BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

December 14, 2007

Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law	)))	Docket No. 04-00381

CORRECTIONS
TO COMPSOUTH'S PETITION FOR RECONSIDERATION

Competitive Carriers of the South, Inc. ("CompSouth") submits the enclosed Attachment A to its Petition for Reconsideration, which was filed with the Authority on December 13, 2007. Attachment A, which is a copy of an opinion by Director Jones in another docket, is referenced on page 3 of the Petition but was omitted when filed.

CompSouth also submits a revised page 1 of the Petition. The revised version now includes in footnote 1 the current members of CompSouth.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to:

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on this the 14th day of December, 2007.

Henry M. Walker

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

December 13, 2007

Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law	)))	Docket No. 04-00381

COMPSOUTH PETITION FOR RECONSIDERATION

Pursuant to Tennessee Code Annotated Section 4-5-317(a) and Tennessee Regulatory Authority Rule 1220-1-2-.20, Competitive Carriers of the South, Inc. ("CompSouth")[1] submit the following Petition for Reconsideration of one aspect of the Authority's November 28, 2007 Order (the "Order") in the above-captioned proceeding. CompSouth requests the Authority reconsider its decision regarding Issue 14, regarding commingling requirements established by the FCC.[2] Specifically, CompSouth urges the Authority to reconsider the decision of a majority of the panel that BellSouth is not required to commingle network elements provided pursuant to Section 251 with those provided pursuant to Section 271 of the Telecommunications Act of 1996 ("the Act"). The decision of the panel majority is inconsistent with the only federal court decision that is precisely on point,[3] and is also out of step with the decisions of the majority of the state commissions in the BellSouth region.[4]

In the Order, "the majority of the panel found that unbundling and commingling are Section 251 obligations, and when BellSouth provides an element pursuant only to Section 271,

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1 CompSouth's members participating in this docket include the following companies: Access Point Inc., Access Integrated, Cavalier Communications, DIECA Communications, Inc., d/b/a Covad Communications Company, DeltaCom, Level 3 Communications, Momentum Telecom Inc., NuVox Communications, Sprint Nextel, Time Warner Telecom, and XO Communications.

2 Issue 14 is addressed at pages 27-33 of the Authority's Order.

3 *See NuVox Communications, Inc. v. Edgar*, 511 F. Supp.2d 1198 (N.D. Fla. 2007).

4 Only three state commissions (Florida, Mississippi, and South Carolina) have supported the position taken in the Order, and the Florida PSC's decision was reversed by the federal court in the *NuVox* case cited above. The state commissions in Alabama, Georgia, Kentucky, Louisiana, and North Carolina have ruled consistently with position advocated by CompSouth here.

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESEE

December 5, 2007

IN RE:	)	
	)	**DOCKET NO.**
JOINT PETITION FOR ARBITRATION	)	**04-00046**
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	)	

SEPARATE OPINION OF DIRECTOR RON JONES

This docket came before a panel of the Tennessee Regulatory Authority ("Authority") at Authority Conferences on March 6, 2006, April 17, 2006 and May 15, 2006, for consideration of the *Joint Petition for Arbitration* filed by 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 (collectively "Joint Petitioners") on February 11, 2004. I respectfully dissent from the majority's decisions on Items 26, 37, and 97 and offer additional comments with regard to Items 36 and 38.

I. 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?

During the deliberations on March 6, 2006, the majority of the panel voted to "not require BellSouth to commingle [unbundled network elements ("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."[1] In support of their decision and consistent with the arguments put forth by BellSouth Telecommunications, Inc. ("BellSouth"), the majority cites the *Errata* to the *Triennial Review Order* and the District of Columbia Circuit Court of Appeals decision in *United States Telecom Association v. Federal Communications Commission*.[2] Because I disagree with the majority's interpretation of and reliance on these authorities as well as the arguments offered by BellSouth, I voted in opposition to the prevailing motion. In support of my position, I first explain my reasons for rejecting BellSouth's arguments and, thereby, the reasoning of the majority. Next, I provide the specific reasoning supporting my conclusion.

A. BELLSOUTH'S ARGUMENTS

In paragraph 579 of the *Triennial Review Order*, the FCC determined that commingling means:

> the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services.[3]

The FCC further wrote:

> As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special

[1] *Final Order of Arbitration Award*, p. 7 (Dec. 5, 2007).
[2] 359 F.3d 554, 589 (D.C. Cir. 2004).
[3] *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-36, 18 FCCR 19,020, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, para. 579 (Aug. 21, 2003) (hereinafter *Triennial Review Order*).

> access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services.[4]

BellSouth concludes that the FCC's reference to "wholesale services" in paragraph 579 does not include section 271 offerings. BellSouth provides five arguments to justify this conclusion.

The first argument BellSouth asserts is that section 271 offerings are not "wholesale services" because BellSouth "has no 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."[5] In support of this proposition, BellSouth cites footnote 1990 of the *Triennial Review Order* and *United States Telecom Association v. Federal Communications Commission.* I do not disagree with BellSouth's characterization of its obligation, but I do disagree that the characterization supports the conclusion that commingling does not apply to section 271 offerings.

BellSouth accurately states that it is not required to combine section 271 elements or to combine elements that the FCC no longer requires it to unbundle pursuant to section 251(c)(3). However, the current obligations described by this statement are wholly separate and do not touch on the issue before the Authority under Item 26, that is, whether the FCC has required BellSouth to commingle section 271 elements with section 251 elements. Combining section 251 elements, combining section 271 offerings, and commingling section 251 elements and section 271 offerings are three distinct activities. Considering these activities as interchangeable necessarily obscures the subtle characteristics that make each activity unique.

The second argument offered in support of the conclusion that the provisioning of section 271 elements are not "wholesale services" is that "[t]o hold otherwise would require BellSouth to do exactly what the FCC and D.C. Circuit held was impermissible as it would require BellSouth

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[4] *Id.*

[5] *BellSouth Telecommunications, Inc. Post Hearing Brief*, p. 36 (Apr. 15, 2005).

to combine services that are no longer required to be unbundled under section 251(c)(3)."[6] The heart of this argument is that requiring commingling of section 271 offerings and section 251 elements will serve to resurrect UNE-P.[7] This argument too is flawed because it fails to take into consideration the pricing of the elements. Section 251 elements are subject to pricing using the Total Element Long-Run Incremental Cost methodology, a cost-based approach adopted by the FCC to satisfy the requirements of section 252(d)(1).[8] However, the pricing of section 271 elements is subject only to the restrictions that the rates be just, reasonable and not unreasonably discriminatory as required by sections 201 and 202.[9] Thus, while allowing the commingling of section 271 elements and section 251 elements will allow a competing carrier to bring together a loop and switching, the resulting price will be different than if both elements are subject to unbundling pursuant to section 251.

A third argument offered by BellSouth is that the deletion in the *Errata* of the only specific reference to section 271 in the commingling section of the *Triennial Review Order* indicates that section 271 offerings are not "wholesale services." The text of the relevant paragraph as it appeared prior to the *Errata* is as follows:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including <u>any network elements unbundled pursuant to section 271 and</u> any services offered for resale pursuant to section 251(c)(4) of the Act. Section 251(c)(4) places the duty on incumbent LECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on" the resale of telecommunications services provided at retail to customers who are not telecommunications carriers. Any restriction that prevents commingling of UNEs (or UNE combinations) with resold services constitutes a limitation on both reselling the eligible service and on obtaining access to the UNE or UNE combination. We conclude that a restriction on commingling UNEs and UNE combinations with services eligible for resale is

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[6] *Id.*

[7] *See id.* at 37. UNE-P is an acronym used to describe a combination of a section 251 loop and section 251 switching.

[8] *See* 47 U.S.C. § 252(d)(1); *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, 11 FCCR 15,499, *First Report and Order*, para. 672 (Aug. 1, 1996).

[9] *Triennial Review Order*, *supra* note 3, at para. 656 (referencing 47 U.S.C. §§ 201 and 202).

> inconsistent with the section 251(c)(4) prohibition on "unreasonable ... conditions or limitations" because it would impose additional costs on competitive LECs choosing to compete through multiple entry strategies, and because such a restriction could even require a competitive LEC to forego using efficient strategies for serving different customers and markets. We agree with ALTS that an incumbent LEC's obligations under sections 251(c)(3) and 251(c)(4) are not mutually exclusive. In addition, a restriction on obtaining UNEs and UNE combinations in conjunction with services available for resale would constitute a discriminatory condition on the resale of eligible telecommunications services because incumbent LECs impose no such limitations or restrictions on their ability to combine facilities and services within their network in order to meet customer needs.[10]

In the *Errata*, the FCC deleted the above underlined language, which references section 271. It is this deletion that BellSouth contends indicates that section 271 offerings are not "wholesale services." Certainly, the FCC had a reason for deleting the language. It is my opinion, however, that the reason was not because section 271 offerings are not "wholesale services" and, thereby, not subject to the commingling obligations. Instead, it is my opinion that the language was deleted for the simple reason that the remaining text relates solely to the resale obligation of section 251(c)(4). Thus, the reference to section to 271 in this paragraph was misplaced and appropriately removed.

A fourth argument offered by BellSouth is that "throughout the entire commingling section in the [*Triennial Review Order*], the FCC limits its description of the wholesale services that are subject to commingling to tariffed access services."[11] BellSouth specifically relies on sentences it extracted from paragraphs 579, 580, 581 and 583 of the *Triennial Review Order*.[12] In relying on these sentences, however, BellSouth fails to address the fact that the language of the sentences either applies to a particular service[13] or refers to tariffed access services as merely

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[10] *Id.* at para. 584.
[11] *See BellSouth Telecommunications, Inc. Post Hearing Brief*, p. 38 (Apr. 15, 2005).
[12] *See id.*
[13] *See id.* (quoting *Triennial Review Order*, *supra* note 3, at paras. 581 and 583).

an example of a wholesale service, not a definition of a wholesale service.[14] The excerpts do not support, either when read independently or in conjunction with BellSouth's other arguments, the conclusion that section 271 offerings are not "wholesale services."

The fifth and final argument offered by BellSouth is that in the *Triennial Review Remand Order*[15] the FCC limited conversion rights described in the *Triennial Review Order* as applicable to wholesale services to only tariffed incumbent services.[16] Thus, it is seemingly BellSouth's conclusion that the FCC has "construed the phrase 'wholesale services' to be limited to tariffed services."[17] It is my opinion that BellSouth has read the referenced language too narrowly. The plain language of paragraph 229 of the *Triennial Review Remand Order* does not state that the FCC limited its holding in the *Triennial Review Order* regarding conversions to tariffed services. This paragraph states:

> We determined in the *Triennial Review Order* that competitive LECs may convert tariffed incumbent LEC services to UNEs and UNE combinations, provided that the competitive LEC seeking to convert such services satisfies any applicable eligibility criteria. The *USTA II* court upheld this determination. The BOCs have nevertheless urged us in this proceeding to prohibit conversions entirely. Given our conclusion above that a carrier's current use of special access does not demonstrate a lack of impairment, we conclude that a bar on conversions would be inappropriate.[18]

I can read no intent in this language to limit the term "wholesale services" to tariffed incumbent LEC services.

Based on the foregoing discussion, it is my opinion that the arguments and resulting conclusion asserted by BellSouth should be rejected. The arguments taken either separately or in

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[14] *See id.* (quoting *Triennial Review Order*, *supra* note 3, at paras. 579 and 580).
[15] *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-290, 20 FCCR 2533, *Order on Remand* (Feb. 4, 2005) (hereinafter *Triennial Review Remand Order*).
[16] *See BellSouth Telecommunications, Inc. Post Hearing Brief*, p. 38 (Apr. 15, 2005) (citing *Triennial Review Order*, *supra* note 3, at para. 585 and *Triennial Review Remand Order*, *supra* note 15, at para. 229).
[17] *Id.* at 39.
[18] *Triennial Review Remand Order*, *supra* note 15, at para. 229.

conjunction with one another do not support a finding that the FCC excluded section 271 offerings from the term "wholesale services."

B. ANALYSIS SUPPORTING DETERMINATION THAT SECTION 271 OFFERINGS SHOULD BE INCLUDED IN THE TERM "WHOLE SALE SERVICES"

It is my determination that federal law obligates BellSouth to perform the functions necessary to commingle a section 251 UNE or UNE combination with facilities or services obtained at wholesale from BellSouth pursuant to a method other than section 251 unbundling. It is further my determination that a facility or service obtained pursuant to section 271 is a facility or service obtained at wholesale from BellSouth pursuant to a method other than section 251 unbundling. These determinations are based primarily on the plain language of 47 C.F.R. section 51.309(e) and (f)[19] and paragraphs 579 through 584[20] and footnote 1990[21] of the *Triennial Review Order* as corrected by the September 17, 2003 *Errata*.

The FCC's purpose for making the changes it made to the *Triennial Review Order* via the *Errata* garnered the lion's share of the arguments on this item. Unfortunately for the panel, the FCC was silent as to the reasons for deleting language referring to section 271 from paragraph

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[19] These rules state:

> (e) Except as provided in § 51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.
> (f) Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.

Triennial Review Order, *supra* note 3, at Appendix B – Final Rules, 51.309(e) & (f) (codified at 47 C.F.R. § 51.309(e) & (f)).

[20] *Id.* at paras. 579-84.

[21] *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Errata*, para. 31 (Sept. 17, 2003) (hereinafter *Errata*) (deleting the last sentence of footnote 1990).

584 of the *Triennial Review Order* and for deleting language regarding commingling of section 271 elements from footnote 1990 of the *Triennial Review Order*.[22]

Such silence does not foreclose; however, my basic analysis. The rules adopted pursuant to the *Triennial Review Order* require commingling of UNEs and UNE combinations with wholesale services obtained from an incumbent LEC.[23] The text of the *Triennial Review Order* affirms the text of the rule adding only that the wholesale service be one obtained from the incumbent LEC "pursuant to any method other than unbundling under section 251(c)(3) of the Act."[24] The final rules adopted as part of the *Triennial Review Remand Order* did not alter the rules adopted through the *Triennial Review Order*.[25] The text of the *Triennial Review Order* as amended by the *Errata* is silent as to the inclusion or exclusion of section 271 offerings in the term "wholesale services."

In my opinion, it is a reasonable and sound judgment to conclude that section 271 offerings are wholesale services. Generally, the services to be provided pursuant to section 271 are no different than the services BellSouth is required to provide pursuant to section 251. When the services are provided pursuant to section 251 they are considered to be wholesale services.[26]

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[22] The text of paragraph 584 is set forth in the above text. The footnote at issue originally appeared in the *Triennial Review Order* as footnote 1990. The footnote reads:

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

Triennial Review Order, *supra* note 3, at n.1990. The *Errata* deleted the underlined sentence of the above-quoted footnote. *Errata*, *supra* note 21, at para. 31.

[23] *Triennial Review Order*, *supra* note 3, at Appendix B – Final Rules, 51.309(e) & (f) (codified at 47 C.F.R. § 51.309(e) & (f)).

[24] *Id.* at para. 579.

[25] *Triennial Review Remand Order*, *supra* note 15, at Appendix B – Final Rules, p. 146.

[26] This is evidenced by the FCC's language "obtained at wholesale from an incumbent LEC pursuant **to any method other than** unbundling under section 251(c)(3) of the Act." *Triennial Review Order*, *supra* note 3, at para. 579 (emphasis added).

The fact that the statutory authority obligating BellSouth to provide the service has changed does not alter the nature of the service as being wholesale.

To the extent it is necessary to provide meaning to the FCC's decision to remove the section 271 related language, I adopt Joint Petitioners' explanation as it is consistent with the plain language of the *Triennial Review Order* as corrected. Joint Petitioners argue that the removal of the reference to section 271 in paragraph 584 of the *Triennial Review Order* was because the reference was not related to the subject of the paragraph, which was resale services.[27] As I discussed earlier in this opinion, I find this analysis the more reasonable of the two arguments offered by Joint Petitioners and BellSouth.[28] Joint Petitioners also argue that in removing the last sentence of footnote 1990, the FCC "avoided any misunderstanding that Section 271 elements are not eligible for commingling."[29] Once again, I agree with Joint Petitioners as such analysis is consistent with the FCC's rules and the remaining language of the *Triennial Review Order*.

Based on the foregoing analysis, it is my conclusion that this issue should be answered affirmatively. As this conclusion is in direct opposition to the decision of the majority, I dissent from that decision.

II. ITEMS 36, 37, AND 38

In the *Final Order of Arbitration Award*, it is noted that I offered an additional limitation with regard to Item 36 during the April 17, 2006 deliberations in this docket, that I dissented from the decision with regard to Item 37, and that I was in the majority with regard to Item 38.[30]

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[27] *See Joint Petitioners' Post-Hearing Brief*, p. 25 (Apr. 15, 2005).
[28] *See* text *supra* at pp. 4-5.
[29] *See Joint Petitioners' Post-Hearing Brief*, p. 27 (Apr. 15, 2005).
[30] *Final Order of Arbitration Award*, p. 31 n.69, p. 33 n.75 & p. 34 (Dec. 5, 2007).

There is a common thread running through these three issues. I write separately here to ensure that my position with regard to this common thread is clear and consistent.

A. ITEM 36: (A) HOW SHOULD LINE CONDITIONING BE DEFINED IN THE AGREEMENT? (B) WHAT SHOULD BELLSOUTH'S OBLIGATIONS BE WITH RESPECT TO LINE CONDITIONING?

BellSouth maintained with Items 36, 37, and 38 that it is not obligated to perform line conditioning in any manner other than the manner in which it performs line conditioning for its customers.[31] Specifically, BellSouth argues that its obligation is limited because line conditioning is a routine network modification and BellSouth is only obligated to perform routine network modifications for CLECs to the extent it performs such for its own customers.[32] In my opinion, a complete response to Item 36(B) demands that the panel explicitly address BellSouth's argument. Thus, I concluded during the April 17, 2006 deliberations that BellSouth's position should be rejected and, today, I offer two reasons in support of my conclusion.[33]

First, in the *UNE Remand Order,* the FCC required line conditioning because without such conditioning access to the line might not include access to all the features, functions and capabilities of the line.[34] Thus, the FCC determined that line conditioning falls within the definition of the line.[35] In the *Triennial Review Order,* the FCC stated: "we readopt the

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[31] *See BellSouth Telecommunications, Inc. Post Hearing Brief,* p. 41 (Item 36), p. 44 (Item 37) (Apr. 15, 2005). With regard to Item 38, BellSouth suggests that it is not obligated to remove bridge taps because it does not remove bridge taps for its own customers, but agrees to a particular scenario for removing bridge taps for CLECs because of BellSouth's work with the Shared Loop Collaborative. *Id.* at 47.

[32] *See id.* at 41 (quoting *Triennial Review Order, supra* note 3, at para. 643).

[33] BellSouth asserted a similar argument in support of its position on Issue 26 presented for consideration in Docket No. 04-00381. *In re: BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law,* Docket No. 04-00381, *BellSouth Telecommunications, Inc.'s Post-Hearing Brief,* pp. 114-15 (Oct. 28, 2005). The panel deliberated the merits of Issue 26 in Docket No. 04-00381 immediately preceding its consideration of Item 36 in this docket. In Docket No. 04-00381, a majority of the panel voted that routine network modifications should not include line conditioning. Transcript of Authority Conference, pp. 75-77 (May 15, 2006). This conclusion is consistent with my conclusion described above.

[34] *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCCR 3696, para. 173 (Nov. 5, 1999) (Third Report and Order and Fourth Further Notice of Rulemaking).

[35] *Id.*

Commission's previous line and loop conditioning rules for the reasons set forth in the *UNE Remand Order*." The FCC's references in the *Triennial Review Order* and the *UNE Remand Order* to section 251(c)(3) relate to the CLECs' right to nondiscriminatory access to the line, which necessarily includes line conditioning.[36] Thus, it is my conclusion that the obligation to provision line conditioning is tied to the obligation to provision the line and is not dependant on how or whether the ILEC provides line conditioning to its retail customers.

Second, BellSouth argues that the FCC language in paragraph 643 of the *Triennial Review Order* supports the conclusion that line conditioning is nothing more than a particular routine network modification.[37] The relevant language of paragraph 643 reads: "Line conditioning does not constitute the creation of a superior network, as some incumbent LECs argue. Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers."[38] It is my opinion that this language provides only that routine network modifications and line conditioning are similar in that neither activity results in the creation of a superior network, not that line conditioning is a subset of routine network modifications.

Given the above analysis and my determination in Docket No. 04-00381, I am unable to answer Item 36(B) without explicitly recognizing that BellSouth should not be permitted to limit line conditioning as if it were a routine network modification. Thus, although I voted in favor of the prevailing motion, which merely cited to applicable rules, the additional limitation of prohibiting BellSouth from limiting the provisioning of line conditioning to circumstances in

[36] *Id.*; *Triennial Review Order*, *supra* note 3, at para. 643.
[37] *BellSouth Telecommunications, Inc. Post Hearing Brief*, p. 41 (Apr. 15, 2005).
[38] *Triennial Review Order*, *supra* note 3, at para. 643 (footnote omitted).

which it regularly performs line conditioning for its own customers should also apply the parties' agreements.[39]

B. 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 37 relates to a particular function of line conditioning known as load coil removal. The prevailing motion on this item limits BellSouth's obligation to remove load coils to circumstances where BellSouth provides load coil removal for its own customers.[40] Because this limitation is contrary to my conclusion in Docket No. 04-000381 and Item 36(B) of this docket, I dissent from the conclusion of the majority.

C. ITEM 38: UNDER WHAT RATES, TERMS, AND CONDITIONS SHOULD BELLSOUTH BE REQUIRED TO PERFORM LINE CONDITIONING TO REMOVE BRIDGE TAPS?

I offered the prevailing motion for Item 38. I discuss the item here simply to wholly discuss the line conditioning items in this docket. Item 38 relates to the removal of bridge taps, a particular function of line conditioning. Because this item involves line conditioning, which is treated differently than routine network modifications, my motion, which received a second, did not include any limitation as to the length of the loop to be conditioned. The reason being that BellSouth should not be permitted to limit the provisioning of line conditioning based on the activities it performs for its own customers.

III. ITEM 97: WHEN SHOULD PAYMENT OF CHARGES FOR SERVICE BE DUE?

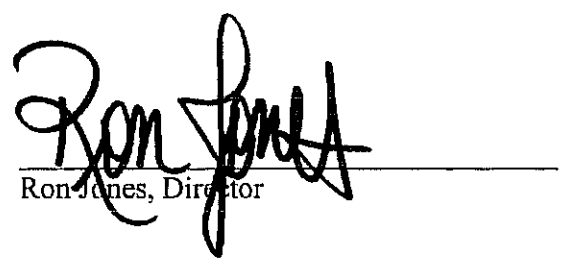
In Docket No. 03-00119, a majority of the panel determined that "25 days from the bill receipt date to the payment due date would give DeltaCom sufficient time to review its bills from

[39] Transcript of Authority Conference, p. 30 (Apr. 17, 2006).
[40] Transcript of Authority Conference, p. 88 (May 15, 2006); *Final Order of Arbitration Award*, 33 (Dec. 5, 2007).

BellSouth, and accordingly determined that the due date of bills should be 25 days from the date of receipt."[41] The underlying reasoning for this determination is that the billing-cycle should be approximately thirty days from the bill date, but that the realization of the thirty-day cycle is dependant on BellSouth getting the bill to the CLECs within five (5) days of the bill date.[42] It is my opinion from the record in this docket that neither party has put forth an argument sufficient to justify a departure from my position in Docket No. 03-00119. Therefore, it is my position that the due date of bills should be twenty-five (25) days from the date of receipt. Because the majority voted that the "payment of bills should be due on or before the next established regular bill date"[43] and because this conclusion is contrary to my conclusion, I dissent from the decision of the majority.

IV. CONCLUSION

Based on the foregoing, I respectfully dissent from the decisions of the majority on Items 26, 37 and 97. Related thereto, I adopt the additional limitation discussed herein with regard to Item 36 and affirm that the same limitation applies to my determination of Item 38.



Ron Jones, Director

[41] *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 03-00119, *Order of Arbitration Award*, p. 63 (Oct. 20, 2005).
[42] *See id.*; Transcript of Proceedings, pp. 38-39 (Jan. 12, 2004) (Arbitration Deliberations).
[43] *Final Order of Arbitration Award*, p. 25 (Dec. 5, 2007).