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April 15, 2005

VIA HAND DELIVERY

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

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

Dear Chairman Miller

Enclosed are the original and fourteen copies of BellSouth's *Post-Hearing Brief*. Copies of the enclosed are being provided to counsel of record

Very truly yours,

Guy M. Hicks

GMH ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re *Joint Petition for Arbitration of NewSouth Communications Corp., et al of an Interconnection Agreement with BellSouth Telecommunications, Inc Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*

Docket No 04-00046

BELLSOUTH TELECOMMUNICATIONS, INC. POST-HEARING BRIEF

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I. INTRODUCTION

There are five common characteristics to the issues raised by NewSouth Communications Corp ("NewSouth"), NuVox Communications, Inc. ("NuVox"), KMC Telecom V, Inc., KMC Telecom III LLC (collectively "KMC"), and Xspedius Communications, LLC ("Xspedius") (collectively referred to as "Joint Petitioners") in this proceeding: the Joint Petitioners want greater rights than (1) those that BellSouth Telecommunications, Inc ("BellSouth") offers its own customers or (2) even those that the Joint Petitioners offer their own customers; (3) the Joint Petitioners are arbitrating issues based upon hypothetical concerns and speculation rather than actual experience; (4) the Joint Petitioners are attempting to change established industry standards without any justification, (5) and the Joint Petitioners want relief irrespective of whether the Telecommunications Act of 1996 (the "Act") obligates BellSouth to provide it

Tellingly, the Joint Petitioners disclosed their motivation for unnecessarily arbitrating issues in the North Carolina hearing, stating: "Throughout these negotiations the joint petitioners have held tight to the principle that they will not give up something for nothing." The Joint Petitioners were not as transparent in the instant hearing as they conveniently failed to disclose this information in Tennessee Nevertheless, this philosophy permeates almost every issue in dispute Consequently, the Joint Petitioners are arbitrating issues that, as admitted, are of no force and effect as a matter of law; that turn industry standards on their head for no justifiable reason; and that seek terms and conditions that they are not willing to provide to their own customers

Section 252(c) of the 1996 Act requires the Tennessee Regulatory Authority ("Authority") ensure that its determinations in this arbitration meet the requirements of Section

251 BellSouth simply requests that the Authority apply the arbitration standards set forth in the Act and reject the Joint Petitioners arguments and proposed language

II. PROCEDURAL BACKGROUND

The Joint Petitioners filed a Petition for Arbitration ("Petition") pursuant to the Act with the Authority on February 11, 2004. On March 8, 2004, 2004 BellSouth Telecommunications, Inc ("BellSouth") filed its Response to the Petition. Initially, the Joint Petitioners asked the Authority to resolve 107 issues, excluding subparts. As a result of continued diligent negotiations by the Parties, both before and after the hearing, there remain only 20 issues, excluding subparts, for the Authority's consideration.

On July 15, 2004, the Parties filed a Joint Motion for Abeyance with the Authority where the Parties asked for a 90-day abatement of the arbitration proceeding so that they could include and address issues relating to the D C. Circuit's decision in *United States Telecom Ass'n v* FCC, 359 F 3d 554 (D.C Circuit 2004) ("*USTA II*") in this proceeding. The Authority granted the abeyance on July 16, 2004 During this 90-day abatement period, the Federal Communications Authority ("FCC") issued its *Order and Notice of Proposed Rule Making* in WC Docket No. 04-313, CC Docket No. 01-338 ("*Interim Rules Order*") At the end of the abeyance period, on October 15, 2004, the Parties filed a revised Joint Matrix, which included Items 108-114 ("Supplemental Issues"). These Items addressed *USTA II* and the *Interim Rules Order* On January 4, 2005, the Authority rejected the Parties' attempt to include the Supplemental Issues in this arbitration proceeding, finding that other, alternative proceedings existed that could address the Supplemental Issues, including Docket No 04-00381 ("Generic Proceeding") *See* TRA January 4, 2005 Order

On March 11, 2005, the FCC's Final Unbundling Rules in, FCC 04-290, WC Docket No 04-313, CC Docket No 01-338 (rel Feb. 4, 2005) ("*TRRO*") became effective. No issues in the arbitration substantively address the *TRRO* because it was not effective until March 2005, after the window for identifying issues to be arbitrated in this proceeding and after the close of the evidentiary record in this case.[1] Nevertheless, Item 23 is similar if not identical in nature to Issue 12 in the Generic Proceeding Consequently, the Parties have jointly asked for this Item to be moved to the Generic Proceeding for consideration and resolution to (1) save the Authority and Parties time and resources in litigating an issue more than once; (2) avoid potentially conflicting rulings; (3) allow each Party to modify their position on Item 23 in light of the *TRRO*.[2] As a result, BellSouth will reserve briefing this Item until the appropriate time in the Generic Proceeding.[3]

Finally, BellSouth also takes the position that the Authority should move Items 26, 36, 37, 38, and 51 to the Generic Proceeding because similar, if not identical, issues are being raised in that proceeding as well At a minimum, the Authority should defer resolution of these Items until its decision in the Change of Law Proceeding to avoid inconsistent rulings.

The hearing in this matter was held on January 11-13, 2005 At the hearing, BellSouth submitted the pre-filed testimony of Kathy Blake, Scot Ferguson, Eddie Owens, and Eric Fogle.[4] The Joint Petitioners submitted the testimony of Hamilton Russell, James Falvey, Marva Johnson, John Fury, Robert Collins, and Jerry Willis. This Post-Hearing Brief is submitted as directed by the Authority at the close of the hearing.

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[1] BellSouth offers excerpts of the *TRRO* in its Brief only to demonstrate the directives of the FCC as they may relate to some of the issues raised in the arbitration

[2] In seeking to move these Items to the Generic Proceeding, BellSouth does not waive any rights or arguments it has to the Items

[3] BellSouth requests that it be allowed to supplement this Brief to address Item 23 in the event the Authority denies the Joint Motion

[4] Ms Blake adopted the pre-filed Direct and Rebuttal Testimony of BellSouth witness Carlos Morillo In addition, since the hearing of this matter, the Parties have settled all of Mr Owens' issues

III. LEGAL STANDARDS UNDER THE 1996 ACT

Sections 251 and 252 of the 1996 Act encourage negotiations between Parties to reach local interconnection agreements Section 252(a) of the 1996 Act requires incumbent local exchange companies to negotiate the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 251(c)(2)-(6). As part of the negotiation process, the 1996 Act allows a party to petition a state Authority for arbitration of unresolved issues.[5] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[6] The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues, (2) the position of each of the Parties with respect to those issues; and (3) any other issues discussed and resolved by the Parties "[7] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the Authority receives the petition.[8]

The 1996 Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response [9] Further, an ILEC can only be required to arbitrate and negotiate issues related to Section 251 of the Act, and the Authority can only arbitrate non-251 issues to the extent they are required for implementation of the interconnection agreement [10] Issues or topics not specifically related to these areas are outside the scope of an arbitration proceeding Importantly, Section 252 makes clear that the

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

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

IV. DISCUSSION OF INDIVIDUAL ISSUES[11]

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

The Joint Petitioners should not be permitted to interpret or apply the definition of "End User" in a way that will result in the Joint Petitioners obtaining or wholesaling unbundled network elements ("UNEs") in a prohibited manner. Nor should the definition of "End User" permit the Joint Petitioners to use other services under Section 251 for purposes that are not authorized. Accordingly, BellSouth opposed the Joint Petitioners' attempt to define "End User" as a "customer of a party", because the Joint Petitioners could use this definition to obtain UNEs in an unlawful manner, including in violation of the Enhanced Extended Link ("EEL") eligibility criteria established by the FCC in the *TRO*[12] (discussed in Item 51, *infra*). (Blake Rebuttal at 21)

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

[11] To facilitate the Commission's review of BellSouth's positions, BellSouth has attached as BellSouth Exhibit A BellSouth's most recent language for each of the remaining issues in dispute

[12] Triennial Review Order, FCC 03-36, 18 FCC Rcd 16978 (Aug 21, 2003) (defined herein as "*TRO*")

however, would permit the use of resold services to provide services to telecommunications carriers – a use expressly prohibited by 47 C F R § 51 605(a) Because of this potential area of abuse, BellSouth could not accept the Joint Petitioners' definition

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

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

(*Id* at 2-3), *see also*, *Arbitration of Non-Costing Issues For Successor Interconnection Agreements to the Texas 271 Agreement*, T.P.U.C , Docket No 28821 at 30 (Feb. 23, 2005)

(confirming decision in Docket No 25188 and stating that "[i]n other words, a carrier is an end user when actually consuming the retail service, as opposed to using the service as an input to another communications service ") (emphasis in original).

Nevertheless, in an effort to alleviate the Joint Petitioners' concerns with respect to BellSouth's definition of "End User", subsequent to the hearing, BellSouth proposed three definitions to make it clear to the Joint Petitioners that BellSouth is not attempting to limit their right to obtain UNEs in a lawful manner. The three definitions are as follows.

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

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

- ***end user**, as used in this Interconnection Agreement, means the End User or any other retail customer of a Telecommunications Service, including ISPs/ESPs, CLECs, ICOs and IXCs, that are provided the retail Telecommunications Service for the exclusive use of the personnel employed by ISPs/ESPs, CLECs, ICOs and IXCs, such as the administrative business lines used by the ISPs/ESPs, CLECs, ICOs and IXCs at their business locations, where such ISPs/ESPs, CLECs, ICOs and IXCs are treated as End Users* This definition addresses circumstances where a carrier, such as an IXC, is actually an End User in the traditional sense of the word. This situation would arise where, for example, a carrier needs to purchase lines for its own communications needs, such as for its administrative business office needs While that carrier would not be the

recipient of those services on a wholesale basis, in the event that the situation presented itself, Joint Petitioners would be entitled to purchase such services pursuant to the ICA for the provision of services to the carrier for its administrative purposes

With these three definitions of "End User", all of the Joint Petitioners' concerns should be addressed Nevertheless, the Joint Petitioners continue to arbitrate this issue for no apparent reason. In any event, the Authority should reject the Joint Petitioners' attempt to define "End User" in such a manner that leads or could lead to the improper use of UNEs by the Joint Petitioners If the Authority determines that the Joint Petitioners' definition is appropriate, the Parties should have the opportunity to review each use of the term in the Agreement to ensure that such definition is appropriate and consistent with federal law in the context in which it is used

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

With this Issue, the Joint Petitioners are attempting to change the standard in the telecommunications industry regarding limitation of liability by obtaining (1) greater rights against BellSouth than what BellSouth provides to its own Tennessee customers; and (2) greater rights than even the Joint Petitioners provide to their own customers Specifically, with convoluted and confusing language, the Joint Petitioners seek to have each Party's liability limited to 7 5 percent of amounts paid or payable at the time the claim arose, subject to several caveats and conditions Conversely, BellSouth's proposed language is quite simple and memorializes the standard in the industry as it limits each Party's liability for negligent acts to bill credits The Authority should reject the Joint Petitioners' language and adopt BellSouth's for the following reasons

First, the Joint Petitioners' language exceeds the FCC Wireline Competition Bureau's standard as to the scope of an Incumbent Local Exchange Company's liability ("ILEC") to a

Competing Local Exchange Carrier ("CLEC"). In *In the Matter of Petition of WorldCom, Inc Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State* Corporation, CC Docket No. 00-251, 17 FCC Rcd 27,039 (Jul. 17, 2002) ("*Virginia Arbitration Order*") at ¶ 709, the FCC determined that an ILEC should treat a CLEC in the same manner that it treats its retail customers "Specifically, we find that, in determining the scope of Verizon's liability, it is appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers" *See also, Sprint Communications, LP*, Case No. 96-1021-TP-ARB (Ohio P U.C. Dec. 27, 1996), 1996 WL 773809 at *32 ("The panel does not believe that GTE's proposal to limit its liability to Sprint to the same degree it limits its liability to its own retail customers is unreasonable... In accordance with the Commission's award in 96-832, it is appropriate for GTE to limit its liability in the same manner in which it limits its liability to its customers"); *See In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L P*, Docket No. 05-BTKT-365-ARB at 102 (Feb 16, 2005) (refusing to adopt the Joint Petitioners' and CLEC proposal for limitation of liability language that exceeded bill credits).

BellSouth's proposed language complies with this standard as it limits each Party's liability for negligence to bill credits, which is exactly the standard applied to BellSouth's retail customers. [13] (Tr. Vol. at 37) The Joint Petitioners concede this fact as well as the fact that BellSouth's language is the standard in the industry for interconnection agreements. *See* Russell Depo. at 82-83; Tr. at 37-38.

In contrast, the 7 5 percent language proposed by the Joint Petitioners is not the standard in the industry The Joint Petitioners are aware of no interconnection agreement that contains

[13] TRA Rule 1220-4-2-10(2), which applies to retail billing by utilities to end users and which provides for pro rata credits for service outages, is consistent with BellSouth's position

language that is similar to what the Joint Petitioners propose here (Tr. at 37, Joint Petitioners Supplemental Response to Request for Production No 6). In fact, KMC is arbitrating with Sprint and SBC in several other states and KMC is not proposing similar limitation of liability language in any of those proceedings *See* Johnson Depo. at 54 Likewise, none of the Joint Petitioners have similar limitation of liability language in their tariffs or standard contracts with Tennessee consumers (Tr Vol at 40). Instead, like BellSouth, the Joint Petitioners limit their liability to bill credits *Id* And, KMC imposes limitation of liability language on its Tennessee customers that actually exceeds BellSouth's language as it limits its liability even for claims resulting from gross negligence or willful misconduct *See* Johnson Depo. at 62; KMC Tariff at § 2.1.4(h) Accordingly, in violation of the FCC standard, the Joint Petitioners want greater limitation of liability rights against BellSouth than what BellSouth provides for its own customers and what the Joint Petitioners are willing to provide to their customers As hesitantly conceded by Mr. Russell on cross-examination, the Joint Petitioners' own tariff language – language that they impose on Tennessee consumers – is unacceptable to the Joint Petitioners (Tr at 46). The Authority should reject this hypocritical standard.

Second, the Joint Petitioners' language is unnecessary The Joint Petitioners' tariffs and standard contracts limit their exposure to bill credits and also insulate them from any liability for damages that result from the actions of service providers, including BellSouth. *See* Johnson Depo at 31, 57, Hamilton Depo. at 45; NuVox Tariff at § 2.1.4.3; KMC Tariff at § 2.1.4(c) Thus, BellSouth's language would totally compensate the Joint Petitioners for any loss that may result from BellSouth's negligence. With their language, however, the Joint Petitioners want more, they want the ability to recover 7 5 percent of amounts paid or payable on the day the claim arose, regardless of the extent or scope of their damage, in addition to any bill credits that

they may receive *See* Joint Petitioner Exhibit A at GT&C § 10.4.1 ("provided that the foregoing provisions shall not be deemed or construed or (B) limiting either Party's right to recover appropriate refund(s) of or rebate(s) or credit(s) for fees, charges, or other amounts paid at Agreement rates ") Consequently, adopting the Joint Petitioners' language could result in a financial windfall to the Joint Petitioners that greatly exceeds any harm actually experienced [14]

Third, the Joint Petitioners' claim that their proposed language is what is typically found in commercial contracts is of no import (Tr. at 50-51). The fallacy in this argument is that the instant agreement is not a commercial contract – it is an interconnection agreement negotiated and arbitrated pursuant to Section 252 of the Act A true commercial contract would not require this Authority to resolve disputed language or to decide the Parties' contractual obligations to each other Based on this very reasoning, the North Carolina Utilities Commission has already rejected this "commercial agreement" argument as it found, in a dispute between BellSouth and a Joint Petitioner, that interconnection agreements are not commercial contracts. *See In the Matter of BellSouth Telecommunications, Inc v NewSouth Communications, Corp* , Docket No P-772, Sub at 6 (Jan. 20, 2005) ("*NewSouth Reconsideration Order*") ("Interconnection agreements are not be treated as typical commercial contracts ") [15]

[14] Additionally, the Joint Petitioners' proposal fails to take into account that they receive SEEMs penalties from BellSouth for the very actions that may give rise to a claim of negligence against BellSouth (Tr Vol 1 at 735)

[15] The Joint Petitioners provided conflicting testimony as to the source of their proposed language Mr Russell testified in his deposition that the Joint Petitioners based this 7 5 percent cap upon software and government contracts that he personally reviewed Russell Depo at 84 In contrast to Mr Russell's testimony, Ms Johnson and Mr Falvey testified that they instructed their lawyers to research this issue and that their understanding as to what is typically found in commercial contracts was based upon representations made by their lawyer They further testified they did not read any government or software contracts prior to developing the proposed language Johnson Depo at 53-54, Falvey Depo at 55, 57, and 59 Notwithstanding this discrepancy, the contracts Mr Russell claims to have reviewed are inapplicable to the instant arbitration Mr Russell conceded, as he must, that the contracts he purportedly reviewed were not telecommunications contracts entered under the Act and did not involve parties who were forced to enter into contracts as a matter of law (Tr Vol 53)

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

> If the FCC's Order is viewed not merely as a general regulation which bears on the proper interpretation of the interconnection agreements but as an outright abrogation of provisions of parties' interconnection agreements, consideration of its jurisdiction to act in the premises must take into account that interconnection agreements are "not . ordinary private contract[s]," and are "not to be construed as . traditional contract[s] but as instrument[s] arising within the context of ongoing federal and state regulation "

Id (quoting *E spire Communications, Inc v N M Pub Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir 2004)(citing *Verizon Md, Inc v Global Naps, Inc*, 377 F.3d 355, 364 (4th Cir. 2004) ("interconnection agreements are a 'creation of federal law' and are 'the vehicles chosen by Congress to implement the duties imposed in § 251 '") [16]

Fourth, the Authority should reject the Joint Petitioners' proposed language because it imposes costs on BellSouth that were not taken into consideration when establishing BellSouth's UNE costs (Blake Direct at 27) Rather, those rates were established using the industry standard limitation of liability language that limits BellSouth's liability to bill credits Significantly, the Joint Petitioners have not offered to pay any increased UNE rates that may result from the adoption of their language. The Iowa Utilities Board in *In re US West Communications, Inc*, Docket No INU-00-2 , 2002 WL 595093 at * 14 (Mar 12, 2002) recognized this exact issue in rejecting AT&T's request for limitation of liability language that exceeded what an ILEC provided to its retail customers

[16] At a minimum, Xspedius should be aware of the E spire decision because Xspedius is the successor company to E spire (*See* Tr at 282)

> AT&T's proposal for SGAT section 5 8.1 would increase Qwest's liability to amount that are greater than what Qwest charges for wholesale service One problem with the proposal is that it seems to ignore that a provider's rate must cover its costs of service. Presumably, Qwest's retail and wholesale rates only include amounts necessary to reimburse customers for the actual loss of service (i e., what the customer would have paid Quest for the service not received). AT&T believes that Qwest should have greater liability when providing wholesale service, but the record does not indicate that AT&T is willing to pay higher wholesale rates to obtain it.

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

Fifth, the Joint Petitioners' language is unworkable Although the Joint Petitioners now claim that they all have the same position on the issues (Tr. Vol. at 53-54), they originally did not In fact, in their depositions, the Joint Petitioners each had different interpretations of what "payed or payable" or "on the day the claim arose" meant – two key provisions in their proposal. (Tr. at 54) It was not until the North Carolina hearing that the Joint Petitioners admitted that there was a "misunderstanding" between them regarding their original, differing interpretations of the same language and thus engaged in an "effort to conform" their differing positions *Id* Notwithstanding this *ex-post facto* attempt to reconcile their differences, each of the Joint Petitioners originally had a different understanding as to how their "joint" language would work and how it should be interpreted. This fact alone proves that their proposal is unworkable and subject to abuse

Further buttressing this conclusion is the fact that the Joint Petitioners' language only benefits the Joint Petitioners. For instance, according to NuVox, BellSouth bills NuVox approximately $3 million a month for services and that NuVox bills BellSouth substantially less (Tr. at 36, Russell Depo. at 22). Assuming that NuVox bills BellSouth $1,000 a month (even

though the Parties are under a bill and keep regime), NuVox's total liability to BellSouth would be ***$2,700*** after three years under the Joint Petitioners' proposal In contrast, BellSouth's liability to NuVox for the same time period would be ***$8,100,000***. Clearly, the Authority should not approve language that results in such disparate treatment.

Finally, the Authority should reject the Joint Petitioners' attempt to minimize the fatal affect their own tariff and contract language has on this issue. Specifically, the Authority should reject the Joint Petitioners' "canned" mantra that they often deviate from the standard limitation of liability language in their end user contracts. The Joint Petitioners have presented no credible evidence to support this claim and their testimony on this issue is inherently suspect at best. For instance, in discovery, the Joint Petitioners could not identify a single instance where they had to concede limitation of liability language to attract a customer. *See* Joint Petitioners Response to Interrogatory No 22 [17] Additionally, in their depositions, each of the Joint Petitioners stated that they were not aware of a specific instance where an end user contract deviated from standard limitation of liability language *See* Johnson Depo at 29-30, Falvey Depo at 33; Russell Depo. at 46 Regarding the identification of any particular customer, Mr. Falvey even attempted to minimize his lack of knowledge for this specific factual question by stating that there was much he did not know about Xspedius

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

[17] The Joint Petitioners claim that BellSouth is at fault for believing that the Joint Petitioners provided accurate and truthful responses to discovery should be given little credence Regardless of what they now claim or the reason for providing the discovery response provided, the Joint Petitioners responded to BellSouth's discovery by stating that they had no specific knowledge to support their allegations as to deviations from their tariff language in end user contracts

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

In any event, whether or not the Joint Petitioners deviate from the standard limitation of liability language in negotiating with their customers – a fact they cannot prove – is irrelevant in the determining the limitation of liability between the Joint Petitioners and BellSouth. This is because the Joint Petitioners, unlike BellSouth, have a choice. The Joint Petitioners can make the business decision to alter their standard limitation of liability language with an end user in deciding whether to enter into a contract BellSouth does not have the same contractual freedoms under the Act Unlike the Joint Petitioners, BellSouth cannot refuse to enter into an interconnection agreement (Tr. at 59-60, Russell Depo. at 87-89). Thus, even if true, the Joint Petitioners' argument is irrelevant for the purposes of this arbitration and only highlights the fact that the standard limitation of liability language in the industry should govern.

Item 5: If the CLEC elects not to place in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the risks that result from this business decision? (GT&C, Section 10.4.2)

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

The Joint Petitioners objection to BellSouth's language is unsupportable The exact language BellSouth proposes for this issue is in the Joint Petitioners' current agreement and has never been the subject of any dispute (Tr Vol at 60) Further, the Joint Petitioners currently

have limitation of liability language in their tariffs and contracts, they believe that their language is the maximum limit allowed by law, they have no plans to remove this language; their tariffs are in force and in effect today; and they intend to enforce tariff provisions limiting their liability (Tr. Vol at 58; Falvey Depo. at 61; Johnson Depo. at 81-82) In fact, as conceded by NuVox witness Russell, having unlimited liability is not a prudent business-move. *See* Russell Depo at 82.

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

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

Thus, if the Joint Petitioners commit to providing a customer $1000 if they fail to provision a loop within a specific time period and BellSouth misses the due date for the loop, the

Joint Petitioners could seek to recover the $1,000 guaranteed to the customer from BellSouth through its indemnification language. (Blake Direct at 29). If that customer was a BellSouth customer, however, BellSouth's total exposure would be for bill credits BellSouth should not be exposed to greater liability than otherwise contemplated simply because the end user is a CLEC end user The Minnesota Public Utilities Commission addressed this exact scenario in rejecting similar indemnification language proposed by AT&T in an arbitration with Qwest:

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

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

The Authority should avoid the same result here and adopt BellSouth's proposed language, especially if it is inclined to adopt the Joint Petitioners' indemnification language BellSouth's language is reasonable and insures that BellSouth's ultimate exposure to a CLEC end user is the same as it would be for a BellSouth end user

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

There is no legitimate reason for the Joint Petitioners to be arbitrating this issue. The Parties agree that they will not be liable to each other for indirect, consequential or incidental

damages However, with their confusing language, the Joint Petitioners are apparently attempting to preserve certain damage claims their end users may have against BellSouth (Tr. Vol at 72) The Joint Petitioners take this position even though they readily concede that neither BellSouth nor the Joint Petitioners can affect the rights of third-party end users through this interconnection agreement (Tr Vol at 73). As stated by NuVox witness Russell who admitted he graduated from law school but refused to concede that he was a lawyer·

> Q Now, you're a lawyer; is that right?
>
> A I graduated from law school, let's put it that way I'm not Matlock like you, Mr. Meza.
>
> Q Thank you. You would agree with me that as a matter of law you cannot impact the rights of third parties vis-à-vis a contract between BellSouth and NuVox?
>
> A. That's my understanding, yes.

(Tr at 73, see also, Johnson Depo. at 5, 67, and 71) Thus, the Joint Petitioners are arbitrating an issue that is of no force and effect as a matter of law.

In addition to being legally unsupportable, the Joint Petitioners' language is unnecessary and guts any limitation of liability protections ultimately ordered NuVox witness Russell testified that the purpose of their proposed language was to make certain that damages that arise directly and proximately from BellSouth's negligence, gross negligence or willful misconduct cannot be termed in this agreement as incidental or consequential. (Tr Vol at 73-73; Russell Depo at 102, 104-105)

The language proposed by the Joint Petitioners, however, does not address this nonsensical concern It provides that no Party would be responsible for indirect, incidental, or consequential damages "provided that neither the foregoing nor any other provision of this Section 10 shall be deemed or construed as imposing any limitation on the liability of a Party for

claims or suits for damages incurred by End Users of the other Party or by such other Party vis-à-vis its End Users to the extent such damages result directly and in a reasonably foreseeable manner from the first Party's performance of services hereunder .. " *See* Joint Petitioner Exhibit A at GTC § 10 4 4 If damages are direct and foreseeable then they cannot also be indirect, incidental or consequential. Thus, not only is the Joint Petitioners language of no force and effect as a matter of law, it is also unnecessary.

Notwithstanding the Parties' agreement that there should be some limitation of liability between them, the Joint Petitioners' language emasculates any such limitation by excluding the limitation of liability provision for damages "incurred by such other Party vis-à-vis its End Users " Thus, as long as the Joint Petitioners brought a damage claim for damages incurred by the Joint Petitioners "vis-à-vis its End Users" (whatever that means), BellSouth's liability to the Joint Petitioners could be unlimited The Authority should not tolerate such gamesmanship and should preclude the Joint Petitioners' attempt to use legally unenforceable and unnecessary language to circumvent already agreed upon concepts. BellSouth's proposed language is legally enforceable, reasonable, and accurately sets forth the Parties' mutual agreement to not be liable to each other for indirect, consequential or incidental damages

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

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

As conceded by NuVox witness Russell, in most cases, the Joint Petitioners will be the receiving Party and BellSouth will be the providing Party. (Tr. at 65). Thus, if adopted, BellSouth will have virtually unlimited indemnification obligations to the Joint Petitioners while the Joint Petitioners will have essentially no indemnification obligation to BellSouth

In fact, if BellSouth were sued by a third party solely as the result of the negligence of a Joint Petitioner, BellSouth would have no indemnification rights against the Joint Petitioners (Tr at 66-67). The Joint Petitioners are aware of no other interconnection agreement that contains such draconian indemnification obligations. (Tr at 64). Clearly, such a result is unacceptable, because BellSouth, as a service provider should be indemnified by the Joint Petitioners for claims brought against BellSouth by the Joint Petitioners' end users. The Joint Petitioners expect as much from their end users as NuVox's tariffs require end users to indemnify it for "any act or omission" and do not require NuVox to indemnify the end user in any instance (*See* Tr at 60-62, *see also*, NuVox Tariff at § 2.1 4 8; KMC Tariff at § 2 1.4(G))

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

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

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

The same rationale applies here as the Joint Petitioners' language is designed to obligate BellSouth to indemnify them for essentially any type of claim This is especially true given the Joint Petitioners' position that "Applicable Law" includes the law in existence at the time of execution of the interconnection agreement, regardless of whether that law is memorialized in the agreement (Tr 67-68) Thus, if the Authority adopted the Joint Petitioners' language,

BellSouth could be obligated to indemnify the Joint Petitioners for alleged violations of some undisclosed law. *Id*

Moreover, the expansive and almost unlimited indemnification obligations sought by the Joint Petitioners is ultimately unnecessary because each of them have provisions in their tariffs that preclude any liability for the actions of service providers, like BellSouth. (Tr. at 71; *see also*, Johnson Depo. at 51) Thus, the Joint Petitioners already insulate themselves from the very liability they seek to have covered through their indemnification language The Joint Petitioners concede this fact (Tr at 71) Additionally, the Joint Petitioners can cite to no past history or dealings between the Parties to support this substantial change in the industry standard. None of the Joint Petitioners are aware of any instance where they previously sought indemnification from BellSouth. (Russell Depo. at 154, Johnson Depo. at 50, Falvey Depo at 92).

Further, as with Item 4, the Joint Petitioners' reliance on what are purported common provisions in the commercial agreement context is misplaced. As previously stated and as found by the North Carolina Commission and federal courts, interconnection agreements are not commercial agreements *In the Matter of BellSouth Telecommunications, Inc v NewSouth Communications, Corp*, Docket No. P-772, Sub at 6; *BellSouth v Mississippi Public Serv Comm'n*, Civil Action No. 3:05CV173LN at 13 And, irrespective of what may or may not be commercially reasonable, BellSouth's UNE rates were not established under the premise that BellSouth would have almost unlimited exposure via indemnification language in an interconnection agreement (Blake Direct at 32).

In contrast, BellSouth's proposed language for this issue complies with the standards in the industry, including the Joint Petitioners tariffs as it requires the receiving Party to indemnify the providing Party in two limited situations (1) claims for libel, slander, or invasion of privacy

arising from the content of the receiving Party's own communications; or (2) any claim, loss, or damaged claimed by the "End User or customer of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties or obligations arising out of this Agreement." *See* BellSouth Exhibit A, GT&C at § 10.5. BellSouth's language is quite narrow and insures that the providing Party will be indemnified in the unique situation when the end user of the receiving Party sues the providing Party based on the receiving Party's use or reliance of services provided by the providing Party. Therefore, the Authority should adopt BellSouth's language on this issue because it is reasonable, is consistent with industry standards (including the Joint Petitioners' tariffs) and complies with the general concept that indemnification provisions should be limited to foreseen risks.

Item 9:Should a Party be allowed to take a dispute concerning the interpretation of implementation of any provision of the Agreement to a court of law for resolution without first exhausting its administrative remedies? (GT&C Section 13.1)

This issue centers on whether the Parties should be required to submit disputes that are within the expertise or jurisdiction of the Authority or FCC to the Authority or FCC for resolution. BellSouth takes the position that the Authority should order such a requirement but that, if the dispute is outside the jurisdiction or expertise of the Authority or FCC, the Parties can take the dispute to a court of law. (Blake Direct at 36; BellSouth Exhibit A, GT&C at § 13.1). Conversely, the Joint Petitioners want to bring a dispute to a court of law even in circumstances when the Authority has jurisdiction and/or expertise to resolve the dispute (Tr. at 275). For the following reasons, the Authority should adopt BellSouth's proposed language.

First, there can be no question that the Authority should resolve matters that are within its expertise and jurisdiction. Interconnection agreements achieved through either voluntary negotiations or through compulsory arbitration are established pursuant to Section 252 of the

Specifically, Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the Authority for approval. As such, unlike a court, state commissions are in the best position to resolve disputes relating to the interpretation or enforcement of agreement that it approves pursuant to the Act (Blake Direct at 35)

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

The Authority has previously arbitrated a similar issue In an arbitration proceeding involving BellSouth and AT&T[18], the Authority addressed its role in resolving interconnection agreement disputes The issue being arbitrated was whether or not a third party commercial arbitrator should be used to resolve such disputes. In ruling that the Authority should resolve all disputes that arise under the Agreement, the Authority stated as follows:

> Resolution of interconnection agreement disputes by the Authority is necessary to ensure consistent interpretation of interconnection agreements and application of public policy. Moreover, consideration by the Authority will ensure compliance with applicable state law and Authority rulings.[19]

[18] *See* Final Order of Arbitration Award, dated November 29, 2001 in Docket No 00-00079
[19] *Id* p 32

At its core, the Joint Petitioners' language would result in this Authority standing by as a federal court in Louisiana, Georgia, Mississippi or any other state resolves disputes impacting Tennessee carriers Clearly, this Authority should be involved in disputes relating to agreements that it arbitrates and approves. Adoption of the Joint Petitioners' proposal could effectively prohibit the Authority from such a role.

Likewise, the FCC, having regulatory oversight over ILECs and CLECs and their obligations under the Act, also has expertise to resolve disputes relating to the interpretation and implementation of the agreement (Blake Direct at 36). Accordingly, the FCC is another available forum that the Joint Petitioners could employ to resolve disputes relating to the interpretation implementation of the agreement

The Joint Petitioners concede that state commissions have the authority to enforce and interpret interconnection agreements that they approve pursuant to the Act. (Tr at 276-277). The Joint Petitioners also concede that this Authority and the FCC are experts with respect to a number of issues in the agreement. *Id* In fact, on cross-examination, Xspedius witness Falvey testified that the Authority was the expect with respect to "telecommunications matters contained within the contract . " (Tr at 277). Based on these concessions, the Joint Petitioners should have no dispute with BellSouth's proposed language. This is not the case, and the Joint Petitioners continue to arbitrate this issue

The apparent motivation of the Joint Petitioners in continuing to arbitrate this issue is to obtain the ability to go to a single forum to address a region-wide dispute and to avoid bifurcated hearings (Tr. at 278, 281) Neither of these goals, however, are likely achievable with their proposed language. For instance, the Joint Petitioners attempt to mitigate their concession that the state Authority and the FCC are experts in several matters by stating that, pursuant to the

doctrine of primary jurisdiction, a court could refer these "expert" matters to the state commissions for resolution (Joint Petitioner Rebuttal at 36) Invocation of this doctrine, however, leads to the same result the Joint Petitioners are attempting to avoid – bifurcated hearings. Specifically, under the doctrine of primary jurisdiction, a court would resolve matters outside the expertise of a state Authority while nine state commissions would resolve matters within their expertise The Joint Petitioners do not dispute this fact. (*See* Johnson Depo. at 81-82, Tr at 281-282).

Additionally, BellSouth's proposed language gives the Joint Petitioners the ability to resolve a dispute in a single forum as it allows either Party to bring a dispute to the FCC. Ironically, by arbitrating this dispute in nine different states pursuant to the Act, the Joint Petitioners run the risk that they will not have this "one-stop shop" option with a court of law. This is because if eight states commissions reject the Joint Petitioners' language while one state Authority accepts it, the Joint Petitioners right to proceed to a court of law to resolve a dispute would be only applicable in that one state and they would have to litigate the dispute in eight other state commissions. (Tr. at 282-83; Falvey Depo. at 89-90; Johnson Depo. at 82). Thus, unless the Joint Petitioners are successful on this issue in all nine states, they will not even obtain the desired effect of their proposed language.

In sum, BellSouth's language preserves the ability of this Authority to resolve disputes that are within its expertise while also providing the Joint Petitioners the option of going to a court of law for matters outside such expertise. Accordingly, BellSouth's language is balanced, reasonable, and should be adopted [20]

[20] Contrary to any claim the Joint Petitioners may assert, BellSouth is not attempting to limit any rights the Joint Petitioners have to go to a court of law for dispute resolution The Authority has exclusive jurisdiction over telecommunications issues under Tennessee law T C A § 65-4-104 Further, Tennessee courts routinely enforce forum selection clauses *See Signal Capital Corp v Signal One, LLC*, 2000 WL 1281322 *3 (Tenn Ct App

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

This issue centers on how the Parties should handle disputes when one Party asserts that an obligation, right, or other requirement relating to telecommunications law is applicable even though such obligation, right, or requirements is not expressly memorialized in the interconnection agreement This issue is not about whether BellSouth intends to comply with Applicable Law.[21] BellSouth has agreed to do so. *See* GTC at § 32.1. This issue is about providing the Parties with certainty in the interconnection agreement as to their respective telecommunications obligations BellSouth's proposed language is designed to do just that as it ensures that (1) no Party is penalized by the lack of clarity or silence in this agreement relating to its obligations under telecommunications law; and (2) no Party has the opportunity to renegotiate provisions of the contract based on a new reading of Applicable Law.

Specifically, BellSouth's concern is that, with their language, the Joint Petitioners will review a telecommunications rule or order, interpret it in a manner that BellSouth could not have anticipated, claim that such interpretation forms the basis of a contractual obligation (even though during the two years of negotiations the Joint Petitioners did not raise the issue), and then seek to enforce the obligation against BellSouth.[22] BellSouth's language addresses this concern as it provides that "to the extent that either Party asserts that an obligation, right or other requirement, ***not expressly memorialized herein***, is applicable under this Agreement by virtue of a reference to an FCC or Authority rule or order, or ***with respect to substantive***

2000)

[21] Section 32 1 defines "Applicable Law" as "all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, injunctions, judgments and binding decisions and decrees that relate to its obligations under this Agreement " BellSouth has agreed to comply with Applicable Law

[22] This exact scenario is not unprecedented as NuVox and NewSouth are using this very argument in defense of BellSouth's attempt to conduct an EEL audit under their current agreement (Blake Direct at 32)

telecommunications law only, Applicable Law" and the other Party disputes such right, obligation, or requirement, the Parties agree to submit the dispute to dispute resolution before the Authority and agree that any finding that such right or obligation exists prospectively only. *See* BellSouth Exhibit A, GT&C at § 32.2 (emphasis added).[23] Clearly, if the Authority determined that the obligation should have applied retroactively, the Authority could include such a requirement in its order

The Joint Petitioners concede that the interconnection agreement contains the Parties' interpretation of various FCC rules and decisions. (Tr. at 23). The Joint Petitioners also agree that the Parties should be confident that they are clear as to the scope of their obligation in the agreement and that the purpose in contracting is to be expressly clear (Tr at 86). Additionally, the Joint Petitioners agree that Parties should not be able to use the Applicable Law provision to circumvent what the Parties agree to in this agreement and that the parties have spent the last two years negotiating in an attempt to memorialize their mutual understanding of substantive telecommunications law (Tr. at 81, 82).

Notwithstanding these admissions, the Joint Petitioners continue to advance language that results in the complete confusion of the Parties' respective obligations and potential obligations. In particular, the Joint Petitioners take the position that the law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise (Tr at 77; Russell Depo at 142; 145). Thus, under the Joint Petitioners' language and interpretation of the law, the Parties would not need an interconnection agreement to memorialize their respective telecommunications obligations to each other because, according to them, the law is automatically incorporated into the agreement.

[23] This issue does not address changes in the law that result after the execution of the Interconnection Agreement And, this issue is also not applicable in the instance where the FCC or court provides that a change of law is self-effectuating and thus not subject to any change of law obligations

Consequently, not only does the Joint Petitioners' language defeat the entire purpose of negotiation or arbitrating pursuant to Section 252 of the Act (as well as the efforts of the Parties since June 2003),[24] it also leads to ambiguity and thus defeats the entire admitted purpose of entering into an agreement

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

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

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

[24] The Parties have been negotiating the instant agreement since at least June 2003 (Johnson Depo at 86)

Moreover, the Joint Petitioners interpretation of this issue should be rejected for the additional reason that it conflicts with other, already-agreed upon provisions in the agreement. For instance, the Joint Petitioners admit that, under their interpretation of this issue, Tennessee state unbundling law is automatically incorporated into this Section 252 agreement upon execution, unless it is expressly excluded. (Tr at 84, Falvey Depo. at 90-91).[25] However, Section 32.1 of the General Terms and Conditions defines Applicable Law as being the law that relates to its obligations under this agreement. Moreover, the fourth "whereas" clause in the General Terms and Conditions establishes the general parameters of this agreement as it provides that the "Parties wish to interconnect their facilities and exchange traffic pursuant to and consistent with the rights and obligations set forth in Section 251 and 252 of the Act." Accordingly, Applicable Law, as it is defined in the agreement, is limited to the law addressing BellSouth's obligations under Section 251 and 252 of the Act.

The North Carolina Commission reached this same conclusion in the BellSouth/DeltaCom arbitration *See In re Petition for Arbitration by ITC^DeltaComs*, Docket No P-500, Sub 18, *Recommended Arbitration Order* at 25 (finding that the Commission was "acting under the authority granted by TA96 in arbitrating interconnection agreements and its decisions are rendered pursuant to section 251 of TA96" and that "it is appropriate for the agreement to indicate compliance only with state and federal rules pursuant to Section 251."). Thus, the Authority should reject the Joint Petitioners' language because it improperly expands the already agreed-upon scope of this agreement and conflicts with the purpose of this Section 251/252 agreement

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

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

Adoption of the Joint Petitioners' language violates the legal principles established in *Conserv* as it essentially requires BellSouth to negotiate and arbitrate non-251 issues, including state unbundling laws, even though the parties never addressed such issues either in negotiation or arbitration in a Section 252 agreement The Authority should prevent this attempt by the Joint Petitioners to violate BellSouth's rights under federal law by seeking to force BellSouth to negotiate, arbitrate, and incorporate issues that it has no duty to negotiate and address in a Section 252 agreement [26]

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

As an initial matter, the Authority will be addressing this exact issue in the Generic Docket Accordingly, the Authority should move this issue to the Generic Docket for

[26] The Joint Petitioners claim that BellSouth's proposed language would result in the parties not being obligated to comply with CPNI laws because such laws are not included in the Interconnection Agreement is misplaced As an initial matter, the Parties have already agreed to procedures that protect CPNI consistent with those laws in Attachment 7 regarding Customer Service Records and Letters of Authorizations Further, even if factually correct, BellSouth's language is only applicable when there is a dispute as to the existence of an obligation that was not previously disclosed or set forth in the Agreement Obviously, BellSouth does not dispute the existence of CPNI laws or that BellSouth is obligated to comply with them Indeed, BellSouth is arbitrating Item 86(B), which deals with the rights the Parties should have when one Party violates CPNI laws relating to Customer Service Records

consideration and resolution It would be a waste of the Authority's and the Parties' time and resources to address this issue in the context of a Section 252 arbitration when the issue is being raised at the generic level. Additionally, because the Authority's decision on this issue may impact carriers that are not Parties to the arbitration proceeding, the Authority should address and resolve this dispute only once and in the context of the Generic Docket The Joint Petitioners would not be prejudiced by such action because they are actively participating in the Generic Proceeding At a minimum, if the Authority does not move this Item to the Generic Docket, the Authority should defer resolution of this issue until its decision in the Generic Proceeding to avoid inconsistent rulings.

In the event the Authority chooses to address the issue now, BellSouth's position is as follows. The issue in dispute with Item 26 is whether the FCC in the *TRO* required BellSouth to commingle 271 elements with 251 elements. As made clear by a review of the *TRO* as well as the FCC's errata to the *TRO*, the answer to this question is "no", and the Authority does not have jurisdiction to order otherwise.

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

Joint Petitioners' interpretation of BellSouth's commingling obligations, BellSouth could be required to combine 271 switching with a UNE loop, thereby resurrecting UNE-P. The FCC's decision in the *TRRO* made it clear that BellSouth has no 251 obligation to provide UNE-P.[27] And, the New York Public Service Commission as well as a Federal District Court have indicated that the "FCC's decision 'to not require BOCs to combine Section 271 elements no longer required to be unbundled under Section 251, [made] it [] clear that there is no federal right to 271-based UNE-P arrangements '" *BellSouth v Mississippi Public Serv Comm'n*, Civil Action No. 3 05CV173LN at 16-17 (stating that the court would agree with the New York Commission's findings) (quoting *Order Implementing TRRO Changes*, Case No. 05-C-0203, N.Y P S.C (Mar 16, 2005))

This conclusion is buttressed by the fact that the FCC, in its Errata, deleted the only reference to 271 in the entire discussion of commingling. Specifically, in paragraph 584, the FCC originally stated that "[a]s a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act " *TRO* at ¶ 584. In the Errata, the FCC deleted this phrase "unbundled pursuant to section 271." *See TRO* Errata at ¶ 27 Without this reference, there is no other discussion of 271 elements in the commingling section of the *TRO* The Joint Petitioners do not dispute this fact nor the fact that the Errata is in force and effect. (Tr at 211) [28]

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

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

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

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

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

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

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

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

These passages, in conjunction with the Errata, make it clear that the FCC never intended for ILECs to commingle 271 elements with 251 elements.[29]

Additionally, although not at issue in this arbitration, the *TRRO* provides further guidance on this issue that is consistent with BellSouth's position Particularly, in addressing

[29] The Joint Petitioners' assertion that the Errata simply cleans up stray language from paragraph 584 because the FCC wanted to make clear that resale was a wholesale service is simply implausible (Tr at 212) To believe this assertion, the Authority must accept the Joint Petitioners' claim that there was confusion in the industry as to whether resale constitutes a wholesale service The FCC never made this reference in the *TRO* and there is no evidence to support such a specious interpretation Further, the Joint Petitioners' claim that the FCC could not have used the Errata to strike substantive law must also be rejected (Tr at 211-212) Indeed, the Joint Petitioners focus on the fact that the FCC in the Errata deleted the last sentence of note 1990 in the *TRO*, which provided that ILECs have no obligation to commingle 251 with 271 elements (The FCC deleted this sentence presumably because of the Errata's deletion of 271 services in paragraph 584) To believe the Joint Petitioners would result in the Authority rejecting the very facts that the Joint Petitioners cite to support their argument Stated another way, the Joint Petitioners rely on the deletion of a substantive provision in the *TRO* to support their claim regarding commingling Apparently the Joint Petitioners take the position that an Errata cannot affect substantive rights only if those rights are in BellSouth's favor

conversion rights, the FCC in the *TRO* used the same "wholesale services" phrase that forms the basis of the Joint Petitioners' commingling argument – that is "wholesale services" includes services offered pursuant to Section 271. *See TRO* at ¶ 585 ("We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations ....") In the *TRRO*, the FCC described its holding in the *TRO* regarding conversions to be limited to the conversion of tariffed services to UNEs. "We determined in the *Triennial Review Order* that competitive LECS may convert tariffed incumbent LEC services to UNEs and UNE combinations " *TRRO* at ¶ 229. Thus, the FCC has subsequently construed the phrase "wholesale services" to be limited to tariffed services, which is consistent with BellSouth's position.

The only logical conclusion based upon the express wording of the *TRO* as well as the Errata (and the *TRRO*) is that BellSouth has no obligation to commingle 271 elements with 251 elements. At least two state commissions have reached the same conclusion. *See In re DIECA Communications, Inc.*, Docket No. 04-2277-02, Utah P.S.C., 2005 WL 578197 at *13 (Feb. 8, 2005) (finding that "ILECs are required to commingle wholesale elements obtained by means other than Section 251(c)(3), except for Section 271 elements."), *In re XO Illinois, Inc.*, 04-0371 Ill. C.C., 2004 WL 3050537 at 15 (Oct. 28, 2004) ("SBC is not required to commingle UNEs and UNE combinations with network elements unbundled pursuant to Section 271. The FCC specifically removed that requirement from the *TRO* 584 when it issued its *TRO* Errata.").[30]

Finally, the FCC and not the Authority has jurisdiction over elements provided pursuant to Section 271. 47 U.S.C. § 271(d)(1), (d)(3), (d)(6). The only role Congress gave state commissions in Section 271 is a consultative role during the approval process. 47 U.S.C. §

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

271(d)(2)(B). This conclusion is bolstered by the plain text of § 252, which limits state authority to agreements entered into "pursuant to section 251." 47 U.S.C. § 252(a)(1). Simply put, Congress did not authorize a state Authority to ensure that an agreement satisfies Section 271, to establish any 271 obligations, or to establish rates for any Section 271 obligation. *See UNE Remand Order* at ¶ 470; *TRO* at ¶ ¶ 656, 664, *USTA II*, at 237-38 The United States District Court for the Southern District of Mississippi recently confirmed that the FCC is sole body to enforce 271 obligations *BellSouth v Mississippi Public Serv Comm'n*, Civil Action No. 3 05CV173LN at 17 ("It would further observe, though, that even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth has failed to comply, § 271 explicitly places enforcement authority with the FCC ... Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service"). Accordingly, the Authority is prohibited from finding in this arbitration that BellSouth has an obligation to commingle 271 elements with 251 elements

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

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

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

For the same reasons as discussed in Item 26, the Authority should move these Items to the Generic Docket for consideration and resolution because similar if not identical issues are being raised in the Generic Proceeding. At a minimum, the Authority should defer resolution of these Items until its decision in the Generic Proceeding to avoid inconsistent rulings

In the event the Authority chooses to address these issues now, BellSouth's position is as follows.[31] These issues represent another attempt by the Joint Petitioners to arbitrate issues that have no impact on their current business operations and to obtain rights that exceed what BellSouth offers its customers Further, the Joint Petitioners' position as to the scope of BellSouth's line conditioning obligations conflicts with the *TRO* and BellSouth's nondiscriminatory obligations under the Act and thus should be rejected. And, their stated need for arbitrating these issues is based on pure speculation and conjecture and, ultimately, are factually incorrect

(Item 36)

Fundamentally, BellSouth is obligated to perform line conditioning on the same terms and conditions that BellSouth provides for its own customers. In paragraph 643 of the *TRO*, the FCC stated that "line conditioning should be properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers " *TRO* at ¶ 643 The FCC went on further to state that "incumbent LECs must make the routine adjustments to unbundled loops to deliver services ***at parity*** with how incumbent LECs provision such facilities for themselves" and that "line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their section 251(c)(3) nondiscrimination obligations." *Id* (emphasis added) BellSouth's proposed language complies with this standard by offering to perform line conditioning for the Joint Petitioners pursuant to the same terms and conditions that it provides for its own customers. (Tr. Vol. 6 at 14-15).

[31] All of these issues are interrelated as they address BellSouth's line conditioning obligations in both a general and a specific fashion Thus, BellSouth will brief them together

The Joint Petitioners concede that the source of BellSouth's obligation to perform line conditioning is established in its nondiscriminatory obligation under the Act and that this obligation requires BellSouth to do for CLECs what it does for "its retail division" (Tr at 197) Notwithstanding these concessions, the Joint Petitioners' position is that BellSouth's line conditioning obligations are established by the FCC rule, which does not provide for the same definition of line conditioning that appears in paragraph 643 of the *TRO* (Tr. at 194-195) Consequently, the Joint Petitioners take the position that, based on the FCC rule, BellSouth has an obligation to perform line conditioning that exceeds what it provides for its own customers (Tr 203-204) This interpretation not only violates the FCC's express findings that BellSouth's line conditioning obligations are premised on Section 251(c)(3)'s nondiscrimination obligations but also the FCC's holding in the *TRO* that line conditioning does not result in the creation of a "superior network" *TRO* at ¶¶ 630, 643

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

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

USTA II, 359 F 3d at 578

Simply put, adoption of the Joint Petitioners' position violates BellSouth's nondiscrimination obligations under the Act Accordingly, the only interpretation of both paragraph 643 as well as the FCC rule that gives effect to both provisions is BellSouth's interpretation. To hold otherwise, would be to "read away" and ignore the FCC's express findings in paragraph 643 because BellSouth would be required to perform line conditioning for the Joint Petitioners that exceed what BellSouth provides for its own customers (Tr 203-204).

The fact that the Joint Petitioners' current agreements contain TELRIC rates for line conditioning in excess of what BellSouth provides for its customers is of no consequence. This is because their current agreements are not *TRO* compliant and the FCC in the *TRO* clarified that BellSouth's line conditioning obligations are limited to what BellSouth routinely provides for its own customers Additionally, the Joint Petitioners' argument (and Venn Diagram) that not all line conditioning is a routine network modification should be rejected. (Tr. at 587). In its discussion of routine network modifications, the FCC expressly equated its routine network modification rules to its line conditioning rules in the *TRO*: "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LEC currently undertake under our line conditioning rules" *TRO* at ¶ 635 The FCC echoed these sentiments in paragraph 250 of the TRO: "As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service." *TRO* at ¶ 250.

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

> It's BellSouth's position that line conditioning is limited by what's stated in the TRO. What the FCC has clearly said is that line conditioning is properly seen as a routine network modification What's interesting about this particular diagram is an area of mathematics called Vin diagrams or Set Theory If you go to taking word problems or language and you turn it into mathematics and try to create Vin diagrams, as the joint petitioners have done here, there are specific mathematical definitions of various terms If you go and simply try to decipher the mathematical definition of the phrase, line conditioning is properly seen as a routine network modification: The key word is properly seen If you look in the dictionary or any place else for the mathematical definition of properly seen, it is a subset In other words, line conditioning is entirely contained within or a subset of routine network modifications So to properly draw a Vin diagram based on that sentence would have line conditioning as a smaller circle contained entirely within the routine network modification circle What that means is there are routine network modifications that are not line conditioning but that there are no line conditioning obligations that are not routine network modifications as the subset That's how BellSouth would draw the same diagram, which is very different than what the joint petitioners have offered

(Tr at 588-589) For all of these reasons, the Authority should harmonize paragraph 643 and the FCC rule, adopt BellSouth's language, and find that BellSouth's obligation is to provide the Joint Petitioners with line conditioning on the same terms and conditions that it provides to its own customers

(Item 37)

BellSouth should have no obligation to remove load coils in excess of 18,000 feet at TELRIC for the Joint Petitioners because BellSouth does not remove load coils on long loops for its own customers. As stated above, this standard complies with paragraph 643 of the *TRO* as well as BellSouth nondiscrimination obligations under the Act (Fogle Direct at 7) If requested, BellSouth will remove load coils on such loops pursuant to its tariff via the special construction process *Id*

Pursuant to current network standards, BellSouth places load coils on loops greater than 18,000 feet to enhance voice service. *Id* at 6-7. Essentially, load coils reduce static on long loops (Tr at 600-601). The Joint Petitioners do not dispute this fact *Id* at 6 BellSouth placed load coils, generally in groups of 400 or more, after 18,000 feet when the network was originally built Load coils are designed to be in the network for long periods of time, given their useful function for enhancing voice service. Consequently, load coils are generally found in splice cases or buried (Tr at 605-606) Mr Fogle further described the difficulties in removing load coils on long loops in his testimony.

> [Load coils] come in 25-pair complements and then binder groups with 3 or 400 pairs So what we'll have is a load coil actually will be a bank of load coils There will be 400 load coils in a big, large box that's buried or – you know, they connect it into the facility at that point The CLECs are asking or joint petitioners are asking that we go out and find this device, unbury it, open up the spliced cables, find the specific pair that they're using, cut out the load coil, and then four months later, six months later, a year later when they're no longer using it, we have to go back and put the load coil back in

(Tr at 605-606). As a result of these difficulties and because BellSouth has no obligation to remove load coils on loops in excess of 18,000 feet, BellSouth will remove such load coils upon request of a CLEC but only pursuant to special construction pricing, which allows BellSouth's engineers to evaluate the specific costs associated with removing and replacing an individual load coil *Id* NuVox argues that the adoption of BellSouth's definition of line conditioning would prevent them from using two new technologies that they were considering deploying, Etherloop and G HDSL. (Joint Petitioner Direct at 60). The Joint Petitioners boldly claim that, without line conditioning on loops in excess of 18,000 feet, these services will not work This claim is a complete farce based upon pure speculation and conjecture In fact, the sole witness presented by the Joint Petitioners to support this allegation, Jerry Willis, testified that he was a

consultant for NuVox and that his job duties did not include the development of new technologies (Tr at 243) He further testified that he was not familiar with the percentage of NuVox's loops that were in excess of 18,000 feet and that he was unfamiliar with how Etherloop works (Tr at 246) Additionally, Mr. Willis conceded that he did not know whether Etherloop would work with load coils or bridge taps, that he "was not very familiar" with Etherloop, and that it is not a technology that is being deployed widely. (Tr at 251-252) [32] Mr. Willis' lack of knowledge is not surprising given that BellSouth received only 14 requests through-out its entire nine-state region to remove load coils in 2004, with only two of those requests being for loops in excess of 18,000 feet. (Tr at 605).[33]

In addition to the fact the Joint Petitioners concerns regarding Etherloop and G.HDSL are factually inaccurate and are not based on actual experience, Mr Fogle testified that new technologies will take into account current network limitations, such as load coils and bridge taps in their development. ".. But what's important to understand from a technical and engineering standpoint is that new and innovative services are designed to work on the phone network, on the POTS network, plain old telephone service network They're usually designed to work with the impediments that are on the network.. So new technology almost always understands the existing – the situation and the existing state of the art plan and accommodates that " (Tr. at 595). Thus, the Joint Petitioners' claim that BellSouth's proposed language will prevent them from deploying advanced services is simply not credible.

[32] Mr Collins, KMC's witness in North Carolina, provided similar testimony as he stated that he was not familiar with how Etherloop works and he did not know whether KMC was intending to deploy Etherloop *See* Collins Depo at 14-15

[33] Mr Willis' statement that G SHDSL would not work with bridge taps is also incorrect As testified by Mr Fogle, the design standards for G SHDSL provide for six different loops that are required in order to provide the service Five of the six loops identified in these standards have bridge taps on them (Tr at 599)

(Issue 38)

This dispute centers on whether BellSouth should be required to remove bridge taps between 0 and 2500 feet at TELRIC. There is no dispute that BellSouth will remove bridge taps over 6500 feet for free and between 2500 and 6000 feet at TELRIC. (Tr. at 249). Bridge taps are standard network enhancements that are used to allow BellSouth to maximize the extent of voice service that can be provided over certain pairs. (Tr. at 249-250) Even though BellSouth does not remove bridge taps at any length for its own customers, in conjunction with the CLEC Shared Loop Collaborative, BellSouth has agreed to remove bridge taps for CLECs in the following scenarios (1) Over 6,000 feet for free, (2) between 2500 and 6000 feet at TELRIC, and (3) between 0 and 2500 feet pursuant to special construction pricing (Fogle Direct at 8-9). BellSouth has offered these same terms and conditions to the Joint Petitioners.

In contrast to the CLEC community, the Joint Petitioners assert that BellSouth should be required to remove bridge taps between 0 and 2500 feet at TELRIC However, as conceded by Mr Willis, the Joint Petitioners are not aware of any instance where they have asked BellSouth to remove bridge taps in order to provide a service, even though he believed that they were providing service that required the removal of bridge taps (Tr at 250). Further, the Joint Petitioners' claim is rebutted by the fact that BellSouth removed 55 bridge taps in its entire region in 2004, none of which were from the Joint Petitioners. (Tr at 593) This lack of knowledge to support their claim is not surprising given that the Joint Petitioners did not participate in the CLEC collaborative that established the terms and conditions for the removal of bridge taps Accordingly, the Authority should reject the Joint Petitioners language on this issue and adopt BellSouth's as it provides the Joint Petitioners with exactly what the CLEC community has already agreed to.

Item 51: (B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed?

For the same reasons as discussed in Items 26 and 36-38, the Authority should move this Item to the Generic Proceeding for consideration and resolution because similar if not identical issues are being raised in the Generic Proceeding At a minimum, the Authority should defer resolution of this Item until its decision in the Generic Proceeding to avoid inconsistent rulings.

In the event the Authority chooses to address these issues now, BellSouth's position is as follows This issues relates to the Joint Petitioners' attempt to impose unnecessary conditions on BellSouth's EEL audit rights in contravention of the *TRO* by (1) seeking to limit BellSouth's audit rights to those circuits identified in the notice of the audit and for which sufficient documentation is produced to support the audit, and (2) selection of the auditor There is nothing in the *TRO* that supports these conditions, which are only designed to impede or delay BellSouth's right to catch and correct the Joint Petitioners' unauthorized use of EELs

An EEL or an Enhanced Extended Link is a UNE combination that contains loop and transport (Tr at 86-87) There are limitations as to when a CLEC can use an EEL under the *TRO* (Tr at 87; *TRO* at ¶ 597) For instance, as already agreed to by the Parties, an EEL must have 911 capability, terminate in a collocation arrangement, and be served by a switch capable of switching local voice traffic. (Attachment 6, §§ 5 2.5.2 1 – 5 2 5.2.7) In order to obtain an EEL, the CLEC has to certify that it is using the EEL in compliance with the *TRO*'s eligibility criteria (Tr. at 87 , *TRO* at ¶ 623). As an alternative to an EEL, a CLEC can purchase a special access circuit, which is more expensive than an EEL Tr at 88 As admitted by the Joint Petitioners, the purpose of the certification is to ensure that the CLECs are using the EELs in compliance with the law (Tr. at 87) Importantly, the Joint Petitioners believe that they are

using and EELs in compliance with the law. (Tr at 91-92). Because BellSouth has no ability to challenge the CLEC's certification, the *TRO* provides BellSouth with audit rights to ensure compliance with the EEL eligibility criteria and to prevent gamesmanship by CLECs. *TRO* at ¶ 626

Contrary to the *TRO*, the Joint Petitioners assert that, in any notice provided by BellSouth to initiate an audit, BellSouth must identify the particular circuits that it believes are not in compliance with the eligibility requirements as well as provide all documentation that supports this belief. (Tr. at 88). The Joint Petitioners further claim that BellSouth's audit rights should be limited to the circuits identified in the audit *Id* As conceded by the Joint Petitioners, however, there is nothing in the *TRO* that supports these additional conditions. (Tr. 2 at 89). In fact, the *TRO* is absolutely silent on the contents of any notice requirement and does not limit BellSouth's audit right to those circuits identified in any notice. The *TRO* does make it clear, however, that the auditor should determine the scope of the audit pursuant to standard auditing practices "Consistent with standard auditing practices, such audits require compliance testing designed by the independent auditor, which typically include an examination of a sample selected in accordance with the independent auditor's judgment." *TRO* at ¶ 626.

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

Moreover, the Joint Petitioners proposal effectively limits BellSouth's right to audit to when it can catch the CLECs using EELs in violation of the law without benefit of an audit. Not

only is this unreasonable, but it may also allow CLECs to avoid audits altogether BellSouth should not be put in the position of having its annual audit rights frustrated or precluded by unnecessary conditions and obstacles that are not supported by the *TRO*.

Similarly, the Joint Petitioners' argument that the costs associated with audits supports its position should also be rejected. The *TRO* makes it clear that the ILEC pays for the audit and that, to the extent the auditor's report concludes that the CLEC complied in all material respects with the eligibility requirements, the ILEC must reimburse the CLEC for its costs associated with the audit *TRO* at ¶ 626, 628. The FCC even states that "audited carriers should account for the staff time and other appropriate costs for responding the audit (*e g*, collecting data in response to the auditor's inquiries, meeting for interviews, etc)" *TRO* at ¶ 628, n.1908 And, given the Joint Petitioners' statements that (1) regardless of the methodology or scope used to conduct the audit, the Joint Petitioners will pass the audit (Tr at 98), the Joint Petitioners should have no concerns about the costs associated with an audit as they will get reimbursed pursuant to the *TRO*.

In addition to the "scope of the audit issue," the Parties also disagree on the selection of the auditor The Joint Petitioners take the position that the Parties should be required to agree on the auditor prior to the audit commencing (Tr at 86). The stated purpose of this requirement is to remove any uncertainty as to whether the auditor is independent There is no requirement in the *TRO* for mutual agreement in the selection of the auditor Rather, the *TRO* simply states that the "independent auditor must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants ("AICPA")

. " *TRO* at ¶ 626. The Parties have already agreed to this standard. The Parties also agree that the AICPA standards require the auditor to have integrity and objectivity and to be independent (Tr at 99-100)

Further, the Joint Petitioners do not even agree amongst themselves as to who would be an appropriate auditor. NuVox takes the position that it would not object to the selection of a nationally recognized auditing firm like KPMG or Deloitte. (Tr. at 101) KMC takes the position that there still may be a conflict in retaining a national accounting firm because of a potential conflict of interest. (Johnson Depo at 187) And, Mr. Falvey testified that his recent experience found that a Deloitte auditor was not independent. (Falvey Depo. at 189) This disagreement amongst the Joint Petitioners highlights the fact that their proposal is subject to disagreement, abuse and delay as they cannot even agree amongst themselves as to who the auditor *could* be.

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

NewSouth Reconsideration Order at 7 The Authority should reach the same conclusion here based on the *TRO*

In sum, the Authority should reject the Joint Petitioners' proposed language for this Item and adopt BellSouth's. To find otherwise would subject BellSouth to unnecessary conditions and obstacles designed to frustrate and delay BellSouth from exercising its audit rights Simply put, if a CLEC is in violation of the law, there is no type of notice, or any sufficient amount of documentation, or any auditor that will satisfy the CLEC such that it will agree to proceed with the audit

Item 65: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic? (Attachment 3, Section 10.10.1)

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

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

Virginia Arbitration Order at ¶ 117 The Georgia Public Service Commission recently reached the same conclusion it its transit traffic docket as it refused to order a TELRIC rate for the transit function and ordered that BellSouth's transit intermediary charge ("TIC") of $.0025 applied as an interim rate. *See BellSouth's Petition for a Declaratory Ruling Regarding Transit Traffic*, Docket No. 16772-U, *Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies*, G P.S.C (Mar. 24, 2005). Likewise, the Kansas Commission recently refused to find that SBC had a duty to provide the transit function at a TELRIC rate. *See In the Matter of the Petition of the CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L P.* Docket No 05-BTKT-365-ARB at 102 (Feb. 16, 2005).[34] And, the Authority recently approved BellSouth's Transit Traffic Service Tariff, which provides for a non-TELRIC rate for the same service at issue in Item 65 *See* Docket No. 04-00380.

Further evidence that the TIC should not need to be priced at TELRIC is the fact that the Joint Petitioners have the option of directly interconnecting with the terminating carrier instead of using BellSouth's transit function (Tr at 231) In addition, there are companies other than BellSouth that offer this transit service, including Neutral Tandem Services, and KMC has even considered providing this transit service as well. (Tr. at 231; Johnson Depo. at 220-222) Obviously, KMC will not provide this competing tandem service if BellSouth has to provide the same service at TELRIC

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

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

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

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

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

Joint Petitioners concede that customer service record ("CSR") information contains Customer Proprietary Network Information ("CPNI"), and that BellSouth and the Joint Petitioners have an obligation under federal law to protect the unauthorized disclosure of CPNI (Tr at 314). Given such obligations, it is no surprise that the parties have agreed to refrain from accessing CSR information without an appropriate Letter of Authorization ("LOA") from a customer and to "access CSR information only in strict compliance with applicable laws" (Tr. at 314-315, *see* Attachment 6, Section 2 5.5). Regarding LOAs, the parties have agreed that upon request, a party "shall use best efforts" to provide an appropriate LOA within seven business days *See* Attachment 6, Section 2 5.5.1.

Under BellSouth's most recent proposed language, if the accused party fails to produce an appropriate LOA within the allotted time period, the requesting party will provide written notice ***via email to a person designated by the other party to receive such notice*** specifying the

alleged noncompliance and advising that access to ordering systems may be suspended in five (5) days if such noncompliance does not cease *See* BellSouth Exhibit A, Attachment 6, Sections 2.5 5 2 and 2.5.5 3. Accordingly, Joint Petitioners' hypothetical fears about a "buried" written notice sitting on someone's desk for days have been eliminated. (Tr. at 318-319).

Further, under BellSouth most recent proposed language, if the accused party disputes the allegations of noncompliance, ***then the requesting party*** will seek an expedited resolution of the CSR dispute from the appropriate regulatory body pursuant to the dispute resolution provisions contained in the agreement's General Terms and Conditions section. *See* BellSouth Exhibit A, Attachment 6, Sections 2.5.5.2, 2.5.5.3. The agreement's dispute resolution provisions obligate the parties to continue meeting all contractual obligations while a dispute is pending General Terms and Conditions, Section 13 (Resolution of Disputes). As such, the Joint Petitioners' paranoia about BellSouth taking corrective action during the pendency of such a dispute has been obviated (Joint Petitioners Direct Testimony at 86, ll. 18-19 ["it is not clear at all whether BellSouth gets to pull the plug while the [CSR] dispute is pending"]) In short, BellSouth offered revised language for Item 86(B) in an effort to compromise and address the Joint Petitioners' concerns about "buried" notices or "pull-the-plug" provisions. Despite offering this language over two months ago, the Joint Petitioners have failed to respond to BellSouth's modified language for Item 86(B), or to articulate what could possibly be objectionable with BellSouth modified language

Moreover, the Joint Petitioners' concern, assuming it still exists, is based upon pure speculation. Prior to any action being taken by the requesting party, the accused party has at least two full weeks to exercise best efforts to produce the LOA. Two weeks is more than sufficient time to produce documentation that the Joint Petitioners are legally and contractually

obligated to keep. This is particularly true here, given the fact that the Joint Petitioners' lead witness on this issue (1) cannot identify any prior dispute regarding unauthorized access to CSR information (Tr. at 322-323), (Falvey Depo at 253); (2) acknowledges that Joint Petitioners have a contractual obligation to use "best efforts" to produce an appropriate LOA (Tr at 319); and (3) affirmatively states that his company would exercise "good faith" to investigate any allegation regarding unauthorized access to CSR information. (Falvey Depo at 236-237). In short, the Authority should adopt BellSouth's most recent proposed language on Item 86(B) as it addresses all of the Joint Petitioners' concerns as well as giving the parties sufficient recourse if a party refuses to comply with its legal and contractual obligations regarding the protection of CSR.

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

As will be established below, this item is not appropriate for arbitration under Section 252 of the Act because BellSouth has no Section 251 obligation to expedite service orders Compulsory arbitration under Section 252 should be properly limited to those issues necessary to implement a Section 251 interconnection agreement *See MCI,* 298 F 3d at 1274. Expedite charges are not necessary to implement the agreement, especially since BellSouth meets its 251 obligations by providing service pursuant to standard provisioning intervals already established by the Authority (Tr at 672-673). Accordingly, the Authority should refrain from arbitrating this issue

Indeed, BellSouth has a Section 251 obligation to provision interconnection services and UNEs within standard provisioning intervals. (Tr. at 672-673). This Authority recognized this obligation in establishing a performance measurement plan ("SQM/SEEM plan") for BellSouth

in Tennessee [35] The SQM/SEEM plan is designed to ensure that BellSouth continues to meet its Section 251 obligations and requires BellSouth to pay SEEM penalties if BellSouth fails to provision services with such standard intervals The SQM/SEEM plan contains no "expedited" provisioning measures.[36] Moreover, the Authority has an active performance measurement docket, Docket No 04-00150, and in such docket no party has proposed adding any expedited provisioning measures to the SQM/SEEM plan. These facts provide conclusive evidence that the expedited provisioning of a service order is a matter that is completely outside the scope of Section 251

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

With the exception of citing Section 251(c)(3) of the Act, the Joint Petitioners cannot cite any authority that supports its contention that a service expedite request should be priced at TELRIC. (Tr at 331), (Falvey Depo. 258-262). Of course, the words "expedite" or "advancement" do not appear in the text of Section 251(c)(3). Instead, BellSouth has, among other things, a "nondiscriminatory" obligation under Section 251(c)(3). From a provisioning

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[35] *See* Final Order Accepting Settlement Agreement and Adopting Performance Measurements, Benchmarks and Enforcement Mechanisms *In re Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth Telecommunications, Inc*. Docket No 01-00193 (October 4, 2002)

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

perspective, BellSouth satisfies such obligation by provisioning services within standard intervals and by charging CLECs the same service expedite rate that it charges its retail customers for purchasing services out of BellSouth's access tariff (Blake Rebuttal Testimony at 4) The Joint Petitioners' assertion that they are not retail customers and thus should not be charged retail tariff rates misses the mark. At hearing, the Joint Petitioners acknowledged that CLECs buy services out of BellSouth's access tariffs (such as special access) and when they do, they are charged the rates in the access tariff (Tr at 332-333).

As a practical matter, if there were a TELRIC-based service expedite charge, it is likely that many (if not most) CLEC orders would be expedited, thus causing BellSouth to miss its standard intervals and its obligations to provide non-discriminatory access. (Blake Rebuttal Testimony at 4). Further, although Joint Petitioners' lead witness on this issue (Jim Falvey) testified that BellSouth's service expedite charges are "killing" Joint Petitioners (Tr. at 331), this same witness acknowledged that his company charges its customers a service expedite fee, but he did not know -- nor could he even estimate -- his own company's service expedite charge (Falvey Depo at 256). Moreover, Xspedius' Tennessee tariff allows Xspedius to recover from its customer all costs associated with a service expedite request.(Xspedius Tennessee Tariff No. 1, Sections 2 18 [Special Construction] and 12 1 1 [Special Charges]). In short, the unsubstantiated assertion that BellSouth's service expedite rates are "killing" Joint Petitioners is pure speculation and belies the plain terms of the Joint Petitioners' tariff Additionally, from a policy perspective, any requirement that forces BellSouth to price voluntarily-offered services at TELRIC prices will chill BellSouth's willingness to voluntarily offer services to CLECs

Finally, the "special" expedite rate reflects the value of the "special" expedite service being provided, and is no different from ***choosing*** to pay in excess of $10 00 to send a letter via

overnight rather than paying 37 cents to send the same letter via first class mail. At hearing, the Joint Petitioners admitted that special pricing should govern special provisioning requests.

> Q. [Y]ou have got a choice regarding the provisioning of a UNE loop, don't you? The company can either pay the UNE rates and receive the standard UNE provisioning interval or pay something extra and receive an expedited service interval?
>
> A That's correct. But that choice is driven by customer choice. We are all here trying to make sure the Tennessee customers have equal choices from all carriers.... yes, technically we have a choice, but if we want to win that customer, then we have to offer the expedite

(Tr. at 337-338) Of course, Tennessee customers do have an equal choice as BellSouth charges CLECs and its retail customers the same service expedite rate. (Blake Rebuttal Testimony at 4) At its core, Joint Petitioners concede that they simply want something more than standard provisioning intervals priced at TELRIC, (Tr. at 338), without any justification for making such a request In sum, the Authority should refrain from setting rates for voluntarily-offered services, and should adopt BellSouth's position on Item 88 as it reasonable and nondiscriminatory

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

Payment for services should be made on or before the Payment Due Date (i e. the next bill date) in immediately available funds. The Joint Petitioners, like all CLECs that do business with BellSouth, have a set (constant) bill issuance date for every invoice (or bill) that the Joint Petitioners receive Based on the bill date, Joint Petitioners know the exact date when payment is due for each bill (it is due by the next bill issuance date). (Blake Rebuttal Testimony at 8-9) For example, a NuVox invoice that is dated the 5th day of the month, will always be dated the 5th day of the month, and will always be due by the 5th day of the following month

In addition to knowing when their bills are due, the Joint Petitioners concede, as they must, that their monthly billings are reasonably predictable and that Joint Petitioners are in the best position to predict (or estimate) their monthly billings. (Tr at 105, Russell Depo. at 237-238, Falvey Depo at 315-316). Further, NuVox witness Russell testified that his company pays all of its BellSouth bills in a timely manner (Tr at 104 [we've had a stellar payment record. I can't say that it's been perfect for seven years], [We've paid all the monies owed to BellSouth over the past seven years "]; (Russell Depo. at 231). In short, Mr. Russell's uncontradicted testimony belies the Joint Petitioners' assertion that they ***need*** at least 30 days to review and pay their bills (Tr at 106).

Further, it is difficult to reconcile the Joint Petitioners' own tariffs with their assertion that BellSouth's payment terms would be considered "unacceptable in most commercial settings". (Joint Petitioners Direct Testimony at 106). The Joint Petitioners' own end user tariffs require Tennessee consumers to pay on or before the payment due date. (Tr at 109, 111). Further, the Joint Petitioners concede that the payment terms that BellSouth seeks in this arbitration are the same payment terms contained in retail tariffs of BellSouth and the Joint Petitioners. (Tr. at 114-116).

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

Granting special payment terms to the Joint Petitioners is also contrary to the Act. Specifically, under Section 251(c) BellSouth has, among other things, an obligation to provide interconnection services and UNEs on rates, terms, and conditions that are just, reasonable and non-discriminatory For billing purposes, Bellsouth satisfies its nondiscrimination obligations by delivering bills to CLECs in the same time and manner that BellSouth delivers bills to its own retail customers Additionally, BellSouth pays SEEM penalties if BellSouth fails to delivery CLEC bills in a timely manner (i e at parity with the time it takes BellSouth to deliver bills to its retail customers) As Mr Russell acknowledged on cross-examination, from a timeliness perspective, the SQM/SEEM plan measures the time it takes BellSouth to deliver bills to CLECs and, as measured by the SQM, BellSouth's delivery of bills to NuVox in December 2004 was substantially less than the approximate seven days that NuVox claims that it takes BellSouth to deliver its bills to NuVox (Tr. at 107-108) Further, the Joint Petitioners admitted that they have no reason to question the results produced by the SQM/SEEM plan (Tr. at 108). In contrast, Mr. Russell admitted that the NuVox bill study concluded almost two years ago (July 2003) (Tr. at 106-107). In short, the Joint Petitioners' testimony demonstrated that their bill study information is outdated and exaggerated when compared to the more recent billing data produced by BellSouth's SQM/SEEM plan. Moreover, from a practical perspective, BellSouth has at least two practical reasons (getting paid and avoiding SEEM penalties) for delivering bills to CLECs as soon as possible

To minimize any delay in receiving its bills, the Joint Petitioners can elect to receive its bills electronically. Indeed, the Joint Petitioners receive bills electronically (Tr at 105-106; Johnson Depo at 297-298, Falvey Depo. at 305) Further, if any Joint Petitioner has billing questions, nothing precludes the Joint Petitioner from contacting BellSouth with such questions,

and BellSouth will respond in a prompt manner. (Blake Rebuttal Testimony at 9). In fact, Mr Russell admitted that NuVox speaks with its BellSouth account representative on a regular basis regarding billing matters. (Tr. at 120-121). Additionally, nothing prevents the Joint Petitioners from exercising their rights under the agreed upon billing dispute resolution provision, if any Joint Petitioner received a bill (or bills) that appears incomplete or confusing. *See* Attachment 7, Section 2

It is reasonable for BellSouth to expect that payment will be made by the next bill date. BellSouth expects the same from its retail customers. Moreover, if special circumstances warrant, a Joint Petitioner may request an extension of the payment due date and BellSouth does not unreasonably refuse to grant such a request. (Blake Rebuttal Testimony at 9).

Finally, the Joint Petitioners' proposal would result in an ever extending, revolving payment due date Additionally, granting the Joint Petitioners' request for special payment terms would require modifications to BellSouth's billing systems, and would involve substantial costs Incurring such costs to meet the special payment due date request of the Joint Petitioners is unnecessary and unwarranted given the fact that in granting BellSouth long distance authority in Tennessee, both the Authority and the FCC determined that BellSouth's billing practices are non-discriminatory [37] In short, it has already been determined that BellSouth's *existing* billing practices give CLECs a meaningful opportunity to compete in the local market. Accordingly, the Authority should reject the Joint Petitioners' request for special treatment, and adopt BellSouth's proposed language on Item 97.[38]

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

[38] Regarding Item 97, the Joint Petitioners assert that they will accept the TRA's decision in the BellSouth/Deltacom arbitration proceeding (Docket No 03-00119) What the Joint Petitioners neglected to state is

Item 100: Should CLEC be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination? (Attachment 7, Section 1.7.2)

Two important agreed upon contractual provisions should not be forgotten when deciding Item 100 First, Item 100 is limited to a Joint Petitioner's failure to pay undisputed amounts that are past due *See* BellSouth Exhibit A, Attachment 7, Section 1.7.2, (Tr at 123). Second, BellSouth will not commence any suspension or disconnection activity involving amounts that are subject to a billing dispute. *Id.* Attachment 7, Section 2 1 2 ("All Valid Disputes . shall be posted so as to remove disputed amounts from the collections process prior to that process being initiated ") Given these circumstances, if a Joint Petitioner receives a notice of suspension or termination from BellSouth as a result of the Joint Petitioner's failure to timely pay amounts that are not subject to a billing dispute, the Joint Petitioner should be required to pay all undisputed amounts that are past due as of the date of the pending suspension or termination action Again, Joint Petitioners know when they receive bills, they know when the bills are due, and they admit that the amount of such bills can be predicted with a reasonable degree of accuracy. *See* Item 97 discussion, *supra* Further, nothing precludes the Joint Petitioners from contacting BellSouth with any questions they may have regarding amounts owed and BellSouth will cooperate to promptly answer any billing related questions. *Id* (Tr. at 701-704)

It is important to recognize that payment of non-disputed charges is due by the Payment Due Date, which is clearly posted on every invoice/bill that the Joint Petitioner receives from BellSouth (Tr at 696-697). Once an invoice/bill becomes past due, BellSouth commences

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that they have rejected the payment and deposit terms that DeltaCom and BellSouth actually agreed upon and which are included in DeltaCom's interconnection agreement

collection (or "treatment") action, such as sending suspension notices, in an effort to collect the undisputed amounts that are past due (Tr at 690-694).

The Joint Petitioners apparent objection to BellSouth's proposed language for Item 100, is a concern about "guessing" what additional past due amounts must be paid to avoid suspension or termination. (Tr. at 121-122). BellSouth has eliminated any legitimate concern by revising it proposed language to remove the Joint Petitioners' paranoia about perceived "guesswork" Specifically, BellSouth is willing to agree that, upon request, BellSouth will advise of the additional undisputed amounts that have become past due since the issuance of the original notice of suspension or termination *See* BellSouth Exhibit A, Attachment 7, Section 1 7.2 The Joint Petitioners have failed to respond to BellSouth's revised language on this Item

The Authority should continue to allow BellSouth to protect its financial interest by allowing BellSouth to discontinue providing service to any Joint Petitioner that fails to timely pay for services rendered, and therefore should adopt BellSouth's proposed language on Item 100 Holding otherwise would be to allow the Joint Petitioners to have a revolving extension for payment of undisputed, past due amounts.

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

The maximum amount of a deposit should not exceed an average of two months of actual billing for existing customers or two months estimated billing for new customers [39] BellSouth's policy of reserving the right to require a deposit of no more than two months of a CLEC's actual or estimated billings is consistent with industry standards, including the Joint Petitioners' deposit requirements (Xspedius Tariff No § 2.5 2, KMC Telecom Tariff § 2.5.4), and how BellSouth treats its retail customers (BellSouth General Subscriber Service Tariff, A2.4 2)

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

It is undisputed that BellSouth has a right to a deposit (or to demand an additional deposit) if any Joint Petitioner fails to meet the specific and objective deposit criteria set forth in Attachment 7, Section 1.8.5.[40] Further, it cannot be disputed that a deposit reduces BellSouth's potential losses if a Joint Petitioner (or any CLEC that adopts a Joint Petitioner's interconnection agreement) ceases to pay its bills Specifically, a two months deposit is necessary because BellSouth must wait at least two months after service is rendered before BellSouth can disconnect service for non-payment. It takes BellSouth approximately 74 days to disconnect a CLEC for non-payment under the provisions of the agreement. (Blake Rebuttal Testimony at 16)

From a financial risk perspective, reserving the right to require a deposit of up to two months billing is necessary and demonstrates sound business judgment, as recognized by the Joint Petitioners adopting this same standard for their own customers. From a practical perspective, the Joint Petitioners' opposition to BellSouth's proposed maximum deposit amount disregards the parties' experience. First, the Joint Petitioners testified that BellSouth can demand up to a two-month's deposit under the Joint Petitioners' existing interconnection agreements (Tr at 130-131) Second, two of the three Joint Petitioners acknowledged having existing deposits with BellSouth that are substantially less than two months billing. (Falvey, Depo. at 314). In fact, Mr Russell acknowledged that NuVox's current deposit with BellSouth (a $1 million letter of credit and $500,000 cash) is substantially less than two months billing (around $6 million). (Tr at 130-131). Third, and completely contrary to the assertion that BellSouth is continually trying to extract deposits from the Joint Petitioners (Tr. at 418), witness

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

Russell testified that in the past BellSouth agreed to ***lower*** NuVox's deposit by between $500,000 and $1 million. (Russell Depo at 221-224)

Further, the Joint Petitioners' request for a lower maximum deposit amount for existing CLECs overlooks the fact that a new CLEC may be in stronger financial shape than an existing CLEC and that the financial health of an existing CLEC can deteriorate. In addition to being consistent with the industry norm, a two month maximum deposit amount is reasonable given that BellSouth will refund, return, or release any security deposit within 30 calendar days of determining that a Joint Petitioners' creditworthiness indicates a deposit is no longer necessary. *See* Attachment 7, Section 1.8.10. Accordingly, the Authority should approve BellSouth's language for Item 101

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

As a general matter, a CLEC deposit should not be reduced by amounts owed by BellSouth to such CLEC. (Blake Rebuttal Testimony at 18) The CLEC's remedy for addressing late payment by BellSouth should be suspension/termination of service and/or application of interest/late payment charges *Id* BellSouth is within its rights to protect itself against uncollectible debts on a non-discriminatory basis *Id* Deposits are needed to mitigate the risk that a CLEC may not be able to fulfill its financial obligations in the future. *Id* BellSouth attempts to collect a deposit amount that is consistent with that risk. For BellSouth to do otherwise would not protect the interests of BellSouth's shareholders, employees, or other customers.

Moreover, BellSouth *must* protect against unnecessary risk given its obligation to provide service to all requesting CLECs. The Joint Petitioners have no similar obligation (Blake Rebuttal Testimony at 18). Further, on a monthly basis, the amounts the Joint Petitioners

owe BellSouth substantially exceeds the amounts BellSouth owes the Joint Petitioners As the Authority recognized in the BellSouth/DeltaCom arbitration, the parties are not similarly situated, and BellSouth's need for a deposit to reduce its financial exposure cannot be credibly debated, nor should it be subject to an ill defined off set provision.

Additionally, the Joint Petitioners' proposal on Item 102 is administratively unmanageable and overly simplistic (Blake Rebuttal Testimony at 19). It also fails to exclude amounts that are subject to a valid billing disputes submitted by BellSouth. *See* Joint Petitioner Exhibit A, Attachment 7, Section 1 8.3.1. In fact, the Joint Petitioners' lead witness on this issue unequivocally testified that the Joint Petitioner's offset proposal ***does not exclude amounts that are subject to a billing dispute.*** (Tr at 355-357). This unreasonable stance should be reason enough alone for the Authority to reject the Joint Petitioners' proposed language for issue 102. Similarly, the Joint Petitioners' language misses the mark as deposits are established to avoid the risk of non-payment due to default, not a risk of slow-payment. Slow payment should be treated through suspension/termination of service or the application of late payment charges (Blake Rebuttal Testimony at 18) Moreover, Joint Petitioners concede that their offset proposal is effectively a deposit reduction mechanism (Tr at 357). The parties have already agreed to a deposit refund provision *See* Attachment 7, Section 1.8 10 This is yet another reason why the Joint Petitioners' proposed offset provision is unnecessary and should be rejected.

That said, in an effort to compromise, BellSouth is willing to agree that when BellSouth makes a deposit demand (or a request for additional deposit) BellSouth will reduce its deposit demand by the undisputed amount past due (if any) owed by BellSouth to any Joint Petitioners for payments pursuant to Attachment 3 of the Interconnection Agreement. (Blake Rebuttal Testimony at 18) (although Mr. Blake's testimony limits the offset to amounts owed for

reciprocal compensation, BellSouth has expanded its compromise offset provision to include all undisputed amounts owed to Joint Petitioners under Attachment 3) Upon BellSouth's payment of such amount, Joint Petitioners would be required to immediately increase the deposit in an amount equal to such payment(s) *Id* BellSouth does not understand why this compromise language is unacceptable.

Item 103: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days? (Attachment 7, Section 1.8.6)

To protect its financial interests, BellSouth should be able to terminate service if a Joint Petitioner fails to pay (or properly dispute) a deposit demand within 30 calendar days. It is undisputed that BellSouth has a contractual right to a deposit. *See* Attachment 7, Section 1 8 It is undisputed that the parties have agreed to objective and specific criteria regarding deposits that govern BellSouth's right to demand a deposit *See* Attachment 7, Section 1.8 5; Tr. at 137. Further, it is undisputed that if a Joint Petitioner satisfies the deposit criteria, then BellSouth will refund the deposit amount within 30 calendar days, plus accrued interest. *See* Attachment 7. Section 1.8.10. Accordingly, it logically follows that if a Joint Petitioner fails to satisfy the objective and specific deposit criteria, thereby triggering BellSouth's right to a deposit, then BellSouth should be permitted to terminate service if a Joint Petitioner refuses to respond to a deposit demand within 30 calendar days Termination for non-payment is not a novel concept and is included in the Tennessee retail tariffs of both BellSouth and the Joint Petitioners *See* NewSouth Tariff, §2 7 3; KMC Tariff §2 5 5; Xspedius Tariff § 2 7

Given such agreed upon contractual provisions, 30 calendar days is a reasonable time period for a Joint Petitioner to satisfy an undisputed demand for a deposit.[41] Every month,

[41] Joint Petitioners remain confused about the scope of Item 103 (Tr Vol 1 at 140 ("Q [Item] 103, again, let's be clear, we're not talking about a deposit demand that's disputed, are we? Right? We are talking about a

BellSouth provides services worth millions of dollars to the Joint Petitioners. (Tr. at 99-100). The Joint Petitioners are valued customers, however, BellSouth has a responsibility to its shareholders and to its other customers to avoid unnecessary business risks Continuing to provide service to a Joint Petitioner that fails to respond to a deposit demand (or a request for an additional deposit) is such a risk Accordingly, the Authority should adopt BellSouth's proposed language on Item 103

Item 104: What recourse should be available to either Party when the Parties are unable to agree on the need for or amount of a reasonable deposit? (Attachment 7, Section 1.8.7)

If a Joint Petitioner does not agree with the amount or need for a deposit demanded by BellSouth, the Joint Petitioner may file a petition with the Authority seeking resolution of such dispute and BellSouth will cooperate in pursuing an expedited resolution of the dispute If there is disagreement over BellSouth's deposit demand, which only comes into play if a Joint Petitioner fails to establish specific and objective deposit criteria, then it is appropriate for the party disputing or disagreeing with the deposit demand to seek resolution of such dispute (Tr. at 735). During the pendency of such a proceeding, BellSouth will not terminate service, provided that the Joint Petitioner posts a payment bond. (Blake Rebuttal Testimony at 22). In an effort of compromise, and to address the Joint Petitioners' incorrect impression that the bond requirement somehow makes a CLEC the "loser" of a pending deposit dispute proceeding, BellSouth has recently reduced its bond requirement to one-half of its deposit demand *See* BellSouth Attachment 7, Section 1 8 7

BellSouth has a responsibility to ensure that risk of nonpayment is minimized and posting a bond serves to minimize BellSouth's risk (Blake Rebuttal Testimony at 23) To

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deposit demand that's simply not paid? A If it's not paid, isn't that disputed?") Item 103 has nothing to do with disputes Rather Item 103 addresses BellSouth's rights if a Joint Petitioner disregards or simply ignores a deposit demand

minimize the risk of financial loss, it is reasonable to require a Joint Petitioner to post a bond while a deposit dispute is pending. Again, BellSouth's right to a deposit (or an additional deposit) hinges on a Joint Petitioner's failure to satisfy already-agreed to specific, independent and objective deposit criteria Attachment 7, Section 1 8.5. As such, it is unreasonable to expect BellSouth to remain completely, or inadequately, unsecured during the pendency of an Authority proceeding regarding the need for a deposit or additional deposit

In fact, to allow such a situation could encourage a Joint Petitioner (or a CLEC that adopts a Joint Petitioner's interconnection agreement) that is on the verge of bankruptcy, to file a complaint simply to avoid paying a deposit while such Joint Petitioner files for bankruptcy protection In the past two years, there have been instances in which BellSouth has asked a state commission to require a CLEC to pay a deposit where the CLEC has not done so. (Blake Rebuttal Testimony at 23) In some instances, while BellSouth was waiting for state commission action, the CLEC filed for bankruptcy (Blake Rebuttal Testimony at 23). The filing of bankruptcy stayed BellSouth's efforts to collect a deposit in such commission proceedings

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

CONCLUSION

The Authority should adopt BellSouth's positions on each of the issues in dispute. BellSouth's positions on these issues are reasonable and consistent with the Act, which cannot be said about the positions advocated by the Joint Petitioners. With few exceptions, the issues

that the Joint Petitioners have brought before the Authority have little or nothing to do with the Joint Petitioners providing local service to Tennessee consumers Rather, the Joint Petitioners' issues serve mainly to shift their costs of doing business in Tennessee to BellSouth. For the foregoing reasons, BellSouth requests that the Authority rule in BellSouth's favor on each arbitration issue.

Respectfully submitted,

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BELLSOUTH
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 [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 [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

[1] Revised for filing 04/01/05

Item No 5, Issue No G-5 [Section 10 4 2] If the CLP elects not to place in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the risks that result from this business decision?

10 4.2 [BellSouth Version] Limitations in Tariffs 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] How should indirect, incidental or consequential damages be defined for purposes of the Agreement?

10 4 4 [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.

Item No 7, Issue No G-7 [Section 10 5] What should the indemnification obligations of the parties be under this Agreement?

10 5 [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

Item No 9, Issue No G-9 [Section 13 1] Should a party be allowed to take a dispute concerning the interpretation or implementation of any provision of the agreement to a Court of law for resolution without first exhausting its administrative remedies?

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.**

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 [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 [Sections 1 11 1 - 1 11 6] 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?

1 11 1 [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?

1.13 [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 [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 [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 [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 [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.**

Item No 51, Issue No 2-33 [Sections 5 2 6, 5 2 6 1] (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?

5 2 6 [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 [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 10 1 (KMC), 10 8 1 (NSC/NVX), 10 13 (XSP)] Should BellSouth be allowed to charge the CLP a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

10 10 1 [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

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 [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 [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

Item No 97, Issue No 7-3 [Section 1 4] When should payment of charges for service be due?

1 4 [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

Item No 100, Issue No 7-6 [Section 1 7 2] To avoid suspension or termination, should CLP be required to pay additional amounts that become past due after Notice of Suspension or Termination for Nonpayment is sent?

1 7 2 [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 Owned")**, is not received by the fifteenth (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 [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 [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.**

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 [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).

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 [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.**

SUPPLEMENTAL ISSUES
(ATTACHMENT 2)

Item No 108, Issue No S-1 How should the final FCC unbundling rules be incorporated into the Agreement?

Language to be provided by the Parties.

Item No 109, Issue No S-2 (A) How should any intervening FCC Order adopted in CC Docket 01-338 or WC Docket 04-313 be incorporated into the Agreement? (B) How should any intervening State Commission order relating to unbundling obligations, if any, be incorporated into the Agreement?

Language to be provided by the Parties.

Item No 110, Issue No S-3 If FCC 04-179 is vacated or otherwise modified by a court of competent jurisdiction, how should such order or decision be incorporated into the Agreement?

Language to be provided by the Parties.

Item No 111, Issue No S-4 What post Interim Period transition plan should be incorporated into the Agreement?

Language to be provided by the Parties.

Item No 112, Issue No S-5 (A) What rates, terms and conditions relating to switching, enterprise market loops and dedicated transport were "frozen" by FCC 04-179? (B) How should these rates, terms and conditions be incorporated into the Agreement?

Language to be provided by the Parties.

Item No 113, Issue No S-6 (A) Is BellSouth obligated to provide unbundled access to DS1 loops, DS3 loops and dark fiber loops? (B) If so, under what rates, terms and conditions?

Language to be provided by the Parties.

Item No 114, Issue No S-7 (A) Is BellSouth obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport? (B) If so, under what rates, terms and conditions?

Language to be provided by the Parties.

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2005, a copy of the foregoing document was served on the following, via the method indicated

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

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