid or payable to such Party for any and all services provided or to be provided by such Party pursuant to this Agreement as of the Day on which the claim arose; provided that the foregoing provisions shall not be deemed or construed as (A) imposing or allowing for any liability of either Party for (x) indirect, special or consequential damages as otherwise excluded pursuant to Section 10.4.4 below or (y) any other amount or nature of damages to the extent resulting directly and proximately from the claiming Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to all applicable damages or (B) limiting either Party's right to recover appropriate refund(s) of or rebate(s) or credit(s) for fees, charges or other amounts paid at Agreement rates for services not performed or provided or otherwise failing to comply (with applicable refund, rebate or credit amounts measured by the diminution in value of services reasonably resulting from such noncompliance) with the applicable terms and conditions of this Agreement. Notwithstanding the foregoing, claims or suits for damages by either Party, any End User of either Party, or by any other person or entity, to the extent resulting from the gross negligence or willful misconduct of the other Party, shall not be subject to the foregoing limitation of liability.**

[BellSouth Version] Except for any indemnification obligations of the Parties hereunder, **and except in cases of the provisioning Party's gross negligence or willful misconduct,** each Party's liability to **the other for any loss, cost, claim, injury, liability or expense, including reasonable attorneys' fees relating to or arising out of any negligent act or omission in its performance of this Agreement, whether in contract or in tort,** shall be limited to **a credit for the actual cost of the** services **or functions** not performed or **improperly performed.**

*Item No. 5, Issue No. G-5 [Section 10.4.2]: (A) To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future), should it be obligated to indemnify the other Party for liabilities not limited? (B) 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?*

10.4.2 [CLEC Version] **No Section.**

[BellSouth Version] **<u>Limitations in Tariffs</u>. A Party may, in its sole discretion, provide in its tariffs and contracts with its End Users, customers and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to the End User, customer or third party for (i) any loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such loss and (ii) consequential damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a loss as a result thereof, such Party shall indemnify and reimburse the other Party for that portion of the loss that would have been limited had the first Party included in its tariffs and contracts the limitations of liability that such other Party included in its own tariffs at the time of such loss.**

*Item No. 6, Issue No. G-6 [Section 10.4.4]: (A) Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customers/End Users resulting directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance of obligations set forth in the Agreement are not indirect, incidental or consequential damages? (B) How should indirect, incidental or consequential damages be defined for purposes of the Agreement?*

10.4.4 [CLEC Version] Nothing in this Section 10 shall limit a Party's obligation to indemnify or hold harmless the other Party set forth elsewhere in this Agreement. Except in cases of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages **provided that neither the foregoing nor any other provision of this Section 10 shall be deemed or construed as imposing any limitation on the liability of a Party for claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder and were not and are not directly and proximately caused by or the result of such Party's failure to act at all relevant times in a commercially reasonable manner in compliance with such Party's duties of mitigation with respect to such damage.** In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the services or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

[BellSouth Version] Nothing in this Section 10 shall limit a Party's obligation to indemnify or hold harmless the other Party set forth elsewhere in this Agreement. Except in cases of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the services or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

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

10.5 [CLEC Version] Indemnification for Certain Claims. The Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim **for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications. The Party receiving services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party providing services hereunder against any claim, loss or damage to the extent arising from (1) the providing Party's failure to abide by Applicable Law, or (2) injuries or damages arising out of or in connection with this Agreement to the extent caused by the providing Party's negligence, gross negligence or willful misconduct.**

[BellSouth Version] Indemnification for Certain Claims. 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 or customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations** arising out of this Agreement.

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| *Item No. 9, Issue No. G-9 [Section 13.1]: Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the Interconnection Agreement?* |

13.1 [CLEC Version] Except **as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the FCC, the Commission or a court of law for a resolution of the dispute. Either Party may seek expedited resolution by the Commission, and may request that resolution occur in no event later than sixty (60) calendar days from the date of submission of such dispute. The other Party will not object to such expedited resolution of a dispute. If the FCC or Commission appoints an expert(s) or other facilitator(s) to assist in its decision making, each party shall pay half of the fees and expenses so incurred to the extent the FCC or the Commission requires the Parties to bear such fees and expenses.** Each Party reserves any rights it may have to seek judicial review of any ruling made by the FCC, the Commission or a court of law concerning this Agreement. **Until the dispute is finally resolved,** each Party shall continue to perform its obligations under this Agreement, **unless the issue as to how or whether there is an obligation to perform is the basis of the dispute, and shall continue to provide all services and payments as prior to the dispute** provided however, that neither Party shall be required to act in any unlawful fashion.

13.1 [BellSouth Version] Except **for procedures that outline the resolution of billing disputes which are set forth in Section 2 of Attachment 7 or as otherwise set forth in this Agreement, each Party agrees to notify the other Party in writing of a dispute concerning this Agreement. If the Parties are unable to resolve the issues relating to the dispute in the normal course of business then either Party shall file a complaint with the Commission to**

**resolve such issues or, as explicitly otherwise provided for in this Agreement, may proceed with any other remedy pursuant to law or equity as provided for in this Section 13.**

13.2 **Except as otherwise stated in this Agreement, or for such matters which lie outside the jurisdiction or expertise of the Commission or FCC, if any dispute arises as to the enforcement of terms and conditions of this Agreement, and/or as to the interpretation of any provision of this Agreement, the aggrieved Party, to the extent seeking resolution of such dispute, must seek such resolution before the Commission or the FCC in accordance with the Act.** Each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Either Party may seek expedited resolution by the Commission. **During the Commission proceeding** each Party shall continue to perform its obligations under this Agreement; provided, however, that neither Party shall be required to act in an unlawful fashion.

13.3 **Except to the extent the Commission is authorized to grant temporary equitable relief with respect to a dispute arising as to the enforcement of terms and conditions of this Agreement, and/or as to the interpretation of any provision of this Agreement, this Section 13 shall not prevent either Party from seeking any temporary equitable relief, including a temporary restraining order, in a court of competent jurisdiction.**

13.4 **In addition to Sections 13.1 and 13.2 above, each Party shall have the right to seek legal and equitable remedies on any and all legal and equitable theories in any court of competent jurisdiction for any and all claims, causes of action, or other proceedings not arising: (i) as to the enforcement of any provision of this Agreement, or (ii) as to the enforcement or interpretation under applicable federal or state telecommunications law. Moreover, if the Commission would not have authority to grant an award of damages after issuing a ruling finding fault or liability in connection with a dispute under this Agreement, either Party may pursue such award in any court of competent jurisdiction after such Commission finding.**

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

32.2 [CLEC Version] **Nothing in this Agreement shall be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, except in such cases where the Parties have explicitly agreed to an exception to a requirement of Applicable Law or to abide by provisions which conflict**

**with and thereby displace corresponding requirements of Applicable Law. Silence shall not be construed to be such an exemption to or displacement of any aspect, no matter how discrete, of Applicable Law.**

[BellSouth Version] [BellSouth Version] **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 herein, is applicable under this Agreement by virtue of a reference to an FCC or Commission rule or order or, with respect to substantive Telecommunications law only, Applicable Law, and 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, and 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.**

## ATTACHMENT 2

## NETWORK ELEMENTS AND OTHER SERVICES

*Item No. 23, Issue No. 2-5 [Section 1.11.1]: 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?*

[CLEC Version] **In the event section 251 UNEs or Combinations are no longer offered pursuant to, or are not in compliance with, the terms set forth in the Agreement, including any transition plan set forth herein or established by the FCC or Authority, BellSouth may provide notice ("transition notice") to <<customer_short_name>> identifying specific service arrangements (by circuit identification number) that it no longer is obligated to provide as section 251 UNEs and that it insists be transitioned to other service arrangements. <<customer_short_name>> will acknowledge receipt of such notice and will have 30 days from such receipt to verify the list, notify BellSouth of initial disputes or concerns regarding such list, or select alternative service arrangements (or disconnection). <<customer_short_name>> and BellSouth will then confer to determine the appropriate orders to be submitted (i.e., spreadsheets, LSRs or ASRs). Such orders shall be submitted within 10 days of agreement upon the appropriate method (i.e., spreadsheets, LSRs or ASRs) and such agreement shall not be unreasonably withheld or delayed. There will be no service order, labor, disconnection, project management or other nonrecurring charges associated with the transition of section 251 UNEs to other service arrangements. The Parties will absorb their own costs associated with effectuating the process set forth in this section. In all cases, until the transition of any section 251 UNE to another service arrangement is physically completed (which, in the case of transition to another service arrangement provided by an entity other than BellSouth or one of its affiliates, shall be the time of disconnection), the applicable recurring rates set forth in the parties' interconnection agreement that immediately preceded the current Agreement or that were otherwise in effect at the time of the transition notice shall apply.**

[BellSouth Version] **In the event that <<customer_short_name>> has not entered into a separate agreement for the provision of Local Switching or services that include Local Switching, <<customer_short_name>> will submit orders to either disconnect Switching Eliminated Elements or convert such Switching Eliminated Elements to Resale within thirty (30) calendar days of the last day of the Transition Period. If <<customer_short_name>> submits orders to transition such Switching Eliminated Elements to Resale within thirty (30) calendar days of the last day of the Transition Period, applicable recurring and nonrecurring charges shall apply as set forth in the**

**appropriate BellSouth tariff, subject to the appropriate discounts described in Attachment 1 of this Agreement. If <<customer_short_name>> fails to submit orders within thirty (30) calendar days of the last day of the Transition Period, BellSouth shall transition such Switching Eliminated Elements to Resale, and <<customer_short_name>> shall pay the applicable nonrecurring and recurring charges as set forth in the appropriate BellSouth tariff, subject to the appropriate discounts described in Attachment 1 of this Agreement. In such case, <<customer_short_name>> shall reimburse BellSouth for labor incurred in identifying the lines that must be converted and processing such conversions. If no equivalent Resale service exists, then BellSouth may disconnect such Switching Eliminated Elements if <<customer_short_name>> does not submit such orders within thirty (30) calendar days of the last day of the Transition Period. In all cases, until Switching Eliminated Elements have been converted to Comparable Services or disconnected, the applicable recurring and nonrecurring rates for Switching Eliminated Elements during the Transition Period shall apply as set forth in this Agreement. Applicable nonrecurring disconnect charges may apply for disconnection of service or conversion to Comparable Services.**

1.11.2 **Other Eliminated Elements. Upon the end of the Transition Period, <<customer_short_name>> must transition the Eliminated Elements other than Switching Eliminated Elements ("Other Eliminated Elements") to Comparable Services. Unless the Parties agree otherwise, Other Eliminated Elements shall be handled in accordance with Sections 1.11.2.1 and 1.11.2.2 below.**

1.11.2.1 **<<customer_short_name>> will identify and submit orders to either disconnect Other Eliminated Elements or transition them to Comparable Services within thirty (30) calendar days of the last day of the Transition Period. Rates, terms and conditions for Comparable Services shall apply per the applicable tariff for such Comparable Services as of the date the order is completed. Where <<customer_short_name>> requests to transition a minimum of fifteen (15) circuits per state, <<customer_short_name>> may submit orders via a spreadsheet process and such orders will be project managed. In all other cases, <<customer_short_name>> must submit such orders pursuant to the local service request/access service request (LSR/ASR) process, dependent on the Comparable Service elected. For such transitions, the non-recurring and recurring charges shall be those set forth in BellSouth's FCC No. 1 tariff, or as otherwise agreed in a separately negotiated agreement. Until such time as the Other Eliminated Elements are transitioned to such Comparable Services, such Other Eliminated Elements will be provided pursuant to the rates, terms and conditions applicable to the subject Other Eliminated Elements during the Transition Period as set forth in this Agreement.**

1.11.2.2 If <<customer_short_name>> fails to identify and submit orders for any Other Eliminated Elements within thirty (30) calendar days of the last day of the Transition Period, BellSouth may transition such Other Eliminated Elements to Comparable Services. The rates, terms and conditions for such Comparable Services shall apply as of the date following the end of the Transition Period. If no Comparable Services exist, then BellSouth may disconnect such Other Eliminated Elements if <<customer_short_name>> does not submit such orders within thirty (30) calendar days of the last day of the Transition Period. In such case <<customer_short_name>> shall reimburse BellSouth for labor incurred in identifying such Other Eliminated Elements and processing such orders and <<customer_short_name>> shall pay the applicable disconnect charges set forth in this Agreement. Until such time as the Other Eliminated Elements are disconnected pursuant to this Agreement, such Other Eliminated Elements will be provided pursuant to the rates, terms and conditions applicable to the subject Other Eliminated Elements during the Transition Period as set forth in this Agreement.

1.11.3 To the extent the FCC issues an effective Intervening Order that alters the rates, terms and conditions for any Network Element or Other Service, including but not limited to Local Switching, Enterprise Market Loops and High Capacity Transport, the Parties agree that such Intervening Order shall supersede those rates, terms and conditions set forth in this Agreement for the affected Network Element(s) or Other Service(s).

1.11.4 Notwithstanding anything to the contrary in this Agreement, in the event that the Interim Rules are vacated by a court of competent jurisdiction, <<customer_short_name>> shall immediately transition Local Switching, Enterprise Market Loops and High Capacity Transport pursuant to Section 1.11 through 1.11.2.2 above, applied from the effective date of such vacatur, without regard to the Interim Period or Transition Period.

1.11.5 Notwithstanding anything to the contrary in this Agreement, upon the Effective Date of the Final FCC Unbundling Rules, to the extent any rates, terms or requirements set forth in such Final FCC Unbundling Rules are in conflict with, in addition to or otherwise different from the rates, terms and requirements set forth in this Agreement, the Final FCC Unbundling Rules rates, terms and requirements shall supercede the rates, terms and requirements set forth in this Agreement without further modification of this Agreement by the Parties.

1.11.6 In the event that any Network Element, other than those already addressed above, is no longer required to be offered by BellSouth pursuant to Section 251 of the Act, <<customer_short_name>> shall immediately transition such

**elements pursuant to Section 1.11 through 1.11.2.2 above, applied from the effective date of the order eliminating such obligation.**

*Item No. 26, Issue No. 2-8 [Section 1.13]: 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?*

1.7 [CLEC Version] **BellSouth shall permit <<customer_short_name>> to commingle a UNE or Combination of UNEs with any wholesale service, consistent with 47 C.F.R. 51.309(e). BellSouth shall perform the functions necessary to commingle a UNE with any wholesale service, consistent with 47 C.F.R. 51.309(f).**

[BellSouth Version] **Notwithstanding any other provision of this Agreement, BellSouth will not commingle UNEs or Combinations of UNEs with any service, Network Element or other offering that it is obligated to make available only pursuant to Section 271 of the Act. Nothing in this Section shall prevent <<customer_short_name>> from commingling Network Elements with tariffed special access loops and transport services.**

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

2.12.1 [CLEC Version] **BellSouth shall perform line conditioning in accordance with FCC 47 C.F.R. 51.319 (a)(1)(iii). Line Conditioning is as defined in FCC 47 C.F.R. 51.319 (a)(1)(iii)(A).** Insofar as it is technically feasible, BellSouth shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.

[BellSouth Version] **Line Conditioning is defined as a RNM that BellSouth regularly undertakes to provide xDSL services to its own customers. This may include the removal of any device, from a copper loop or copper sub-loop that may diminish the capability of the loop or sub-loop to deliver high-speed switched wireline telecommunications capability, including xDSL service. Such devices include, but are not limited to; load coils, low pass filters, and range extenders.** Insofar as it is technically feasible, BellSouth shall test and report troubles for all the features, functions, and capabilities of conditioned copper lines, and may not restrict its testing to voice transmission only.

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

2.12.2 [CLEC Version] **No Section.**

[BellSouth Version] **BellSouth will remove load coils only on copper loops and sub loops that are less than 18,000 feet in length. BellSouth will remove load coils on copper loops and sub loops that are greater than 18,000 feet in length upon <<customer_short_name>>'s request at rates pursuant to BellSouth's Special Construction Process contained in BellSouth's FCC No. 2 as mutually agreed to by the Parties.**

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

2.12.3 [CLEC Version] Any copper loop being ordered by <<customer_short_name>> which has over 6,000 feet of combined bridged tap will be modified, upon request from <<customer_short_name>>, so that the loop will have a maximum of 6,000 feet of bridged tap. This modification will be performed at no additional charge to <<customer_short_name>>. Line conditioning orders that require the removal of **other** bridged tap will be performed at the rates set forth in Exhibit A of this Attachment.

[BellSouth Version] Any copper loop being ordered by <<customer_short_name>> which has over 6,000 feet of combined bridged tap will be modified, upon request from <<customer_short_name>>, so that the loop will have a maximum of 6,000 feet of bridged tap. This modification will be performed at no additional charge to <<customer_short_name>>. Line conditioning orders that require the removal of bridged tap **that serves no network design purpose on a copper loop that will result in a combined level of bridged tap between 2,500 and 6,000 feet** will be performed at the rates set forth in Exhibit A of this Attachment.

2.12.4 [CLEC Version] **No Section.**

[BellSouth Version] **<<customer_short_name>> may request removal of any unnecessary and non-excessive bridged tap (bridged tap between 0 and 2,500 feet which serves no network design purpose), at rates pursuant to**

**BellSouth's Special Construction Process contained in BellSouth's FCC No. 2 as mutually agreed to by the Parties.**

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| *Item No. 51, Issue No. 2-33 [Sections 5.2.6, 5.2.6.1]: (A)* ***This issue has been resolved.*** <br><br> *(B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?* <br><br> *(C) Who should conduct the audit and how should the audit be performed?* |

5.2.6 [CLEC Version] To invoke its limited right to audit, BellSouth will send a Notice of Audit to <<customer_short_name>>, identifying **the particular circuits for which BellSouth alleges non-compliance and** the cause upon which BellSouth rests its allegations. **The Notice of Audit shall also include all supporting documentation upon which BellSouth establishes the cause that forms the basis of BellSouth's allegations of noncompliance.** Such Notice of Audit will be delivered to <<customer_short_name>> **with all supporting documentation** no less than thirty (30) calendar days prior to the date upon which BellSouth seeks to commence the audit.

[BellSouth Version] To invoke its limited right to audit, BellSouth will send a Notice of Audit to <<customer_short_name>> identifying the cause upon which BellSouth rests its allegations. Such Notice of Audit will be delivered to <<customer_short_name>> no less than thirty (30) calendar days prior to the date upon which BellSouth seeks to commence the audit.

5.2.6.1 [CLEC Version] The audit shall be conducted by a third party independent auditor **mutually agreed-upon by the Parties** and retained and paid for by BellSouth. The audit shall commence at a mutually agreeable location (or locations).

[BellSouth Version] The audit shall be conducted by a third party independent auditor retained and paid for by BellSouth. The audit shall commence at a mutually agreeable location (or locations).

## ATTACHMENT 3

## INTERCONNECTION

*Item No. 65, Issue No. 3-6 [Section 10.11. 1 (KMC/XSP), 10.8.1 (NSC/NVX)]: Should BellSouth be allowed to charge the CLEC a Transit Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?*

10.10.1 [CLEC Version] Each Party shall provide tandem switching and transport services for the other Party's Transit Traffic. Rates for Local Transit Traffic and ISP-Bound Transit Traffic shall be the applicable Call Transport and Termination charges (i.e., common transport and tandem switching charge; end office switching charge is not applicable) as set forth in Exhibit A to this Attachment. Rates for Switched Access Transit Traffic shall be the applicable charges as set forth in the applicable Party's Commission approved Interstate or Intrastate Switched Access tariffs as filed and effective with the FCC or Commission, or reasonable and non-discriminatory web-posted listing if the FCC or Commission does not require filing of a tariff. Billing associated with all Transit Traffic shall be pursuant to MECAB guidelines.

[BellSouth's Version] Each Party shall provide tandem switching and transport services for the other Party's Transit Traffic. Rates for Local Transit Traffic and ISP-Bound Transit Traffic shall be the applicable Call Transport and Termination charges (i.e., common transport and tandem switching charges and **tandem intermediary charge**; end office switching charge is not applicable) as set forth in Exhibit A to this Attachment. Rates for Switched Access Transit Traffic shall be the applicable charges as set forth in the applicable Party's Commission approved Interstate or Intrastate Switched Access tariffs as filed and effective with the FCC or Commission, or reasonable and non-discriminatory web-posted listing if the FCC or Commission does not require filing of a tariff. Billing associated with all Transit Traffic shall be pursuant to MECAB guidelines.

## ATTACHMENT 6

## ORDERING

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| *Item No. 86, Issue No. 6-3 [Sections 2.5.6.2, 2.5.6.3]: (A)* ***This issue has been resolved.*** *(B) How should disputes over alleged unauthorized access to CSR information be handled under the Agreement?* |

2.5.5.2 [CLEC Version] Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice to the other Party specifying the alleged noncompliance. **The Party receiving the notice agrees to acknowledge receipt of the notice as soon as practicable. If the Party receiving the notice does not dispute the other Party's assertion of non-compliance, the receiving Party agrees to provide the other Party with notice that appropriate corrective measures have been taken or will be taken as soon as practicable.**

[BellSouth Version] Notice of Noncompliance. If, after receipt of a requested LOA, the requesting Party determines that the other Party has accessed CSR information without having obtained the proper end user authorization, or, if no LOA is provided by the seventh (7th) business day after such request has been made, the requesting Party will send written notice by email to the other Party specifying the alleged noncompliance.

2.5.5.3 [CLEC Version] Disputes over Alleged Noncompliance. **If one Party disputes the other Party's assertion of non-compliance, that Party shall notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting** Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. In such instance, the Parties cooperatively shall seek expedited resolution of the dispute. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

[BellSouth Version] Disputes over Alleged Noncompliance. In it's **written notice to the other Party** the alleging Party will state **that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if such**

**use is not corrected or ceased by the fifth (5th) calendar day following the date of the notice. In addition, the alleging Party may, at the same time, provide written notice by email to the person designated by the other Party to receive notices of noncompliance that the alleging Party may terminate the provision of access to ordering systems to the other Party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth (10th) calendar day following the date of the initial notice. If the other Party disagrees with the alleging Party's allegations of unauthorized use, the alleging** Party shall proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions. All such information obtained through the process set forth in this Section 2.5.5 shall be deemed Information covered by the Proprietary and Confidential Information Section in the General Terms and Conditions of this Agreement.

*Item No. 88, Issue No. 6-5 [Section 2.6.5]: What rate should apply for Service Date Advancement (a/k/a service expedites)?*

2.6.5 [PARTIES DISAGREE ON THE RATE, NOT THE LANGUAGE] Service Date Advancement Charges (a.k.a. Expedites). For Service Date Advancement requests by <<customer_short_name>>, Service Date Advancement charges will apply for intervals less than the standard interval as outlined in Section 8 of the LOH, located at http://interconnection.bellsouth.com/guides/html/leo.html. The charges shall be as set-forth in Exhibit A of Attachment 2 of this Agreement and will apply only where Service Date Advancement has been specifically requested by the requesting Party, and the element or service provided by the other Party meets all technical specifications and is provisioned to meet those technical specifications. If <<customer_short_name>> accepts service on the plant test date (PTD) normal recurring charges will apply from that date but Service Date Advancement charges will only apply if <<customer_short_name>> previously requested the order to be expedited and the expedited DD is the same as the original PTD.

## ATTACHMENT 7

## BILLING

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

1.4 [CLEC Version] Payment Due. Payment **of charges** for services rendered will be due **thirty (30) calendar days from receipt or website posting of a complete and fully readable bill or within thirty (30) calendar days from receipt or website posting of a corrected or retransmitted bill in those cases where correction or retransmission is necessary for processing** and is payable in immediately available funds. Payment is considered to have been made when received by the billing Party.

[BellSouth Version] Payment Due. Payment for services will be due **on or before the next bill date (Payment Due Date)** and is payable in immediately available funds. Payment is considered to have been made when received by the billing Party.

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

1.7.2 [CLEC Version] **Each Party** reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the **Due Date, the billing Party may** provide written notice **to the other Party** that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, **as indicated on the notice in dollars and cents**, is not received by the fifteenth (15th ) calendar day following the date of the notice. In addition, **the billing Party** may, at the same time, provide written notice that **the billing Party** may discontinue the provision of existing services to **the other Party** if payment of such amounts, **as indicated on the notice (in dollars and cents),** is not received by the thirtieth (30th ) calendar day following the date of the Initial Notice.

[BellSouth Version] **BellSouth** reserves the right to suspend or terminate service for nonpayment. If payment of amounts not subject to a billing dispute, as described in Section 2, is not received by the **bill date in the month after the original bill date, BellSouth** will provide written notice to **<<customer_short_name>>** that additional applications for service may be refused, that any pending orders for service may not be completed, and/or that access to ordering systems may be suspended if payment of such amounts, **and all other amounts not in dispute that become past due subsequent to the issuance of the written notice ("Additional Amounts Owed"),** is not received by the (15th) calendar day following the date of the notice. In addition, **BellSouth** may, at the same time, provide written notice that **BellSouth** may discontinue the provision of existing services to **<<customer_short_name>>** if payment of such amounts, **and all other Additional Amounts Owed that become past due subsequent to the issuance of the written notice**, is not received by the thirtieth (30th) calendar day following the date of the initial notice. **Upon request, BellSouth will provide information to <<customer_short_name>> of the Additional Amounts Owed that must be paid prior to the time periods set forth in the written notice to avoid suspension of access to ordering systems or discontinuance of the provision of existing services as set forth in the initial written notice.**

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

1.8.3 [CLEC Version] The amount of the security shall not exceed two (2) month's estimated billing for new CLECs or **one and one-half month's** actual billing **under this Agreement** for existing CLECs **(based on average monthly billings for the most recent six (6) month period)**. Interest shall accrue per the appropriate BellSouth tariff on cash deposits.

[BellSouth Version] The amount of the security shall not exceed two (2) month's estimated billing for new CLECs or actual billing for existing CLECs. Interest shall accrue per the appropriate BellSouth tariff on cash deposits.

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

1.8.3.1 [CLEC Version] **The amount of security due from an existing CLEC shall be reduced by amounts due <<customer_short_name>> by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good**

**payment history, as defined in Section 1.8.5.1, and subject to the standard set forth in Section 1.8.5.**

[BellSouth Version] The amount of the security due from **<<customer_short_name>>** shall be reduced by **the undisputed** amounts due **to** <<customer_short_name>> by BellSouth **pursuant to Attachment 3 of this Agreement that have not been paid by the Due Date at the time of the request by BellSouth to <<customer_short_name>> for a deposit. Within ten (10) days of BellSouth's payment of such undisputed past due amounts to <<customer_short_name>>, <<customer_short_name>> shall provide the additional security necessary to establish the full amount of the deposit that BellSouth originally requested.**

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

1.8.6 [CLEC Version] In the event <<customer_short_name>> fails to remit to BellSouth any deposit requested pursuant to this Section **and either agreed to by <<customer_short_name>> or as ordered by the Commission** within thirty (30) calendar days **of such agreement or order**, service to <<customer_short_name>> may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to <<customer_short_name>>'s account(s).

[BellSouth Version] **Subject to Section 1.8.7 following,** in the event <<customer_short_name>> fails to remit to BellSouth any deposit requested pursuant to this Section within thirty (30) calendar days **of <<customer_short_name>>'s receipt of such request,** service to <<customer_short_name>> may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to <<customer_short_name>>'s account(s).

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

1.8.7 [CLEC Version] The Parties will work together to determine the need for or amount of a reasonable deposit. **If the Parties are unable to agree, either Party** may file a petition for resolution of the dispute and both parties shall cooperatively seek expedited resolution of such dispute.

[BellSouth Version]. The Parties will work together to determine the need for or amount of a reasonable deposit. **If <<customer_short_name>> does not agree with the amount or need for a deposit requested by BellSouth, <<customer_short_name>>** may file a petition with the Commissions for resolution of the dispute and both Parties shall cooperatively seek expedited resolution of such dispute. **BellSouth shall not terminate service during the pendency of such a proceeding provided that <<customer_short_name>> posts a payment bond for 50% of the requested deposit during the pendency of the proceeding.**

# ATTACHMENT 1

PLACE: Dobbs Building, Raleigh, North Carolina

DATE: January 13, 2005

DOCKET NO.: P-772, Sub 8; P-913, Sub 5; P-989, Sub 3; P-824, Sub 6; and P-1202, Sub 4

TIME IN SESSION: 1:21 P.M. TO 5:45 P.M.

BEFORE: Commissioner James Y. Kerr, II, Presiding
Commissioner Lorinzo Joyner
Commissioner Robert V. Owens, Jr.

IN THE MATTER OF:

NewSouth Communications Corp. et al.
Joint Petition of NewSouth Communications Corp. et al.
for Arbitration with BellSouth

VOLUME 6

A P P E A R A N C E S :

FOR BELLSOUTH COMMUNICATIONS, INC.,:

Edward L. Rankin, II
General Counsel - NC
PO Box 30188
Charlotte, NC 28230

James Meza
Robert Culpepper
BellSouth Telecommunications, Inc.
675 West Peachtree Street, NE
Suite 4300
Atlanta, GA 30375

A. No.
Q. You understand that that's the body of contract law that the parties have agreed to, because it's in the BellSouth template, that would govern this contract.
A. Yes, I have that understanding.
Q. Do you understand that the provision that BellSouth has recently proposed would, in effect, be an exemption to Georgia contract law, the way it works?
A. Since I'm not sure how Georgia contract law works, I'm not sure I can answer that question. I'll defer that to my attorneys.
Q. Let's move to item 26. Ms. Blake, is a 271 UNE or element, as you would call it, a wholesale service offering?
A. It could be. There could be some obligations that we have that are--we're required to provide under 271 that we also provide as a wholesale offering.
Q. Would you ever offer a 271 element to a retail customer?
A. Retail customer? I mean, transport is a 271 UNE, and retail customers, I mean, they can buy it out of our special access tariff. So, used in that





context, yes.
Q. So 271 elements, you are willing to offer to retail customers?
A. Well, whatever the provisions are for special access. Again, the list of 271 checklist items, the 14 items, that's where the elements that require like the loop, parts of those are provided as part of the services we offer to retail services. But as a stand-alone, we don't typically offer a loop by itself to a residential customer or retail customer.
Q. Do those residential and retail customers ever buy switching?
A. As part of a component of a retail service, they could, yeah.
Q. Do they ever buy stand-alone switching?
A. A retail customer?
Q. Yes.
A. No, I don't believe so.
Q. So would a Section 271 switching UNE always be a wholesale service offering?
A. Switching is a 271 obligation solely. It's not a wholesale service nor is it a retail service. The only reason we provide 271--I mean, excuse me. The





only reason we provide switching is it's a 271 obligation.
Q. I may have missed it, but I don't think you answered my question.
A. Uh-huh (yes).
Q. Is a 271 switching element always a wholesale service offering; yes or no?
A. It would be provided in the context to a carrier, * CLEC--I mean, the obligation's provided to CLECs for the provision of local tele--I mean, telecom service pursuant to the Act. I mean, that's our obligation set forth under 271.
Q. Yes or no. Can you give me a yes or no answer to that question, Ms. Blake?
A. Can you ask it again?
Q. Okay. Is a 271 switching UNE--Section 271 switching UNE always a wholesale service offering?
A. I would say no. And I guess my--I need to follow that up with, what are you defining as a wholesale service offering? I think switching is a unique item, just because it is only available as a 271 element. It's kind of its own category. It's not offered on a stand-alone basis as a wholesale service offering.





Q. Do you offer it on a retail basis at all?
A. No, not as a stand-alone switching element. It's not as an element by itself. It's part of a group of elements that make up a service offering to a retail customer, just like UNEs--a group of UNEs that may make up an offering to a CLEC.
Q. Ms. Blake, would you agree with me that a service offering is either going to be a wholesale offering or a retail offering?
A. Ask that one more time. I missed the first part of that. Sorry.
Q. Would you agree with me that a particular service offering would be either wholesale or retail or both?
A. A service offering, yes. I don't see switching as a service. It's an element.
Q. Okay. Do you offer that element on a wholesale basis?
A. We offer switching as a component to a--under a commercial agreement as a wholesale offering.
Q. You never offer it on a retail basis, correct?
A. We offer it as a component to a retail service, part of our tariff.
Q. Part of the issue here in item 26, Ms. Blake, is

# ATTACHMENT 2

RECEIVED

JUN 30 2004

EXECUTIVE SECRETARY G.P.S.C.



DEBORAH K. FLANNAGAN
EXECUTIVE DIRECTOR

REECE McALISTER
EXECUTIVE SECRETARY

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12778

Docket No. 12778-U

73946

In Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.

## ORDER ADOPTING IN PART AND MODIFYING IN PART THE HEARING OFFICER'S RECOMMENDED ORDER

BY THE COMMISSION:

This matter arises from the May 13, 2002 Complaint by BellSouth Telecommunications, Inc. ("BellSouth") filed with the Georgia Public Service Commission ("Commission") against NuVox Communications, Inc. ("NuVox") to enforce the parties' interconnection agreement ("Agreement"). BellSouth asserts that it has the right under the parties' interconnection agreement to audit NuVox's records in order to confirm that NuVox is complying with its certification that it is the exclusive provider of local exchange service to its end users. The facilities that BellSouth wishes to audit were initially purchased as special access facilities but were subsequently converted to enhanced extended loops ("EELs") based on NuVox's self-certification that the facilities were used to provide a significant amount of local exchange service.

In construing the interconnection agreement, it is necessary to consider the June 2, 2000 order of the Federal Communications Commission ("FCC") in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 ("*Supplemental Order Clarification*"). The parties disagree both with respect to the meaning of the FCC order, and the extent to which the order was incorporated into the Agreement.

## I. STATEMENT OF PROCEEDINGS

On May 13, 2002, BellSouth filed its Complaint to enforce the parties' Commission-approved interconnection agreement. The specific relief requested by BellSouth was that the Commission resolve the Complaint on an expedited basis, declare that NuVox breached the interconnection agreement by refusing to allow BellSouth to audit the facilities NuVox self-certified as providing "a significant amount of local exchange service," require NuVox to allow such an audit as soon as BellSouth's auditors are available and order NuVox to cooperate with the auditors selected by BellSouth. (BellSouth Complaint, pp. 5-6). NuVox filed with the Commission its Answer to the Complaint on May 21, 2002. NuVox supplemented its Answer on June 4, 2002 exceptions in 47 U.S.C. § 222(c)(1) provide that CPNI may be released with the approval of the customer or if required by law. BellSouth is not required by law to release this information to its auditor; but rather it is requesting authorization from the Commission to do so. It does not appear consistent with the intent of the law to authorize release of the information in this instance. The Staff recommended that BellSouth only be permitted to release the CPNI with the customer's approval.

The Commission adopts the Staff's recommendation with respect to the release of CPNI to BellSouth's auditor.

E. The auditor proposed by BellSouth must be compliant with with the standards and criteria established by the American Institute of Certified Public Accountants.

The *Supplemental Order Clarification* requires that audits must be conducted by independent third parties paid for by the incumbent local exchange provider. (*Supplemental Order Clarification*, ¶ 1). The Agreement includes the following language on BellSouth's audit rights:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] record not more than on[c]e in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements.

(Agreement, Att. 2, § 10.5.4).

This language does not specifically address the issue of the independence of the auditor. BellSouth maintained that it is not required to use a third party independent auditor. It supported this position with the same argument that it used to support its position on the "concern" requirement. That is, BellSouth argued that "the only audit requirement to which the parties agreed is that BellSouth give 30-days' notice." (BellSouth Post-Hearing Brief, p. 3) NuVox disagreed, and argued that the parties did not exempt BellSouth from its obligation to conduct an audit using an independent third party auditor. (Tr. 253) This question of contract construction poses the same question as was addressed with the concern requirement The Agreement does not expressly state either that BellSouth must show a concern or that BellSouth does not need to show a concern.

The Staff recommended that the Commission find that the *Supplemental Order Clarification* and the Agreement require that the audit be conducted by an independent third party auditor. For the reasons discussed in the analysis of the "concern" issue, the Commission adopts Staff's recommendation that the Agreement is unambiguous that the audit is required to be conducted by an independent third party.

The next question is whether the auditor selected by BellSouth is independent. NuVox vigorously objected to the Hearing Officer's conclusion that ACA satisfied this request. NuVox argued that ACA is a small consulting shop that was dependent on ILECs for its business, and therefore could not be characterized as independent. (NuVox Post-Hearing Brief, p. 46). NuVox also claims that ACA marketing material characterizing as "highly successful" its audits that have recovered large sums for ILEC clients reflects a bias. *Id.* NuVox also complained that BellSouth's witness, Ms. Padgett admitted that she had private conversations with ACA regarding the requirements set forth in the *Supplemental Order Clarification*, before and during ongoing audits, with and without the audited party being present. (NuVox Objections, p. 19) NuVox reasons that this illustrates that ACA is subject to the influence of BellSouth. *Id.* NuVox requested that BellSouth conduct the audit using a nationally recognized accounting firm. (NuVox Post-Hearing Brief, p. 47). NuVox also contested the auditor's independence on the ground that ACA is not certified under the standards established by the AICPA. (Tr. 275).

BellSouth argues that none of these points demonstrate that ACA is not independent from BellSouth. (BellSouth Post-Hearing Brief, pp. 27-28). BellSouth counters NuVox's claims with evidence that ACA has competitive local exchange carrier clients and that BellSouth has not previously hired ACA. *Id.* BellSouth also argues that neither the Agreement nor the *Supplemental Order Clarification* required the auditor to comply with AICPA standards. *Id.* at 28.

The *Triennial Review Order*, which the FCC issued after the date of the Agreement, states that audits must be conducted pursuant to the standards established by the AICPA. (*Triennial Review Order*, ¶ 626). The question then is whether this compliance is required for audits conducted pursuant to agreements entered into prior to the issuance of the *Triennial Review Order*. NuVox's position that it should be required is based on a reading that, like with the "concern" requirement, the FCC was simply clarifying in the *Triennial Review Order* what was intended by the term "independent" in the *Supplemental Order Clarification*. (Tr. 276). BellSouth argues that the *Triennial Review Order* does not impact the parties' rights under the Agreement, and in fact, illustrates that the *Supplemental Order Clarification* did not contain this requirement. (BellSouth Post-Hearing Brief, FN 7)

The Staff recommended that the Commission find that BellSouth's auditor met the standards of independence set forth in the *Supplemental Order Clarification*, but that the Commission should consider in its evaluation of the credibility of any audit results whether the audit was conducted pursuant to AICPA standards. The Commission does not adopt the Staff's recommendation NuVox raised serious concerns about the auditor's independence. The FCC has stated clearly not only that auditors must be independent but that the independent auditor must conduct the audit in compliance with AICPA standards. It is true that this latter standard was not clarified until after the parties entered into the Agreement; however, the parties disputed the meaning of the independent requirement prior to the issuance of the *Triennial Review Order*. NuVox always maintained that for an auditor to be independent it must comply with AICPA standards. (Tr. 275). That the FCC later identified AICPA compliance as a prerequisite of an independent audit supports a conclusion that NuVox was correct. BellSouth's argument that the inclusion of the requirement in the latter FCC Order indicates that it was not present in the former is mistaken in this instance. In the *Triennial Review Order*, the FCC gives no indication that it is reversing any portion of the *Supplemental Order Clarification*. The most logical construction of the *Triennial Review Order* is that it is clarifying the requirement that had been in place from the prior FCC order.

In reaching this conclusion, the Commission concedes that the *Supplemental Order Clarification* did not expressly state that AICPA compliance was a prerequisite for an auditor to be deemed "independent." In fact, the *Supplemental Order Clarification* does not expound on the criteria to be considered in determining whether a third party auditor is independent. This lack of detail should not be construed to render the "independent" requirement meaningless. Rather, it leaves to the discretion of the Commission what is required to comply with the standard of independence. For guidance in reaching this determination, it is reasonable to look at other orders of the FCC. The *Triennial Review Order* gives clear guidance that compliance with AICPA standards is necessary in order for a third party auditor to be independent. The Commission finds that any audit firm selected by BellSouth itself be compliant with AICPA standards and criteria.

The Commission remains cognizant that parties are capable of negotiating and agreeing to terms and conditions that are different than the specific requirements set forth in the law. The Commission has concluded that the parties did not do so with regard to this provision of the Agreement. Therefore, the issue is whether the federal law at the time the parties entered into the Agreement required third party audits to comply with AICPA standards in order to be deemed independent. For the reasons discussed, the Commission concludes that it is a fair construction of the term "independent" to require AICPA compliance

Regardless of whether BellSouth argues it has a contractual right to conduct an audit that does not comply with AICPA standards, as the finder of fact the Commission may decide the proper weight to afford the findings of any such audit. In light of the FCC's determination that audits should be conducted pursuant to AICPA standards, the Commission concludes that it would not afford any weight to findings from an audit that was not conducted in compliance with AICPA standards. Given that BellSouth would not be able to convert loop and transport combinations to special access services until it prevailed before the Commission, it would not make any difference if the Commission were to permit BellSouth to conduct the audit with an auditor that was not AICPA compliant. As discussed above, the Commission has concluded that BellSouth does not have this right under the Agreement; however, it is important to distinguish between the parties' arguments concerning their respective contractual rights and the Commission's discretion in evaluating the evidence.

The Staff recommended that NuVox should not have to pay the costs related to adherence to AICPA standards. The Commission agrees. The Recommended Order appeared to base the conclusion that NuVox should pay for compliance with AICPA standards on the premise that such compliance was above and beyond what had been agreed to by the parties. Given the conclusion that AICPA compliance is required by the Agreement, the basis for making NuVox pay no longer exists

<u>F. NuVox's Request for a Stay is denied.</u>

# ATTACHMENT 3

**STATE OF NORTH CAROLINA**
**UTILITIES COMMISSION**
**RALEIGH**

DOCKET NO. P-19, SUB 454

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

| In the Matter of | | |
|---|---|---|
| Petition of Verizon South, Inc., for Declaratory Ruling that Verizon is Not Required to Transit InterLATA EAS Traffic between Third Party Carriers and Request for Order Requiring Carolina Telephone and Telegraph Company to Adopt Alternative Transport Method | ) | ORDER DENYING PETITION |

BY THE COMMISSION: On January 30, 2002, the Commission issued an Order establishing extended area service (EAS) between the Durham exchange of Verizon South, Inc. (Verizon), the Pittsboro exchange of Carolina Telephone and Telegraph Company (Carolina or, collectively with Central Telephone Company, Sprint), and the Hillsborough exchange of Central Telephone Company (Central or, collectively with Carolina Telephone and Telegraph Company, Sprint) (the EAS Order).[1] This EAS was implemented on June 7, 2002. EAS from the Durham exchange to the Pittsboro exchange and zero-rated expanded local calling from the Durham exchange to the Hillsborough exchange were implemented earlier in the tax flow-through docket, Docket No. P-100, Sub 149.

Shortly after the EAS was implemented, the Public Staff began receiving complaints from customers in the Pittsboro exchange who were unable to complete calls to numbers in the Verizon Durham exchange as either local or toll calls. On investigating these complaints, the Public Staff learned that Verizon was blocking calls from the Pittsboro exchange to competing local provider (CLP) and commercial mobile radio service (CMRS) end-users in the Durham exchange. Verizon stated that it blocked the calls because "the proper interconnections between the CLPs, CMRSs and Sprint have not yet been established."[2] Subsequently, the Public Staff learned that Verizon had also begun blocking calls from Central's Roxboro exchange to CLP customers in Durham, calls that it previously had been completing. The Roxboro/Durham route is a two-way interLATA EAS route that has been in service since February 14, 1998. IntraLATA EAS calls from the Hillsborough exchange to CLP end-users in Durham have not been blocked. In its letters

1 *In the Matter of Carolina Telephone and Telegraph Company – Hillsborough and Pittsboro to Durham Extended Area Service, Order Approving Extended Area Service,* Docket No. P-7, Sub 894 (January 30, 2002).

2 See Verizon's letters from Joe Foster to Nat Carpenter dated July 11, 2002, and October 31, 2002, attached as Exhibits A and B to Verizon's Petition.

to the Public Staff, Verizon agreed to discontinue its blocking until the matter had been resolved by the Commission.

On December 9, 2002, Verizon filed a Petition for Declaratory Ruling (Petition) requesting "that the Commission issue a ruling clarifying that Verizon is not required to transit Sprint's InterLATA EAS traffic destined to third party CLPs/CMRS providers" and "that the Commission direct Sprint to cease delivering traffic destined for third-parties to Verizon and make alternative arrangements for proper delivery of such traffic."

On December 10, 2002, the Commission issued an Order seeking comments and reply comments. Petitions to intervene have been filed by The Alliance of North Carolina Independent Telephone Companies (the Alliance); BellSouth Telecommunications, Inc., (BellSouth); AT&T Communications of the Southern States, LLC, (AT&T); ALLTEL Carolina, Inc., and ALLTEL Communications, Inc., (collectively, ALLTEL); KMC Telecom, Inc. (KMC); ITC^DeltaCom, Inc., (ITC); Level 3 Communications, Inc., (Level 3); US LEC of North Carolina, Inc., (US LEC); and Barnardsville Telephone Company, Saluda Mountain Telephone Company, and Service Telephone Company (collectively, TDS Companies). All petitions to intervene were allowed.

ITC, Level 3 and KMC, US LEC, Sprint, the Public Staff, BellSouth, and AT&T filed initial comments. Verizon, the Alliance, Sprint, and the Public Staff filed reply comments.

On May 16, 2003, the Commission issued an Order scheduling an oral argument on June 19, 2003, to consider:

(1) Whether Verizon is legally obligated to perform a transiting function or to act as a billing intermediary in regards to third-party traffic, and

(2) If so, the principles that should inform the rates, terms and conditions for such services and the appropriate procedure for arriving at a decision about them.

On May 23, 2003, Verizon filed a Motion for Clarification requesting that the Commission make clear that the oral argument would address only legal and not factual issues. On June 3, 2003, Sprint filed a response to Verizon's Motion for Clarification in which it argued that the only issues to be resolved in this matter are legal.

On June 5, 2003, the Presiding Commissioner issued an Order clarifying that the purpose of the oral argument was to decide whether Verizon is obligated as a matter of law pursuant to the Telecommunications Act of 1996[3] and other applicable provisions of law to perform a transiting function or to act as a billing intermediary with regards to third-party traffic with particular reference to the third-party interLATA EAS calls at issue in this docket. The Order reserved to Commissioners the right to ask questions of the

3 47 U.S.C.A. §§ 151 *et seq.*, "the Act."

participants at the oral argument bearing upon the regulatory process should the matter be decided in one way or another.

The oral argument was heard by the Commission, Commissioner Joyner presiding, on July 15, 2002.

On August 29, 2003, the Commission received briefs and/or proposed orders from the following: Verizon, BellSouth Telecommunications, Inc. (BellSouth), Sprint, the Public Staff, AT&T Communications of the Southern States, Inc. (AT&T), and US LEC of North Carolina, Inc (US LEC). Of these, Sprint, the Public Staff, AT&T, and US LEC may be classified as proponents of the duty to provide the transiting function as a matter of law, while Verizon and BellSouth may be classified as opponents. Since the arguments of the proponents are largely the same, their arguments will be summarized collectively as those of the "Proponents." Likewise, those of Verizon and BellSouth will be summarized collectively as those of the "Opponents." Since many of the citations to the law are the same, but with the Opponents and Proponents putting a different construction on them, the text of the most common citations is set out below.

<u>Most Common Citations</u>

<u>Telecommunications Act of 1996 (TA96)</u>

Sec. 251(a) General Duty of Telecommunications Carriers.—Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers....

Sec. 251(b) Obligations of All Local Exchange Carriers—Each local exchange carrier has the following duties....

(5) Reciprocal Compensation.—The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Sec. 251(c) Additional Obligations of Incumbent Local Exchange Carriers.—In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:....

(2) Interconnection.—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself...or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

State Law

G.S. 62-110(f1) The Commission is authorized to adopt rules it finds necessary to provide for the reasonable interconnection of facilities between all providers of telecommunications services....

G.S. 62-42(a) Except as otherwise limited in this Chapter, whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds: (1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory...or (5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity, the Commission shall enter and serve an order directing that such...additional services or changes shall be made or affected within a reasonable time prescribed in the order....

Rule R17-4. Interconnection. (a) Interconnection arrangements should make available the features, functions, interface points and other service elements on an unbundled basis required by a requesting CLP to provide quality services. The Commission may, on petition by any interconnecting party, determine the reasonableness of any interconnection request. (b) Interconnection arrangements should apply equally and on a nondiscriminatory basis to all CLPs....

## Summary of Proponents' Arguments

The thrust of the Proponents' arguments was that Verizon is obligated under TA96 as well as under State law to perform a transiting function. They argued that this requirement is clearly in the public interest and is in fact necessary to effectuate the purposes of TA96, which include the preserving and extending of the ubiquitous telecommunications network and the encouragement of competition.

With respect to provisions in TA96, the Proponents argue that the transiting obligation follows directly from the obligation to interconnect and the right of non-incumbent carriers to elect indirect interconnection. *See,* Section 251(a)(1) (all carriers to connect directly or indirectly with other carriers) and Section 252(c)(2) (additional ILEC duties regarding interconnection). Transit traffic is an important option to have available because it offers a simple and economical method of interconnection for carriers exchanging a minimal amount of traffic. It was routinely used without objection prior to the enactment of TA96. Otherwise, such carriers would be forced to created redundant and uneconomic arrangements to deliver their traffic. As such, the obligation to provide transit service is necessary to give meaning to the right to interconnect directly under TA96 and in fulfillment of its purposes. The right to transit service exists independently of any given interconnection agreement, although such agreements may certainly establish procedures for it.

Concerning the *Virginia Arbitration Order* of the FCC's Wireline Competition Bureau (July 17, 2002), the Proponents noted that, contrary to Verizon's representations concerning the import of that decision, the Bureau expressly refused to declare that an ILEC is not obligated to provide transit service but rather, in view of the fact that the FCC had not previously decided the issue, it declined to rule on the issue in the context of its delegated arbitration authority.

The Proponents also maintained that authority to require the transit function could be found under State law. For example, G.S. 62-110(f1) allows the Commission to enact rules regarding interconnection. Rule R17-4 expresses similar sentiments. G.S. 62-42 bears on the matter of compelling efficient service, which would certainly be impaired if there was no duty to provide transit service. Other states, notably Ohio and Michigan, have held for a transit service obligation. None of the Proponents, however, argued that there was a necessary duty for Verizon to perform a billing intermediary function.

<u>Summary of Opponents' Arguments</u>

The key argument of the Opponents was that the provisions of TA96 cited by the Proponents do not create obligations or duties that are separate from interconnection agreements. No such transit obligation, either explicitly or through fair inference, can be found in TA96. Any provision of transit is purely voluntary on the ILECs' part. The Opponents further argue that, since TA96 in both Sections 251 and 252 creates a comprehensive framework with the negotiation and arbitration of interconnection agreements as its centerpiece, this preempts the states from enacting other obligations, such as a transit obligation, based on state law.

With respect to the *Virginia Arbitration Order*, the Opponents contended that the gravamen of that decision was not only that transit services need not be provided at TELRIC rates, they need not be provided at all, since the Bureau stated that it did not find "clear Commission precedent or rules declaring such a duty."

The Opponents declared that at least one state, New York, had decided against a transit obligation, while several others, such as Maryland, Wisconsin, and Michigan, have expressed skepticism about any billing intermediary obligation.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to find that Verizon is obligated to provide the transit service as a matter of law for the reasons as generally set forth by the Proponents. Accordingly, Verizon's Petition for Declaratory ruling in its favor is denied.

The Commission is persuaded that a transit obligation can be well supported under both state and federal law. The Commission does not agree with the Opponents' view that duties and obligations under TA96 do not or cannot exist separately from their incarnation in particular interconnection agreements pursuant to the negotiation and arbitration process—or, as Verizon put it, "[TA96] contemplates only duties that are to be codified in interconnection agreements, not duties that apply independent of interconnection agreements."

Aside from not being compelled by the history, structure, or real-world context of TA96, the "interconnection agreements-only" approach suggested by the Opponents would lead to a number of undesirable, even absurd, results. For example, it would call into question the status of generic dockets, which are an efficient means by which the Commission can resolve interconnection issues arising under TA96 *en masse*. Apparently, the state commissions would be limited to arbitrating interconnection agreements one-by-one. There is simply no evidence that Congress intended to abolish generic dockets by the states; indeed, quite the opposite is suggested. *See*, for example, Section 251(d)(3) (Preservation of State Access Regulations). *As* a practical consequence, adoption of the Opponents' view would immoderately multiply the number of interconnection agreements—and the economic costs relating to entering into them—because the corollary of the Opponents' view is that, in order to fully effectuate rights and obligations, everyone must have an interconnection agreement with everybody else, even if the amount of traffic exchanged is minimal. The overall impact would be a tendency to stifle competition by the imposition of uneconomic costs as, for example, by the construction of redundant facilities.

If there were no obligation to provide transit service, the ubiquity of the telecommunications network would be impaired. Indeed, in a small way this has already happened in this case when Verizon refused to transit certain traffic. It should also be noted that the privilege of initiating arbitration proceedings is not symmetrical. Even if an ILEC, such as a smaller one with less than 200,000 access lines, urgently desires an interconnection agreement from a CLP or CMRS, it may not be able to get one. These effects illustrate the ultimate unsupportability of the Opponents' view of their obligations as ILECs to interconnect indirectly—essentially, as matters of grace, rather than duty.

The fact of the matter is that transit traffic is not a new thing. It has been around since "ancient" times in telecommunications terms. The reason that it has assumed new prominence since the enactment of TA96 is that there are now many more carriers involved—notably, the new CMRS providers and the CLPs—and the amount of traffic has increased significantly. Few, if any, thought about complaining about transit traffic until recently. It strains credulity to believe that Congress in TA96 intended, in effect, to impair this ancient practice and make it merely a matter of grace on the part of ILECs, when doing so would inevitably have a tendency to thwart the very purposes that TA96 was designed to allow and encourage.

The Opponents rely heavily on the *Virginia Arbitration Order* for the proposition that there is no obligation to provide the transit function. The *Order* was not meant to bear such a heavy burden. A close examination of the *Order* yields a more equivocal conclusion. The fact is that the FCC, as is the case in many matters, has not definitively made its mind up on the matter. In the meantime, the telecommunications market and its regulation march on. As much as we would wish for definitive guidance from the FCC, the states cannot always wait for that body to rule one way or another—or somewhere in between.

The Opponents have urged that, in any event, the states are preempted from relying on state law to create a transit obligation. This would seem to follow logically from their view that TA96 has established a comprehensive "interconnection agreements-only" approach. The Commission, as noted above, views this approach as insupportable. In fact, it should be clear that Congress contemplated that states *do* have a role in establishing interconnection obligations as long as they do not thwart the provisions and purposes of Section 251. As alluded to earlier, Sec. 251(d)(3) of TA96 specifically provides that "[i]n prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." It is significant that the wording of this provision mentions both state "policies" and the "purposes" of Sec. 251. It is also useful to observe that the Opponents' "interconnection agreements-only" view would "read out" this savings provision and render it nugatory, because anything done outside of interconnection agreements would, according to the Opponents, be contradictory to Sec. 251. This is yet another example of the consequences of the Opponents' idiosyncratic interpretation of TA96. Establishing a transit obligation and defining reasonable terms and conditions is well within a state's purview, even *arguendo* that no such positive obligation can be derived from TA96.

The real challenge facing the industry and the Commission is not whether there is a legal obligation for ILECs to provide a transit service. The Commission is convinced that there is. The Commission is confident that, should the FCC ever address the issue, it will find the same. The *real* question is what should be the rates, terms and conditions for the provision of that service. Those are matters included or includible under Docket No. P-100, Sub 151. Certainly, interconnection agreements are by and large desirable things, and as many companies as practicable should enter into them. No one really denies that. But it is not always practicable because, among other things, the privilege of petitioning for arbitration under Sec. 252 of TA96 is not symmetrical. This simply reinforces the case that, ultimately, there may need to be a default provision made for those that do not have such agreements or cannot interconnect directly. In such cases, this *may* require ILECs as intermediaries. The equities of the situation are reasonably straightforward—those that seek to terminate traffic should pay for its termination and the one that transits should be compensated for its services. This *may* also require that an ILEC perform a billing intermediary function—again for reasonable compensation. The system of ubiquitous interconnection and the seamless telecommunications network may well be compromised without this "fail-safe" device. The Commission will move expeditiously on Docket No. P-100, Sub 151 should negotiations come to naught.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 22nd day of September, 2003.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

pb091903.01

Commissioner Robert V. Owens, Jr. did not participate.

# ATTACHMENT 4

PLACE: Dobbs Building, Raleigh, North Carolina

DATE: January 13, 2005

DOCKET NO.: P-772, Sub 8; P-913, Sub 5; P-989, Sub 3; P-824, Sub 6; and P-1202, Sub 4

TIME IN SESSION: 1:21 P.M. TO 5:45 P.M.

BEFORE: Commissioner James Y. Kerr, II, Presiding
Commissioner Lorinzo Joyner
Commissioner Robert V. Owens, Jr.

IN THE MATTER OF:

NewSouth Communications Corp. et al.
Joint Petition of NewSouth Communications Corp. et al.
for Arbitration with BellSouth

VOLUME 6

A P P E A R A N C E S :

FOR BELLSOUTH COMMUNICATIONS, INC.,:

Edward L. Rankin, II
General Counsel - NC
PO Box 30188
Charlotte, NC 28230

James Meza
Robert Culpepper
BellSouth Telecommunications, Inc.
675 West Peachtree Street, NE
Suite 4300
Atlanta, GA 30375

A. It is about the TIC, but the transit function is still what's being provided.
Q. Right. And I'm trying to focus in on what costs you're trying to recover. And I asked you about page 82, lines 19 through 20, and you say you want to recover the costs of sending records to the CLPs identifying the originating carrier. And I think we just established that the CLPs would be the originating carrier. Would you agree with me that we know who we are?
A. I think you know who you are. Again, this would be the CLP on the terminating end so that they could understand who the traffic was coming from.
Q. There's a CLP on the terminating end?
A. There could be in the scenario of Mr. Meza, sure, or any third party.
Q. Did we ever ask--did we, the originating CLP, ever ask you to send records to the CLP on the terminating end?
A. I don't know if you did or not, but that's part of the service we offer as part of the TIC.
Q. If we told you we didn't want that, could we eliminate the TIC?
A. That's not the only purpose of the TIC. The TIC is





a value-added service. It's for the--eliminates your need to go directly connect with all third party providers. I mean, it's--it's a value-added service. You pay the tandem rate--the TELRIC tandem rate for that--the transit part, and then the TIC is the value added for not having to be required to interconnect directly with other carriers.
Q. Do you understand that the joint petitioners do not need you to send these records?
A. I don't know that I've heard that in discussions that that's a concern about that being included in whatever rate we charge you for the TIC. That if we pulled that little record out, that that would make you happy. I haven't heard that.
Q. Now, with respect to the TIC, is it your view--your view is that that wouldn't be at a TELRIC rate?
A. Yes.
Q. Is it at a rate that could be negotiated?
A. I believe we did make a proposal to the joint petitioners relative to a composite TIC rate or a composite rate for the transit and the TIC.
Q. And do you recall that the joint petitioners responded with a counter-offer?





A. I don't believe I heard that. I heard it was rejected--our offer was rejected. I may have not gotten all that.
Q. Subject to check?
A. Subject to check, sure. I am not familiar with what your counter-offer is.
Q. Since you're not familiar with the counter-offer, you could not tell me the status of it?
A. No, I could not.
Q. But, yet, you're the BellSouth witness on this issue?
A. Yes, I am.
Q. The person with the most knowledge about it?
A. Subject to all the latest stuff going on, yes.
MR. HEITMANN: I have nothing further for Ms. Blake.
CHAIR KERR: Mr. Cauthen?
CROSS EXAMINATION BY MR. CAUTHEN:
Q. Good afternoon, Ms. Blake.
A. Good afternoon.
Q. Robin Cauthen with the Public Staff, and I am going to try to be quick. Items 2 and 50, the EELs--the whatever we want to call them, local switching is offered out of your access tariff, isn't it?





A. Local switching--we provide access services our of our access tariff. Local switching is typically a term referred to as a UNE element or a usage element of a UNE of switching.
Q. Do you offer it under your access tariff?
A. Not that I'm aware of it as just switching by itself.
Q. Is it a wholesale service?
A. Not the 271 switching that we provide pursuant to 271.
Q. Is local switching a wholesale service?
A. No.
Q. Do you know what a--in North Carolina, a shared tenant service provider is?
A. Vaguely. Not to any great detail.
Q. If I might just briefly describe it.
A. Sure.
Q. There are circumstances where you have a piece of property or a building--
A. Strip mall.
Q. --with various occupants or tenants or whatever.
A. Doctors, right.
Q. It could be doctors. It could be a university dorm.

# ATTACHMENT 5

P.U.C. DOCKET NO. 28821

| | | |
|---|---|---|
| ARBITRATION OF NON-COSTING ISSUES FOR SUCCESSOR INTERCONNECTION AGREEMENTS TO THE TEXAS 271 AGREEMENT | § § § § | PUBLIC UTILITY COMMISSION OF TEXAS |

# ARBITRATION AWARD—TRACK 1 ISSUES

## Table of Contents

determining the tandem interconnection rate currently in the T2A.[120] Therefore, the Commission readopts the blended tandem rate and the 3 to 1 traffic threshold rationale for calls terminated on a multifunction switch specified in Docket No. 21982.[121] Additionally, the Commission rejects the LATA-by-LATA test proposed by SBC Texas[122] because of its arbitrary nature and inconsistency with the method adopted by the Commission in Docket No. 21982.

***Provision of Transit Services at TELRIC Rates (DPL Issue No. 17)***

Consistent with prior Commission decisions in the Mega-Arbitrations, Docket No. 21982 and the predecessor T2A agreement, the Commission finds that SBC Texas shall provide transit services at TELRIC rates. The Commission notes that there has been no change in law or FCC policy to warrant a departure from prior Commission decisions on transit service. Furthermore, a federal court found that a state commission may require an ILEC to provide transiting to CLECs under state law.[123] Given SBC Texas's ubiquitous network in Texas and the evidence regarding absence of alternative competitive transit providers in Texas,[124] the Commission concludes that requiring SBC Texas to provide transit services at cost-based rates will promote interconnection of all telecommunications networks. In the absence of alternative transit providers in Texas, the Commission finds that SBC Texas's proposal[125] to negotiate transit services separately outside the scope of an FTA § 251/252 negotiation may result in cost-prohibitive rates for transit service. The Commission also notes SBC Texas's concerns regarding billing disputes related to transit traffic and reaffirms its decision in Docket No. 21982 that terminating carriers must directly bill third parties that originate calls and send traffic over SBC Texas's network.[126]

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[120] Direct Testimony of Charles D. Land (Attachment 12: Compensation), CLEC Joint Petitioners Ex. 1 at 12-15.

[121] Docket No. 21982, Revised Award at 52-53 (Nov. 15, 2000).

[122] Direct Testimony of J. Scott McPhee, SBC Texas Ex. 24 at 19.

[123] *Michigan Bell Tel. Co. v. Chappelle*, 222 F. Supp. 2d 905, 918 (E.D. Mich. 2002).

[124] Tr. at 252-253 (Sept. 22, 2004).

[125] Direct Testimony of J. Scott McPhee, SBC Texas Ex. 24 at 84.

[126] Docket No. 21982, Revised Arbitration Award at 64 (Aug. 31, 2000).

# ATTACHMENT 6

ISSUE: What rate should apply for Service Date Advancement (a/k/a service expedites)?

REQUEST: Please identify and state the amount of all costs that BellSouth incurs to perform a Service Date Advancement (or "service expedite"). Include a BellSouth cost study and cost study information compiled in accordance with FCC TELRIC rules.

RESPONSE: BellSouth objects to this interrogatory to the extent it requires the disclosure of confidential and proprietary cost information. BellSouth also objects to the extent providing a response to this interrogatory imposes an obligation on BellSouth that does not exist under the law.

Subject to this objection and without waiving this objection, BellSouth's Service Date Advancement (or "service expedite") charge is an alternative to direct interconnection and a market based service and, thus, the Service Date Advancement rate was developed as a market based additive and there is no TELRIC cost study for this service.. Furthermore, BellSouth's costs regarding this service are not relevant to this proceeding and BellSouth objects to producing any information.

# ATTACHMENT 7

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

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|---|---|
| In the Matter of the Petition of the CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b) of the Telecommunications Act of 1996. ) | Docket No. 05-BTKT-365-ARB |
| In the Matter of the Application of AT&T Communications of the Southwest, Inc. and TCG Kansas City, Inc. for Compulsory Arbitration of Unresolved Issues with SBC Kansas Pursuant to Section 252(b) of the Telecommunications Act of 1996. ) | Docket No. 05-AT&T-366-ARB |
| In the Matter of the Request of the CLEC Joint Petitioners for Arbitration with Southwestern Bell Telephone L.P. d/b/a SBC Kansas for an interconnection Agreement that Complies with Section 251 and 271 of the Federal Telecommunications Act of 1996. ) | Docket No. 05-TPCT-369-ARB |
| In the Matter of the Petition of Navigator Telecommunications, LLC for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996. ) | Docket No. 05-NVTT-370-ARB |

**Arbitrator's Determination of Issues**

The above matter comes before Arbitrator Robert L. Lehr, appointed by The State Corporation Commission of the State of Kansas (Commission) for consideration and recommendation. Being duly advised in the premises and familiar with all matters of record, the Arbitrator finds and concludes as follows.

customers of SWBT in Kansas. The term "back-billed" is not programmed as a phrase code in the billing system. Back-billing, then, cannot be set out separately on CLEC bills and it would be expensive and time-consuming to make that change. However, SWBT will provide a spreadsheet detailing the back-billing upon request.[47]

**Determination.**

43. Based upon the recommendations and testimony of the parties, the Arbitrator finds that parties are permitted a 12-month back-billing window. To the extent that SWBT can separately identify back charges on a bill, the Arbitrator finds that it should do so. In all other regards, the Arbitrator finds that the record evidence supports SWBT's position and the Arbitrator, therefore, adopts SWBT's proposed language.

**General Terms and Conditions--deposit/escrow**

**CLEC Coalition GTC-8, 15(c); Joint Petitioners GTC-8(c), 9; Navigator GTC- 3, 4**

44. The CLEC Coalition accepts the notion that SWBT is entitled to request a deposit from a CLEC, but only under limited circumstances and at an amount that would not exceed two months of billings to the CLEC by SWBT. The CLEC Coalition believes that it should be the CLEC's choice to provide the deposit amount in cash or irrevocable letter of credit as SWBT is protected equally well with either assurance device. The CLEC Coalition is concerned about SWBT's ability to call in the deposit if, in "SWBT"s reasonable judgment"[48], the CLEC's credit worthiness is impaired. The CLEC Coalition

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[47] SWBT Quate Direct p. 26 line 16 - p. 28 line 2; Rebuttal p. 17 line 6 - p. 18 line 5.

[48] CLEC Coalition GTC DPL § 3.2.2 p. 19, SWBT language.

notes that SWBT did not quantify any losses that it might have suffered with the 180 CLECs that ceased conducting business since 2000 throughout SWBT's 13-state region.[49]

45. With respect to SWBT's proposal to require CLECs to escrow an amount equal to the amount of a bill being disputed, the CLEC Coalition points to the poor quality of SWBT's bills. For instance, Birch Telecom lodged over 1,000 billing disputes in Kansas in 2004 totaling $500,000. Birch noted that 80% of its disputes with SWBT-Kansas and other SBC ILECs are decided in its favor. Birch claims that CLECs generally do not have sufficient financial resources to fund SWBT's billing errors. The CLEC Coalition recommends that escrows not be required until SWBT improves its billing systems.[50]

46. The Joint Petitioners propose a standard deposit of $17,000 and do not believe that a single missed payment should trigger invocation of a deposit equal to three months of billing.[51]

47. The Joint Petitioners also oppose SWBT's ability to require the billing dispute amount to be escrowed. They propose that no escrow be required if the CLEC disputing a bill (a) does not have a proven history of late payments and has established a minimum of six months good credit history with SWBT or (b) if more that 50 percent of the billing disputes lodged by the CLEC during the most recent 12-month period are determined in the CLEC's favor.[52]

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[49] CLEC Coalition Joint Direct p. 28 line 16 - p. 30 line 9; Rebuttal p. 14 line 18 - p. 16 line 15.

[50] CELC Coalition Wallace Direct p. 10 line 16 - p. 11 line 25.

[51] Joint Petitioners Schaub Direct p. 6 line 4 - p. 7 line 3.

[52] Joint Petitioners GTC DPL § 8.7 p. 22.

48. Xspedius and SWBT appear to be in a billing dispute. Xspedius admits to owing SWBT $172,000 in undisputed amounts under its interconnection agreement, but claims that SWBT owes Xspedius approximately $1.9 million. Xspedius proposes that any time that SWBT owes Xspedius more than one month's worth of Xspedius billings, a deposit by Xspedius will not be required.[53]

49. Navigator believes that SWBT's potential financial exposure for unpaid charges of a CLEC is one month's worth of billing. Navigator is concerned about SWBT's ability to invoke its deposit requirement upon a CLEC's failure to pay even the smallest of bills.[54] Navigator also objects to SWBT's proposed ability to require escrow of the disputed amount of a bill. Navigator claims that, since beginning business in 1997, it has filed numerous billing disputes over some aspect of SWBT's bills. Because the resolution of these disputes may take one to one and a half years, Navigator is concerned with the large of amount of cash that would be tied up if Navigator is forced to provide escrow.

50. SWBT's criterion for establishing satisfactory credit is 12 consecutive months of timely payments to SWBT.[55] However, during the hearings, SWBT revised its criterion to a CLEC's credit history with SBC as a whole, saying that "deposits should not be state-specific."[56] Ms. Quate continued in her direct testimony, that SWBT's proposed triggers for determining impaired creditworthiness were based on concrete, clearly defined and objective criteria such as investment grade credit ratings and failure to timely

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[53] CLEC Coalition Joint Direct p. 54 line 2 - p. 55 line 26.

[54] Navigator LeDoux Direct p. 8 line 22 - p. 10 line 9.

[55] SWBT Quate Direct p. 47 lines 18 - 26.

[56] SWBT Quate Tr. Vol. 1 p. 148 lines 11 - 14.

pay a bill. SWBT reports that the Michigan Public Service Commission approved the exact same language proposed here in its arbitration proceedings between SBC Michigan and MCI.[57]

51. SWBT claims that the escrow requirement in billing disputes is necessary because some CLECs, such as Delta Phones, Inc., have been known to "game the system" by challenging bills just to extend their time for payment. However, SWBT is willing to waive escrow for "customers with good credit histories and who have not filed a large number of disputes that were resolved in SWBT's favor" and where there has been a material billing error. Otherwise, SWBT expects the disputed amount to be escrowed by the CLEC prior to the bill due date.[58]

**Determination.**

52. The Arbitrator finds for the CLECs with respect to deposits. SWBT's proposal that it be permitted to use its "reasonable judgment" to determine if a CLEC's creditworthiness has been impaired is entirely too vague and subjective to provide CLECs with proper notice of when they become credit-unworthy. Furthermore, imposition of a deposit upon a previously creditworthy CLEC due to failure to pay some unquantified level of bill may be so out of balance and so vague as to be unacceptable in any corner of any market. The Arbitrator also disagrees with SWBT that the claim of Xspedius is a red herring that should be determined elsewhere. The Arbitrator finds that Xspedius' testimony is on point. If its position is accurate, requiring a deposit of Xspedius would be extremely unfair.

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[57] SWBT Quote Direct p. 47 lines 5-12.

[58] SWBT Post-Hearing Brief p. 41.

# ATTACHMENT 8

| Issue Statement | Issue No. | Attachment and Section(s) | CLEC Language | CLEC Preliminary Position | SBC OKLAHOMA Language | SBC OKLAHOMA Preliminary Position | Arbitrator's Recommendation |
|---|---|---|---|---|---|---|---|
| Does the Commission have the jurisdiction to arbitrate language which pertains to Section 271 and 272 of the Act and which was not voluntarily negotiated and does not address 251(b) or (c) obligation?<br><br>**Coalition Statement of the Issue:** Should the O2A successor interconnection agreements continue to reflect the commitments SBC made to the Commission and CLECs in | 1 | WHEREAS | WHEREAS, pursuant the Telecommunications Act of 1996 (the Act), the Parties wish to establish terms for the resale of SBC OKLAHOMA services and for the provision *by* SBC OKLAHOMA of Interconnection, **<u>unbundled</u>** Network Elements, and Ancillary Functions as designated in the Attachments hereto.<br><br>**<u>WHEREAS, the Oklahoma Corporation Commission ("OCC", "Commission", or "OKLAHOMA Commission") recommended approval of SBC OKLAHOMA's application for 271 relief, based in large part on the existence of the Oklahoma 271 Agreement ("O2A");</u>**<br><br>WHEREAS, the Parties want to Interconnect their networks pursuant to | **CLEC Coalition position on remaining issues:**<br><br>SBC made commitments to the OCC and Oklahoma CLECs in order to obtain the OCC's support for its 271 application. Those commitments were embodied in the O2A and should not be eliminated unless SBC is willing to give up its 271 relief. The CLEC Coalition's language accurately reflects the representations and actions where SBC agreed to treat CLECs as valued wholesale customers, in response to | WHEREAS, pursuant to **Sections 251 and 252 of** the Telecommunications Act of 1996 (the Act), the Parties wish to establish terms for the resale of SBC OKLAHOMA services and for the provision *by* SBC OKLAHOMA of Interconnection, **Unbundled** Network Elements, and Ancillary Functions as designated in the Attachments hereto.<br><br>WHEREAS, the Parties want to Interconnect their networks pursuant to Attachment 11 and associated appendices to provide, directly or indirectly, Telephone Exchange Services and Exchange Access to residential and | The CLEC Coalition proposes language which purports to set forth SBC OKLAHOMA's obligations pursuant to Section 271 and 272 of the Telecommunications Act. Pursuant to the Fifth Circuit's recent opinion in *Coserve v. Southwestern Bell Tel.* Co, 350 F. 3d 482 (5th Cir. 2003), this language is mandatory arbitration because it does not relate to SBC OKLAHOMA's 251(b) or (c) obligations and SBC | The Interconnection agreement should contain reference to § 251 terms and conditions as well as reference to the elements required to be provided to the CLEC in order to complete interconnection. Although it is clear that only mandated UNEs must be provided to CLECs by SBC, the Arbitrator finds that this affects the price for certain elements as opposed to the availability for purchase of some of the elements. The CLEC's language is adopted, after changing "Texas" to "Oklahoma." |



Key: **Bold represents language proposed by SBC and opposed by CLECs.**
**<u>Bold and Underline language represents language proposed by CLEC and opposed by SBC.</u>**

| Issue Statement | Issue No. | Attachment and Section(s) | CLEC Language | CLEC Preliminary Position | SBC OKLAHOMA Language | SBC OKLAHOMA Preliminary Position | Arbitrator's Recommendation |
|---|---|---|---|---|---|---|---|
| | | | **3.10.**<br><br>**3.5 If during the first six (6) months of operations, CLEC has been sent one delinquency notification letter by SBC OKLAHOMA, the deposit amount shall be re-evaluated based upon CLEC's actual billing totals and shall be increased if CLEC's actual billing average:**<br><br>**3.5.1 for SBC OKLAHOMA for a two (2) month period exceeds the deposit amount held; or**<br><br>**3.6 Throughout the Term, any time CLEC has been sent two (2) delinquency notification letters by SBC OKLAHOMA, the deposit amount shall be re-evaluated based upon CLEC's actual billing totals and shall be increased if CLEC's actual billing** | imposition of what is nothing less than a penalty for attempting to enter into competition with SBC Oklahoma. Finally, the CLEC (and not SBC) should have the option of picking whether to satisfy any deposit requirement by using cash or a letter of credit. SBC is protected either way, so the option should be left to the CLEC.<br><br>In the recent T2A proceeding, the Texas Commission agreed that giving SBC such unbridled discretion was bad policy. Consequently, the Texas PUC is | **Cash Deposit shall constitute the grant of a security interest in the Cash Deposit pursuant to Article 9 of the Uniform Commercial Code in effect in any relevant jurisdiction.**<br><br>**3.6 A Cash Deposit will accrue simple interest, however, SBC OKLAHOMA will not pay interest on a Letter of Credit.**<br><br>**3.7 SBC OKLAHOMA may, but is not obligated to, draw on the Letter of Credit or the Cash Deposit, as applicable, upon the occurrence of any one of the following events:**<br><br>**3.7.1 CLEC owes SBC OKLAHOMA** | services between billing account numbers. SBC OKLAHOMA believes that deposits should be assessed on an overall customer basis.<br><br>3.9 SBC agrees that an irrevocable Bank Letter of Credit can satisfy its deposit requirements provided it meets the criteria specified in SBC's proposed assurance of payment language.<br>Quate Direct pp. 40-45<br><br>Quate Rebuttal pp. 21-26 | **calculate CLEC's monthly average.**<br><br>**3.7.1 After calculating the amount equal to the average billing to CLEC for a two (2) month period in Oklahoma, SBC OKLAHOMA shall add the amount of any charges that would be applicable to transfer all of CLEC's then-existing End-Users of Resale Services to SBC OKLAHOMA in the event of CLEC's disconnection for non-payment of charges. The resulting sum is the amount of the deposit.**<br><br>**[Xspedius only]**<br>3.7.1 **In no event will Xspedius be subject to an assurance of payment to SBC OKLAHOMA that exceeds two months' projected average billing by SBC OKLAHOMA to Xspedius, less the amount of billings by Xspedius to SBC OKLAHOMA. If SBC** |



Key: **Bold represents language proposed by SBC and opposed by CLECs.**
**Bold and Underline language represents language proposed by CLEC and opposed by SBC.**

| Issue Statement | Issue No. | Attachment and Section(s) | CLEC Language | CLEC Preliminary Position | SBC OKLAHOMA Language | SBC OKLAHOMA Preliminary Position | Arbitrator's Recommendation |
|---|---|---|---|---|---|---|---|
| | | | **average:**<br><br>**3.6.1 for SBC OKLAHOMA for a two (2) month period exceeds the deposit amount held; or**<br><br>**3.7 Whenever a deposit is re-evaluated as specified in Section 3.5 or Section 3.6, such deposit shall be calculated in an amount equal to the average billing to CLEC for a two (2) month period. The most recent three (3) months billing on all of CLEC's CBAs and BANs for Resale Services or Network Elements within that state shall be used to calculate CLEC's monthly average.**<br><br>**3.7.1 After calculating the amount equal to the average billing to CLEC for a two (2) month period in Oklahoma, SBC OKLAHOMA shall add the amount of any charges that** | requiring SBC to make decisions on deposits for established CLECs based solely on the CLEC's payment history. Similarly, in the K2A proceeding, the Arbitrator agreed that SBC's language is unreasonable, and adopted the CLEC Coalition's language on all sub-issues.<br><br>**Xspedius preliminary position:**<br>At any given time, SBC Oklahoma owes Xspedius significantly more in reciprocal compensation that Xspedius owes SBC under the ICA. SBC is therefore more | **undisputed charges under this Agreement that are more than thirty (30) calendar days past due; or**<br><br>**3.7.2 CLEC admits its inability to pay its debts as such debts become due, has commenced a voluntary case (or has had an involuntary case commenced against it) under the U.S. Bankruptcy Code or any other law relating to insolvency, reorganization, winding-up, composition or adjustment of debts or the like, has made an assignment for the benefit of creditors or is subject to a receivership or** | | **owes Xspedius more than $500,000, then a deposit would not be required until such time as the outstanding balance is reduced below this amount.**<br><br>**3.7.3 The expiration or termination of this Agreement.**<br><br>**3.8 If SBC OKLAHOMA draws on the Letter of Credit or Cash Deposit, upon request by SBC OKLAHOMA, CLEC will provide a replacement or supplemental letter of credit or cash deposit conforming to the requirements of Section 3.3.**<br><br>**3.9 Notwithstanding anything else set forth in this Agreement, if SBC OKLAHOMA makes a request for assurance of payment in accordance with the terms of this Section, then SBC OKLAHOMA shall have no obligation** |



Key: **Bold represents language proposed by SBC and opposed by CLECs.**
**Bold and Underline language represents language proposed by CLEC and opposed by SBC.**

# ATTACHMENT 9

**Attachment 9 contains information that is CONFIDENTIAL & PROPRIETARY and has been filed under seal with the TRA.**

# ATTACHMENT 10

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LIMITATION OF LIABILITY FOR INTERRUPTION OF SERVICE FOR REGULATED TELEPHONE COMPANIES: AN OUTMODED PROTECTION?

NAME: Rendi L. Mann-Stadt

SUMMARY:
... Historically, local telephone companies have enjoyed a broad limitation of liability for service outages. ... Finally, the author argues that despite the dramatic shift in the nature of telephone regulation, a modified limitation of liability tariff provision is still warranted. ... Yet, although the degree of telephone company regulation is abating at the state level, the limitation of liability still persists in most jurisdictions. ... Part IV proposes that limitation of liability continues to have a legitimate place in local operating telephone company regulation, albeit with some modification. ... Many telephone company tariffs contain limitation of liability language which protects the corporation from damage claims arising from errors or omissions in service. ... Although a detailed discussion of the policy shift in state telephone regulation is well beyond the scope of this note, certain elements of the new regulatory schemes impact the analysis of the limitation of liability tariff clauses. ... Highlighting the interrelation between limited damage awards and economical telephone rates, the California Supreme Court found that the utility commission relies upon the validity of the limitation of liability as a general policy in setting rates. ... An additional distinction between a manufacturer's liability and the liability of a telephone company is the nature of the customer. ...

TEXT:
[*629]

Historically, local telephone companies have enjoyed a broad limitation of liability for service outages. This protection evolved along with the strict oversight and regulation that characterized the predivestiture telecommunications industry. In exchange for the required universal service obligation, state utility commissions limited recovery of damages against the utility, partially as a method of keeping telephone rates reasonable. As the modern telecommunications industry undergoes regulatory reform, however, the historic basis for limitation of liability may no longer exist. The author of this note explores the historical underpinnings of limitation of liability in telephone regulation and discusses public policy considerations for the protection. Next, the author examines the justification for limitation of liability in the context of the new forms of utility regulation. Finally, the author argues that despite the dramatic shift in the nature of telephone regulation, a modified limitation of liability tariff provision is still warranted.

## I. Introduction

In 1988, a fire destroyed the telephone switching station in the Chicago suburb of Hinsdale, Illinois. n1 The fire completely devastated the communications facility, which had routinely routed and directed up to 3.5 million calls daily. n2 After the fire, the damage completely suspended telephone service to and from the western and southwestern suburbs of Chicago, and for approximately one month after the disaster, the residences and businesses in the affected area still had disrupted service. n3

As a result of the outage, businesses in this high-tech corridor sustained enormous financial losses estimated beyond ten million dollars. n4 Alleging negligence and seeking economic damages, numerous customers filed a class action suit against Illinois Bell Telephone Company. n5 In seeking a dismissal of the claim, Illinois Bell cited exculpatory language [*630] in its tariff filed with the Illinois Commerce Commission. n6 Relying in large part upon this limitation of liability in the tariff, the trial court granted Illinois Bell's motion for summary judgment and the appellate court affirmed. n7 The Illinois Supreme Court, however, reversed and remanded, holding that the facts as pleaded presented a valid cause of action based on another section of Illinois law. n8

Similar exculpatory language in tariffs in many other jurisdictions has been interpreted to extend protection from outage-related claims to utilities in general, and telephone companies in particular. n9 Thus, in most jurisdictions, even if a telephone company's conduct is negligent, regardless of the extent of the damage, it can completely avoid liability. The limitation of liability tariff language and the protection it extends to the respective utility is an outgrowth of the structure of utility regulation, and is frequently justified as compensation for the "rigors" of regulation. n10

Most states have statutory provisions that burden local operating telephone companies with strict oversight and require telephone companies to provide universal service within their franchise area. n11 In ex [*631] change, many states also regulate utility liability, limiting recovery of damages against utilities and thereby avoiding the imputation of such costs into customer rates. n12 But strict telephone regulation, which represents the burden that limitation of liability serves to alleviate, is shifting. Both competition and deregulation now characterize segments of the industry, and many state utility commissions have approved regulatory schemes with more flexible pricing and regulation. n13 Yet, although the degree of telephone company regulation is abating at the state level, the limitation of liability still persists in most jurisdictions.

This note examines whether the limitation of liability is still appropriate for local operating telephone companies within the current regulatory framework. Part II explores the origins of the limitation of liability doctrine in telephone regulation and provides an overview of the nature of current limitation of liability provisions. n14 Part II also discusses the public policy considerations and legal doctrines utility commissions and courts use to justify limited liability in the telephone company context. n15 Part III analyzes the limitation policy in light of the present structure and status of telephone regulation. n16 Part IV proposes that limitation of liability continues to have a legitimate place in local operating telephone company regulation, albeit with some modification. n17 Part V concludes that even in light of shifting trends in regulatory oversight, limitation of liability tariff provisions are still conscionable and necessary so long as protection is not extended to cases of wilful or wanton misconduct by a utility. n18

II. Background: Historical Origins of Telephone Regulation and the Limitation of Liability

Many telephone company tariffs contain limitation of liability language which protects the corporation from damage claims arising from errors or omissions in service. n19 These provisions evolved as a compo [*632] nent of the regulatory structure of telephony. n20 This section traces the evolution of telephone regulation, the genesis of the limitation of liability concept, and the weight the judiciary has afforded such clauses.

A. Telephone Regulation

In 1910, Congress delegated responsibility for telephone and telegraph regulation to the Interstate Commerce Commission. n21 In 1934, Congress established the Federal Communications Commission which assumed responsibility for telephone regulation. n22 Currently, interstate telephone operations remain under the jurisdiction of the Federal Communications Commission, n23 while regulatory commissions in each state oversee the intrastate operations of telephone companies. n24 States typically classify corporations which provide telephone service as regulated monopolies, subject to governmental agency oversight of operations and rate making. n25

Most state legislatures have enacted public utility statutes which create and authorize state utility commissions to regulate the intrastate operations of the natural telephone monopoly. n26 As a regulated utility, a telephone company is obligated to serve all customers in the franchise area, under the same terms and conditions, and under rates approved by [*633] the regulatory commission. n27 Historically, state regulatory agencies emphasized the public policy of universal service, n28 and used rate of return regulation n29 with a subsidized pricing structure to ensure economical residential service. n30

The underlying goal of universal service was the provision of optimum penetration of service at reasonable rates. n31 In 1982, however, government antitrust litigation against AT&T resulted in the divesture of that company and the formation of the "Baby Bells." n32 The settlement of the AT&T antitrust suit, the Modified Final Judgment, n33 not only changed the structure of telecommunications, but also created a shift in the power of regulatory oversight of the local exchange companies from the federal arena to the state level. n34 Since the divestiture of AT&T in 1984, n35 state utility commissions have followed the national procompetition movement and have approved a variety of regulatory reforms. n36 Regulatory commissions still maintain the role of overseer of the tele [*634] phone companies. Strict rate of return regulation, however, has ceded in many jurisdictions to alternative paradigms of regulatory oversight including price cap, n37 incentive, n38 or rate stabilization regulation. n39

Although a detailed discussion of the policy shift in state telephone regulation is well beyond the scope of this note, certain elements of the new regulatory schemes impact the analysis of the limitation of liability tariff clauses. For purposes of evaluating limitation of liability, the important characteristics of this transformation are lessened regulatory constraints, an increased ability for telephone companies to retain revenues, and a restricted ability to raise rates. n40 These characteristics generally indicate a lessening of the burden of regulation on local telephone companies. n41

While state utility commissions have not addressed limitation of liability as a facet of any of these new regulatory plans, several states have imposed quality of service standards as a component of more flexible regulation. n42 Other quality oversight measures have been precipitated by [*635] large outages. n43 For example, in reaction to the Hinsdale fire, n44 the Illinois Commerce Commission enacted a rule requiring certain maintenance and disaster response procedures. n45

Another pertinent and interesting outgrowth of the increase in telecommunications competition is that many local telephone companies have explored alternative routing (called route diversity) to enhance reliability and avoid paralyzing outages resulting from a single facility loss. n46 While not directly mandated by the regulatory body, this technological enhancement reduces the risk of outage. To meet their nonregulated competitors' offerings, many local telephone companies may offer customers who rely heavily on telecommunications the option of paying for specific route "insurance." n47

Quality of service standards and service enhancements may ease the amount of litigation regarding limitation of liability clauses. Despite these efforts, however, courts do not analyze companies' efforts to reduce risk of outage, but merely apply the blanket limitation of liability. n48 This limitation, developed as compensation for the more traditional regulatory environment, n49 remains virtually unchanged n50 despite the altered regulatory approaches.

B. Limitation of Liability Clauses

1. Tariffs as Force of Law: Source of Limitation of Liability Clauses

Despite the procompetition movement in telephone regulation, traditional tariff filing requirements still prevail in most jurisdictions. n51 [*636] Most states have statutes which require local exchange telephone companies to file comprehensive schedules of rates, rules, classifications, and regulations with the administrative agency charged with public utility oversight. n52 Provisions dictated by these jurisdictional statutes and tariffs curtail and govern the rights and privileges that a utility might seek if it were an unregulated corporation entering into ordinary contractual relationships with customers in the open marketplace. n53

A telephone company's official tariff binds both the company and its subscribers. n54 Most courts recognize the delegation of authority by the legislature to the utility commission, and hold that the tariff exclusively dictates the extent of the utility's duty to its customers. n55 Therefore, when a limitation of liability rule is properly approved by the jurisdictional regulatory body, most courts hold that liability provisions, if reasonable, operate to limit the telephone company's liability. n56

2. Traditional Support for Limitation of Liability Provisions

Inclusion of tariff provisions limiting telephone company liability evolved from doctrines established in telegraph law. n57 In Primrose v. [*637] Western Union Telegraph Co., n58 a seminal case in telegraph regulation, the U.S. Supreme Court distinguished between telegraph companies' duties and those of other common carriers. n59 The Court stated that although telegraph companies have a clear duty to the public, they are not completely analogous to common carriers because message carriers move something with no recognizable intrinsic value to the carrier. n60 The Court went on to say that because message carriers cannot foresee the value of the cargo, telegraph companies are not subject to the same liabilities as other common carriers. n61 Thus, the Court concluded that because telegraph companies are unaware of the value a message might have, and are unable to take commensurate precautions for highly valued transmissions, the message carrier cannot be expected to assume a potentially unlimited liability for a subscriber's valuable message in unforeseeable circumstances. n62

Historically, many jurisdictions recognized the quid pro quo of limited liability as a component of the burdens and constrictions of telephone regulation. n63 For example, in Correll v. Ohio Bell Co., n64 an Ohio appellate court noted:

A public utility is, by law, regulated strictly in its operation. Rights and privileges which it might seek under ordinary contractual relations are curtailed by provisions of the statutes. Its liabilities are likewise regulated and limited by provisions of the statutes. The theory is that, since it renders service affecting the public, the state shall regulate and control it in order to prevent injustice, and further, in consideration of such regulation and control, its liability is and should be defined and limited. In a sense it is a matter of contract, on the one hand by the utility and on the other by the state representing all of its citizens. n65

Courts in most states consistently find that limitation of liability rules are constitutional and legal when applied to cases of telephone outages or errors involving negligence. n66 Where such forbearance is a com [*638] ponent of the tariff appropriately filed and is approved by the appropriate utilities commission, most courts have held that this tariff clause is binding. n67 The substantial deference most courts give to an agency's approval of a limitation of liability clause is often based on the premise that the tariff defines the legal duty of the utility and that no other contractual basis exists for a cause of action. n68

3. Types of Limitation of Liability Clauses

Although most courts generally uphold utility commission approved limitation of liability tariff provisions, the language and character of these clauses varies among jurisdictions. n69 A majority of states limit telephone company liability for service interruptions to a rebate of the service charges during the outage period. n70 Some jurisdictions make distinctions based on the level of negligence, or intent, upholding the limitation only if the plaintiff fails to prove gross negligence, or wilful or wanton behavior. n71 Other jurisdictions distinguish the type of suit to be brought, sustaining immunity for claims alleging contractual breach, but waiving the limitation for actions brought using tort theories. n72 Generally, limitation of liability does not apply to situations involving illegality, or fraudulent, wilful, or wanton misconduct. n73 For example, the Califor [*639] nia Public Utilities Commission promulgated a rule requiring tariffs to inform customers that the limitation of liability rules do not apply to situations involving wilful misconduct, fraudulent conduct, or violations of the law. n74

Thus, historically, state utility commissions approve limitation of liability clauses for telephone companies, and courts sustain their validity. n75 An evaluation of their continued applicability must, however, progress beyond the statement of prevalence and analyze the motives underlying these limitations. The following section surveys the policy justifications for limitation of liability provisions.

4. Justifying Limitation of Liability for Regulated Utilities

The willingness of most courts to uphold limitation of liability provisions depends on a variety of public policy considerations regarding the particular character and responsibilities of regulated telephone companies. n76 Primarily courts view the limitation as a key element of the regulatory process, in particular as necessary compensation for the economic burden imposed by the universal service requirement and the strictures of regulation, n77 and as a vital limiting component of the rate-making process. n78 Some courts also cite the unique vulnerability telephone companies have because of their intense reliance on technology, n79 and acknowledge the inability to foresee damages related to the transmission of messages that are unknown as to content and value. n80 This section considers those theories associated with regulation and rate making that have been used to justify limitation of liability. [*640]

A. Limited Liability as Compensation for Strict Regulation

The basic theory supporting exculpatory clauses for damages arising from service interruptions is that "a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges, shall likewise be regulated and limited as to its liabilities." n81 The limitation of liability is seen, to some extent, as necessary to an equitable balance between the benefits and burdens of regulation. n82 Underlying this premise is the principle that property devoted to public use, or a use in which the public has an interest, grants to the public an interest in the use, which can be controlled by the public for the common good. n83

The appropriate regulatory body effectuates this control, and is charged with the duty to ensure that utilities render both reasonable and adequate service. n84 Thus, the telephone company is in a class of corporations strictly limited in its rights and privileges. Therefore, some argue it must be regulated, at least to the extent of its static known exposure to liabilities arising from its duty to serve its customers. n85

A telephone company cannot be selective about its customers; it is required to offer universal service without weighing the cost against the benefit of serving a particular customer. n86 A California appellate court, discussing this theory in the context of limited liability for errors in directory listings, held that because the state regulates and controls the telephone company, the utility's liabilities should be defined and limited. n87

A variation of the burden/benefit theory characterizes the limitation clause as not solely a limit on damage claims, but rather a limitation and definition of the duty of the telephone company to provide service. n88 Ac [*641] cording to this theory, the limitation clause sets out what type of service the utility will supply and the scope of the service it is required to furnish. n89 In this context, a telephone company is charged with the duty of providing service upon application, but in exchange for such responsibility, the corporation will not be required to provide completely uninterrupted or perfect quality service. n90

B. Limited Liability as a Rate Component

Most frequently, courts refer to the interrelationship between potential liability and rate structure as justification for limitation of liability for utilities. n91 The U.S. Supreme Court, in Western Union v. Esteve Bros. & Co., n92 limited a telegraph company's damage liability for an unreceived message. n93 Justice Brandeis, writing for the majority, stated, "the limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service ....". n94 Similarly, in Southwestern Sugar Co. v. River Terminals Corp., n95 the Supreme Court, in discussing common carrier obligations, noted, "the rate specified in the relevant tariff is computed on the understanding that the exculpatory clause shall apply to relieve the ... carrier of the expense of insuring itself against liability for damage ... and it is a reasonable rate so computed." n96

The goals of uniformity and equality are additional principles of telephone regulation and rate making that implicate limitation of liability. n97 The Court in Esteve Bros. n98 emphasized the uniform nondiscriminatory application of utility rates, and held that uniformity demanded that the rate as set in the tariff be the sole legal indicator of the company's liability and duty. n99 The Esteve Bros. Court further indicated that to allow some customers to recover for damages related to interrupted service provides a higher standard of service to those customers, and in effect, [*642] provides unequal treatment to a particular class of customers. n100

When validating company exculpatory clauses, state courts generally defer to utility commissions' powers created either under the state constitution or by the state legislature. n101 According to the Georgia Court of Appeals, the power to legislate rates and to determine what limitations of liability are necessary to establish the rates rests exclusively with the appropriate commission. n102 Highlighting the interrelation between limited damage awards and economical telephone rates, the California Supreme Court found that the utility commission relies upon the validity of the limitation of liability as a general policy in setting rates. n103 Thus, the court could not entertain suits for damages as a result of telephone service outages without thwarting the policy of economical telephone rates. n104

Another basis for limitation of liability that is a function of the rate-making rationale is the principle of risk compensation. n105 Many courts recognize that regulating agencies set a utility's rates commensurate with the risk assumed, n106 and reasonable rates are dependent in part upon upholding the limitation of liability rule. n107 Unlike a corporation competing in the open marketplace, the structure of utility regulation does not allow telephone companies to select a particular population to serve by assessing the risks associated with providing service to a specific location or customer. n108 Instead, telephone companies have a duty to serve all [*643] customers within their franchise area. n109 When courts uphold limitation of liability for common carriers or utilities, they often focus on the ultimate economic impact on the average ratepayer. n110

Broadened liability exposure inevitably raises costs, and thereby the rates of service. n111 For example, in a case where a business owner sought damages for losses resulting from a burglary, alleging a telephone company employee negligently tagged the lines connected to the alarm system, a Louisiana court of appeals held that if unlimited liability is placed upon public utilities for every service they provide, the general public as a whole would bear the burden. n112 Because state legislatures charge utility commissions with the duty of setting reasonable rates, commissions have the discretion to design regulations to minimize risks and costs which would be reflected in rates. n113 For example, if telephone company liability was extended for all subscribers suffering any measure of pecuniary loss, the burden of this cost, through rate of return regulation, would ultimately be shifted to each ratepayer. n114 This basis for restricting recovery against telephone companies is deeply ingrained in the notion that recovery for a few customer losses unjustly burdens all ratepayers.

This section considered the theories upon which courts rely to limit the ability of subscribers to recover damages from telephone companies and the relation of those theories to public policy and the regulatory process. n115 In the context of the technological burst of the last twenty years n116 and the accelerating move to deregulation in telecommunications, n117 however, the foundation and rationale for this limitation requires closer scrutiny. n118 The following section examines the appropriateness of continuing to limit liability as the form of telephone regulation shifts. n119 [*644]

III. Analysis

A. Present Day Justification: Is It Ceteris Paribus? n120

Two significant factors have had a profound impact on American telecommunications in the last ten years. First, sensational technological advancements in the industry have dramatically increased both competition and customer participation, and created an explosion of new products and capabilities. n121 Second, the watershed divestiture of AT&T in 1984 marked a dramatic change in telephone regulation. n122 The breakup of AT&T, n123 the formation of the "Baby Bells," n124 and the structural separations of the Modified Final Judgment, n125 created a transformation in the methodology of telephone regulation. n126 In light of these very critical changes, previous justifications for telephone company protection from liability merit review.

1. Do the Benefit and Burden Still Balance?

As indicated in part II, n127 one of the cornerstones of the justification for limitation of liability is the balance between the burdens and benefits of regulation. n128 In the current environment, however, many state regulatory commissions are allowing telephone companies greater flexibility in service provision and earnings, n129 and the lessened burden may no longer justify such a strict limitation of liability.

a. The Degree of Regulatory Stricture

The public policy rationale for limiting liability is often described as compensation for the encumbrances of restrictive regulation. n130 Judicial justification for endorsing limitation of liability focuses on the "imposition" of regulation upon the utility. n131 In fact, this scenario of a utility company as victim is questionable if one adopts the theory of some com [*645] mentators who suggest that regulation of the telecommunications industry was a desirable arrangement engineered by the Bell system to protect market dominance. n132 In fact, faced with ruthless competition in the early 1900s, AT&T viewed regulation as a protective milieu where monopolistic advantages could thrive. n133 This affirmative participation in self-regulation makes questionable the protectionist underpinnings of the balancing theory of limitation of liability.

Public policy theorists also point to the ability of regulated entities to influence the very administrative agencies charged with their oversight. n134 On the other hand, the history of telecommunications regulation is often cited as an exception to the "self-interest" theory of regulation where the telephone companies, particularly in recent years, have been unable to influence the regulatory agency to the extent of placing the regulators in the role of "cartel manager." n135 Perhaps a middle ground between the self-interest regulation theory and the passive disciplinary view of the restrictions of regulation is more realistic. Even such a moderate view, when interposed with a shift in the extent of actual regulation, makes questionable the degree of protection against liability warranted by telephone companies.

b. Risk Assumption Revisited

One element of the balancing of burden rationale is risk assumption. n136 Historically, utility commissions restricted telephone company rates and earnings levels while protecting the utility from competitive risk. n137 Modern state regulatory schemes, however, are premised upon a new contract of regulation. This new contract often allows a utility to earn and retain a higher rate of return in exchange for less protection from competition. n138 If an important component of the new regulatory frameworks is to "free" the local telephone companies to participate in the competitive marketplace, n139 should they still enjoy the guaranteed protection against liability arising from service disruption?

The essential question is still one of balancing benefits and burdens - weighing the appropriate risk with the appropriate return. It is [*646] possible that the risk appropriately correlated with the permission to retain more of the generated revenue is found in other areas such as lack of guaranteed rate increases, lack of ability to unilaterally change the price of its services, or competitors not saddled with regulated portions of the business. n140 If the risk and revenue levels are altered, however, sound public policy requires a re-examination of the appropriate degree of protection.

2. Is Rate Protection Still Necessary?

The dominant argument in favor of limitation of liability is the economic impact of insuring a few customers at the expense of all. n141 The major motivation for allowing limitation of liability in rate of return regulation is the fear that all costs create upward pressure on rates and ultimately increase prices. n142 In many jurisdictions, however, the modern state regulatory structure does not support this premise. An example of a new regulatory scheme that maintains rate protection is California where the two largest telephone companies have the ability to retain some measure of earnings at a higher rate of return with certain restrictions. n143 One of these restrictions is that local service rates are placed in a category of services that still require utility commission approval for any increases. n144 Another example is Illinois where in late 1992 Illinois Bell proposed a new method of regulation n145 that included a three year freeze on local rates. n146 These examples illustrate that if increased liability were imposed, upward pressure on rates might not affect the average ratepayer directly, or would at least be measurably delayed. n147

Because of the changes in regulatory structure, the basis for upholding strict limitation of liability provisions is less convincing. For many companies the threshold of allowed return has risen, n148 suggesting a company should be required to accept commensurate risk, possibly in the [*647] form of an expanded duty to customers. Other policy considerations and legal principles, however, suggest that some measure of limitation, even in the current regulatory environment, n149 is still valid.

3. Tort Principles: Argument Against Expanding Liability

Although the new forms of state telephone regulation suggest the need to curtail the limitation of liability, the relative capacity of the telephone companies and their customers to bear loss requires a moderate approach to any alteration of the limitation of liability. n150 The relative capacity is not so much a matter of the relative wealth of the parties, but a matter of the relative ability of the parties to avoid the loss, absorb it, or distribute it among a larger group. n151

At first glance, an obvious parallel to the situation of utilities and their consumers is that of a product manufacturer and its customers. In products liability, the extension of liability to the ultimate consumer is aided by the feeling that the manufacturer is best able to bear and distribute the loss. n152 However, the nature of the output is a significant difference between a manufacturer's product liability and the enormous liability that would be imposed on a telephone company. n153 When a manufacturer offers a product for sale, the customer can determine whether the price - which theoretically includes a premium to cover potential product liability damages - is worth the utility of the product. The customer can decide to forego the purchase or shop for a substitute product at a lower price. The typical utility consumer in today's environment however, is not similarly situated, but is still largely a captive consumer at the only price offered. n154

In the case of the telephone customer, because telephone service has become a necessity, n155 with few or no alternatives, n156 the customer can [*648] not forego the service. Rather, the customer must pay the predetermined rate, even if the rate includes the cost of defending liability suits and damage payments. Thus, a telephone company's limitation of liability for negligence cannot be completely removed because the resulting increase in damage costs would be distributed via increased rates to all customers, many of whom would be unable to bear the loss. This is unjust in the context of a monopoly where subscribers have few, if any, alternatives. Eliminating the limitation of liability might distribute the cost of liability across the entire ratepaying public. It would also, however, create an undesirable tension with the historical goal of universal telephone service n157 by burdening those customers who can barely afford existing rates.

An additional distinction between a manufacturer's liability and the liability of a telephone company is the nature of the customer. Consumer products are typically sold to individual households that are not in a position to insure against potential injury or loss resulting from faulty manufacturing. The manufacturer is in a better position to insure against loss. In those situations where goods are sold to large industrial customers, however, equal bargaining power enables the parties to make any liability or limitation thereof a contractual matter under the terms of the transaction. n158 Conversely, typical telephone customers n159 who would incur significant loss as a result of an outage such as the service interruption following the Hinsdale fire n160 are large industrial and commercial customers who can insure against losses. The telephone company, however, is probably not in a position to insure itself against liability. The California Public Utilities Commission recognized this when it cited the unavailability of insurance for utilities against liability of this kind as a significant factor in its decision to sustain telephone company limitation of liability for service and directory errors. n161 [*649]

Although new regulatory paradigms n162 still limit utilities' ability to pass all costs directly to the ratepayer, n163 the changes are not significant enough to subject local telephone companies to unchecked liability, n164 especially in light of the magnitude and complexity of the service they provide. n165 Thus, opposing interests must be carefully weighed in developing the correct degree of liability a telephone company should be exposed to under the current regulatory framework. Increased earning potential and limits on rate increases suggest local telephone companies should assume commensurate risk. n166 On the other hand, established tort principles continue to provide sound arguments against a carte blanche assumption of liability n167 and suggest caution when contracting the broad limitation currently in place in many jurisdictions.

IV. Proposal

Assuming that the cost of unlimited liability is too great an imposition on the telephone company and its ratepayers, a more appropriate method of risk sharing under current regulatory scenarios is a moderate expansion of telephone company liability. Moderation is warranted because many telephone customers could not absorb the rate increase that would be necessary to protect the telephone company from the increased cost due to complete liability.

Illinois House Bill 4026, proposed in April of 1992, n168 illustrates an attempted but unsuccessful alteration of the limitation of liability. In pertinent part, the proposed bill would have prevented the regulatory commission from approving any rate, charge, classification, or tariff that would limit a utility's liability for direct or indirect losses due to disrup [*650] tion of service that exceeds twenty-four hours. n169 The bill's failure n170 was probably attributable to its broad language:

Such sweeping language removes all limitation of liability for outages over twenty-four hours, and signals too dramatic a change because unlimited recovery of damages in the instance of service failure or telephone company error is inconsistent with both regulatory needs and principles of common law. n171 Although legislation might be a solution to constricting the unbridled indemnity that currently exists, language in any such legislation should be carefully constructed to tailor the limitation instead of eliminating it.

A more practical alternative would be to follow the practice of several states that have refused to uphold limitation of liability provisions unless the corporation is still liable for acts of gross negligence. n172 This expansion of duty on the part of telephone companies increases the level of customer protection without imposing theoretically unlimited liability. It further provides a measure of incentive for utilities to maintain adequate service quality standards and to continue technological efforts to provide alternative routing. n173

Under this system, once the plaintiff proves gross negligence or wanton misconduct, the tariff provision might subject the company to a penalty, dependent on the length of outage. Thus the telephone company is forced to compensate some customers, but not to the extent that rates are dramatically increased. A system similar to this proposal is the tariff clause mandated by the California Utilities Commission which limits recovery to $ 10,000 when a plaintiff proves gross negligence. n174 This "limited limitation" is consistent with new forms of telephone regulation, allowing local telephone companies to operate less as a regulated monopoly, but affording adequate protection in the areas which are still under relatively strict oversight.

Utility commissions should also mandate telephone company quality standards that reduce the chance of an interruption. Many of the new regulatory scenarios include quality standards as factors in the earnings formula. n175 The necessity of such mandates may abate as true competitive market conditions penetrate the local telephone marketplace. In the short term, however, regulatory commissions should oversee service quality levels to ensure that new regulatory paradigms, which allow in [*651] creased earnings levels, do not compromise system reliability. Additionally, nonmandated technological service "insurance," such as customer specific route diversity, n176 should be encouraged because such services can have the effect of passing the cost of insurance directly to those customers who most need and can most afford this protection. Such technological offerings allow the demands of the marketplace, rather than regulatory mandates, to ultimately drive the quality of service.

V. Conclusion

Historically, the public policy justification for limiting telephone company liability for outages and errors is founded on the traditional regulatory model. n177 Since the divesture of AT&T and the rapid changes in telecommunications regulation, however, telephone companies have been given greater flexibility in earnings and pricing. n178 Due to the easing of regulatory strictures, complete limitation of liability for telephone company errors and outages is less compelling in today's regulatory environment. The nature of the telecommunications industry and the local telephone companies, however, necessitates a moderate alteration of the limitation. Thus, telephone companies should suffer some financial penalty for damages resulting from gross negligence, and utility commissions should include quality standards as a requisite index in any price sharing or earnings formula.

**FOOTNOTES:**

n1. Maria Hunt et al., Fire Wipes Out Phones in West Suburbs, Chi. Trib., May 9, 1988, 1, at 1.

n2. *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65,* at *2-3 (Ill. Aug. 26, 1993).

n3. Id. at *4.

n4. Stevenson Swanson et al., Phone Repair Woes Mount Bell Problems Reach Out and Touch Millions, Chi. Trib., May 15, 1988, 1, at 1.

n5. *In re Ill. Bell, No. 73999, 1993 Ill. LEXIS 65,* at *4.

n6. Id. at *11-12. The tariff provides:

The liability of the Company for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in transmission occurring in the course of furnishing service or other facilities, and not caused by the negligence of customer, shall in no event exceed an amount equivalent to the proportionate charge to the customer for the period of service during which such mistake, omission, interruption, delay, error or defect in transmission occurs. No other liability shall in any case attach to the Company.

Id. The appellate court also held that the "economic loss" doctrine articulated in *Moorman Manufacturing Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982),* precluded recovery. The Illinois Supreme Court, however, reasoned that the doctrine did not bar recovery. Id. at 15-16. *In re Ill. Bell, No. 73999, 1993 Ill. LEXIS 65,* at *4. The discussion of economic recovery in tort, however, is beyond the scope of this note.

n7. Id. at *1.

n8. Id. at *12. The Illinois Supreme Court held that the plaintiffs asserted a valid claim for civil damages pursuant to 5-201 of the Public Utilities Act. Id. The statute provides:

In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this Act or any rule, regulation, order or decision of the Illinois Commerce Commission, issued under authority of this Act, the public utility shall be liable to the persons or corporations affected thereby or resulting therefrom, and if the court shall find that the act or omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by way of punishment.

*220 ILCS 5/5-201* (West 1992).

In In re Illinois Bell, the court distinguished previous appellate court rulings where exculpatory provisions were held to preclude the recovery of consequential damages for interruption of phone service, because, in contrast to the In re Illinois Bell claim, the previous cases did not involve statutory damages claims brought under 5-201 of the *Utilities Act. In re Ill. Bell, No. 73999, 1993 Ill. LEXIS 65,* at *8. At the time of this writing, a motion for rehearing is pending before the Illinois Supreme Court.

n9. *In re Ill. Bell Switching Station Litig., 234 Ill. App. 3d 457, 463-64, 596 N.E.2d 678, 682, 173 Ill. Dec. 54, 58 (1st Dist. 1992),* rev'd, *No. 73999, 1993 Ill. LEXIS 65* (Ill. Aug. 26, 1993).

n10. See *Correll v. Ohio Bell Tel. Co., 27 N.E.2d 173, 174 (Ohio Ct. App. 1939)* (justifying tariff limitation of liability for telephone company directory omissions and errors in partial consideration for state regulation and control).

n11. Robert B. Horowitz, The Irony of Regulatory Reform 132 (1989) ("Regulation granted local telephone monopoly franchises and secured the stabilization of business risk ... In return, regulation was able to "extract" from telephone companies the public interest obligation of service to all - 'universal service.' "); see also Paul E. Teske, After Divestiture 2 (1990).

n12. Ithiel de Sola Pool, Technologies of Freedom 101 (1983).

n13. Walter G. Bolter et al., Telecommunications Policy for the 1990s and Beyond 131 (1990).

n14. See infra notes 19-75 and accompanying text.

n15. See infra notes 76-119 and accompanying text.

n16. See infra notes 120-67 and accompanying text.

n17. See infra notes 168-76 and accompanying text.

n18. See infra notes 177-78 and accompanying text.

n19. Ronald A. Case, Annotation, Liability of Telephone Company to Subscriber for Failure or Interruption of Service, *67 A.L.R. 3d 76, 83 (1975)*; see also *Helms v. Southwestern Bell Tel. Co., 794 F.2d 188, 192-93 n.9 (5th Cir. 1986)* (citing cases from 29 states regarding limitation of liability provisions in telephone company tariffs); *Wilhite v. South Cent. Bell Tel., 693 F.2d 340, 342 (5th Cir. 1982)* (citing jurisdictions where, absent wilful or wanton conduct, courts uphold limitation of liability clauses); *University Hills Beauty Academy v. Mountain States Tel. & Tel. Co., 554 P.2d 723, 726 n.1 (Colo. Ct. App. 1976)* (providing an extensive list of decisions upholding limitation of liability clauses in telephone company yellow page advertising cases).

n20. Horowitz, supra note 11, at 100.

n21. See Richard M. Owen & Ronald Braeutigam, The Regulation Game 200 (1978). The Mann-Elkins Act extended the Interstate Commerce Commission's (ICC) jurisdiction to include the telephone, telegraph, and cable companies engaged in transmission of interstate (or intercountry) messages.

n22. Pub. L. No. 416, ch. 652, 48 Stat. 1064 (1934). The administrative deficiencies both of ICC oversight of wired communications and oversight of radio saw legislative proposals as early as 1929 to consolidate federal authority over communications in one agency. In response, Congress created the Federal Communications Commission (FCC) under the Communications Act of 1934. The Communications Commission's mandate was vague, requiring that carriers provide good service at reasonable rates. Horowitz, supra note 11, at 122, 126. The 1934 Communications Act authorized continuing federal institutional involvement in telephone regulation by establishing the FCC, thereby articulating the goal of universal, affordable service. Teske, supra note 11, at 2.

n23. *47 U.S.C.S. 152* (1989).

n24. See Horowitz, supra note 11, at 100. State telephone regulation began in 1907 with establishment of the New York and Wisconsin public utility commissions. Most states formed public utility commissions shortly thereafter. Teske, supra note 11, at 2.

n25. Telephony in the United States has not always had a monopolistic structure. The expiration of the Bell patents in 1893 sparked fierce competitive battles as the number of telephones increased 1000% between 1893 and 1907. In many instances, as a result of the growth, numerous telephone companies operated in concurrent locales. Bell, however, began an aggressive consolidation, and reduced the number of "independent" telephone companies and emerged the dominant force in the market. Alarmed at these developments, public policy makers at the state and federal level intervened. Bolter et al., supra note 13, at 75-76.

n26. See, e.g., *Or. Rev. Stat. 756.040* (1992) ("The commission is vested with power and jurisdiction to supervise and regulate every public utility ... and to do all things necessary and convenient in the exercise of such power and jurisdiction."); *Va. Code Ann. 56-35* (Michie 1993) ("The Commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all public service companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies.").

n27. This doctrine of universal service is the common underpinning of legislative intent and scholarly analyses of the history of regulatory origin and is called the "public interest" theory of regulation. The public interest theory of regulation views the administrative agency as functioning as a watchdog for the general welfare through oversight of rates and profit levels. Horowitz, supra note 11, at 23-25.

n28. "Universal service meant that telephone service must be made available to and be generally affordable by everyone." Id. at 132. The statutory basis for this is usually found in the language of state public utility acts. For example, in California, the Public Utility Code provides: "The Legislature finds and declares that ... the offering of high quality basic telephone service at affordable rates to the greatest number of citizens has been a longstanding goal of the state." *Cal. Pub. Util. Code 871.5* (West 1993).

n29. The justification for regulating telephone companies' return on investment has been that they are monopoly providers. Theoretically, in the absence of regulation, they could command prices significantly above what a competitive market would allow. Rate of return regulation attempts to make the incentive for investing in a monopoly service similar to that possible in nonmonopoly services. Greatly simplified, this process consists of determining the rate base - the cost of providing service including depreciation and taxes - and adding to that a reasonable profit or return sufficient to attract the capital necessary for investment. There are a number of problems associated with this method, including the incentive for the firm to overinvest since its rate of return is based on total capital investment, and the discouragement of operating efficiencies because the benefits of cost-saving techniques flow to the consumers rather than providing additional profit to the firm. David Twenhafel et al., Introduction to Telecommunications Policy and Economic Development 1, 4 (Jurgen Schmandt et al. eds., 1989).

n30. Bolter et al., supra note 13, at 131.

n31. See *Southern Bell Tel. & Tel. v. Ivenchek, Inc., 204 S.E.2d 457 (Ga. Ct. App. 1974)* (indicating utility commission must require a level of service and reasonable rates).

n32. Teske, supra note 11, at 5.

n33. Amid a growing trend towards deregulation and mounting competitive interest in telecommunications, the U.S. Department of Justice brought suit against AT&T to end its powerful vertical integration through divesture of Western Electric and the Bell operating companies. *United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982)*. Between 1974 and 1982, AT&T lobbied heavily to defeat the antitrust case, but was unsuccessful in its bid to have legislation passed protecting the monopoly structure. On January 8, 1982, the Department of Justice and AT&T reached a settlement in the case, resulting in the divesture of both Western Electric and the operating companies, which were spun off as the seven separate and independent regional monopolies. Horowitz, supra note 11, at 241. For an in depth discussion of the AT&T antitrust action and divesture, see Steve Coll, The Deal of the Century: The Breakup of AT&T (1986).

n34. Twenhafel et al., supra note 29, at 1.

n35. *AT&T, 552 F. Supp. at 131.*

n36. Bolter et al., supra note 13, at 131.

n37. Price caps can be a feature of incentive regulation plans, see infra note 38, but the term generally refers to a method of capping basic prices. Dawn Bushaus, State Regulators: Incentive Regulation Local Competition a Top Agenda - What's Best for Ratepayers?, CommunicationsWeek, Aug. 26, 1991, at 22F hereinafter Bushaus, Incentive Regulation. Under such plans, regulatory commissions set ceiling and floor rates for competitive services and let telephone companies adjust their rates within the limits. Dawn Bushaus, States Easing Local Regulations - New Incentive Plans Allow Pricing Flexibility in Return for Productivity Guarantees, CommunicationsWeek, July 27, 1992, at 27 hereinafter Bushaus, States Easing.

n38. Incentive regulation means letting a telephone company keep a certain portion of their profits, provided they can keep costs down. Bushaus, Incentive Regulation, supra note 37, at 22F.

n39. Under the rate stabilization approach, carrier rates are generally reduced if earnings exceed authorized levels and, conversely, rates will rise if earnings are deficient. Bolter et al., supra note 13, at 137; see also Gail G. Schwartz & Jeffrey H. Hoagg, Virtual Divestiture: Structural Reform of an RHC, *44 Fed. Comm. L.J. 285 (1992).*

n40. These characteristics are evident in examples of innovation in telephone regulation in Vermont, Alabama, and Nebraska. In 1987, Vermont entered negotiations leading to a "social contract" between the Vermont Service Board and New England Telephone Company (NET). Twenhafel et al., supra note 29, at 185. The terms of the Vermont agreement require stabilized local rates, shifting of the risk associated with inflation to the telephone company, and limited increases for certain services. Although the plan does not guarantee New England Telephone Company a reasonable return on its investment, neither does it limit NET's ability to earn. Bolter et al., supra note 13, at 132. In 1990 the Alabama Public Service Commission extended a form of incentive regulation, called a "Rate Stabilization and Equity Plan," for South Central Bell. The plan allows several tiers of rates of return and includes service measurements. Alabama Continues SCB Alternative Regulation Plan Three More Years With Minor Changes, Telecommunications Reports, Nov. 19, 1990, at 24. An even more radical regulatory shift occurred in Nebraska where the Supreme Court of Nebraska recently refused to void legislation totally deregulating telecommunications. The court's decision followed several years of legislative and judicial activity and provides Nebraska telephone companies considerable freedom from rate of return regulation. 1990 A.B.A. Sec. Pub. Util., Comm. & Transp. L. Ann. Rep., at 147.

n41. Mary Nagelhout, Incentive Regulation of Local Exchange Telephone Carriers, Pub. Util. Fort., July 1, 1991, at 46.

n42. Id. For example, the California Public Utilities Commission adopted an incentive-based regulation framework for that state's two largest telephone companies which included Commission oversight of the quality of service. Id. The Nevada Public Service Commission approved an alternative regulatory scheme in 1990 that included as a goal the improvement of the quality of telephone service to customers. The plan also was intended to encourage local exchange telephone companies to take maximum advantage of modern telecommunications technology. Id. at 48.

n43. Andrew Fegelman, New Rules Aim to Prevent Fires That Would Snarl Phone Service, Chi. Trib., Sept. 25, 1991, 2, at 4.

n44. See supra notes 1-3 and accompanying text.

n45. Fegelman, supra note 43, at 4.

n46. Dennis L. Weisman, The Emerging Market for "Faultless' Telecommunications, Telecommunications Pol'y, Aug. 1990, at 333, 336.

n47. Id. at 338.

n48. See infra notes 52-68 and accompanying text.

n49. See infra notes 76-119 and accompanying text.

n50. The Illinois Supreme Court's recent holding refusing to limit liability despite exculpatory language in Illinois Bell's tariff was unrelated to the form of regulation. *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65* (Ill. Aug. 26, 1993). See infra notes 1-8 and accompanying text.

n51. Brooks B. Albery & Peter J. Grandstaff, Local Transport Competition in U.S. Telecommunications, Telecommunications Pol'y, Dec. 1989, at 355 (noting divestiture has actually increased telecommunications regulation). For example, in 1992, the Chesapeake & Potomac Telephone Company (C&P) of Maryland asked the Maryland Public Service Commission to extend the current price-cap plan (in operation the past two years) for another six years. C&P of Maryland Makes Case for Rate Changes, CommunicationsWeek, June 1, 1992, at 3. However, under the plan, C&P must still gain Commission approval of rate changes for many services such as residential service, business lines, and advanced calling services such as call waiting and call forwarding. Id. In California, an incentive-based regulation framework placed basic monopoly services in a category subject to fixed rates, and indexed other rates to an indexing mechanism. Nagelhout, supra note 41, at 46. In Illinois, in 1993, Illinois Bell Telephone Company proposed a price cap plan that would freeze local rates for three years and allow other rates to change based on a formula considering inflation, Bell's efforts to cut overhead costs, and the quality of service. Rob Karwath, Bell Seeks Rate Overhaul, Chi. Trib., Dec. 1, 1992, 1, at 1. Few states have reached the extreme deregulatory stance of Nebraska, where local telephone companies can increase local prices up to 10% annually, with 90 days notice, unless 2% of affected consumers sign a petition opposing the increase. Some services are nearly free of any rate of return regulation. Teske, supra note 11, at 116-17.

n52. An example of such a statute is as follows:

No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical areas or areas in which the service shall be offered or provided. The Commission may prescribe the form of such tariff and any additional data or information which shall be included therein.

*220 ILCS 5/13-501* (1993).

n53. *Correll v. Ohio Bell Co., 27 N.E.2d 173, 174 (Ohio Ct. App. 1939).*

n54. *Illinois Bell Tel. Co. v. Miner, 11 Ill. App. 2d 44, 136 N.E.2d 1 (2d Dist. 1956).*

The company's official tariff filed with the state utility commission ... is a part of the terms and conditions upon which telephone service is rendered, is necessarily a component and integral part of its contracts and relationships with its subscribers, expressly or by implication or by operation of law; the subscribers are bound thereby, as is the company; it cannot deviate and its subscribers cannot deviate therefrom; ...

*Id. at 58, 136 N.E.2d at 8.* But see *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65,* at *12 (Ill. Aug. 26, 1993) ("Nothing in the Public Utilities Act or the Commission's regulations authorizes a utility to exempt itself from this liability by means of a tariff.").

n55. See *Cole v. Pacific Tel. & Tel. Co., 94 P.2d 216, 218-19 (Cal. Ct. App. 1952)* (citing *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571-72 (1921)).*

n56. See *Riaboff v. Pacific Tel. & Tel. Co., 102 P.2d 465* (Cal. App. Dep't Super. Ct. 1940). Limitation of liability clauses are not unique to telephone companies, and can be found in the tariffs of other utilities and common carriers. See *Lee v. Consol. Edison Co. of N.Y., 413 N.Y.S.2d 826 (N.Y. App. Div. 1978)* (sustaining electric utility's provision of limitation of liability where tariff exempts utility from liability for ordinary negligence and renders it liable for gross negligence only). But see *Boston & Me. R.R. v. Piper, 246 U.S. 439, 445 (1918)* (finding railroad's liability limitation invalid as in violation of specific statutory language prohibiting exculpatory clauses); *In re Ill. Bell Switching Station Litig., No. 73999, 1993 Ill. LEXIS 65,* at *2-3 (Ill. Aug. 26, 1993) (holding state statute negated effect of exculpatory tariff language).

n57. Pool, supra note 12, at 101. Telegraph companies are classified as instruments of commerce, transporting messages across state lines. Similar to telegraph companies, telephone companies are obligated to serve all interested customers; they owe a clear duty to the public to provide quality message service at reasonable rates. *Primrose v. Western Union Tel. Co., 154 U.S. 1, 14 (1893);* see also *Telegraph Co. v. Texas, 105 U.S. 460, 464 (1881).*

n58. *154 U.S. 1 (1893).*

n59. *Id. at 14.*

n60. *Id. at 14-15.*

n61. Id.

n62. *Id. at 14-15, 33-34.*

N63. See *Waters v. Pacific Tel. Co., 523 P.2d 1161, 1164-66 (Cal. 1974)* (citing numerous California court cases upholding telephone companies' right to limited liability on the theory that strict regulation necessitates curtailed liability); *Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457, 459-60 (Ga. Ct. App. 1974)* (holding reasonable limitation of liability for damages for interrupted telephone service is part of the rate-making function).

n64. *27 N.E.2d 173, 174 (Ohio Ct. App. 1939).*

n65. Id.

n66. *Helms v. Southwestern Bell Tel. Co., 794 F.2d 188, 192 n.9 (5th Cir. 1986)* (citing 26 jurisdictions where courts have ruled favorably for defendants in cases involving directory errors or omissions). The majority of courts hold limitation of liability clauses to be valid; the exception is the few instances where certain jurisdictions refuse to uphold the limitation in cases of directory listing errors and/or omissions, particularly for yellow pages listings. See *Underwoood v. South Cent. Bell Tel. Co., 590 So. 2d 170 (Ala. 1991)* (holding limitation of liability clause unconscionable in directory omission case); *Anchorage v. Locker, 723 P.2d. 1261 (Alaska 1986)* (holding tariff provisions protecting regulated subjects from liability did not apply to yellow page advertising); *Allen v. Michigan Bell Tel. Co., 171 N.W.2d 689 (Mich. Ct. App. 1969)* (relying on monopolistic nature of yellow pages and holding clause limiting liability unenforceable due to disparity of bargaining power between parties).

n67. *Cole v. Pacific Tel. & Tel. Co., 246 P.2d 686, 687 (Cal. Ct. App. 1952)* (denying claim for telephone directory omission based on telephone company exculpatory tariff clause).

n68. See generally *Southwestern Sugar & Molasses Co. v. River Terminals, 360 U.S. 411, 417 (1959)* (giving effect to exculpatory clause in tariff filed by common carrier with Interstate Commerce Commission); *Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457, 460 (Ga. Ct. App. 1974)* (finding fixing of utility rates is not a matter of private contract, and limited liability for damages for interrupted telephone service is an inherent part of rate).

n69. Case, supra note 19, at 83.

n70. Id.

n71. See, e.g., *Robinson v. Southwestern Bell Tel. Co., 366 F. Supp. 307, 311 (W.D. Ark. 1972)* (stating that in Arkansas liability limitation will not stand in the face of wilful and wanton misconduct or gross negligence); *Wheeler Stuckey Inc. v. Southwestern Bell Tel. Co., 279 F. Supp. 712, 714-15 (W.D. Okla. 1967)* (holding that telephone company may limit its liability in tariff language approved by the Oklahoma Corporation Commission so long as it does not seek immunity from gross negligence or wilful conduct); *Waters v. Pacific Tel. Co., 523 P.2d 1161, 1167 n.9 (Cal. 1974)* (noting California's imposition of liability for gross negligence); *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 590 (Nev. 1992)* (holding Nevada Bell tariff limitation of liability provision does not apply to wilful, wanton or gross negligence); *Abraham v. New York Tel., 380 N.Y.S.2d 969, 972 (N.Y. Civ. Ct. 1976)* (upholding New York Public Service Commission's limitation of liability to acts or omissions of gross negligence).

n72. *Valentine v. Michigan Bell Tel. Co., 199 N.W.2d 182 (Mich. 1972)* (holding tariff provision unconscionable as to tort claim, but in dicta stating pleadings indicated a lack of proof of negligence on part of telephone company). But cf. *Ivenchek, Inc., 204 S.E.2d at 457* (denying plaintiff's contention that tariff limitation of liability was invalid).

n73. *Wheeler Stuckey, Inc., 279 F. Supp. at 714* (denying telephone customer's claim for actual and punitive damages for alleged negligent conduct by telephone company in yellow pages publishing); Proposed Report Regarding Limitation of Liability for Telephone Corporations, Adopted, Cal. Pub. Util. Commission, Dec. No. 77406, Case No. 8593, (1970) hereinafter California PUC Report.

n74. In 1970, the California Public Utilities Commission undertook an intensive investigation into limitation of liability and concluded the rule has worked reasonably well and has enabled the telephone companies "to provide service to the public at a lesser cost than would be the case if the rules permitted greater liability for errors and omissions." California PUC Report, supra note 73, at 18.

n75. *Bulbman, Inc., 825 P.2d at 590* (noting that most jurisdictions hold that liability limitation should be upheld when the claim is for simple negligence).

n76. See infra notes 77-115 and accompanying text.

n77. *Garrison v. Pacific N.W. Bell Tel. Co., 608 P.2d 1206, 1211 (Or. Ct. App. 1988)* (holding that regulation of liabilities to some extent is necessary to "strike an equitable balance of benefits and burdens").

n78. *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921)* (holding limitation of liability is an inherent part of regulated telegraph rates).

n79. *Wilkinson v. New England Tel. & Tel. Co., 97 N.E. 413, 416 (Mass. 1950).* The rationale for limitation of liability adopted by a few courts, especially in the earlier years of telephony, focused on the technological nature of the telephone industry. In Wilkinson the plaintiff alleged faulty service, including erroneous busy signals and failure of the telephone to ring when a call was placed. The court held the failure of the plaintiff to sufficiently allege wanton or wilful misconduct on the part of the defendant precluded recovery under the limitation of liability clause because of the telephone company's inability to control all sources of potential service failure. Id.

n80. *Waters v. Pacific Bell Tel. Co., 523 P.2d 1161 (Cal. 1974).*

n81. *Cole v. Pacific Tel. & Tel. Co., 246 P.2d 686, 688 (Cal. Ct. App. 1952)* (holding customer could not recover for damages allegedly suffered from telephone directory error when telephone company tariff contained limitation of liability clause).

n82. *Garrison v. Pacific N.W. Bell Tel. Co., 608 P.2d 1206, 1211 (Or. Ct. App. 1980)* (justifying limitation as necessary to offset regulatory burdens).

n83. *Great N. Util. Co. v. Public Serv. Comm'n, 293 P. 294, 298 (Mont. 1930)* (explaining utility commission powers to regulate and control utilities (citing *Munn v. Illinois, 94 U.S. 113, 140 (1877))*).

n84. See *Southern Bell Tel. & Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457 (Ga. Ct. App. 1974)* ("It is the responsibility of the commission to require a regulated utility to provide a level of service within its service area ... consonant with this responsibility the commission must approve utility rates ....") (quoting *Georgia Power Co. v. Public Serv. Comm'n, 201 S.E.2d 423, 427 (Ga. 1973))*.

n85. See *State ex rel. Mountain States Tel. & Tel. Co. v. District Court, 503 P.2d 526, 528-29 (Mont. 1972).*

n86. Horowitz, supra note 11, at 132.

n87. *Cole v. Pacific Bell Tel. & Tel. Co., 246 P.2d 686, 687 (Cal. Ct. App. 1952).*

Since the telephone company renders a service affecting the public, the state shall regulate and control it in order to prevent injustice, and further, in consideration of such regulation and control its liability is and should be defined and limited ... In a sense it is a matter of contract, on the one hand by the utility; and on the other by the state representing all its citizens.

Id. (quoting *Correll v. Ohio Bell Tel. Co., 27 N.E.2d 173, 174 (Ohio Ct. App. 1939)).*

n88. *Wilkinson v. New England Tel., 97 N.E.2d 413, 416 (Mass. 1951)* ("This regulation is not solely a limitation of damages in case of failure of service. Its purpose is rather to limit and define the duty ... to supply service."); see also *Julington Creek Marina, Inc. v. Southern Bell Tel. & Tel. Co., 35 Fla. Supp. 183, 185 (Cir. Ct. 1971).*

n89. *Julington Creek Marina, 35 Fla. Supp. at 185.*

n90. *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 591 (Nev. 1992)* (recognizing company would be subject to enormous liability if responsible for every telephone service disruption).

n91. *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921)* (allowing limited liability of telegraph company for unrepeated telegraph messages); *Davidian v. Pacific Tel. & Tel. Co., 94 Cal. Rptr. 337, 339 (Ct. App. 1971)* (noting commissions take into consideration limitation of liability when fixing rates for telephone service); *Cole v. Pacific Bell Tel. & Tel. Co., 246 P.2d 686, 687 (Cal. Ct. App. 1952)* (recognizing reasonable rates are dependent on limitation of liability rules).

n92. *256 U.S. 566.*

n93. *Id. at 571.*

n94. Id.

n95. *360 U.S. 411 (1959).*

n96. *Id. at 417-18.*

n97. See *Esteve Bros., 256 U.S. at 573.*

n98. *Id. at 566.*

n99. *Id. at 572.*

Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement, still less by ... lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but as a matter of law by which uniform liability was imposed.

Id.

n100. *Id. at 573* ("Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all."); see also *Western Union Tel. Co. v. Priester, 276 U.S. 252, 259 (1928)* ("The established rates ... thus became the lawful rates and the attendant limitation of liability became the lawful condition upon which messages might be sent."); *Sims v. Western Union Tel. Co., 236 N.Y.S.2d 192, 195 (Sup. Ct. 1963).*

n101. *Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co., 664 P.2d 994, 997 (N.M. Ct. App. 1983)* ("The limitation exists as an integral part of the rate-making function, a function that is totally regulated by state and federal agencies.") (quoting *Pilot Indus. v. Southern Bell Tel. & Tel. Co., 495 F. Supp. 356 (1979)).*

n102. *Southern Bell Tel. Co. v. Ivenchek, Inc., 204 S.E.2d 457, 459 (Ga. Ct. App. 1974).* "What is just and reasonable to be charged, what is actuarially sound, what limitations of liability are necessary to reach this result, are matters which need to be taken into account in the determination of public utility rates, just as there are proper actuarial considerations in fixing insurance premiums." Id.

n103. *Waters v. Pacific Tel. & Tel. Co., 523 P.2d 1161, 1166 (Cal. 1974).*

n104. *Id. at 1166.*

It stands undisputed that the commission has approved a general policy of limiting the liability of telephone utilities for ordinary negligence to a specified credit allowance, and has relied upon the validity and effect of that policy in exercising its ratemaking function. It also appears clear that to entertain suits for damages as a result of service interruption ... would thwart the foregoing policy.

Id.

n105. *State ex rel. Western Union Tel. Co. v. Public Serv. Comm'n, 264 S.W. 669, 671 (1924)* ("The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of common law.").

n106. Id.; see also Horowitz, supra note 11, at 132 (discussing regulation of AT&T as a monopoly and noting "the stabilization of business risk was accomplished through a guaranteed fair rate of return and a policy of long-term capitalization.").

n107. See *Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 572 (1921).*

n108. See *Waters v. Pacific Tel. & Tel. Co., 523 P.2d 1161, 1164 n.5 (Cal. 1974)* (acknowledging "that considerations of public policy which might be applicable to disputes between public parties are not necessarily applicable to provisions of a tariff filed with, and subject to the pervasive regulatory authority of, an expert administrative body.") (citing *E. B. Ackerman Importing Co. v. Los Angeles, 394 P.2d 566, 569 (Cal. 1964))).*

n109. See Horowitz, supra note 11, at 132.

n110. *Waters, 523 P.2d at 1164* (noting that reasonable telephone rates are in part dependent on limitation of liability rules); see also *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 591 (Nev. 1992)* (recognizing telephone companies would be forced to raise rates to cover increased cost of providing service absent limitation of liability); California PUC Report, supra note 73, at 18 (noting that one effect of limitation of liability rules has been to enable telephone companies to provide service to the public at a lesser cost than if greater liability were permitted).

n111. *Abraham v. New York Tel. Co., 380 N.Y.2d 969, 972 (Civ. Ct. 1976); Garrison v. Pacific Northwest Bell, 608 P.2d 1206 (Or. Ct. App. 1980).* Rate of return regulation is cost based - thus all costs of service are imputed into the rate base, and ultimately made part of the rate. See generally Twenhafel et al., supra note 29, at 4.

n112. *Peacock's, Inc. v. South Cent. Bell, 455 So. 2d 694, 698 (La. Ct. App. 1984).*

n113. See *Great N. Util. Co. v. Public Serv. Comm'n, 293 P.2d 294 (Mont. 1930).*

n114. See *Peacock's, Inc., 455 So. 2d at 698 (La. Ct. App. 1984)* (denying recovery for alleged failure of telephone lines connected to alarm system).

n115. See supra notes 81-113 and accompanying text.

n116. Bolter et al., supra note 13, at 84-85.

n117. Horowitz, supra note 11, at 241.

n118. See infra notes 119-76 and accompanying text.

n119. See infra notes 120-67 and accompanying text.

n120. "Other things being equal." Webster's Third New International Dictionary 368 (1981).

n121. Roger M. Noll, The Future of Telecommunications Regulation in Telecommunications Regulation Today and Tomorrow 41, 44 (Eli M. Noam ed., 1983); see also Bolter et al., supra note 13, at 84-85.

n122. See generally Teske, supra note 11 (analyzing state telecommunications regulatory decisions following the industry wide change precipitated by the divestiture of local telephone operating companies from AT&T in 1984).

n123. See supra notes 33-35 and accompanying text.

n124. See supra notes 33-35 and accompanying text.

n125. *United States v. Western Electric Co., No. CIV.A.82-0192, 1982 WL 1882* (D.D.C. Aug. 24, 1982); see Horowitz, supra note 11, at 241.

n126. Teske, supra note 11, at 13-14.

n127. See supra notes 19-119 and accompanying text.

n128. See supra notes 82-90 and accompanying text.

n129. Bushaus, States Easing, supra note 37, at 27 ("As the local telecommunications environment grows more competitive, state utility commissions nationwide are opening up their regulations to encourage innovation and lower the cost of services.").

n130. See supra notes 81-90 and accompanying text.

n131. See, e.g., *State ex rel. Mountain States Tel. & Tel. Co. v. District Court, 503 P.2d 526, 529 (Mont. 1972).*

n132. Horowitz, supra note 11, at 102-03. "Regulation substituted a guaranteed return on capital and management freedom for the uncertainties of the marketplace. This was precisely the kind of regulation Vail president of AT&T had sought." Id. at 103. "AT&T did not actively oppose ... regulation. In fact, it suggested that regulation might serve as a substitute for competition by, among other things helping to resolve the problems posed by duplicated services." Owen & Braeutigam, supra note 21, at 200.

n133. Owen & Braeutigam, supra note 21, at 200.

n134. Id. at 11.

n135. Bolter et al., supra note 13, at 43.

n136. See supra notes 105-14 and accompanying text.

n137. See, e.g., *Peacock's, Inc. v. South Cent. Bell, 455 So. 2d 694, 698 (La. Ct. App. 1984).*

n138. Bushaus, Incentive Regulation, supra note 37, at 27.

n139. Nagelhout, supra note 41, at 46 (stating that as the competitive telecommunications market continues to evolve, state regulators are increasingly willing to ease the regulatory burden imposed on local telephone carriers.").

n140. Alain de Fontenay et al., Local Competition and Resale of Network Services in the USA, Telcommunications Pol'y, Mar. 1987, at 45, 53, 56 (noting differential regulatory treatment between local telephone companies and their competitors).

n141. See supra notes 112-14 and accompanying text.

n142. *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 590-91 (Nev. 1992)* (indicating that absent liability limitations, broad liability exposure would create tremendous pressure on utility service rates).

n143. Nagelhout, supra note 41, at 46.

n144. Id.

n145. Karwath, supra note 51, at 1. Illinois Bell proposed a plan with prices tied to a formula based on such variables as inflation, company productivity, and quality of service. Id. The proposal also includes a three-year freeze on local rates. Id. Under the proposed scheme, Illinois Bell would be able to earn above the current fixed 13.1% rate of return. Id.

n146. Id.

n147. Arguably, if certain rates are frozen for a period of years, a telephone company and a commission could study more accurately the actual impact of increased liability for outages to make a more informed assessment of the degree of increased costs the change creates. The speculative assessment of the cost of increased liability may not match the actual experience.

n148. Rob Karwath, Bell Rate Plan Appears Right on Line, Chi. Trib., Dec. 2, 1992, 1, at 1 (noting new regulatory plans allow telephone companies to earn higher profits).

n149. See supra note 40.

n150. W. Page Keeton et al., Prosser and Keeton on the Law of Torts 4, at 24 (5th ed. 1984).

n151. Id.

n152. Id. at 25.

n153. A telephone company does not have a duty to provide flawless, uninterrupted service, but is only required to provide "reasonable" or "adequate" service. See, e.g., *Or. Rev. Stat. 759.035* (1992) ("Every telecommunications utility is required to furnish adequate and safe service"); *Va. Code Ann. 56-234* (Michie 1993) ("It shall be the duty of every public utility to furnish reasonably adequate service and facilities"). While technological innovation has created a much more reliable network, the vastness and interconnective nature of the system are inconsistent with imposition of such a broad duty. If a telephone company were required to provide perfect service, such a duty would impose a standard of strict liability. This is not only economically infeasible with such an intangible product, but unjustified without the traditional rationales of strict liability such as an abnormally dangerous enterprise. Keeton et al., supra note 150, at 546 (strict liability has been said many times to be confined to things or activities which are "extraordinary," "exceptional," or "abnormal").

n154. See supra notes 97-100 and accompanying text.

n155. *Waters v. Pacific Tel. Co., 523 P.2d 1161, 1166 n.8 (Cal. 1974)* ("Telephone service is a business and a personal necessity, and the subscriber thereto ordinarily would not be motivated by the availability of damages in the event of negligent service.").

n156. As technological innovations bring competition to even local service, alternatives may be more reasonably priced. Currently, while pagers and cellular telephone service are local service alternatives, the average customer views such services as adjunct, specialized services, and not as a substitute for local residential service. Jennifer Jarrutt & Joseph F. Coates, Future Use of Cellular Technology, Telcommunications Pol'y, Feb. 1990, at 78.

n157. See supra note 28.

n158. See, e.g., U.C.C. 2-509(4) (1978) (allowing parties to enter into contractual agreements shifting risk of loss).

n159. When examining the risk of liability, or the extent of the duty to a customer, one of the troubling issues is the heterogenous mixture of the customer base. Telephone usage valuation varies from one customer to another. The spectrum of utility of the service is broad, from luxury item (i.e., fixed income household) to a major source of revenue (i.e., telemarketing firms). With such a variety of uses, the value of a telephone outage will vary drastically between different customer groups. Bolter et al., supra note 13, at 43. For example, a three-hour outage may be transparent to a residential customer who is not home at the time of the interruption, but the same outage could result in a major loss of both current and future profits for a stock brokerage firm. Assuming that all costs eventually find their way into increased rates, it is questionable if equity is served by requiring all ratepayers to insure the relatively few customers who would experience great loss in the event of service interruption.

n160. See supra notes 1-4 and accompanying text.

n161. California PUC Report, supra note 73, at 12 ("at the present time, no liability insurance is available to insure against service or directory errors. If a change in the limitation of liability rule results in payouts greater than at present the money must come from the revenues of the company affected.").

n162. See, e.g., supra notes 40-42.

n163. See supra notes 143-47 and accompanying text.

n164. The concepts of actual and proximate cause are also inconsistent with creating carte blanche recovery for customer service failure. For example, if a home is burglarized, can the plaintiff adequately prove that static on the line was the actual cause of a significant delay in the signal reaching the police station in order to sustain a claim against the utility with the static? Another classic example is the residential fire, where the customer is unable to summon the fire department because of an outage. Is the delay in reaching the fire department the "but for" cause of the loss, or was the nature of the blaze such that the house would have been demolished even without the delay? Of even more difficult proof is proximate cause. How can a telephone company reasonably foresee the value of the communication lost, or the ensuing damages? The "floodgates of litigation" argument surfaces, but in fact, the pervasive number of telephone company customers coupled with the duty of ubiquitous service makes the company assume near unlimited risk, without any ability of the company to manage that risk. *Bulbman, Inc. v. Nevada Bell, 825 P.2d 588, 591 (Nev. 1992)*. This does create potential for an explosive volume of litigation for all utilities.

n165. *Bulbman, 825 P.2d at 591* (noting that defects and disruption are inevitable when providing service to hundreds of thousands of customers); Keeton et al., supra note 151, at 663 (explaining that in light of the cost-based regulatory process of utilities their civil liability was unique).

n166. See supra notes 137-41 and accompanying text.

n167. See supra notes 150-61 and accompanying text.

n168. H.B. 4026, 87th General Assembly, Illinois, 1992.

n169. Telephone Interview with Pat O'Brien, Public Utilities Committee Clerk, Springfield, Ill. (Feb. 8, 1993).

n170. H.B. 4026, 87th General Assembly, Illinois, 1992.

n171. See supra notes 21-50 and accompanying text.

n172. See, e.g., *Holman v. Southwestern Bell, 358 F. Supp. 727 (D. Kan. 1973); Stern v. General Tel. Co. of Cal., 123 Cal. Rptr. 373, 376 (Ct. App. 1975); Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co., 664 P.2d 994, 996 (N.M. Ct. App. 1983)*.

n173. *Stern, 123 Cal. Rptr. at 376* (citing California Public Utilities Commission report that exposure for gross negligence might be an incentive to reduce errors for all ratepayers).

n174. *Colich & Sons v. Pacific Bell, 244 Cal. Rptr. 724, 716 n.4 (Ct. App. 1988)*.

n175. See, e.g., supra note 42 and accompanying text.

n176. See supra note 47 and accompanying text.

n177. See supra notes 21-50 and accompanying text.

n178. See supra notes 120-25 and accompanying text.

# ATTACHMENT 11

## REGULATIONS

2.3 Obligations of the Customer (Cont'd)

2.3.2 Claims

With respect to any service or facility provided by the Company, Customers shall indemnify, defend and hold harmless the Company from and against all claims, actions, damages, liabilities, costs and expenses, including reasonable attorneys' fees for:

A) any loss, destruction or damage to the property of the Company or any third party, or death or injury to persons, including, but not limited to, employees or invitees of either party, to the extent caused by or resulting from the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees; or

B) any claim, loss, damage, expense or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Customer, including, without limitation, use of the Company's services and facilities in a manner not contemplated by the agreement between the Customer and the Company.


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## REGULATIONS

2.3 Obligations of the Customer (Cont'd)

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2. REGULATIONS (Cont'd)

2.3 Obligations of the Customer (Cont'd)

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REGULATIONS

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REGULATIONS

2.3 Obligations of the Customer (Cont'd)

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## REGULATIONS

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## REGULATIONS

2.3 Obligations of the Customer (Cont'd)

2.3.2 Claims

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B) any claim, loss, damage, expense or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Customer, including, without limitation, use of the Company's services and facilities in a manner not contemplated by the agreement between the Customer and the Company.

# ATTACHMENT 12

**Attachment 12 contains information that is CONFIDENTIAL & PROPRIETARY and has been filed under seal with the TRA.**