BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 5, 2007

IN RE:	)	
	)	
JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP, NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF CHATTANOOGA, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH	)	DOCKET NO. 04-00046

FINAL ORDER OF ARBITRATION AWARD

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This matter came before Chairman Ron Jones, Director Pat Miller and Director Sarah Kyle[1] of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the Panel of Arbitrators ("Panel" or "Arbitration Panel") assigned to this docket, on March 6, 2006, April 17, 2006, and May 15, 2006 for consideration of the *Joint Petition for Arbitration ("Joint Petition")* filed by NewSouth Communications, Inc. ("NewSouth"), NuVox Communications, Inc. ("NuVox"), KMC Telecom V, Inc. ("KMC V"), KMC Telecom III ("KMC III") (collectively, "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC ("Xspedius Switched") and Xspedius Management Co. of Chattanooga, LLC ("Xspedius Chattanooga") (collectively "Xspedius") (collectively "Joint Petitioners" or "CLECs").

Factual and Procedural History

On February 11, 2004, the Joint Petitioners filed a *Joint Petition for Arbitration* ("*Joint Petition*"), pursuant to Section 252(b) of the Telecommunications Act of 1996 ("1996 Act") and Chapter 1220-1-1, Rules and Regulations of Practice and Procedure, requesting arbitration of certain issues arising between the Joint Petitioners and BellSouth Telecommunications, Inc. ("BellSouth") in the negotiation of an interconnection agreement.

The *Joint Petition* states that the CLECs' interconnection agreements with BellSouth have expired, although the CLECs and BellSouth have agreed to continue operating pursuant to the rates, terms and conditions of their respective interconnection agreements until the Authority approves their replacement agreements. The *Joint Petition* sets forth 107 issues to be arbitrated and states that the CLECs and BellSouth began negotiations on September 6, 2003 and have reached agreement on many issues but that a number of other issues remain unresolved.

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[1] On February 24, 2006, a *Notice of Reassignment of Panels* was issued reassigning this docket to the Panel of Chairman Jones, Director Pat Miller and Director Sara Kyle due to the resignation of Director Deborah Taylor Tate on January 3, 2006.

On February 25, 2004, BellSouth filed its *Motion to Sever or Impose Procedural Restrictions* ("*Motion to Sever*"), and on March 2, 2004, the CLECs filed their response to BellSouth's *Motion to Sever*. On March 8, 2004, BellSouth filed its *Answer to the Petition for Arbitration*, and on March 12, 2004, BellSouth filed its motion for leave to file reply to the CLECs' response to BellSouth's *Motion to Sever* and BellSouth's proposed reply to petitioners' response to BellSouth's *Motion to Sever*.

On March 22, 2004, the Panel assigned to this docket voted unanimously to appoint the General Counsel or his designee to serve as Pre-Arbitration Officer for the purposes of considering the acceptance of the arbitration, the adoption of issues and parties to each issue, a procedural schedule, BellSouth's *Motion to Sever* and any other matters necessary to prepare the docket for arbitration. On May 25, 2004, the Pre-Arbitration Officer issued an *Order* denying BellSouth's *Motion to Sever* in part and establishing a procedural schedule. On June 8, 2004, the Pre-Arbitration Officer issued an *Order* accepting the CLECs' *Joint Petition*. On June 25, 2004, the parties filed their pre-filed direct testimony along with a revised Issues Matrix.

On July 15, 2004, the parties filed a *Joint Motion to Hold Proceeding in Abeyance ("Abeyance Motion")* requesting the Authority to hold this docket in abeyance and suspending all deadlines for a period of 90 days. The *Abeyance Motion* specified that no new issues may be raised other than those resulting from the parties' negotiations concerning the post-*USTA II*[2] regulatory framework. The *Abeyance Motion* was granted by the Pre-Arbitration Officer in an order issued on July 16, 2004.

On September 23, 2005, two of the Joint Petitioners, NuVox Communications, Inc. and Xspedius Communications, LLC, ("Plaintiffs") filed a complaint in federal court alleging that Authority orders related to the FCC's *TRRO* effectively nullified the Authority's order granting the *Abeyance Motion*. On October 17, 2005, the Authority filed a *Motion to Dismiss Complaint*

[2] *United States Telecom Ass'n. v FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

on several grounds, including lack of subject matter jurisdiction and failure on the part of the Plaintiffs to exhaust their administrative remedies. On December 21, 2005, the district court dismissed the action without prejudice upon the Plaintiffs' own motion to dismiss.[3]

On January 19, 2005, a Status Conference was held during which the parties announced that they had settled Issue Nos. 27, 46, 57 and 106. On January 24, 2005, the Joint Petitioners filed a revised Issues Matrix, revised Exhibit A (disputed contract language by section) and an Errata sheet.

Arbitration Hearing

The Hearing in this proceeding was conducted from January 25, 2005 through January 27, 2005 before the Panel of Arbitrators: Chairman Pat Miller, Director Deborah Taylor Tate[4] and Director Ron Jones. In attendance at the Hearing were the following parties as represented by counsel:

> Joint Petitioners - **H. LaDon Baltimore, Esq.**, Farrar & Bates, LLP, 211 Seventh Avenue North, Suite 420, Nashville, TN 37219; **John J. Heitmann, Esq.** and **Garret R. Hargrave, Esq.**, Kelley Drye & Warren LLP, 1200 19th Street, NW, Suite 500, Washington, DC 20036
>
> BellSouth - **Guy M. Hicks, Esq.**, 333 Commerce Street, #2101, Nashville, TN 37201-3300; **James Meza** and **Robert A. Culpepper**, BellSouth Center – Suite 4300, 675 West Peachtree Street, N.E., Atlanta, GA 30375

The parties filed post-hearing briefs on April 15, 2005. In addition, on April 15, 2005, the Joint Petitioners and BellSouth (together the "Parties") filed the *Joint Motion to Move Issues to the Generic Proceeding* requesting that certain arbitration issues be moved to the Generic Proceeding[5] and that certain issues be declared moot. The Parties asserted that issues related to the *Triennial*

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[3] The Authority asserted that the Court lacked subject matter jurisdiction because the request of the Plaintiffs was not a reviewable action under 47 U.S.C. § 252(e)(6) and that in the absence of the Authority completing the arbitration and deliberating on an interconnection agreement, the Plaintiffs had failed to exhaust their administrative remedies before pursing the federal court action. *See NuVox Communications, Inc. v. Tennessee Regulatory Authority*, Case No. 3:05-cv-0742 (M. D. Tenn. Dec. 21, 2005).

[4] Director Tate resigned her position as director with the Tennessee Regulatory Authority on January 3, 2006.

[5] *In re: BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 04-00381 ("Generic Proceeding" or "Generic Docket").

Review Remand Order ("*TRRO*")[6] will be considered in the Generic Proceeding and that one of the issues proposed for the Generic Proceeding is "substantially similar" to Arbitration Item 23 ("Item 23")[7] in the Parties' arbitration.[8] The Parties requested that, to the extent that they do not negotiate otherwise, Item 23 be moved to the Generic Docket for consideration and the resolution of Item 23 be folded back into the arbitration so that it could be properly incorporated into the resulting agreements.

In the *BellSouth Telecommunications, Inc. Post-Hearing Brief*, BellSouth requested that Arbitration Items 26, 36, 37, 38, and 51[9] be moved to the Generic Proceeding because similar, if not identical, issues were being raised in that proceeding.[10] BellSouth contended that it would be a waste of the Authority's and the Parties' time to address these similar issues in the context of a Section 252 arbitration when they are being raised in the Generic Docket. The *Joint Petitioners' Post-Hearing Brief* did not mention the possibility of considering these issues outside of the arbitration.

On May 11, 2005, the Panel heard oral argument on the *Joint Motion to Move Issues to the Generic Proceeding* and BellSouth's request to move Arbitration Items 26, 36, 37, 38, and 51 to the Generic Proceeding. After hearing the oral argument of the Parties, the Panel voted unanimously to grant the *Joint Motion to Move Issues to the Generic Proceeding.* The Panel also

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[6] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, 20 FCC Rcd. 2533 (2004) ("*Triennial Review Remand Order*" or "*TRRO*").

[7] Item 23: What rates, terms and conditions should govern the CLECs' transition of existing network elements that BellSouth is no longer obligated to provide as UNEs to other services?

[8] *See* Generic Proceeding, Docket No. 04-00381, *Joint Issues Matrix* (September 9, 2005).

[9] 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?
Item 36: (A) How should Line Conditioning be defined in the Agreement? (B) What should BellSouth's obligations be with respect to Line Conditioning?
Item 37: Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less?
Item 38: Under what rates, terms and conditions should BellSouth be required to perform Line Conditioning to remove bridged taps?
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?

[10] *BellSouth Telecommunications, Inc. Post-Hearing Brief*, p. 7 (April 15, 2005).

voted unanimously that the Joint Petitioners must respond by May 20, 2005 to BellSouth's request to move Arbitration Items 26, 36, 37, 38 and 51 to the Generic Docket, and that the request would be deliberated by the Arbitration Panel at a later date.

On May 20, 2005, the Joint Petitioners filed *Joint Petitioners' Opposition to BellSouth's Request to Remove Certain Issues from Joint Petitioners' Section 252 Arbitration Proceeding ("Joint Petitioners' Opposition").*[11] On June 7, 2005, BellSouth filed *BellSouth Telecommunications Inc. Reply to Joint Petitioners' Opposition.* On July 18, 2005, the Joint Petitioners submitted their *Joint Petitioners' Rebuttal to BellSouth's Reply Regarding Removing Certain Issues from the Joint Petitioners' Section 252 Arbitration Proceeding.*

At a regularly scheduled Authority Conference held August 8, 2005, the Panel voted unanimously to deny BellSouth's request to move Arbitration Items 26, 36, 37, 38 and 51 to the Generic Docket. The Arbitration Panel rejected BellSouth's arguments that the issues should be moved to avoid inconsistent decisions and to avoid prejudice to other CLECs and found that the Joint Petitioners are entitled to have the issues decided within the context of the arbitration.

In addition, a majority of the Arbitration Panel found that it is unclear whether the arbitration issues BellSouth is requesting to be moved are identical to the issues in the Generic Docket. Instead of granting BellSouth's alternative request to defer Items 26, 36, 37, 38 and 51 until the conclusion of the Generic Docket, a majority of the Arbitration Panel found that it would be beneficial to hear testimony of the witnesses in the Generic Docket and voted to hold deliberations on Arbitration Items 26, 36, 37, 38 and 51 in abeyance until the conclusion of the hearing in the Generic Docket, which was scheduled to begin September 13, 2005.[12]

[11] On May 25, 2005, the Joint Petitioners filed a corrected version with the Authority which corrected footnotes 1 and 11.
[12] Chairman Jones opposed deferring the proceedings because the docket is ripe for a decision, and he did not recognize any benefit derived from the delay. Chairman Jones also noted that holding the decision in abeyance may cause an unwarranted deleterious effect in subsequent negotiations between BellSouth and the Joint Petitioners.

On February 11, 2005, the parties notified the Authority that they had resolved Items 43, 50, 95 and 99 and reached a conditional settlement of Items 63, 94 and 96. On July 6, 2005 the parties notified the Authority that they had settled Items 2 and 104.

The March 6, 2006 Authority Conference

At a regularly scheduled Authority Conference held on March 6, 2006, the Arbitration Panel deliberated Item 26 (Issue 2-8).

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

Position of the Parties

The Joint Petitioners aver that BellSouth should provide UNEs and combinations of UNEs commingled with services, network elements and any other offering it is required to provide pursuant to Section 271. The Joint Petitioners state that Federal Communications Commission ("FCC") rules "...do not allow BellSouth to impose commingling restrictions on stand-alone loops and EELs."[13]

BellSouth avers that "...there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the 1996 Act."[14] BellSouth opines further that unbundling and commingling are Section 251 obligations, and that services not required to be unbundled are not subject to Section 251. BellSouth further opines that the FCC has clarified that there are network elements identified in Section 271 that are not subject to Section 251 unbundling requirements. BellSouth opines that it is "only obligated to permit commingling between UNEs and UNE combinations (subject to section 251) and wholesale facilities and services."[15]

[13] Joint Petitioners' Supplemental Direct Testimony, p. 51 (October 29, 2004).
[14] Kathy Blake, Pre-Filed Direct Testimony, p. 42 (June 25, 2004).
[15] *Id. at* 43.

Deliberations and Conclusions

A majority of the Panel[16] found that the competitive checklist in Section 271(2)(B) requires that local loop transmission from the central office to customer premise, local transport from the trunk side of a switch and local switching are to be unbundled. The majority further found that while the FCC may have initially concluded in paragraph 584 of the *Triennial Review Order* ("*TRO*")[17] that incumbent local exchange carriers ("ILECs") are required to provide UNEs and combinations of UNEs, the FCC ultimately issued an errata clarifying that this only applied to commingling of UNEs and UNE combinations with other wholesale facilities and services including services offered for resale. The majority relied on the *USTA II* decision which in part provided that "...the commission decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements."[18]

Based upon the above findings, a majority of the Panel voted to reject the Joint Petitioners' position and, therefore, not require BellSouth to commingle UNEs or UNE combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act. In addition, the Panel majority voted that consistent with paragraph 27 of the *Errata* to the *TRO,* BellSouth must permit competitive local exchange carriers ("CLECs") commingling of UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to Section 251(c)(4) of the 1996 Act. However, the Panel clarified that this does not provide CLECs a basis to obtain UNE-P services.

[16] Director Jones did not vote in favor of the prevailing motion and filed a separate opinion explaining his position.
[17] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket 01-338, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16,978 (2003), as modified by *Errata*, 18 FCC Rcd. 19020 (2003), vacated in part, *U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*Triennial Review Order*" or "*TRO*").
[18] *USTA II* at 589.

The April 17, 2006 Authority Conference

At a regularly scheduled Authority Conference held on April 17, 2006, the Arbitration Panel deliberated 15 of the remaining 19 unresolved issues.

ITEM 4 (ISSUE G-4): What should be the limitation on each party's liability in circumstances other than gross negligence or willful misconduct?

Position of the Parties

The Joint Petitioners argue that the Parties should agree to a reasonable limitation on their exposure to risk in cases other than gross negligence and willful misconduct. The Joint Petitioners propose that in cases other than gross negligence and willful misconduct by the other party, liability should be limited to a maximum of a 7.5% recovery to an injured party, calculated from the total revenue received and/or billed as of the date the negligence took place.[19]

BellSouth contends that the limitation on each party's liability in circumstances other than gross negligence or willful misconduct should be the industry standard limitation, which limits the liability of the provisioning party to a credit for the actual cost of the services or functions not performed or improperly performed. BellSouth argues that the Joint Petitioners' position is inconsistent with how they treat their own customers, in that the Joint Petitioners' retail tariffs limit their liability to the actual cost of the services or function not performed.[20]

BellSouth contends that its proposed language complies with the standard regarding the scope of an ILEC's liability to a CLEC, which was set forth in an order issued by the FCC Wireline Competition Bureau ("*Virginia Arbitration Order*" or "*Order*").[21] In the *Virginia*

[19] Testimony of the Joint Petitioners, pp. 26-28 (June 25, 2004).
[20] Kathy Blake, Pre-Filed Direct Testimony, p. 12 (June 25, 2004).
[21] *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration*, CC Docket No. 00-218, *Memorandum Opinion and Order*, 17 FCC Rcd. 27,039 (2002) ("*Virginia Arbitration Order*").

Arbitration Order, the FCC determined that an ILEC should treat a CLEC in the same manner as it treats its own retail customers.[22]

Deliberations and Conclusions

Both BellSouth and the Joint Petitioners agree that each party's liability should be limited in circumstances other than gross negligence or willful misconduct. The parties, however, disagree as to the amount and method of recovery for an injured party. BellSouth proposes language that would limit its liability for negligent acts to a bill credit for the actual cost of the services or functions not performed or performed improperly. According to BellSouth, it limits liability to retail customers to bill credits in this manner and asserts that such practice is the industry standard. The Joint Petitioners, however, seek to expand the limitation of liability to 7.5% of amounts paid or payable on the day the claim arose. The Joint Petitioners' proposal is inconsistent with the FCC's *Virginia Arbitration Order* where the Wireline Competition Bureau determined that it was appropriate for an ILEC to treat a CLEC in the same manner in which the ILEC treats its own retail customers.

The Panel voted unanimously to accept BellSouth's language, which is identical to both language in other approved interconnection agreements and the liability provisions contained in BellSouth's approved tariffs for end users.

[22] *BellSouth Telecommunications, Inc. Post-Hearing Brief,* p. 13 (April 15, 2005) (citing *Virginia Arbitration Order* at ¶ 709).

ITEM 5 (ISSUE G-5): **(A) (Originally Joint Petitioners' statement of issue) To the extent that a party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future), should it be obligated to indemnify the other party for liabilities not eliminated?**

(B) (Originally BellSouth's statement of issue) If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks?

Position of the Parties

The Joint Petitioners contend that BellSouth should not be able to dictate the terms of service between the Joint Petitioners and their customers by holding them liable for failing to mirror BellSouth's limitations of liability in the Joint Petitioners' own End User tariffs and/or contracts.[23] The Joint Petitioners assert that they are committed to adhering to standards of due care, commercial reasonableness and mitigation in their tariffs and contracts. The Joint Petitioners, however, should not be forced to include terms in their tariffs and contracts that are as stringent as BellSouth's limitation of liability provisions.[24]

BellSouth asserts that a CLEC should bear the risk of loss arising from its decision not to limit its liability to its end users in accordance with industry norms. According to BellSouth, the language it proposes is in the Joint Petitioners' current agreement and has never been the subject of any dispute.

Deliberations and Conclusions

The Panel found that given the obligatory nature of this interconnection agreement, BellSouth should not be subject to liability in excess of any amounts it would have to pay pursuant to standard industry limitations. Further, the Panel reasoned that the Joint Petitioners are free to negotiate limitation of liability terms with their end users that are more favorable to the consumer

[23] Testimony of the Joint Petitioners, p. 30 (June 25, 2004).
[24] *Joint Petitioners' Post-Hearing Brief*, pp. 82-83 (April 15, 2005).

than those offered by standard industry limitations, but they do so at their own risk. The Panel noted that Joint Petitioners can also negotiate with their end users for terms equal to or less than standard industry limitations.

Based on these findings, the Panel voted unanimously that if a party does not include specific limitation of liability terms in its tariffs and end user contracts consistent with standard industry limitations, the other party should not be responsible for liabilities not limited. The party that fails to include standard industry limitations in its tariffs or end user contracts should also bear the resulting risks.

ITEM 6 (ISSUE G-6): **(A) (Originally Joint Petitioners' statement of issue) Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customers/End Users resulting directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance of obligations set forth in the Agreement are not indirect, incidental or consequential damages?**

(B) (Originally BellSouth's statement of issue) How should indirect, incidental or consequential damages be defined for purposes of the Agreement?

Position of the Parties

The Joint Petitioners argue that their proposed language is needed to avoid reading the limitation of liability provisions in the Agreement in such a way that would shield BellSouth from liability for claims or suits for damages incurred by the Joint Petitioners' customers or the Joint Petitioners vis-à-vis its customers (situations in which Joint Petitioners are held liable to its customers) for damages actually caused by BellSouth. The Joint Petitioners assert that, in any contract, each party should be liable for damages that are the direct and foreseeable results of its actions. According to the Joint Petitioners, "[s]uch liability is an appropriate risk to be borne by any service provider in a contract such as the Agreement that clearly envisions that the effect of

performance or nonperformance of such services will be passed through to ascertainable third parties related to the other party to the contract."[25] As such, the Joint Petitioners assert that BellSouth should not be allowed to limit its liability to End Users or to the Joint Petitioners vis-à-vis End Users for damages that are direct and foreseeable results of BellSouth's own actions. The proposed language would be subject to the foreseeability and legal and proximate cause limitations that the Joint Petitioners have proposed for inclusion as well as those included in the Agreement's general liability provisions.

BellSouth contends that indirect, incidental or consequential damages should be defined according to pertinent state law rather than the confusing and lengthy definition proposed by the Joint Petitioners. According to BellSouth, the Joint Petitioners want to attach liability to certain circumstances even if the damages are indirect, incidental or consequential, which would effectively eviscerate the parties' agreed-upon limitation of liability. BellSouth maintains that it makes no sense for the Joint Petitioners to argue on the one hand that there should be no liability for indirect, incidental or consequential damages but then to alter the operative terms so that the result could be the opposite of that to which the parties have agreed.[26]

Deliberations and Conclusions

The Panel voted unanimously to give the parties additional time to negotiate this issue because it was unclear what remained for consideration by the Panel in light of the parites agreement and the Panel's decisions on other possibly related liability issues. The Panel requested that if the negotiations are unsuccessful that final best offers ("FBOs") be submitted to the Authority within 30 days of deliberations.[27]

[25] Testimony of the Joint Petitioners, p. 34 (June 25, 2004).
[26] Kathy Blake, Supplemental Direct Testimony, pp. 26-31 (October 29, 2004).
[27] BellSouth advised the Authority in a filing dated May 18, 2006 "that the parties have resolved Item 6 by agreement and are therefore not filing BFOs." *See BellSouth Telecommunications, Inc.'s Best and Final Offer*, p. 1 (May 18, 2006).

ITEM 7 (ISSUE G- 7): What should the indemnification obligations of the Parties be under the Agreement?

Position of the Parties

The Joint Petitioners offer language which would mandate that the party providing service under the Agreement should be indemnified, defended and held harmless by the party receiving services against any claim for libel, slander or invasion of privacy arising from the content of the receiving party's own communications. The Joint Petitioners also propose that the receiving party should be indemnified, defended and held harmless by the providing party against any claims, loss or damage to the extent reasonably arising from (1) the providing party's failure to abide by applicable law, or (2) injuries or damages arising out of or in connection with the Agreement to the extent caused by the providing party's negligence, gross negligence or willful misconduct.[28]

BellSouth proposes that the receiving party 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 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.'[29]

Deliberations and Conclusions

The Panel found that neither party, with exception of liability discussed in Item 5, should be liable for the actions of the other party that result in loss or damages. The Panel voted unanimously that the interconnection agreement should contain indemnification language that serves to indemnify either party in the instance that the other party's actions result in loss or damages to the first party, including loss or damages resulting from claims of third parties.

[28] Joint Petitioners' Supplemental Direct Testimony, p. 32 (October 29, 2004).
[29] *BellSouth Telecommunications, Inc. Post-Hearing Brief*, pp. 26-27 (April 15, 2005).

ITEM 9 (ISSUE G-9): **Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the Interconnection Agreement?**

Position of the Parties

The Joint Petitioners argue that either party should be able to petition the Authority, the FCC or a court of law for resolution of a dispute. The Authority should not foreclose any legitimate venue for resolving disputes. BellSouth can force carriers into heavily discounted, non-litigated settlements even if the dispute is regional in nature, because the disputed amounts in each state may be too low for the Joint Petitioners to justify the cost of nine separate litigations. The Joint Petitioners argue that courts of law have unquestioned jurisdiction to entertain such disputes, and in certain cases they may be equipped to resolve disputes more efficiently than litigating before nine separate state commissions or waiting for the FCC to decide whether or not it will accept an enforcement role. The parties should decide on a case-by-case basis the appropriate venue for resolving each dispute. Courts may be better equipped to handle some types of disputes that would heavily tax the Authority's expertise and resources, such as: resolution of intellectual property and tax issues; determination of negligence, willful misconduct or gross negligence; petitions for injunctive relief and claims for damages. A court can always defer to the expertise of the state or federal commission under the doctrine of primary jurisdiction if these complaints are brought directly to courts.[30]

BellSouth maintains that the Authority or the FCC should resolve disputes over the interpretation or implementation of the Agreement, but it offers to include language that would enable the Joint Petitioners to petition another venue for resolution of disputes that lie outside the expertise of the Authority or the FCC. BellSouth argues that since Section 252 gives the

[30] Joint Petitioners' Supplemental Direct Testimony, pp. 36-40 (October 29, 2004).

Authority power to approve interconnection agreements, the Authority should also resolve disputes regarding such agreements, and that the FCC may also resolve such disputes. Courts should not be the initial venue for these disputes, because they lack the necessary technical expertise and background.[31]

Deliberations and Conclusions

The Panel found that the Authority has jurisdiction to interpret and enforce interconnection agreements entered into pursuant to 47 U.S.C. § 252 and that Congress intended for issues related to the interpretation and enforcement of those interconnection agreements to come first to the state commissions. Nevertheless, the Panel also found that the Authority should not limit the right of a party to seek relief in a court of law, whether it be state or federal, that the party believes to have jurisdiction to resolve a dispute. Further, the Panel found that it is not the place of the Authority to define the jurisdiction of state and federal courts. Absent explicit language in the 1996 Act providing the TRA with exclusive authority to initially resolve enforcement and/or interpretation issues, the jurisdictional assessment for such authority should be left to the courts. While BellSouth argued that the Authority has ruled in Docket No. 00-00079 that it should resolve all disputes that arise under an interconnection agreement, the Panel found that the issue in that docket is distinguishable as it involved resolution of interconnection issues by an arbitrator, not another branch of government. Based on its findings, the Panel voted unanimously that courts of law may be included as forums for initial resolution of interconnection agreement disputes, although a court may decline to exercise jurisdiction or may determine that it lacks jurisdiction.

[31] Kathy Blake, Supplemental Direct Testimony, pp. 35-37 (October 29, 2004).

ITEM 12 (ISSUE G-12): Should the Agreement explicitly state that all existing state and federal laws, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?

Position of the Parties

The Joint Petitioners contend that:

> nothing in the Agreement should be construed to limit a Party's rights or exempt a Party from obligations under Applicable Law, as defined in the Agreement, except in such cases where the Parties have explicitly agreed to a limitation or exemption. This is a basic legal tenet and is consistent with both federal and Georgia law (agreed to by the parties), and it should be explicitly stated in the Agreement in order to avoid unnecessary disputes and litigation that has plagued the Parties in the past.[32]

The Joint Petitioners stress that the Parties have agreed to be bound by Georgia law and that their proposed language is intended to be a restatement of Georgia law. The Joint Petitioners' language incorporates the principle that "all laws of general applicability that exist at the time of contracting will apply to the contract unless expressly repudiated via an explicit exception or displaced by conflicting requirements."[33]

BellSouth expresses concern that under the Joint Petitioners' proposed language, a company would "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."[34] BellSouth contends that the Joint Petitioners seek to keep obligations fluid for purposes that appear inconsistent with the Act.[35]

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[32] *Joint Petition for Arbitration*, p. 16 (February 11, 2004).
[33] *Joint Petitioners' Post-Hearing Brief*, p. 18 (April 15, 2005).
[34] *BellSouth Telecommunications, Inc. Post-Hearing Brief*, p. 31 (April 15, 2005).
[35] Kathy Blake, Rebuttal Testimony, p. 33 (November 19, 2004).

Deliberations and Conclusions

The Panel found that adopting the Joint Petitioners' language would add nothing to the meaning of the Agreement nor would it serve to expedite the resolution of a dispute as to whether an obligation exists. In addition, the Panel found that BellSouth's proposed language unnecessarily limits relief to prospective relief starting upon amendment of the agreement. Such a timing determination should be made during the negotiations between the parties or at the time a dispute is resolved.

The Panel voted unanimously that the Agreement should not explicitly state that all existing state and federal laws, regulations, and decisions apply unless otherwise specifically agreed to by the parties. In addition, the Panel voted unanimously to remove, absent mutual agreement to the contrary, any language limiting a party's recovery to prospective relief only once it has been found that an obligation, right or other requirement exists.

ITEM 36 (ISSUE 2-18): **(A) (Originally Joint Petitioners' statement of issue) How should line conditioning be defined in the Agreement?**

(B) (Originally BellSouth's statement of issue) What should BellSouth's obligations be with respect to line conditioning?

ITEM 37 (ISSUE 2-19): **Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet?**

ITEM 38 (ISSUE 2-20): **Under what rates, terms and conditions should BellSouth be required to perform Line Conditioning to remove bridged taps?**

A majority of the Panel voted to defer consideration of these issues until the same type of issues are resolved in the Generic Proceeding.[36]

[36] Director Jones dissented from the prevailing motion and stated that he found the issues ripe for consideration.

ITEM 51 (ISSUE 2-33): **(B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?**

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

Position of the Parties

The parties have agreed to a 30-calendar day notice requirement prior to the date of the audit. The Joint Petitioners view this issue as having two remaining audit-implementation subparts on which they disagree with BellSouth. First, they insist on a "mutually agreed upon auditor," not an auditor chosen by BellSouth. Second, the Joint Petitioners want BellSouth, in the notification of audit sent to the CLEC, to identify the specific circuits to be audited. The Joint Petitioners want the "for cause" standard incorporated into the Agreement, including the requirement that BellSouth provide supporting documentation in the Notice of Audit, upon which it bases its "cause" to conduct the audit and identify the specific circuits to be audited.[37]

BellSouth agreed to the notice stating cause and thirty calendar days' notice for the audit. In response to the Joint Petitioners' proposal that BellSouth include in the Notice of Audit the specific circuits to be examined, BellSouth states that this would defeat the purpose of an audit.

As for the selection of the auditor, BellSouth states that there is no requirement in the *TRO* for mutual agreement in the selection of the auditor. BellSouth requested that this issue be moved into the Generic Proceeding, or at a minimum, defer resolution of this item until a decision is reached in that docket regarding this issue.[38]

Deliberations and Conclusions

The Panel first noted that in the *Supplemental Order Clarification*, the FCC determined that an ILEC should only undertake an audit when it has "a concern that a requesting carrier has not

[37] Joint Petitioners' Supplemental Direct Testimony, pp. 70-74 (October 29, 2004).
[38] *BellSouth Telecommunications, Inc. Post Hearing Brief*, pp. 49-52 (April 15, 2005).

met the criteria for providing a significant amount of local exchange service." [39] The Panel also noted that in the *Triennial Review Order*, the FCC discussed verification of certified eligibility status for cause.[40] The Panel found that neither order put forth the notice requirement requested by the Joint Petitioners. The Panel found that just as the CLECs may self-certify compliance with the eligibility criteria, BellSouth may self-certify cause.

As to the issue of whether the scope of the audit should be limited to the identified circuits, the Panel found based on its conclusion as to the previous issue and the FCC's explicit finding that the scope of the audit should be determined in accordance with standard audit practices, which typically includes the use of a sample, that the Joint Petitioners' position should be rejected.

As to the issue regarding the manner in which to identify the independent auditor, the Panel found that the Joint Petitioners' position is in direct conflict with the FCC's statement that the ILEC "may obtain and pay for an independent auditor to audit."[41]

Based on these findings, a majority of the Panel voted that:

(1) the agreement of the parties to a thirty calendar day notice prior to the date of the audit be accepted;

(2) BellSouth should not be required to identify the specific circuits to be audited;

(3) BellSouth should obtain and initially pay for the independent auditor;

(4) the auditor must perform its evaluation in accordance with AICPA standards; and

(5) reimbursement of audit costs should conform to the provisions of paragraph 627 of the *Triennial Review Order*.

[39] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCCR 9587, n.86 (June 2, 2000).
[40] *TRO* at ¶ 622.
[41] *Id.* at ¶ 626.

ITEM 65 (ISSUE 3-6): Should BellSouth be allowed to charge the CLEC a Transit Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?

Position of the Parties

The Joint Petitioners state that a Transit Intermediary Charge ("TIC") should not be charged based on the following reasoning: (1) the charge is an exploitation of market power because BellSouth is the only company capable of providing transit between all providers; (2) the TIC is discriminatory because BellSouth does not apply the charge uniformly to all CLECs; and (3) transiting is an interconnection issue covered by Section 251 of the Act and has been included in interconnection agreements for approximately eight years while the TIC is a purely additive non-TELRIC rate. The Joint Petitioners argue that transiting costs are already collected in TELRIC compliant rates, and if BellSouth believes that additional costs are incurred, BellSouth should submit a TELRIC cost study.[42]

BellSouth asserts that this issue is not appropriate for arbitration because the CLEC's request is not encompassed within BellSouth's obligations pursuant to Section 251 of the Act. BellSouth insists that it should not bear the cost that CLECs avoid by choosing not to interconnect directly to other carriers and further maintains that TELRIC rates do not cover the costs associated with the transit function, and therefore, the rates charged for such service would not need to be based on a TELRIC cost study.[43]

Deliberations and Conclusions

The Panel found that regardless of the classification of this service (Section 251 obligation or otherwise) the issue was properly before the Arbitrators as the record was clear through statements of both parties that the provisioning of transit service was a subject of the parties'

[42] Joint Petitioners' Supplemental Direct Testimony, pp. 81-83 (October 29, 2004).
[43] Kathy Blake, Rebuttal Testimony, p. 47 (November 19, 2004).

negotiations and part of the interconnection agreement initially offered to Joint Petitioners by BellSouth.[44]

Since the parties have agreed that BellSouth will provide transit services to Joint Petitioners, the Panel found that all that remained to be determined was whether BellSouth should be permitted to charge a TIC in addition to the TELRIC rates charged for tandem switching and transport and, if so, how the rate should be calculated. The Panel found that the services provided in exchange for the TIC are part of the Section 251 tandem switching UNE function. Because the tandem switching rate was set using a TELRIC compliant methodology, to the extent that the costs of providing the TIC services are not already incorporated into the existing tandem switching rate, the TIC rate should also be established using a TELRIC compliant methodology. Based on the above reasoning, the Panel determined that the Authority has jurisdiction over this issue rejecting BellSouth's argument that the issue is not a Section 251 obligation.

Based on these findings, the Panel voted unanimously that:

(1) Issue 65 is appropriate for arbitration;

(2) BellSouth should be allowed to charge a TIC for transiting tandem traffic;

(3) The TIC should be priced at TELRIC based rates;

(4) BellSouth should submit a TELRIC cost study for the TIC; and

(5) BellSouth should charge an interim rate and the parties should submit FBOs within 30 days from the date of deliberations on what the interim rate should be.[45]

[44] Transcript of Proceedings, v. I, p. 239 (January 25, 2006); Transcript of Proceedings, v. III, pp. 826-827 (January 27, 2006); CLEC Supplemental Direct, pp. 82-83. *See Conserv Limited Liability Corp. v. Southwestern Bell Tele. Co.*, 350 F.3d 482 (5th Cir. 2003).

[45] On May 18, 2006, the parties submitted FBOs for consideration by the Panel. At the June 26, 2006 Authority Conference, the Panel found that the FBOs were unresponsive and ordered the Parties to submit another set of FBOs. On July 17, 2006, the parties sent a letter to the TRA indicating that they had reached an agreement on the interim rate. On August 3, 2006, the parties sent a letter to the TRA indicating that they had reached agreement on a "permanent" TIC charge, thereby resolving Item No. 65 in its entirety.

ITEM 86B (ISSUE 6-3): How should disputes over alleged unauthorized access to Customer Service Record information be handled under the Agreement?

Position of the Parties

This issue involves a determination as to whether a party may terminate, refuse or suspend access to certain services as a result of the other party's alleged unauthorized access to Customer Service Record ("CSR") information. The Joint Petitioners submit that if a party disputes the other party's assertion of non-compliance, the party asserting the non-compliance must submit in writing to the accused party the basis for the assertion of non-compliance. If the accused party then fails to provide notice that appropriate corrective measures have been taken within a reasonable time or provide proof sufficient to persuade the other party that it erred in asserting the non-compliance, the accused party should proceed pursuant to the dispute resolution provisions set forth in the General Terms and Conditions, and the Parties should cooperatively seek expedited resolution of the dispute.[46]

BellSouth's position is that the party providing notice of the alleged impropriety should notify the offending party that additional applications of 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 calendar day following the date of the notice. In addition, the alleging party may, at the same time, provide written notice to the person(s) 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 calendar day following the date of the initial notice.[47]

[46] Joint Petitioners' Supplemental Direct Testimony, p. 85 (October 29, 2004).
[47] Scot Ferguson, Supplemental Direct Testimony, p. 11 (October 29, 2004).

Deliberations and Conclusions

The Panel found that neither party may terminate or suspend access absent recourse to the dispute resolution process. The Panel found that BellSouth's position regarding having the ability to terminate, refuse or suspend access initially with the burden on the other party to initiate the dispute resolution process proposed a severe remedy. Because of the severity of the remedy proposed by BellSouth and the fact that this issue involves *alleged* misconduct, the Panel found that the party seeking to terminate, refuse or suspend access for alleged unauthorized access to CSR information should use the dispute resolution process before terminating, refusing or suspending access. The Panel further found that it was reasonable to provide the responding party thirty days within which to answer the allegation. Finally, the Panel found that consistent with its earlier decisions, the parties may take such a dispute to a court of law.

The Panel voted unanimously to adopt the position of the Joint Petitioners and not allow BellSouth to terminate, refuse or suspend access to services upon the unanswered allegation of misuse of CSR information. The Panel also voted unanimously that allegations of misuse should be answered within thirty days and a party may avail itself of the court system to resolve such disputes.

ITEM 88 (ISSUE 6-5): What rate should apply for Service Date Advancement (a/k/a service expedites)?

Position of the Parties

The Joint Petitioners maintain that rates for Service Date Advancement (a/k/a/ service expedites) related to UNEs, interconnection or collocation should be set consistent with TELRIC pricing principles. This issue is appropriate for arbitration because the manner in which BellSouth provisions UNEs is within the parameters of Section 251.[48]

[48] Joint Petitioners' Supplemental Direct Testimony, pp. 87-88 (October 29, 2004).

BellSouth argues that its obligations under Section 251 of the Act are to provide certain services in non-discriminatory ("standard") intervals at cost-based prices. The Act does not require BellSouth to provide service in less than the standard interval, nor does it require BellSouth to provide service faster to its wholesale customers than to its retail customers. BellSouth contends that this issue is not appropriate for a Section 251 arbitration and should not, therefore, be included in the Agreement, nor should BellSouth be required to apply TELRIC rates to a function that is not contemplated by the Act.[49]

Deliberations and Conclusions

Section 251(c)(3) requires that carriers provide nondiscriminatory access to 251(c)(3) network elements on rates, terms and conditions that are nondiscriminatory. Thus, to the extent that BellSouth provides access to its retail division of Service Date Advancement, the Panel found that BellSouth must provide the same access to Joint Petitioners.

The Panel found that Service Date Advancement is a provisioning alternative and that because provisioning is a component of a Section 251 UNE, the alternative is also part of the UNE and should be priced using a cost-based methodology. Given this reasoning, the Panel determined that the Authority has jurisdiction over this issue rejecting BellSouth's argument that Service Date Advancement is not a Section 251 obligation.

Based on these findings, a majority of the Panel[50] voted that:

(1) Item 88 is appropriate for arbitration;

(2) Service Date Advancement should be priced at TELRIC based rates;

(3) within thirty days of deliberations, BellSouth should submit a TELRIC cost study for Service Date Advancement to be filed in the same docket as Item 65 (the TIC cost study); and

[49] Carlos Morillo, Supplemental Direct Testimony, p. 4 (October 29, 2004).

[50] Director Kyle dissented, finding that the appropriate resolution of this issue would be to require the parties to negotiate the appropriate rate for an additional thirty days. If the parties were unable to reach a negotiated rate at that time, then they should be ordered to submit final best offers.

(4) the parties shall file final best offers as to an appropriate interim rate, which will be subject to true-up, within thirty days of deliberations.[51]

ITEM 97 (ISSUE 7-3): When should payment of charges for service be due?

Position of the Parties

The Joint Petitioners maintain that payments for services rendered should be due thirty calendar days from receipt or website posting of a complete and fully readable bill or thirty calendar days from receipt or website posting of a corrected or retransmitted bill when correction or retransmission is necessary.[52]

BellSouth asserts that payment for services should be due on or before the next bill date. BellSouth claims that it cannot offer different customers different due dates. BellSouth further claims that it has no way of knowing when a customer receives a bill, so it is impossible to set a due date based upon when the customer receives a bill. BellSouth maintains that it provides electronic transmission of bills that allow Joint Petitioners to receive bills sooner, thus allowing more time for review.[53]

Deliberations and Conclusions

The majority of the Panel voted that payment of bills should be due on or before the next established regular bill date.[54]

[51] BellSouth advised the Authority in a filing dated May 18, 2006 "that the parties have resolved Item 88 by agreement and are therefore not filing BFOs." *See BellSouth Telecommunications, Inc.'s Best and Final Offer*, p. 2 (May 18, 2006).
[52] Joint Petitioners' Supplemental Direct Testimony, p. 104 (October 29, 2004).
[53] Carlos Morillo, Supplemental Direct Testimony, p.6 (October 29, 2004).
[54] Director Jones did not vote in favor of the prevailing motion and filed a separate opinion explaining his position.

ITEM 100 (ISSUE 7-6): Should CLECs 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?

Position of the Parties

The Joint Petitioners state that they should not have to calculate and pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for non-payment. The Joint Petitioners assert that trying to calculate additional amounts that may have become due since the initial termination notice will unduly tax billing personnel and expose the Joint Petitioners to suspension or termination due to possible calculation and timing errors.[55] The Joint Petitioners claim that under BellSouth's proposal, customers would be terminated without notice to the Authority.[56]

BellSouth claims that when a CLEC receives a notice of suspension or termination from BellSouth, it should pay all amounts that are past due, even those that become late after the original notice was issued. BellSouth asserts that its risk increases once a CLEC's account is referred to collection and that it must limit its exposure to the risk of continued non-payment of bills.[57]

Deliberations and Conclusions

A majority of the Panel found that there were too many contingencies that could alter the amount due to BellSouth to find in favor of BellSouth on this issue. A majority of the Panel voted that Joint Petitioners should be required to pay only those undisputed, past due amounts specified in the notice of suspension or termination for nonpayment in order to avoid suspension or termination of service.[58]

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[55] Carlos Morillo, Supplemental Direct Testimony, pp. 8-9 (October 29, 2004).
[56] Joint Petitioners' Supplemental Direct Testimony, pp. 109-111 (October 29, 2004).
[57] Transcript of Proceedings, v. I, p. 123 and 128 (January 25, 2005).
[58] Director Kyle did not vote in favor of the prevailing motion and instead found that CLECs needed to make timely payments for wholesale services and that they should pay all past due amounts to avoid suspension, absent an order from the Authority.

ITEM 101 (ISSUE 7-7): How many months of billing should be used to determine the maximum amount of the deposit?

Position of the Parties

The Joint Petitioners assert that the maximum amount of a deposit should not exceed two months' estimated billing for new CLECs and 1½ months actual billing for existing CLECs.[59] BellSouth asserts that the average of two months of billing for existing customers or of estimated billing for new customers should be used to determine the maximum deposit amount.[60]

Deliberations and Conclusions

The Panel found that BellSouth's position is the one best supported by the record. Joint Petitioners failed to take into consideration the all or nothing requirement of the existing pick-and-choose rule or to provide justification for the 1½ month timeframe. BellSouth, however, supported its alternative with the fact that it must wait in excess of two months before it can disconnect a customer for non-payment and that it will refund with interest a deposit in the event it is determined that no deposit is required. The Panel voted unanimously to adopt BellSouth's position that an average of two months' actual billing for existing customers or estimated billing for new customers should be used to determine the maximum deposit.

ITEM 102 (Issue 7-8): Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to the CLEC?

Position of the Parties

The Joint Petitioners assert that the deposit amount with BellSouth should be reduced by the amounts due to CLECs from BellSouth that have aged over thirty calendar days.[61] BellSouth

[59] Joint Petitioners' Supplemental Direct Testimony, p. 112 (October 29, 2004).
[60] Carlos Morillo, Supplemental Direct Testimony, p. 9 (October 29, 2004).
[61] Joint Petitioners' Supplemental Direct Testimony, p. 115 (October 29, 2004).

claims that deposit amounts should not be reduced by the amounts it owes CLECs. BellSouth asserts that it must protect itself against the uncollectibles generated by all CLECs.[62]

Deliberations and Conclusions

The Panel found that BellSouth should not be required to reduce the deposit amount by billed amounts that are past due because such a requirement fails to take into consideration the reasoning behind requiring a deposit, that is, insuring against non-payment by the depositing party. The Panel further found that the Joint Petitioners' position was overly broad because it fails to deduct the amount of any disputed bills. The Panel voted unanimously that deposits should not be lowered by the past due amounts owed by BellSouth to CLECs.

ITEM 103 (ISSUE 7-9): Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to nonpayment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days?

Position of the Parties

The Joint Petitioners claim that BellSouth should not have the right to terminate service for refusal to provide a deposit. The Joint Petitioners agree that the only cases where BellSouth should be allowed to terminate service for failure to remit a deposit requested by BellSouth are where (1) the CLEC agrees that such a deposit is required by the Agreement or (2) the Authority has ordered payment of such deposit.[63]

BellSouth asserts that it should be able to terminate services within thirty days when CLECs refuse to remit deposit amounts. BellSouth claims that thirty days is a reasonable period of time for CLECs to meet their financial obligations.[64]

[62] Carlos Morillo, Supplemental Direct Testimony, p. 10 (October 29, 2004).
[63] Joint Petitioners' Supplemental Direct Testimony, pp. 116-117 (October 29, 2004).
[64] Carlos Morillo, Supplemental Direct Testimony, pp. 10-11 (October 29, 2004).

Deliberations and Conclusions

Consistent with its decision on Item 86, a majority of the Panel found that termination of service is a remedy of such severity that it should not be exercised unilaterally when a carrier fails to pay or dispute a deposit requirement within thirty days. The majority further found that although it is reasonable to require a party to pay or dispute a deposit requirement within thirty days, failure to do so should result in use of the dispute resolution process, not unilateral termination of service.

The majority of the Panel voted that BellSouth is not entitled to terminate service to Joint Petitioners if a Joint Petitioner refuses to remit any deposit required by BellSouth within thirty calendar days, Joint Petitioner must remit the requested deposit or dispute such request within thirty calendar days and BellSouth should follow the dispute resolution process before terminating service.[65]

The May 15, 2006 Authority Conference

At a regularly scheduled Authority Conference held on May 15, 2006, the Arbitration Panel considered Issues 36, 37 and 38, the remaining issues in this docket, after its deliberation on the issues in Docket No. 04-00381.

ITEM 36 (ISSUE 2-18): (A) (Originally Joint Petitioners' statement of issue) How should line conditioning be defined in the agreement?

(B) (Originally BellSouth's statement of issue) What should BellSouth's obligations be with respect to line conditioning?

Position of the Parties

The Joint Petitioners state that line conditioning should be defined in the Agreement as set forth in FCC Rule 47 C.F.R § 51.319 (a)(1)(iii)(A). The Joint Petitioners also argue that their

[65] Director Kyle did not vote in favor of the prevailing motion and found instead that deposits constitute amounts owed under these agreements, and accordingly, failure to pay a deposit within thirty calendar days shall trigger the same termination of service remedies as other instances of failure to pay.

language incorporates by reference the aforementioned FCC Rule (the definition of line conditioning) and 47 C.F.R. § 51.319(a)(1)(iii) (the line conditioning rule), to describe BellSouth's obligations. The Joint Petitioners assert this language sets forth, in a simple yet precise way, what BellSouth should be able and willing to provide the Joint Petitioners within the Agreement.[66]

BellSouth states that it accepts the FCC's definition of line conditioning, which is a routine network modification that BellSouth regularly undertakes to provide xDSL services to its own customers. Furthermore, BellSouth claims that its proposed language states that line conditioning may include the removal of any device from a copper loop or copper subloop that may diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including xDSL service. Such devices include, but are not limited to, load coils, excessive bridged taps, low pass filters and range extenders.[67]

Additionally, BellSouth maintains that it should perform line conditioning functions as defined in 47 C.F.R. § 51.319(a)(1)(iii) to the extent the function is a routine network modification that BellSouth regularly undertakes to provide xDSL to its own customers.[68]

Deliberations and Conclusions

BellSouth points out that while Section 51.319(a)(1)(iii) of the FCC Rules provides a definition for line conditioning, the *TRO* clarifies this definition (in paragraph 643) by requiring line conditioning that ILECs regularly perform in order to provide xDSL services to their own customers. A complete reading of paragraph 643 of the *TRO* reveals that the FCC was attempting to explain that "[l]ine conditioning does not constitute the creation of a superior network, as some ILECs argue." The Panel finds that the FCC was not trying to change or modify its existing line conditioning rule but simply providing a clarification to its rule.

[66] Joint Petitioners' Supplemental Direct Testimony, p. 55 (October 29, 2004).
[67] Eric Fogle, Supplemental Direct Testimony, pp. 3-4 (October 29, 2004).
[68] Eric Fogle, Rebuttal Testimony, p. 2 (November 19, 2004).

Any attempt to limit an ILEC's obligation to perform line conditioning could serve as a possible deterrent to new and innovative broadband services that could be offered to customers by both CLECs and ILECs. Therefore, the Panel finds that the plain language of the FCC Rules found in 47 C.F.R. § 51.319(a)(1)(iii)(A) should be used to define line conditioning.

The Panel[69] voted unanimously that line conditioning be defined as set forth in FCC Rule 47 C.F.R. § 51.319(a)(1)(iii)(A):

> Line conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridged taps, load coils, low pass filters, and range extenders.

In addition, the Panel voted unanimously that BellSouth is obligated to perform line conditioning in accordance with FCC Rule 47 C.F.R. § 51.319(a)(1)(iii), which states:

> The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop.

ITEM 37 (ISSUE 2-19): Should the Agreement contain specific provisions limiting the availability of load coil removal to copper loops of 18,000 feet or less?

Position of the Parties

The Joint Petitioners state that they will not agree to language that eliminates any right to order line conditioning (in this case load coil removal) on loops that are longer than 18,000 feet. Furthermore, the Joint Petitioners claim that they are entitled to obtain loops that are engineered to

[69] Director Jones voted in favor of the motion. However, he also included in his motion offered during the April 17, 2006 deliberations an additional point regarding certain proposed limitations on the provisioning of line conditioning. Director Jones explains this point further in his separately filed opinion.

support whatever service they choose to provide, and that BellSouth's refusal to condition loops over 18,000 feet in length may preclude the Joint Petitioners from providing innovative services to a significant number of customers. The Joint Petitioners also assert that BellSouth's position on this matter is contrary to the 1996 Act, is anticompetitive, and that BellSouth's statement that it will not remove load coils on longer loops (greater than 18,000 feet) has no basis in applicable law.[70]

BellSouth claims that FCC rules state that BellSouth must perform line conditioning for CLECs as it does for its own retail customers. Therefore, BellSouth's current procedures for treating its retail customers determine the basis for line conditioning for CLECs. BellSouth states that although not required, it will remove load coils from loops greater than 18,000 feet in length at rates pursuant to BellSouth's Special Construction Process contained in BellSouth's FCC Tariff No. 2.[71]

Deliberations and Conclusions

In the *Local Competition Third Report and Order*, the FCC clarified that incumbent LECs are required to condition loops to enable requesting carriers to offer advanced services, wherever a competitor requests, even if the ILEC itself is not offering xDSL services to the customer on that loop.[72] The FCC explained that a conditioned loop describes a copper loop from which bridged taps, low-pass filters, range extenders and similar devices that carriers use to improve voice transmission capability have been removed.[73] Moreover, in the *Advanced Services Third Report and Order*, the FCC clarified that its intent in requiring loops in excess of 18,000 feet to be conditioned (unless the ILEC demonstrates that conditioning will significantly degrade voice

[70] Joint Petitioners' Supplemental Direct Testimony, pp. 58-59 (October 29, 2004).
[71] Eric Fogle, Supplemental Direct Testimony, p. 7 (October 29, 2004).
[72] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 3,696, ¶ 172 (1999) ("*Third Report and Order*").
[73] *Id.*

service) was to prevent the ILECs from refusing to condition the loop merely because the loop is over 18,000 feet.[74]

BellSouth cites paragraphs 632 and 643 of the *TRO* in support of its argument that it is only required to perform line conditioning for CLECs as it does for its own retail customers. A complete reading of paragraphs 632 through 643 of the *TRO* leads the majority of the Panel to the conclusion that the FCC was referring to routine modifications of existing facilities (as opposed to construction of new facilities) that competitors use to provide high capacity circuits to their customers. Additionally, the FCC went on to identify these loop modifications as the rearrangement or splicing of cable, adding a doubler or repeater, adding an equipment case, adding a smart jack, installing a repeater shelf, adding a line card and deploying a new multiplexer or reconfiguring an existing multiplexer. In paragraph 643, the FCC was explaining that line conditioning does not constitute the creation of a superior network, as some ILECs argued. Thus the Panel finds that the FCC was not establishing new line conditioning rules but simply trying to provide clarification to the rules. The majority of the Panel[75] voted that any provision of service that BellSouth provides for its own customers shall also be made available to CLECs regardless of length.

ITEM 38 (ISSUE 2-20): Under what rates, terms and conditions should BellSouth be required to perform Line Conditioning to remove bridged taps?

Position of the Parties

The Joint Petitioners claim that BellSouth's proposal to remove only bridged taps that serve no network purpose and that are between 2,500 and 6,000 feet in length restricts the Joint Petitioners' ability to obtain loops that are free of bridged tap and is therefore, unlawful and

[74] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 20,912, ¶ 36 (1999) ("*Advanced Services Third Report and Order*").

[75] Director Jones did not vote in favor of the prevailing motion and filed a separate opinion explaining his position.

anticompetitive. Moreover, the Joint Petitioners assert that removing bridged taps pursuant to their request is required by Rule 51.319(a)(1)(iii) (line conditioning).[76] The Joint Petitioners state that BellSouth's offer to remove bridged tap on loops zero to 2,500 feet at rates contained in BellSouth's Special Construction tariff would lead to impairment of DSL and other advanced services because such rates are prohibitively expensive.[77]

BellSouth states that it has discussed, negotiated, and agreed in the CLEC industry collaborative to remove bridged taps as follows: (1) If the bridged tap is more than 6,000 feet BellSouth, will remove it at no charge to the CLECs; (2) For bridged taps that are from 2,500 to 6,000 feet, BellSouth will remove it at TELRIC rates; (3) Bridged tap between 0 and 2,500 feet will be removed at rates pursuant to BellSouth's Special Construction Process contained in BellSouth's FCC Tariff No. 2.[78]

BellSouth argues that it is only required to perform line conditioning (for CLECs) that it performs for its own xDSL customers. Therefore, requests for line conditioning beyond what it does for its own customers are not appropriately dealt with under a Section 251 arbitration.[79]

Deliberations and Conclusions

The majority of the Panel found that BellSouth is obligated to remove bridged taps at any length and at TELRIC rates. The majority of the Panel further found that this is included under provisioning of the loop, including the high-frequency portion of the loop or subloop. The majority of the Panel voted that BellSouth is required to remove bridged taps of any length at TELRIC rates and the language of the interconnection agreement should be consistent with FCC Rules found in 47 CFR 51.319(a)(1)(iii).[80]

[76] Joint Petitioners' Supplemental Direct Testimony, pp. 61-62 (October 29, 2004).
[77] Rebuttal Testimony of the Joint Petitioners, pp. 50-51 (November 19, 2004).
[78] Eric Fogle, Supplemental Direct Testimony, pp. 8-9 (October 29, 2004).
[79] *Id.*
[80] Director Kyle did not vote with the majority.

ORDERED

The foregoing *Final Order of Arbitration Award* reflects the Arbitrators' resolution of Item Nos. 4, 5, 6, 7, 9, 12, 26, 36, 37, 38, 51, 65, 86, 88, 97, 100, 101, 102 and 103. All resolutions contained herein comply with the provisions of the Telecommunications Act of 1996 and are supported by the record in this proceeding.

TENNESSEE REGULATORY AUTHORITY, BY ITS DIRECTORS ACTING AS ARBITRATORS

Ron Jones, Chairman[81]

11-29-07

Pat Miller, Director

Sara Kyle, Director

[81] Director Jones filed a separate opinion with regard to Items 26, 36, 37 and 97.