BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 040130-TP

In the Matter of

JOINT PETITION 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 JACKSONVILLE, LLC, FOR ARBITRATION OF CERTAIN ISSUES ARISING IN NEGOTIATION OF INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.

/

ELECTRONIC VERSIONS OF THIS TRANSCRIPT ARE
A CONVENIENCE COPY ONLY AND ARE NOT
THE OFFICIAL TRANSCRIPT OF THE HEARING,
THE .PDF VERSION INCLUDES PREFILED TESTIMONY.

VOLUME 2

Pages 213 through 402

PROCEEDINGS: HEARING

BEFORE: COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER CHARLES M. DAVIDSON
COMMISSIONER LISA POLAK EDGAR

DATE: Tuesday, April 26, 2005

TIME: Commenced at 11:00 a.m.

PLACE:	Betty Easley Conference Center Room 152 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	JANE FAUROT, RPR Chief, Office of Hearing Reporter Services FPSC Division of Commission Clerk and Administrative Services (850) 413-6732
APPEARANCES:	(As heretofore noted.)

I N D E X

WITNESSES

EXHIBITS

NUMBER:		ID.	ADMTD.
17	Attachment 7	251	282
18	Commission Deposit Rule	256	282
3			282
13			282
14			282
15			282
16			282
19	SQM Report Billing Invoice Timeliness		282
20	KMC Tariff List		282

PROCEEDINGS

(Transcript follows in sequence from Volume 1.)

COMMISSIONER BRADLEY: I would like to reconvene.

MR. MEZA: Thank you, sir.

Thereupon,

HAMILTON E. RUSSELL, III

having been previously sworn, resumed the stand, and testified as follows:

CONTINUED CROSS EXAMINATION

BY MR. MEZA:

Q Mr. Russell, I would like to talk you about Issue 12. And would you agree with me, sir, that this issue deals with how the parties will incorporate applicable law when that law is not expressly addressed in the interconnection agreement?

A Yes, but it might more accurately be reflected as BellSouth's unwillingness to abide by Georgia law as it applies to the applicable law standard.

Q You would agree with me, sir, that BellSouth has agreed to comply with applicable law, correct?

A In certain instances. But it excludes certain applicable law, also. So a blanket statement that it has agreed to abide by applicable law is not correct.

Q There is no dispute in this arbitration proceeding that addresses whether or not BellSouth and the Joint Petitioners will agree to comply with applicable law, is that

right?

A We agree to apply with applicable law. However, in Issue 12, BellSouth attempts to write out of the applicable law definition certain telecommunications law that would otherwise apply to the agreement.

Q Now, you agree with me that the parties have been negotiating this agreement since June of 2003 if not earlier?

A Yes.

Q And throughout these negotiations the parties have attempted to memorialize their understanding of applicable telecommunications law through this interconnection agreement, is that correct?

A Well, we have attempted to negotiate a framework for the commercial relationship between the parties, so --

Q I don't think you answered my question, sir.

A Okay.

Q My question was, isn't it true that throughout these negotiations the parties have memorialized their understanding of their applicable obligations under telecommunications law in this agreement?

A I disagree with that.

Q Isn't it true, sir, that the parties have an Attachment 2?

A We do have an Attachment 2; that's correct.

Q And doesn't Attachment 2 address when the Joint

Petitioners will obtain UNEs?

A It addresses UNE issues, yes.

Q And UNEs are mandated by federal law?

A That's correct. But just how the parties will purchase and pay for UNEs, that does not necessarily address applicable telecommunications law. So a blanket statement that Attachment 2 includes the parties' understanding with regard to applicable law for this agreement is not accurate.

Q Do you agree with Ms. Johnson's deposition statement that the interconnection agreement contains the parties' interpretation of various FCC rules and decisions?

A With regard to certain particular issues, yes. However, Georgia law provides that law that is generally applicable at the time the parties contract becomes part of that agreement. That is consistent with Georgia law, it is consistent with United States Supreme Court decisions, it is consistent with the Telecommunications Act itself, which says in Section 252(a) that the parties can agree to do something different than is provided by applicable law. All we are trying to do, that is the Joint Petitioners, **is be certain that** through some sort of drafting BellSouth does not write out requirements of applicable law that would otherwise govern the parties' relationship.

Q And if I understand your testimony correctly, you believe that in the absence of an exclusion of a certain type

of law, you believe that law is automatically incorporated and binds the company, is that right?

A According to Georgia law, laws of general applicability at the time the parties contract become part of the contract. The parties can agree to do something different. They can specifically agree to exclude some provisions of applicable law. They can specifically agree to do -- to a different type of application. But unless they do that, laws of general applicability become part of the contract at the time of contracting.

Q Would you agree with me that this arbitration proceeding is conducted pursuant to Section 252 of the Act?

A Yes.

Q And we are arbitrating a Section 252 agreement?

A That's correct.

Q Would you also agree with me that state unbundling laws are not addressed in the interconnection agreement?

A I don't know if I can universally say that state unbundling laws are not addressed.

Q Assume for me that there is no reference whatsoever to state unbundling laws in this interconnection agreement, okay?

A Okay.

Q Under the Joint Petitioners' position with Issue 12, is it your opinion that those laws are automatically

.ncorporated into this agreement?

A Unless we agree to do something different. Specifically, exclude them, or specifically change them, yes, they would automatically become part of this agreement.

Q Is it also your position, sir, that you could hold BellSouth in breach or in violation of those laws via this interconnection agreement?

A If BellSouth broke the law, and it had not been specifically excluded through the negotiations of the parties and memorialized in the agreement, yes.

Q If the Federal Communications Commission -- excuse me. If the Federal -- if the FCC, try it that way. If the FCC has determined that BellSouth does not have to provide a certain element on an unbundled basis, and Florida law says that BellSouth still has to, is it your position that with this agreement the Joint Petitioners can contend that BellSouth has an obligation under state law to continue to provide that unbundled element?

A I don't believe so, if I understand your hypothetical correctly. If the decision regarding the unbundling obligation is in the hands of the FCC and they determine that that unbundling obligation is not appropriate, I don't believe that -- I believe that that would override the state obligation. However, I'm confused about your question, sort of. If you could restate it, maybe I can --

Q Sure. Let me back up to make sure we are on the same page. I don't want to confuse you.

A Okay.

Q It is your position that unless we say otherwise, law, the applicable law, is incorporated into this agreement upon execution, correct?

A That's not my position. We have agreed that Georgia law applies to this agreement. BellSouth insisted that we use Georgia law because of your presence in Atlanta. Georgia law requires and provides, and it is the law of the land, that at the time the parties contract, unless they agree to do something different or to exclude a specific provision of applicable law, that it becomes part of the contract. If that were not the case, and we took BellSouth's position and agreed that unless we specifically included every law or rule that we meant to govern the parties relationship, this agreement would be thousands upon thousands of pages long. **The first local** competition report and order itself is 700 pages long. **So it** is our position -- it is not a position. **Georgia law says that** unless the parties agree differently.

Q All right. Mr. Russell, your understanding of Georgia law --

A It is not my understanding. That is the law --

Q Mr. Russell, please, I'm not going to fight with you over an interpretation of what you believe the law is. It is

that it is. I just ask that you address my question.

Under your interpretation of Georgia law as it applies to this issue, if the agreement is silent on the application of state law, and there is a provision of state law that requires the unbundling of an element that federal law says BellSouth does not have to unbundle, is it your position that BellSouth has an obligation with this agreement to continue to provide that element on an unbundled basis?

A If there was a state law that required the unbundling obligation, that law would be incorporated into the agreement as a law of general applicability. If there was an FCC decision that disposed of that obligation without getting into which -- you know, how that would work, it could dispose of that obligation.

Q So if I understand your testimony correctly, even though Georgia law provides that all laws come into -- are incorporated into the agreement upon execution, that is not necessarily the case if the federal government or the FCC preempts certain laws?

A We are talking in a vacuum in this room about how one law would supersede another law, and this group would have a ruling that would override another. So I'm trying to answer your question the best I know how. Unless BellSouth and the parties agreed to exclude that, quote, unquote, state law you are talking about, it would become part of the agreement, okay?

In the event that there was a decision by a body, let's assume it's the FCC, that had authority to override that state law and, in fact, there was a decision that did just that -- and that's where I'm having the disconnect here, because I don't know how it would override that law. To answer your question the law would become part of the agreement.

Q Mr. Russell, let me give you a real life example.

A Okay.

Q Presume for me that Florida law says that you have an obligation to provide unbundled switching for mass market, okay?

A Okay.

Q Are you familiar with the TRRO?

A Absolutely.

Q Would agree with me that in that decision from the FCC that BellSouth does not have an obligation to provide unbundled switching to mass market customers?

A I believe they found nonimpairment. How that nonimpairment standard is articulated within the industry, I'm not certain of, because NuVox does not do very much UNE-P.

Q Okay. If there is a particular element that you are purchasing out of this interconnection agreement, and the federal government or the FCC says that BellSouth does not have to provide that element as a UNE any more at TELRIC?

A They find nonimpairment.

Q Nonimpairment. Okay. But there is a state law out there that says BellSouth has an obligation to provide this same element on an unbundled basis, is it your position as it relates to Issue 12, that that state law obligates BellSouth to continue to provide that element?

A It could, yes.

Q Now, it's BellSouth's position that in the instances where the parties dispute the existence of a particular obligation relating to telecommunications law that is not specifically addressed in the agreement, that the parties go to dispute resolution, is that right?

A Yes.

Q And upon the finding of the existence of such an obligation, BellSouth's position is that the obligation should apply prospectively only, is that correct?

A I believe so.

Q Now, you don't have a running list of the instances where the parties have agreed to something other than applicable law, do you?

A I have instances where the parties have agreed to something other than applicable law. I do not have, as I sit here today, a running list.

Q And I believe in Alabama I went through this, and you provided me with two instances; is that right?

A That's correct.

Q And you would agree with me that this contract that we are arbitrating exceeds 500 pages?

A I believe so.

Q Do you believe that the parties should be confident in knowing what they are obligating to do?

A Yes. If BellSouth has some rules, or orders, or statutes that it does not want to comply with, let's identify them now as opposed to hide them in this section.

Q Are the Joint Petitioners aware of any rule or order that has not already been addressed in the interconnection agreement or being arbitrated?

A Can you repeat that, please?

Q Are you the Joint Petitioners aware of any applicable law that has not been addressed in the interconnection agreement, either via agreed upon provisions or via arbitration?

A For example, I don't believe that the agreement specifically discusses the CPNI rules. Under BellSouth's position, neither party would be obligated to comply with the CPNI rules as it relates to these two parties.

Q Isn't it true, sir, that the parties have already agreed upon provisions protecting customer service records?

A We have agreed to certain provisions, but it does not specifically include the CPNI rules.

Q Is it -- I'm sorry.

A Another example is rules that would, the Florida -- any Florida rules or statutes that regulate telecommunication services here in Florida. We have not specifically included any of those rules, so there would be other rules that would not be included under BellSouth's position that would, in fact, be included under the Joint Petitioners' provision that is consistent with Georgia law.

Q Isn't it true, sir, that BellSouth's dispute resolution provisions only are triggered upon a disagreement as to whether a certain law or rule applies?

A The only time dispute resolution procedures could kick in?

Q Rec

A Regarding Issue 12. That is not an accurate way to say it. It's better put to say that if a party determines that another party is not abiding by a statute or law, they would have to come to this Commission, have the Commission determine if that law applied to this agreement, and then and only then, after the Commission determined that it did, would the parties amend their agreement and apply that law prospectively, that is after a determination was made.

Q But isn't it true, sir, that the dispute resolution is only triggered when one party says it does not believe it has an obligation to comply with the law?

A I believe so.

Q Okay. All right. Let's move to Issue 51. Now, 51 deals with EEL audits, is that right?

A That is correct.

Q And there are two disputes at issue with EEL audits between the parties. One relates to the type of notice that BellSouth should be required to provide, and the scope of the audit; is that right?

A That is correct.

Q The other deals with whether there should be mutual agreement for the selection of the auditor?

A Yes.

Q Now, before we go to the specifics of your position, let's talk about EELs. Would you agree with me that EELs are combinations of loop and transport?

A That's correct.

Q And that based upon the TRO there are limitations as to when a CLEC can obtain an EEL?

A Yes.

Q For instance, you can't use an EEL to provide interexchange service, is that right?

A That is my understanding.

Q And the parties have actually agreed as to what those limitations are in the interconnection agreement, is that right?

A Yes.

Q Now, in order to obtain the EEL, NuVox has to certify to BellSouth that it is using the EEL in compliance with the eligibility criteria established by the FCC in the TRO, is that right?

A That's right.

Q And simply put, you have to tell BellSouth or certify to BellSouth that your use of the EEL complies with federal law, is that right?

A Yes.

Q And as an alternative to an EEL, NuVox could order special access, is that right?

A That is correct.

Q And, generally speaking, special access is more expensive than an EEL?

A Generally speaking. And, again, not knowing all of BellSouth's term and volume plans, that is correct.

Q And the only way that BellSouth can confirm the accuracy of your certification regarding the proper use of an EEL is through an audit, is that right?

A Yes.

Q And the audit would determine whether or not the certification that you are complying with the eligibility criteria is accurate?

A Can you repeat that. I missed the last words you said.

Q Sure. The audit would determine whether or not your certification that you are using the EEL in compliance with federal law is accurate?

A That would be what it would be designed to do, yes.

Q And there is no dispute that BellSouth has an audit right under the TRO, is that right?

A BellSouth has a right to audit for cause and a right of limited audits, and that is pursuant to Paragraph 6, I believe, 22 and 25 of the TRO.

Q And absent this audit right, there is no way for BellSouth to challenge a CLEC's certification, is that correct?

A Absent the audit right, I believe that is right.

Q Now, it is the Joint Petitioners' position that BellSouth should identify the circuits that it believes are not in compliance in the actual notice, is that right?

A That is correct. The Joint Petitioners' position is that when BellSouth wants to conduct an audit, that it identify with specificity the circuits for which it claims a concern and in doing that provide documentation related to those circuits. Because it has been our experience that BellSouth will request a notice without cause, simply say I want to audit all of your circuits. And to simply allow your biggest competitor, your biggest service provider as far as that goes, also, to come in and review your business records without establishing a reason to do so is inappropriate.

Q Mr. Russell, isn't it true, sir, that the Joint Petitioners' position is that BellSouth's audit rights would be limited to those circuits identified in the notice?

A That is correct.

Q And isn't it also true, sir, that BellSouth's audit rights, according to the Joint Petitioners, should be limited to those circuits for which sufficient documentation is produced?

A Well, it would be those circuits for which BellSouth demonstrated a concern. So if that concern was demonstrated by providing some sort of documentation that indicated that the Joint Petitioners were not in compliance, it would be limited to those circuits for which BellSouth demonstrated a concern through producing that documentation.

Q And it would be the Joint Petitioners' decision whether or not the documentation produced is sufficient to go forward with the audit, initially?

A Initially, yes.

Q So if BellSouth produced documents, NuVox doesn't feel that the documents produced are sufficient, the parties would have to go to dispute resolution to resolve that?

A Well, let's --

Q Yes or no, sir, and then explain.

A Yes. In the event that BellSouth sent a piece of paper to NuVox that said we have a concern for 100 circuits,

that would be a document. I don't necessarily know if it would demonstrate a concern.

Q And you today, sitting here, don't know what type of specific documents NuVox believes are sufficient to not object to an audit going forward, do you?

A Well, in the criteria that we have established or agreed to for this agreement, one piece of documentation that might be sufficient is some evidence that BellSouth can show that the circuits are not or do not have 911 capabilities, or if the circuits do not terminate to a NuVox collocation facility, so there would be documents of that type.

Q And, again, sir, you would have the ability to determine whether the documents produced are sufficient, correct, in your eyes?

A I would have to review them, that's correct.

Q And if you oppose or determine that the documents produced are not sufficient, the Joint Petitioners' language would give NuVox the ability to delay the audit going forward until the Commission resolves the dispute?

A It there were a dispute about the authenticity of the documents or whether they, in fact, demonstrated a concern to some degree, the parties would go to dispute resolution.

Q Now, isn't it true, sir, that the TRO does not specifically state that BellSouth's audit rights are limited to circuits identified in a notice?

A It says BellSouth must have a concern. I don't know if it says specifically that they must have documentation related to that concern.

Q Mr. Russell, do you remember this exact question I asked you in Alabama?

A I don't know if it was exact. I remember this line of questioning.

Q And you did not disagree that the TRO does not specifically require BellSouth's audit rights to be limited to circuits identified in a notice?

A But BellSouth has to have a concern, so it has to demonstrate that concern with regard to specific circuits.

Q With all due respect, Mr. Russell, you are not answering my question.

Isn't it true, sir, that the TRO does not expressly state that BellSouth's audit rights are limited to circuits identified in a notice?

A It does not expressly state that they are limited to circuits identified in the notice. It also does not expressly state that BellSouth may audit all circuits at any time for any reason.

Q Isn't it also true, sir, that the TRO does not expressly state that BellSouth's audit rights are limited to documents produced in support of the audit?

A That's correct. But it also states that BellSouth

must demonstrate a concern. In other words, it must have cause. What we are trying to do is put a framework around how to show that type of cause, rather than just send a letter saying, we have cause, which would strip the for cause standard out of that section of the TRO.

Q Isn't it true that regardless of the scope of the audit, NuVox believes that it will pass any audit?

A NuVox certifies compliance and believes it would -- the audit would show that.

Q Isn't it also true that in instances where the auditor finds that NuVox has complied in all material respect with the FCC's eligibility criteria that BellSouth would reimburse NuVox its costs relating to the audit?

A Its costs related to the audit, that's correct. The problem is, and the issue that the Joint Petitioners have with this is BellSouth coming in saying we want to audit all of your EEL circuits, we devote substantial manpower resources to this audit just because BellSouth wants to come in and look at our records, look at our business records, look at our records related to our customer accounts. We don't think BellSouth should have that right unless they show a concern.

The fact that BellSouth would reimburse NuVox for costs for this manpower in conducting the audit, does not in any way take into account removing people from their normal positions in the company to work with auditors on an audit. So

we just don't want BellSouth coming in without any good reason and reviewing our customer records, our business records, or anything else like that. You have to have cause to do that.

Q And if the audit is limited to 50 circuits versus the entire universe of circuits that you have in the state of Florida, you believe that you are going to pass the audit, correct?

A We've certified compliance, we believe the audit would show compliance.

Q Now, presume for me that an audit is conducted on a limited number of circuits in a particular state, and that audit shows 60 percent noncompliance with the FCC's eligibility criteria. In that instance, sir, would you agree to allow BellSouth to audit all of your circuits in the state?

A If the audit was conducted in an appropriate manner by an independent auditor without any violations of accounting or auditing standards during the course of that audit, and 60 percent compliance or noncompliance was shown, the parties would have to get together and decide if the audit should involve more than the initial amount of circuits.

Q So the answer to my question is no, you are not willing to agree today?

A You gave me a hypothetical for which I don't have all the facts.

Q Okay. What about a finding of 70 percent

noncompliance, is that sufficient for NuVox to not object to the expansion of the audit?

A A finding of 70 percent noncompliance by an independent auditor with an audit that was conducted in a professional fashion and according to the accounting or accountant professional standards, that would be something that we needed to talk about. If the audit, in fact, was conducted in violation of those standards, in violation of AICPA by an nonindependent auditor, no, you could not conduct an additional audit.

Q What about 80 percent?

A It is the same hypothetical. You are just increasing the percentages. My answer will remain the same.

Q Mr. Russell, I'm trying to figure out at what point in time or what percentage of noncompliance do you feel is sufficient such that NuVox would not object to the expansion of an audit beyond what is originally identified in the notice. Is it 100 percent?

A We have been through this. If an audit were conducted by an independent auditor, according to AICPA rules in a professional manner, there would be a percentage of noncompliance that would justify an additional audit. But I can't, as I am sitting here today, give you a particular percentage based on a hypothetical.

Q So it's subject to discussion and debate, correct?

rather than isolated compliance issues, BellSouth might then be entitled to expand the scope of the initial audit; isn't that what you say?

A That's correct. That is not the question you asked me four times over.

Q Well, let me ask it again.

A You didn't -- you haven't asked it yet.

Q If a finding of systemic compliance issues, if there is a finding of systemic compliance issues in an audit for a limited subset of circuits, isn't it true, sir, that with such a finding, NuVox is not willing today to agree to the expansion of the audit?

A I said that it might then -- that BellSouth might then be entitled to expand the scope of the initial audit.

Q Might.

A That assumes that there is an independent auditor involved, that that auditor has conducted that audit pursuant to the professional standards that apply to auditors, and there are valid certified results of that audit. So it might then, if then those other things were -- those other criteria had been met, and the audit has been of a subset of circuits, that would expand the audit.

Q Mr. Russell, let's talk about the independent issue. You would agree with me that the parties have agreed that the audit will be conducted pursuant to AICPA standards?

A The parties have dispute resolution procedures in the agreement, so, yes.

Q Isn't it true, sir, that even in a finding of systemic violations of federal law, NuVox is not willing to agree to expand the audit?

A I'm not -- as I sit here today, I'm not presented with that type of situation. You have asked me three hypotheticals, the same hypothetical. I have answered it three times.

Q Mr. Russell, I would like to show you the Joint Petitioners' response to Interrogatory Number 94B.

MR. MEZA: If we may approach, Mr. Chairman.

COMMISSIONER BRADLEY: You may.

BY MR. MEZA:

Q And this is a question from staff to the Joint Petitioners.

COMMISSIONER BRADLEY: Is this already in the record?

MR. MEZA: Yes, sir.

BY MR. MEZA:

Q Take your time and read the entire response, but I would like to focus your attention on the second sentence of the second paragraph.

A Okay.

Q And you state, on the other hand, if BellSouth audits a limited subset of circuits, and the audit indicates systemic

event that a lawyer has a conflict from representing one party against another, he or she, in fact, could not represent one party against another. So simply because -- because I may be a member of the bar of the state of South Carolina, it doesn't mean that I can represent anybody with whom I have a conflict of interest. All we are trying to ensure is that an auditor that has a conflict of interest with one party or colludes with one party cannot, in fact, conduct an audit.

Q Mr. Russell, I believe in your deposition and in prior testimony you stated that NuVox would not object to the selection of a national auditing firm to do the audit, is that correct?

A I believe at the time of my deposition I did agree with that.

Q And you identified firms such as KPMG and Deloitte, is that right?

A Yes, because those were two of the big four that came to mind. Ernst and Young is another. I believe there is some remnant of Arthur Andersen after its days of infamy have ended.

Q Isn't it true that in this proceeding the Joint Petitioners offered a series of auditors that they would not object to, and one of them was KPMG?

A We offered auditors that we would not object to at the request of the Florida staff. I believe, that BellSouth

A That's correct.

Q And the TRO requires that the audit be conducted pursuant to AICPA standards?

A That is correct.

Q And do you know what AICPA stands for?

A American -- I don't have it in front of me. It's the auditing standards.

Q Auditing standards.

A Okay.

Q Now, would you agree with me that one of those standards is that the auditor be independent?

A In fact, the standard is the auditor be independent in fact and appearance.

Q And, also, that these rules also require that the auditor operate with integrity and objectivity?

A That's correct.

Q And notwithstanding the fact that the parties have agreed that the audit will be governed by AICPA, and the parties have agreed as to what AICPA says, you still believe that there should be mutual agreement of the selection of the auditor before the audit -- before the audit proceeds, is that right?

A Yes. And the reason for that is -- and I'm not as familiar with the accounting rules, but I am familiar with conflicts of interest when it comes to practicing law. In the

rejected that offer. We withdrew that offer. Included on that list were, I think, a dozen firms. One of them may have been KPMG at the time we offered that list.

Q Isn't it also true that in response to Commission staff discovery, you described the auditor that is conducting the Georgia EEL audit to be independent?

A At the time I believed that auditor to be independent. I was mistaken.

Q And that auditor was KPMG?

A That auditor was KPMG.

Q So you believe today that KPMG is not independent?

A That is correct.

Q And KPMG is NuVox's outside auditor?

A Well, not unlike BellSouth having a retail arm and an interconnection services arm, KPMG has a consulting arm and an auditing arm. KPMG has in the past audited NuVox's financial records.

Q And isn't it true, sir, that your statement that KPMG is not independent is based upon KPMG's involvement with the Georgia audit?

A What I believe to be their violation of AICPA standards, that's correct, a breach of a fiduciary duty and the breach of a nondisclosure agreement.

MR. MEZA: Thank you, Mr. Russell. I have no further questions for you. Mr. Culpepper may have a few.

CROSS EXAMINATION

BY MR. CULPEPPER:

Q Good afternoon, Mr. Russell.

A Good afternoon.

Q Let's talk about Issue 101, maximum security deposit amount. Would you agree with me that what we are talking about here is what should be the maximum deposit amount that BellSouth would require under the interconnection agreement?

A That's correct.

Q We are not talking about what the actual deposit amount would be; instead, the disagreement is over the maximum deposit amount, right?

A That BellSouth may request.

Q And the Joint Petitioners are proposing a one and one-half month's billing as a maximum deposit amount, right?

A I believe so. But I think in the last -- in the last arbitration hearing it was one month for services billed in advance and two months for services billed in arrears.

Q Do you have your direct testimony available?

A I don't.

Q Would you agree with me that on page --

A I will agree with you that at the time we filed that testimony that was most likely our proposal.

Q In your testimony today, what is the Joint Petitioners' proposal?

A I think the proposal would have to be either/or. Either the one and one-half month max or one month for services billed in advance and two months for services billed in arrears. If you all would agree to either of those standards, we could get rid of this issue.

Q And you would agree with me that BellSouth is proposing a two-month's billing as a maximum deposit amount, correct?

A That is my understanding, yes.

Q There is no maximum deposit amount in your current interconnection agreement, is there, Mr. Russell?

A I believe that the maximum amount is not included in the agreement, but that agreement has to be read in conjunction with state regulations regarding deposit. For instance, in Florida, I believe there is a one month max for services billed in advance. On the other hand, in South Carolina it is a two-month max based on your previous six months billings, the average amount of those billings. So while that specific -- there is no specific maximum in the agreement, the agreement has to be read in conjunction with the state deposit rules.

Q And is it your testimony that that is part of your current interconnection agreement in Attachment 7?

A That is, what's "that"?

Q That your company's -- your company's maximum deposit amount varies from state to state under your current

interconnection agreement?

A It is not that it varies state to state. It is that when BellSouth requests a deposit, it has to take into account the deposit rules that apply in each state. So that in operation usually when we work with BellSouth's deposit group, which is headed up by a lady named Sandra Setty (phonetic), they have requested deposit amounts, but they usually come in under the two-month amount.

Q Mr. Russell, are you familiar with the Joint Petitioners' responses to staff's discovery requests?

A Yes.

Q Are you familiar with the response to Interrogatory Number 67?

A Not as I sit here today, but I am familiar with those responses in general.

MR. CULPEPPER: Mr. Chairman, may I approach the witness to show him the discovery response, please? I believe it is already part of the record.

COMMISSIONER BRADLEY: You may.

BY MR. CULPEPPER:

Q Mr. Russell, in response to Florida Staff Interrogatory Number 67, would you agree with me that NuVox's response is NuVox does not have a maximum deposit amount in its current interconnection agreement?

A That's correct, in agreement with what I just said.

Q Would you agree with me that under your company's current interconnection agreement, BellSouth can require a two months deposit?

A This discovery response says under NewSouth's current interconnection agreement, BellSouth can request an amount not to exceed two months. Are you talking about the agreements we are talking about in this discovery response or the agreement we are currently arbitrating?

Q My question, again, Mr. Russell, is under your company's current interconnection agreement, would you agree with me that BellSouth can require a deposit equal to two months billings?

A I'm confused, I'm sorry. We just went through a series of questions that said BellSouth -- there was no maximum deposit amount in our current interconnection agreement. And now you are telling me that all BellSouth can ask for is a two-month deposit in our current interconnection agreement?

Q No, Mr. Russell. My question is would you agree with me that under your company's current interconnection agreement, BellSouth has the right to demand a two months deposit?

A I don't know the specific language. I know from experience in negotiating with Sandra Setty, usually, it has been based on a two-month average billings over the past six months.

Q So your answer to my question is I don't know?

A I don't know.

Q Mr. Russell, are you familiar with your testimony on this exact same question in Tennessee?

A I am. I am familiar with my testimony in Tennessee, but I am looking at a discovery response that says there is no maximum deposit amount in the current interconnection agreement. I guess I'm confused. Is it your position that there is no maximum amount or it is capped at two months, I just don't know.

Q Mr. Russell, if you don't understand my question, ask me to repeat it.

MR. CULPEPPER: Mr. Chairman, I would ask to approach the witness again to provide him with a copy of the Tennessee transcript.

COMMISSIONER BRADLEY: You may. Is this a new exhibit?

MR. CULPEPPER: No need to mark it. No, Your Honor.

BY MR. CULPEPPER:

Q And, Mr. Russell, I would ask you to turn to Page 129 of the Tennessee transcript, Lines 7 through 10, Volume One.

Have you found it?

A 129?

Q Page 129, Lines 7 through 10. Starting at Line 7, my question is:

"Question: And under your company's current

nterconnection agreement, BellSouth can require a two months deposit, right?" What is your answer?

A My -- oh, I'm sorry, it's got two pages on a page. I was going from 127 to 130, hold on.

"Answer: That's right."

Q Your answer is yes?

A Yes, that's right.

Q And your company's current monthly billings are around 3 million or 3.5 million a month?

A That's correct.

Q So would you agree with me that --

A Are we going off the transcript or are you asking me questions again?

Q I'm asking you a question. Would you agree with me that your company's current monthly billings are around 3 million to 3.5 million a month?

A That's correct, yes.

Q Your company's current deposit consists of a one million-dollar letter of credit and approximately 600,000 in cash, correct?

A That's correct.

Q Now, you would agree with me that that is substantially less than two months estimated billing, which would be around 6 or 7 million, correct?

A That's correct, and last year and in the summer of

2003, I believe, Sandra Setty's group requested a deposit in the amount of $6 million from NuVox. After reviewing BellSouth's failure to post disputes, and acknowledge those disputes, and after reviewing NuVox's payment record, it was determined that that deposit should be set at much less than the 6-million-dollar amount. So, in fact, the deposit for NuVox was set at $1 million. NewSouth's deposit with BellSouth was $600,000 in cash. The combined company now has a combined deposit of $1.6 million.

Q Mr. Russell, you would agree with me that in 2003 that BellSouth reduced NuVox's deposit from a $1.8 million letter of credit to a 1 million-dollar letter of credit, and in the same time frame it also reduced NewSouth's cash deposit from 2.4 million to 600,000?

A I'm familiar with the NuVox reduction. I'm not familiar with the NewSouth reduction because that happened when I was not there.

Q Are you familiar with your Joint Petitioners' response to Staff Interrogatory Number 68?

A I am familiar with it, yes. I'm not disputing the numbers, I'm just not -- as I sit here today, I'm not familiar with what the reduction amount was for NewSouth.

Q Fair enough. Now, you would agree with me that in 2004 there were no deposit discussions and, hence, no possible deposit reductions, because at your specific request BellSouth

agreed to hold off on an annual credit review until new deposit language was hammered out between NuVox and BellSouth?

A That was agreed to between myself and Eric Rhinehold (phonetic), yes.

Q And you would also agree with me that in response to Staff Interrogatory Number 68, that you state that BellSouth has not responded to a recent demand made by your company for a deposit refund, correct?

A At the time, that's correct. Just this past week I got an e-mail from Eric Rhinehold so that we can start the process of looking at that again.

Q And would you agree with me that Mr. Rhinehold requested or advised NuVox that certain financial information would need to be provided before a deposit determination could be made?

A I believe that is correct. I received word in an e-mail.

Q Is your company -- has it provided the requested financial information?

A I haven't been back in my office yet to do that.

Q So your company intends to provide the financial information?

A Yes. I believe I got that e-mail last Wednesday while we were in Alabama. I was in Alabama, now I'm here. I just haven't been there. **We plan on providing that**

information. I just have to get back to the office to handle that.

Q Now, Mr. Russell, you testify in your direct testimony at Page 49 that BellSouth's deposit language fails to take into account that CLECs involved in this arbitration have established business relationships with BellSouth with significant billing history?

A Yes. That is based on my understanding of the fact that we have been in business now for eight years. We have had a deposit on hand with BellSouth. We have got -- as a BellSouth witness indicated in North Carolina, stellar payment history with BellSouth, yet BellSouth still has a deposit from the company. So that is correct.

MR. CULPEPPER: Mr. Chairman, I would ask to approach the witness again. Mr. Russell, we are going to pass out Attachment 7, and this Attachment 7 is dated 2/16/05, and it was included with the Joint Petitioners' arbitration petition filed in South Carolina. And I would ask that it be marked as the next hearing exhibit, Mr. Chairman.

COMMISSIONER BRADLEY: Just a minute. It's being marked as Exhibit 16, and how do you want to title it?

MR. CULPEPPER: It's attachment --

MR. SUSAC: Mr. Chairman, I am showing the next exhibit marked -- this will Number 17 by my count.

COMMISSIONER BRADLEY: You are right. Thanks for the

Correction. You're right.

Number 17, how do you want to mark it? How do you want to title it?

MR. CULPEPPER: Attachment 7, is sufficient.

(Exhibit Number 17 marked for identification.)

BY MR. CULPEPPER:

Q Mr. Russell, you would agree with me that in Attachment 7 that the parties have already agreed to specific deposit criteria, right?

A Yes.

Q And I believe it is in section -- you would agree with me it is in Section 1.8.5 of Attachment 7, which should be on Page 10?

A Yes.

Q And you would agree with me that the deposit criteria is specific and objective?

A It appears to be, yes.

Q And you would agree with me that BellSouth's right to demand a deposit only comes into play if a CLEC doesn't meet the deposit criteria?

A Yes.

Q So is it fair to say that given the deposit criteria whether a deposit is required at all could vary amongst the Joint Petitioners?

A It could vary. That's correct.

Q Would you agree with me that NuVox may satisfy the deposit criteria, but perhaps another CLEC, say Xspedius, does not? Would you agree with me?

A That could be a possibility, yes.

Q So you would agree with me that the agreed upon deposit criteria does, in fact, take into account the parties existing business relationship and billing history?

A No. Because if, for instance, in South Carolina, after two years of good payment history, I would get my deposit back. If there was an item that said, any CLEC has a good payment history for the past seven years gets their deposit back, I would say, yes, it does. So there are criteria. I'm not arguing with you about the criteria. That's my opinion.

Q Mr. Russell, do you have the Tennessee transcript handy?

A I did. Let me find it.

Q And once you find it, I would ask you to go to Volume 1, Page 136 --

A Right.

Q -- Lines 1 through 5.

A Okay.

Q And would you agree with me there the question is: "So would you agree with me that the deposit criteria does, in fact, take into account the parties established business relationship and billing history, wouldn't you?"

And what is your answer?

A "To some degree, yes."

Q While we're on the topic of deposit refunds, you would agree with me that in Section 1.8.10 of Attachment 7 -- I'm sorry.

A Are we in this still or are we going to something else? Can I put the transcript away?

Q Let's go back to Attachment 7.

A **Okay.**

Q **You just testified about refunds in South Carolina,** right?

A That's right, yes.

Q Okay. Well, you would agree with me that in Attachment 7, in Section 1.8.10, the parties have already agreed to a deposit refund provision, haven't they? **And** under the deposit --

A Hold on. Hold on. Let's do one at a time.

Q Section 1.8.10, bottom of the page.

A We have agreed to -- we have agreed to -- that BellSouth shall refund, release or return security, but it goes back to the criteria that we talked about just a minute ago that does not necessarily take into account the fact that NuVox's payment history of the past period of time has been stellar. So we have agreed to criteria. It is provided for in agreement. **But you asked me why I said a specific thing in my**

testimony, and I told you because it does not take into account our payment history over the past seven years for which, in other instances, we would have received a return of our deposit.

Q Mr. Russell, let's go back to the deposit criteria, 1.8.5.

A Right.

Q And would you agree with me that a good payment history is but one of several factors?

A I'm not arguing that with you. I agree.

Q And, again, already agreed upon factors?

A It is one of the already agreed upon factors, that is correct. It does not take into account seven years of good payment history with BellSouth.

Q Let's go on to Issue 103, Mr. Russell.

A Okay.

Q Now, Issue 103 involves the right to terminate service because of nonpayment of a deposit, correct?

A Yes.

Q And BellSouth has a right to a deposit. That is not in dispute, is it?

A If we don't meet those factors, you have a right to deposit. If we meet those factors you agreed with me you don't have a right to a deposit.

Q BellSouth has a right to protect itself against

uncollectible debt, would you agree with me?

A Sure.

Q And you would agree with me that the contract provision that is involved in Issue 103 does not involve disputed deposit demands, correct?

A I don't think that is correct. I think that 103 -- there could be an instance where BellSouth requested a deposit that a CLEC disputes whether that deposit is appropriate. So it could include -- it is based on a deposit dispute.

Q Let's go to Section 1.8.6 of Attachment 7.

A Okay.

Q Do you have it handy?

A 1.8.6. Okay. I'm here.

Q Would you agree with me that the first four words in both version's agreed upon language states, subject to Section 1.8.7?

A That's right.

Q And would you agree me that Section 1.8.7 is the dispute resolution provision for deposits?

A Yes, uh-huh.

Q Mr. Russell, are you aware that this Commission's rules regarding deposits allow a local exchange company to discontinue service if a deposit request is not paid within 48 hours?

A I'm not aware of that.

Q Would you agree with me, subject to check?

A I mean, I just don't know that. I mean --

MR. CULPEPPER: Mr. Chairman, may I approach the witness?

COMMISSIONER BRADLEY: Yes, you may.

BY MR. CULPEPPER:

Q Mr. Russell, while we pass out this exhibit, would you agree with me that your Florida tariff with respect to deposits incorporates applicable Commission rules regarding deposits?

A I believe it does.

COMMISSIONER BRADLEY: Okay. This is not a part of the record, also, right? This is an exhibit.

MR. CULPEPPER: Yes, Mr. Chairman. I would like to mark this.

COMMISSIONER BRADLEY: It's marked as Exhibit 18.

MR. CULPEPPER: Eighteen.

COMMISSIONER BRADLEY: And title?

MR. MEZA: Commission deposit rule.

COMMISSIONER BRADLEY: Okay.

(Exhibit Number 18 marked for identification.)

BY MR. CULPEPPER:

Q Mr. Russell, do you have a copy of the Commission's customer deposit rule?

A Yes.

Q Okay. Would you look at Section 3, which is on the second page, top of the second page. It states new or additional deposits. Do you see that paragraph?

A Right.

Q Do you see it, Mr. Russell?

A Yes. Yes.

Q Would you agree with me that the last sentence of that paragraph states, if the deposit requested is not paid within 48 hours, the company may discontinue service?

A I agree that that is what it says. But the next -- it also says, customers with an established satisfactory payment record and has had continuous service for 23 months, the company shall refund the residential customer's deposit. So, I mean, do I get my deposit back today? Does this apply to residential customers, CLECs? I see what it says, but if BellSouth's made a six million-dollar deposit request on NuVox today, there is no way NuVox could turn around a six million-dollar deposit amount in 48 hours, because we would have to amend our credit facility with our banks, we would have to get permission from our board.

So this rule is out there. If it applies and BellSouth asks this Commission to terminate service in 48 hours if you didn't have $6 million based on the amount you want under this agreement, you would terminate all of our customers in Florida. So I see what this rule says, but because it

relates to residential customers only, I don't know if it applies. If it does apply, I want my deposit back, because we have had a business relationship with you for more than 23 months. In fact, it has been 64 months. So how does this work?

Q Mr. Russell, again, you would agree with me that it has already been agreed upon in Section 1.8.10 if a CLEC satisfies the specific and objective deposit criteria, the CLEC can get its deposit back in 30 days, correct? You don't have to wait two years.

A Under the agreement that we are arbitrating today, that's correct. We don't have those criteria under the agreement that is in existence today. So if this applies, I would like to get my deposit back.

Q Mr. Russell, would you agree with me that the right the Joint Petitioners are so adamantly opposed to here, that is the right to terminate service for nonpayment of a deposit, is a right that this Commission's deposit rule expressly authorized and a right contained in both your company's and BellSouth's retail tariff?

A It does. Our opposition to it is -- you mischaracterize our opposition to it. Our opposition to the deposit -- this remedy that BellSouth seeks; that is, to terminate the service, NuVox's service, based on a deposit dispute is because if through no fault of our end users, we

disagree with BellSouth's request for deposit -- let's say they requested a six million-dollar deposit from NuVox today. And Mr. Culpepper is trying to get me to agree that they would have the ability to terminate service to us in 48 hours. If they terminate service to us based on a deposit dispute, a bona fide dispute, they are also terminating service to all of our end users that have nothing to do with that dispute.

So all we're asking this Commission for, in our requested language -- we have had dispute resolution language in our current agreement that's been in effect now for about five years. We have had a number of deposit requests from BellSouth and likewise requests for deposits and refunds from NuVox. We have always been able to work out these disputes among ourselves. We have never had a provision in our agreement that allowed BellSouth to unilaterally terminate service if we did not immediately turn over a deposit to them, or if we disagreed with the amount of the deposit.

That is the key difference between the language that BellSouth is proposing today and what the companies have currently operated under. If BellSouth -- if we have a deposit dispute with BellSouth, and they terminate our service, they are terminating all of our customer services, too.

Q Mr. Russell, again, Section 1.8.6 is subject to the very next section, 1.8.7, correct?

A That's correct.

Q Which is, again, the deposit dispute resolution provision, right?

A It is the deposit dispute resolution, that is correct.

Q And you just testified that NuVox and BellSouth have had a good history of working out deposit issues in the past, right?

A That is correct.

Q **And the parties** have reached agreement on very specific and objective deposit criteria, correct?

A That is correct.

Q And because the parties have reached such an agreement on the specifics, disputes over whether a deposit can be required should be minimal, shouldn't it?

A They should. But going from past history, BellSouth's last request, a demand for six million dollars, that after BellSouth internally agreed that they had not been posting payments in a timely fashion, posting disputes in a timely fashion, that deposit request went down from six million dollar to one million dollars. So, those were -- those were issues that had nothing to do with NuVox.

Those were internal BellSouth issues, that under the agreement language that you are proposing now may not get worked out in time for us to resolve this deposit dispute. You are asking for a big change in how we have done business over

the years that, in our eyes, has been effective.

Q Do you have Section 1.8.7?

A I do.

Q And you would agree with me that the parties have already agreed that they will work together to determine the need for or an amount of a reasonable deposit?

A That's correct.

Q Mr. Russell, let's move on to Issue 100. And in Issue 100 we are talking about the right to suspend access to ordering systems or terminate service for failure to pay undisputed amounts that are past due, correct?

A That's correct.

Q And BellSouth's right to suspend or terminate service for nonpayment is not in dispute, is it?

A That's correct.

Q And the parties have agreed upon billing dispute language in Attachment 7, right?

A That's correct.

Q And the parties have already agreed that all valid billing disputes shall be removed from the collections process, right?

A Yes.

Q It is your testimony on Page 46 and 47 of your direct testimony that the Joint Petitioners' objection to BellSouth's proposed language is based on a perceived shell game if Joint

Petitioners had to guess the precise amount to pay to avoid suspension or termination of service, correct?

A That's correct.

Q Have you reviewed BellSouth's updated language for Issue 100?

A If it is included in this Attachment A --

Q No. Go to Exhibit A, please, Page 17.

A Okay.

Q Could you read the last sentence in BellSouth's version of Section 1.8 or, sorry, 1.7.2?

A Yes. Do you want me to read it to myself or out loud or what?

Q How about let's read it out loud, please.

A "Upon request, BellSouth will provide information to customer, short name, of additional amounts owed that must be paid prior to the time period set forth in the written notice to avoid suspension of access to ordering systems or discontinuance of the provision of existing services as set forth in the initial written notice."

Q Okay. So you would agree with me that BellSouth has now eliminated the Joint Petitioners' concerns about guessing what amounts must be paid to avoid suspension or termination of service?

A No, I would not agree. Because what we are talking about here is when you receive a notice of suspension from

BellSouth for an amount that is due, the notice also says, you know -- let's say it is a thousand dollars. NuVox, you must pay a thousand dollars by the first of May in order in avoid suspension or termination of service. Well, it's not as if you pay that thousand dollars by that time that the threat of suspension or termination goes away. What BellSouth's language provides is that in addition to the amount on the suspension or termination notice, you also must pay any amounts that come due during that time period, that number of days from the date of the service termination notice to the date that payment is due.

So what we are left with is a situation where if NuVox has made other payments to BellSouth and those are received by BellSouth and not posted during that time period, we could lose service for failure by BellSouth to post those amounts. We could lose service for not accurately calculating interest due on any amount that is late. So all we are asking for is that on the notice of suspension or termination, whatever amount it says at the top of that, be responsible for paying that. And then you can't be terminated for something that wasn't late, that came due in those three or four or 15 days during the time that you received the notice and the date payment is due. That is the shell game we are talking about.

Whatever is on the notice, we will be happy to pay and not risk service termination. Our concern is that there is a situation where BellSouth fails to post a payment, that comes

due during that time period, and they terminate service to us, and in a sense our end users because of some sort of accounting error. That it all we are trying to get rid of.

This upon request, BellSouth will provide additional information of the additional amounts owed, I mean, we have an account representative, Andrew Caldorello (phonetic), a nice guy, he doesn't know on a day-to-day basis whether amounts have been posted to our account; he doesn't know on a day-to-day basis whether BellSouth has acknowledged any bona fide disputes. Who at BellSouth am I supposed to talk to to get these issues worked out? Upon request. Does this include any duty that you provide accurate information? If you don't provide accurate information and you terminate service to our customers --

Q Are you finished with my answer?

A Yeah. I mean, it still leaves a lot of things to be desired. That language does not cure the problem.

Q Mr. Russell, isn't it fair to say that in the last two years that NuVox has timely paid BellSouth all monies owed?

A Yes.

Q So your company hasn't received any suspension or termination notices or had to make payment arrangements to pay off past amounts due to BellSouth recently, have they?

A We have not received any -- we have not had to make any payment arrangements. We have made our payments on time.

however, we have received notices from BellSouth that were sent in error, we believe, that said, unless you pay X amount, we are going to terminate your service, despite the fact that we have a, quote, unquote, stellar payment history according to your witnesses.

So it's the sword of Damocles hanging over your head. We have to figure out why did this get issued. We have a good payment history. What is going on here? Is there a mistake with BellSouth? Andrew, can you help me out? All the while having this sword over our head of wondering if we're going to lose service based on some accounting error at BellSouth.

Q So, Mr. Russell, it's your testimony that NuVox, you haven't had any interaction with BellSouth's collections or treatment process recently?

A We have not had any collection treatment process transactions.

MR. CULPEPPER: Mr. Chairman, I would like to approach the witness again. And I wish to ask the witness some questions about BellSouth's responses to Staff Interrogatory Number 117. The document is proprietary. I will attempt to ask question so it will not -- so no proprietary information will be elicited.

BY MR. CULPEPPER:

Q Mr. Russell, have you found the attachment to Item Number 117?

A It says attachment to request for production of Item Number 22. That is what I have. Is this the right thing?

Q Right. Just turn a couple of more pages, if you will?

A The pages are Bate stamped if that will help us.

Q Okay.

A Do you have a specific page number?

Q Page number 1, followed by five zeros, 2.

A Okay.

Q And for ease of reference, just to go through this document, I will just refer to the last number, like Number 2.

A Okay.

Q Mr. Russell, would you agree with me that this is a letter dated March 18th, 2005, from BellSouth to a CLEC demanding payment of past due amounts?

A Yes.

Q Would you agree with me that in the second paragraph of this demand that it also states that payments are expected for any current bills that may become due?

A That is what it says, yes.

Q So you would agree with me that this is a suspension notice, correct?

A Yes.

Q Would you go to Bates Number 4, Mr. Russell?

A **Yes.**

Q Would you agree with me here that this fax, or facsimile, states that the attached report lists all billing account numbers and outstanding unpaid balances?

A That's what it appears to show.

Q Let's go to Bates Number 5, Mr. Russell?

A Okay.

Q Are you aware that this is a BellSouth aging report?

A I have never seen one. I will take that.

Q Right. Because your company pays its bills on time, correct?

A We do our best.

Q Would you agree with me that this is a spreadsheet that is showing the CLEC, or the company, and there's a column showing current amount owed, and a column showing 30 days owed or past due, a column showing 60 days past due, a column showing 90 days past due, a column showing disputed amount?

A Yes.

Q And, finally, a column showing total amount due less deposit and current charges?

A Yes.

Q Mr. Russell, will you go to Bate's Numbered 16.

Are you there?

A Okay.

Q Would you agree with me that this is an e-mail from the CLEC who received the suspension notice advising of

payments made during the week of 3/21/05?

A That's what it appears to be, yes.

Q Let's go to Bates Number 18. Would you agree with me, Mr. Russell, that this is another e-mail with a spreadsheet attached from a CLEC advising of payments made during the week of 3/28/05?

A Yes.

Q Mr. Russell, let's go to Bates Number 42. Mr. Russell, would you agree with me that Bates Number 42 is an e-mail from BellSouth to the CLEC in question attaching yet another aging summary report?

A Yes.

Q And let's go to the following page, Bates Number 43. Would you agree with me that, again, this is an aging report showing current amounts due, a billing account number, past amounts due, disputed amounts, as well as total amounts less disputes and current charges?

A Yes.

Q Turn to Bates Number 64, if you will.

A Okay.

Q Now, would you agree with me that this e-mail dated April 18th, 2005, is yet another e-mail with an aging report attached that is going from BellSouth to the CLEC in question?

A Yes.

Q Now that we have gone through that paperwork, would

you agree with me that there is no guesswork involved in paying off amounts due to BellSouth, is there, Mr. Russell?

A Not in this instance for KMC. My understanding is they have some treatment process in place with BellSouth currently. But, for instance, the last notice that I saw that was sent to NuVox did not include this kind of detail or the amount of aging. It said simply, we are missing a payment of -- I think it was around $15,000. Unless you pay all other amounts due or come due in the next 15 days, we are going to terminate your service. It didn't include all of this stuff. So if that is going to be what you provide to everybody going forward, that may get rid of the guesswork. If this is a special treatment process issue, then it would not.

MR. CULPEPPER: I have no further questions.

COMMISSIONER BRADLEY: Thank you. Staff.

CROSS EXAMINATION

BY MS. SCOTT:

Q Good afternoon, Mr. Russell, how are you?

A Hey. I'm fine.

Q My name is Kira Scott. I'm an attorney here with the Commission. I will be asking you some questions regarding Issue 51C.

A Okay.

Q Mr. Russell, you had mentioned today that BellSouth had rejected and the Joint Petitioners withdrew the list of

independent auditors provided in Joint Petitioners' late-filed deposition exhibit, is that correct?

A I don't know if that -- we offered a list. We couldn't come to agreement. I don't know if they objected. We just couldn't come to agreement. So we didn't agree to anything, so I think our offer has been withdrawn.

Q Okay. Were there any auditing firms on the list that were acceptable besides -- I think, you had mentioned KPMG had been unacceptable to you. Were the rest of them acceptable on the list?

A Well, at the time we proposed the list, all of the groups were acceptable. Our experience has been with KPMG that they are not acceptable, based on working with them on something. In putting together the list, we got some of the big firms like Ernst and Young and put them on the list. I actually contacted a friend of mine down here to get the names of some local firms in Florida, if the audit was related to Florida, to add to the list. I can't sitting here today recall the name of that firm, but we added some firms to each state specific, and we added those firms. I believe one was even here in Tallahassee.

Q Do you remember the firm Grant Thornton? Was that an acceptable firm?

A The firms we put on the list at the time we made the list were acceptable, so Grant Thornton would probably be

acceptable today, yes.

Q Okay. For purposes of new agreements, would the Joint Petitioners be willing to agree to a list of auditing firms from which an auditor would be selected?

A I think we were willing to do that when we met with staff sometime ago, and we are still willing to consider that proposal and do that.

Q Okay. In staff's second set of interrogatories to BellSouth, we had asked if BellSouth currently maintained a list of auditors that it had used or may use for auditing CLECs' EEL eligibility criteria; and, if so, to identify those auditors.

MS. SCOTT: Chairman, may staff please approach the witness and provide him with BellSouth's response?

COMMISSIONER BRADLEY: Yes. Is this part of the record, or is this also --

MR. SUSAC: Yes, Chairman, this is already a part of the record and does not need to be identified.

THE WITNESS: Thank you.

BY MS. SCOTT:

Q Would you please review that to yourself, BellSouth's response, please.

A Yes.

Q Let me know when you're finished.

A I'm finished.

Q Okay. In your deposition you had mentioned that you had concerns with American Consultants Alliance. Is this correct?

A That's correct, yes.

Q Is ACA, as referenced in BellSouth's response, the same firm as American Consultants Alliance?

A Yes, it is.

Q What are your concerns with this firm?

A Number one, they were not AICPA compliant. Number two, we could not find any information regarding American Consultants Alliance on the Internet, in any sort of accounting -- from any sort of accounting firm that we had a relationship with that did work for us. We would ask have you ever heard of American Consultants Alliance? The answer was no universally. We could not find any references on its principals; that is, the men and women who worked for them.

We reviewed information provided to us from BellSouth about ACA. It appeared that all of ACA's clients were ILECs. We reviewed a letter from ACA to BellSouth claiming that if ACA were selected by BellSouth to conduct audits, that ACA would reap millions of dollars for BellSouth. There were -- I can go on. There were many, many reasons why we objected to ACA. It appeared as if they were beholding to and colluding with BellSouth.

MS. SCOTT: Thank you, Mr. Russell. Staff has no

further questions for this witness.

COMMISSIONER BRADLEY: Thank you.

Commissioners?

Mr. Horton, redirect.

MR. HEITMANN: Good afternoon, Mr. Chairman. My name is John Heitmann. I have short redirect for the witness.

REDIRECT EXAMINATION

BY MR. HEITMANN:

Q Mr. Russell, do you recall with respect to Issue 4, Mr. Meza's questioning regarding liability caps under the Joint Petitioners' proposal?

A Yes.

Q Can you explain when liability up to the cap would attach?

A Yes. In the event that our liability proposal were accepted, and there was a 7.5 percent cap for a party's negligence under the agreement, that would be the total amount that could potentially be available for one party's negligence the day the claim arose. So if three days after this contract is in effect, BellSouth negligently shuts down one of our collocation facilities so that our customers would not have any service and subject NuVox to damages, there would be no liability exposure to BellSouth because we have not paid any money to BellSouth at that time and nothing has been billed.

In the event that 36 months from now after the

company has paid BellSouth $90 million over the course of this agreement, 7.5 percent of that would be about $8.1 million. In the event that on that day BellSouth negligently shut down one of our collocation facilities and subjected NuVox to -- and we will use for this example's sake $100,000 worth of damages, the only amount that we could claim from BellSouth would be $100,000, that amount that was directly related to BellSouth's act of negligence.

It is not as if -- it is not as if over the course of this contract we are going to get an $8.1 million rebate from BellSouth. All we are asking for is to have the ability in the event of BellSouth's negligence to not be left holding the bag. In the event -- in the event that BellSouth's negligence subjected us to $90 million over the course of this agreement and we had to come out of pocket $82 million, the maximum that we could recover from BellSouth would be $8.1 million. And that act of negligence would have to occur on the very last day of the contract, because that is the total amount that we would pay to BellSouth under the contract.

So it is capped at $8.1 million. If over the course of the contract there are no acts of BellSouth's negligence, we would get no dollars. If over the course of the contract there were $200,000 related to acts of BellSouth's negligence for which NuVox had to come out of pocket, we could only get $200,000. That is the best way I know to explain it.

Q Mr. Russell, if under the contract BellSouth paid $90 million to NuVox for services NuVox provided under the contract, what would NuVox's maximum exposure be in that instance?

A $8.1 million. It is completely related to the amounts that one party pays to the other in calculating the 7.5 percent that would be available for acts of negligence of the party receiving the money under the contract.

Q Mr. Russell, is the Joint Petitioners' 7.5 percent cap proposal reflected in typical commercial contracts?

A There are liquidated damages provisions and liability caps in typical commercial contract provisions. For instance, in some software services agreement where we are paying a party to provide us with a service over a course of time, there have been provisions. I have seen it allow for recovery of 50 percent of the amount paid to the party providing the service and the party who is going to be paid over the course of the contract for acts of their own negligence or willful misconduct. What we are providing here is an incremental step away from BellSouth's elimination of liability language that is in our current interconnection agreement and is proposed today.

Q Mr. Russell, have you seen limitation of liability language in interconnection agreements that differs from BellSouth's proposed limitation of liability language?

A Yes, I have. NewSouth, which NuVox Communications

acquired by a merger agreement that was completed on December 31st of this past year, has interconnection agreements with ALLTEL Communications. In each of those interconnection agreements, there is a provision that allows for the recovery of the greater of $250,000, or the aggregate amounts billed so the total amounts billed for the year in which any negligent act on behalf of ALLTEL occurs that subjects NewSouth to liability.

So in an instance where ALLTEL shut down a NuVox collocation facility and subjected NuVox to $100,000 worth of damages, NuVox could recover those damages from ALLTEL based on ALLTEL's negligent acts. They could recover that $100,000 because it would be under the caps provided for in that agreement, the caps being the greater of $250,000 or the total amount billed during a calendar year under that agreement.

Q Mr. Russell, with respect to Issue Number 7, do you recall Mr. Meza's hypothetical wherein an end user sued BellSouth based on NuVox's negligence?

A Yes.

Q Can you explain for me what BellSouth's liability exposure would be in such instance?

A In the event that BellSouth were sued and the customer's cause of action or damages were directly related to NuVox's negligence, BellSouth would have zero liability because the act of negligence was on behalf of NuVox, not BellSouth.

Q Mr. Russell, with respect to Issue Number 5, do you recall your discussion with Mr. Meza regarding commercially reasonably efforts to establish limitation of liability terms?

A Yes.

Q Can you explain for us whether or not it ever would be reasonable or commercially reasonable to agree to limitation of liability terms that were different from BellSouth's tariff provisions or less than the maximum amount allowed by law?

A Yes. There are instances where it would be thoroughly commercially reasonable to agree to different limitation of liability or indemnification terms in trying to win a customer's business. For instance, in many governmental services contracts, that is, for Army bases, for county governments, for city government offices, you have to agree to different liability limitations and indemnification provisions to win that city or county's business.

They put out RFPs to carriers to bid for that business. So in those government contracts, be it for an Army base or for a city, county, or state government, they will dictate or request that you amend the terms of your liability and indemnification provisions for the governmental entity and, in fact, can't select a carrier that doesn't do those things.

So it is commercially reasonable, in certain instances, to make changes to your liability limitation provisions and your indemnification provisions. And it is one

of the benefits of a competitive environment. When competitors have to make changes to their liability limitations provisions and to their indemnification provisions, it is going to drive a couple of things, more choice for consumers and for businesses here in Florida. It's also -- if you have exposure, you are going to try harder not to commit acts that are going to expose you to liability. You are going to try to make sure that you don't have those instances of negligence that occur and most likely would occur more frequently when, in fact, you have a total shield to liability.

Q Mr. Russell, do you recall with respect to Issue Number 6, Mr. Meza's questioning about whether or not BellSouth is trying to insulate itself from end user claims?

A Yes.

Q Can you explain whether or not it is your understanding that BellSouth is trying to insulate itself from end user claims?

A Yes. We have negotiated this agreement for two and a half years now. It has been my understanding through those negotiations that BellSouth's proposal was intended to limit its liability for end user claims. And also in the testimony provided by BellSouth's witness on this issue, that testimony made clear that BellSouth was attempting to limit its liability for damages to end users, even if those damages are directly related to and reasonably foreseeable out of BellSouth's own

negligence. Our language is attempting to make sure that we are not left holding the bag for BellSouth's negligence in the event that an end user is precluded from seeking some sort of redress from BellSouth based on BellSouth's negligence.

Q With respect to Issue Number 51, Mr. Russell, do you recall Mr. Meza's questioning with regard to what the triennial review order says and doesn't say regarding EEL audits?

A Yes.

Q Could you explain for us whether or not the FCC expected for state commissions such as this one to fill out auditing requirements and interconnection agreements such as this one?

A Yes. The states, the FCC said that EEL audits could only be conducted for cause and on a limited basis only. And I believe, and I don't have the TRO in front of me, that states could do something different from that plan, and it set other factors that would guide the conduct of EEL audits in their states.

Q Mr. Russell, with respect to Issue Number 100, do you recall your discussion with Mr. Culpepper regarding payments of all additional amounts that might be due once you received a termination notice?

A Yes.

Q How many bills does NuVox get a month from BellSouth?

A NuVox gets 1,179 bills per month from BellSouth.

Q So how many calculations would you have to make in order to ensure that you paid everything that would be coming due in a 30-day period?

A You would have to calculate what would be due related to 1,179 bills, and any interest related to those bills, and you would have to also clarify or certify that certain disputes had been recognized by BellSouth and that payments posted related to those 1,179 accounts had, in fact, been posted by BellSouth.

Q And what is your experience with respect to BellSouth's track record on posting disputes in a timely manner?

A Our experience has been that disputes are frequently posted late so that they are not reflected all the time on your next bill related to that account. In other words, if you receive a bill on day one from BellSouth for a thousand dollars, and you dispute $250 of those charges because they are erroneous, you are going to receive another bill 30 days from that time. Oftentimes it showed as late, those amounts are late as opposed to in a disputed column. In other words, the dispute reconciliation process is not always timely, so that those disputes aren't recognized in a timely fashion.

Q Mr. Russell, has NuVox or any other Joint Petitioners experienced difficulties getting BellSouth to post payments in a timely manner?

A Yes. While NuVox doesn't bill BellSouth for a lot of services, because we currently have a bill and keep arrangement under our agreement, KMC and Xspedius both bill BellSouth significant amounts to the tune of hundreds of thousands of dollars per month. So that they are more -- they are paying each other each month.

Granted, those carriers are usually paying BellSouth more, but Xspedius, in particular, has had a very difficult time getting BellSouth to pay invoices. At one point in time it was due from BellSouth over $25 million. KMC, on the other hand, I believe, is late paid by BellSouth, if memory serves me, 90 percent of the time, so that they are not being paid in a timely fashion.

MR. HEITMANN: I have nothing further for Mr. Russell at this point.

COMMISSIONER BRADLEY: Thank you. Exhibits?

MR. HORTON: Yes, sir. We would move --

COMMISSIONER BRADLEY: I have -- go ahead, and then I'll make my comment.

MR. HORTON: I would move Mr. Russell's Exhibit Number 8 and, I believe, 13.

COMMISSIONER BRADLEY: Okay. Number 8 and Number HER-1. Number 8, I've got you, and Number 13. Okay. So you all have agreed to that?

Okay. BellSouth, you have exhibits, also?

MR. MEZA: Yes, sir, I would like -- I think it's 13 through 18 moved into the record.

COMMISSIONER BRADLEY: Okay. Without objection, let's deal with Mr. Horton first. Without objection, show Exhibits 8 and 13 admitted into the record. And without objection, let's show Exhibits 14, 15, 16, 17, and 18 by BellSouth admitted into the record also.

(Exhibits 8, 13, 14, 15, 16, 17 and 18 admitted into evidence.)

COMMISSIONER BRADLEY: The witness is excused.

MR. HORTON: Could we take just a quick break before we start?

COMMISSIONER BRADLEY: Yes. Let's take a five-minute break.

MR. HORTON: Thank you, sir.

(Off the record.)

COMMISSIONER BRADLEY: Okay. We need to reconvene. Call your next witness, please.

MR. HORTON: I would like to call Mr. Mertz. And, Mr. Mertz, you were present and you have been sworn, have you not?

THE WITNESS: That is correct.

COMMISSIONER BRADLEY: He has not been or he has been?

MR. HORTON: He has been sworn, sir.

COMMISSIONER BRADLEY: Okay.

hereupon,

JAMES MERTZ

as called as a witness, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HORTON:

Q Could you please state your name and address?

A My name is James Mertz. My address is 1755 North rown Road, Lawrenceville, Georgia 30043.

Q And by whom are you employed and in what position?

A KMC Telecom, and I am the Director of Government ffairs.

Q Mr. Mertz, have you prepared and caused to be istributed to the Commissioners and the parties a document roviding your background and an introduction?

A Yes, I have.

MR. HORTON: Mr. Chairman, we previously distributed four-page document -- three-page document with Mr. Mertz's ntroduction and background. I would like to ask that that be nserted into the record as though read.

COMMISSIONER BRADLEY: Without objection, the refiled testimony of Mr. Mertz --

MR. HORTON: Commissioner, Mr. Mertz --

COMMISSIONER BRADLEY: -- is inserted into the record

is though read.

MR. HORTON: Thank you, sir.

BY MR. HORTON:

Q Mr. Mertz, you have reviewed the testimony of Ms. Johnson in this docket, the rebuttal and the direct?

A Yes, I have.

Q And with the exception of the changes shown on the errata sheet, do you have any changes or corrections to make to that testimony?

A Just the background information.

Q Other than the background information, if I asked you the questions that were contained in that testimony, would your answers be the same?

A Yes, they would.

MR. HORTON: And just for the record, Mr. Chairman, we would ask at this point that the direct and rebuttal testimony of Ms. Johnson, which Mr. Mertz is adopting, be inserted in the record as though read.

COMMISSIONER BRADLEY: Without objection, show the prefiled testimony of Mr. Mertz -- or Ms. Johnson, what did you say?

MR. HORTON: Thank you, sir.

COMMISSIONER BRADLEY: Did you say Mertz or Johnson?

MR. HORTON: It is Ms. Johnson's testimony, Mr. Mertz is adopting it.

COMMISSIONER BRADLEY: Okay. Without objection, show the prefiled testimony of Ms. Johnson, who is going to be represented by Mr. Mertz, is admitted into the record as read.

MR. HORTON: Thank you, sir.

COMMISSIONER BRADLEY: Does that take care of it?

MR. HORTON: That will take care of it, yes, sir.

And I believe there was an exhibit attached to that testimony, which has been pre-identified as Exhibit 7. That is the same exhibit that was already sponsored by Mr. Russell in his testimony. So there is an exhibit, Exhibit A, to that Exhibit Number 7.

WITNESS INTRODUCTION AND BACKGROUND

James M. Mertz (KMC)

Q. PLEASE STATE YOUR FULL NAME, TITLE, AND BUSINESS ADDRESS.

A. My name is James M. Mertz. I am Director of Government Affairs for KMC Telecom Holdings, Inc., parent company of KMC Telecom V, Inc. and KMC III LLC. My business address is 1755 North Brown Road, Lawrenceville, Georgia 30043.

Q. PLEASE DESCRIBE YOUR POSITION AT KMC.

A. I am part of the organization that is responsible for federal regulatory and legislative matters, state regulatory proceedings and complaints, interconnection agreements and local rights-of-way issues. I participate in public policy and industry forums that deal with telecommunications issues. I am responsible for and manage KMC's interstate and intrastate tariffs. I actively support KMC's intercarrier billing organization, marketing department and access cost management organization.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A. I hold a Bachelors of Science in Mathematics from the University of Georgia and a Masters in Business Administration in Finance from Georgia State University. My telecommunications career began in 1979 with AT&T Long Lines, in data processing, designing computer systems to maintain AT&T telecommunications network. I was employed by AT&T until August 2001. While at AT&T I held numerous management positions dealing with accounting, economic analysis, financial analysis, budgeting, training development, strategic planning, regulatory issues management,

Local Exchange Company relations, legislative policy implementation and planning and executing AT&T's strategic business initiatives for intrastate telecommunications services. I joined KMC Telecom in October 2001 as the Director of Access Cost Management.

Q. PLEASE IDENTIFY ALL STATE COMMISSIONS TO WHICH YOU HAVE SUBMITTED TESTIMONY.

A. I have submitted testimony in proceedings before the following commissions: the Alabama Public Service Commission, the Florida Public Service Commission, the Georgia Public Service Commission, the Louisiana Public Service Commission, the Mississippi Public Service Commission, the North Carolina Utilities Commission and the South Carolina Public Service Commission.

Q. PLEASE IDENTIFY ALL ISSUES FOR WHICH YOU ARE OFFERING TESTIMONY.

A. I am prepared to sponsor and adopt all testimony sponsored by my colleague Ms. Marva Brown Johnson. Due to unforeseen circumstances Ms. Johnson will be unable to serve as KMC's regulatory policy witness in this hearing. I am prepared to sponsor testimony on the following issues:

General Terms and Conditions	2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 8/G-8, 9/G-9, 12/G-12
Attachment 2: Unbundled Network Elements	23/2-5, 26/2-8, 27/2-9, 36/2-18, 37/2-19, 38/2-20, 43/2-25, 46/2-28, 50/2-32, 51/2-33(B)&(C)
Attachment 3: Interconnection	65/3-6
Attachment 6: Ordering	86/6-3(B), 88/6-5, 94/6-11

Attachment 7: Billing	95/7-1, 96/7-2, 97/7-3, 99/7-5, 100/7-6, 101/7-7, 102/7-8, 103/7-9, 104/7-10
Supplemental Issues	108/S-1 thru 114/S-7

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position, as set forth with respect to each unresolved issue subsequently herein, and associated contract language on the issues indicated in the chart above.

PRELIMINARY STATEMENTS

WITNESS INTRODUCTION AND BACKGROUND

KMC: Marva Brown Johnson

Q. PLEASE STATE YOUR FULL NAME, TITLE, AND BUSINESS ADDRESS.

A. My name is Marva Brown Johnson. I am Senior Regulatory Counsel for KMC Telecom Holdings, Inc., parent company of KMC Telecom V, Inc. and KMC III LLC. My business address is 1755 North Brown Road, Lawrenceville, Georgia 30043.

Q. PLEASE DESCRIBE YOUR POSITION AT KMC.

A. I manage the organization that is responsible for federal regulatory and legislative matters, state regulatory proceedings and complaints, interconnection agreements and local rights-of-way issues. I am also an officer of the company and I currently serve in the capacity of Assistant Secretary. I participated actively in the negotiation of the Agreement that is the subject of this arbitration.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A. I hold a Bachelors of Science in Business Administration (BSBA), with a concentration in Accounting, from Georgetown University; a Masters in Business Administration from Emory University's Goizuetta School of Business; and a Juris Doctor from Georgia State University. I am admitted to practice law in the State of Georgia. I have been employed by KMC since September 2000. I joined KMC as the Director of ILEC Compliance; I was later promoted to Vice President, Senior Counsel and this is the position that I hold today.

Prior to joining KMC as the Director of ILEC Compliance, I had over eight years of telecommunications-related experience in various areas including consulting, accounting, and marketing. From 1990 through 1993, I worked as an auditor for Arthur Andersen & Company. My assignments at Arthur Andersen spanned a wide range of industries, including telecommunications. In 1994 through 1995, I was an internal auditor for BellSouth. In that capacity, I conducted both financial and operations audits. The purpose of those audits was to ensure compliance with regulatory laws as well as internal business objectives and policies. From 1995 through September 2000, I served in various capacities in MCI Communications' product development and marketing organizations, including as Product Development – Project Manager, Manager - Local Services Product Development, and Acting Executive Manager for Product Integration. At MCI, I assisted in establishing the company's local product offering for business customers, oversaw the development and implementation of billing software initiatives, and helped integrate various regulatory requirements into MCI's products, business processes, and systems.

Q. PLEASE IDENTIFY ALL STATE COMMISSIONS TO WHICH YOU HAVE SUBMITTED TESTIMONY.

A. I have submitted testimony in proceedings before the following commissions: the North Carolina Utilities Commission; the Florida Public Service Commission; and the Tennessee Regulatory Authority.

Q. PLEASE IDENTIFY ALL ISSUES FOR WHICH YOU ARE OFFERING TESTIMONY.

A. I am prepared to sponsor and adopt all testimony sponsored by my colleague Mr. Pifer. Mr. Pifer and I will be sharing the duty of serving as KMC's regulatory policy witness in all nine of the BellSouth arbitrations. Depending on the hearing schedule adopted by the Commission, I may appear at the hearing as a substitute for Mr. Pifer.[1]

General Terms and Conditions	2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 8/G-8, 9/G-9, 12/G-12
Attachment 2: Unbundled Network Elements	23/2-5, 26/2-8, 27/2-9, 36/2-18, 37/2-19, 38/2-20, 43/2-25, 46/2-28, 50/2-32, 51/2-33(B)&(C)
Attachment 3: Interconnection	65/3-6
Attachment 6: Ordering	86/6-3(B), 88/6-5, 94/6-11
Attachment 7: Billing	95/7-1, 96/7-2, 97/7-3, 99/7-5, 100/7-6, 101/7-7, 102/7-8, 103/7-9, 104/7-10
Supplemental Issues	108/S-1 thru 114/S-7

[1] The following issues have been settled: 1/G-1, 3/G-3, 10/G-10, 11/G-11, 13/G-13, 14/G-14, 15/G-15, 16/G-16, 17/1-1, 18/1-2, 19/2-1, 20/2-2, 21/2-3, 22/2-4, 24/2-6, 25/2-7, 28/2-10, 29/2-11, 30/2-12, 31/2-13, 32/2-14, 33/2-15, 34/2-16, 35/2-17, 39/2-21, 40/2-22, 41/2-23, 42/2-24, 44/2-26, 45/2-27, 47/2-29, 48/2-30, 49/2-31, 51/2-33(A), 52/2-34, 53/2-35, 54/2-36, 55/2-37, 56/2-38, 57/2-39, 58/2-40, 59/2-41, 60/3-1, 61/3-2, 62/3-3, 63/3-4 (KMC only), 64/3-5, 66/3-7, 67/3-8, 68/3-9, 69/3-10, 70/3-11, 71/3-12, 72/3-13, 73/3-14, 74/4-1, 75/4-2, 76/4-3, 77/4-4, 78/4-5, 79/ 4-6, 80/4-7, 81/4-8, 82/4-9, 83/4-10, 84/6-1, 85/6-2, 86/6-3(A), 87/6-4, 89/6-6, 90/6-7, 91/6-8, 92/6-9, 93/6-10, 98/7-4, 105/7-11, 106/7-12, 107/11-1, and 115/S-8.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position, as set forth with respect to each unresolved issue subsequently herein, and associated contract language on the issues indicated in the chart above.

GENERAL TERMS AND CONDITIONS[2]

Item No. 1, Issue No. G-1 [Section 1.6]: ***This issue has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 2/ISSUE G-2.

A. The term "End User" should be defined as "the customer of a Party".

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The definition proposed by the Petitioners is simple and avoids controversy. In addition, it is the most natural and intuitive definition. Petitioners have a variety of telecommunications services customers – some wholesale and many retail. Whether or not they qualify as the "ultimate user" of such telecommunications services (whatever that means) is simply not relevant to whether they are or aren't "end users" of the telecommunications services provided by Petitioners.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed definition unnecessarily invites ambiguity and the potential for future controversy, by turning on the notion that in order to be an End User, the customer must be the "ultimate user of the Telecommunications Service". Obviously,

---

[2] **Please note that the disputed contract language for all issues raised in this testimony has been attached to this testimony as *Exhibit A*.** With the exception of the language that pertains to the Supplemental Issues, the contract language contained therein represents the most recent proposals as of the date of this filing. Joint Petitioners received BellSouth's proposed contract language that relates to the Supplemental Issues well beyond the time in which it was promised and only recently had the opportunity to discuss the proposals with BellSouth. Accordingly, Joint Petitioners are not in a position to incorporate in any way BellSouth's new contract language proposals into this filing.

this is a restrictive definition that could serve some ulterior BellSouth motive in the near term or perhaps further down the road. Given that the concept of "ultimate user" is undefined and there is no precise way of knowing which Telecommunications Service is "the Telecommunications Service" BellSouth refers to, BellSouth's proposal seems well suited to unnecessarily narrow Joint Petitioners' rights to use UNEs to provide telecommunications services to customers of their choosing (which may include wholesale customers). However, there is no apparent policy or legal basis to support BellSouth's apparent attempt to limit who can or cannot be Petitioners' customers or whether Petitioners can serve them using UNEs. Provided that Petitioners comply with the contractual provisions regarding resale, UNEs and Other Services (defined in Attachment 2), the contract should in no way attempt to limit who can or cannot be considered an End User of a Party's services.

Q. ARE THERE OTHER REASONS WHY THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. Yes. The curiously restrictive definition proposed by BellSouth is inconsistent with the manner in which the term "End User" has been used elsewhere in the Agreement. For example, under BellSouth's proposed definition of "End User," it is arguable that certain types of CLEC customers, such as Internet Service Providers ("ISPs"), might not be considered to be "End Users". However, in Attachment 3 of the Agreement, BellSouth has agreed to language regarding "ISP-bound traffic" that does treat ISPs as End Users, even under BellSouth's proposed definition. This language already has been agreed to. Yet it is clear that, while ISPs use Telecommunications Services provided by Petitioners and have been considered by the industry to be end users for

more than 20 years, it is not readily apparent that they qualify as "the ultimate user of the Telecommunications Service". There simply is no need for the tension that exists between this provision and the improperly restrictive and ambiguous definition of End User proposed by BellSouth in the General Terms. The bottom line is that the language proposed by the Petitioners is simple, straightforward, and is the best way to avoid unnecessary ambiguity and future controversy.

Q. ARE THERE OTHER APPARENT COMPLICATIONS RAISED BY BELLSOUTH'S PROPOSED DEFINITION?

A. Yes. In connection with Attachment 2, section 5.2.5.2.1, which addresses Enhanced Extended Loop ("EEL") eligibility criteria, BellSouth, attempts to replace the word used in the FCC's rules: "customer" with "End User," a word which BellSouth seeks by definition to limit to a potentially vague subset of Petitioners' customers. If BellSouth wants to change the word used in the FCC's rule for some legitimate purpose, its definition of End User should simply be that it means "customer". This way, the meaning of the rule and the parties' rights vis-à-vis the rule are not changed. By way of background, Petitioners have repeatedly informed BellSouth that they are unwilling to compromise their rights under the EEL eligibility rules. Thus, even if BellSouth had offered Petitioners some offsetting concession in exchange for the more limiting EEL eligibility criteria it seeks to impose upon Petitioners (which they did not), Petitioners would not have accepted it.

In short, BellSouth's proposed re-write of the rule could be used to limit Petitioners' access to EELs in a manner neither intended nor required by the FCC's rules. We

suspect that BellSouth inappropriately seeks to deny Petitioners the ability to use EELs as inputs to wholesale service offerings. Petitioners, however, simply will not agree to a definition that could serve to limit their rights and BellSouth's obligations to provide access to EELs, UNEs or any other services or facilities.

Q. WHY IS ITEM 2/ISSUE G-2 APPROPRIATE FOR ARBITRATION?

A. BellSouth's Issues Matrix states that Issue G-2 "is not appropriate for arbitration" because "the issue as stated by the CLECs and raised in the General Terms and Conditions of the Agreement has never been discussed by the Parties". BellSouth's Position statement appears to have been drafted by somebody that had not taken part in the negotiations. In any event, it is wrong. The Parties discussed the definition of End User in a number of contexts of the Agreement, including the Triennial Review Order ("TRO")-related provisions of Attachment 2. When Petitioners learned that BellSouth was going to attempt to use the definition of End User to limit its obligation to provide, and CLECs' access to, UNEs and Combinations, they refused to agree to the definition of End User proposed by BellSouth in the General Terms and Conditions. The fact that the issue is teed up in the conflicting versions of the definition contained in the General Terms and Conditions document (a document controlled by BellSouth) belies BellSouth's patently false claim that the issue had never been discussed by the Parties. Petitioners have sought to clarify, via arbitration, the correct definition of End User so that it may be used consistently throughout the Agreement and so that it cannot be used to diminish Petitioners' right to UNEs or other services under the Agreement. For these reasons, Issue G-2 is properly before the Commission.

Item No. 3, Issue No. G-3 [Section 10.2]: ***This issue has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 4/ISSUE G-4.

A. In cases other than gross negligence and willful misconduct by the other party, or other specified exemptions as set forth in CLECs' proposed language, liability should be limited to an aggregate amount over the entire term equal to 7.5% of the aggregate fees, charges or other amounts paid or payable for any and all services provided or to be provided pursuant to the Agreement as of the day on which the claim arose.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners and BellSouth should establish and fix a reasonable limitation on their respective risk exposure, in cases other than gross negligence or willful misconduct. As this Agreement is an arm's-length contract between commercially-sophisticated parties, providing for reciprocal performance obligations and the pecuniary benefits as to each such Party, the Parties should, in accordance with established commercial practices, contractually agree upon and fix a reasonable and appropriate, relative to the particular substantive scope of the contractual arrangements at issue here, maximum liability exposure to which each Party would potentially be subject in its performance under the Agreement. The Petitioners, as operating businesses party to a substantial negotiated contractual undertaking, should not be forced to accept and adhere to BellSouth's "standard" limitation of liability provisions, simply because BellSouth has traditionally been successful to date in leveraging its monopoly legacy to dictate terms and impose such provisions on its diffuse customer base of millions

of consumers and dozens of carriers requiring BellSouth service. Petitioners' proposal represents a compromise position between limitation of liability provisions typically found in the absence of overwhelming market dominance by one party, in commercial contracts between sophisticated parties and the effective elimination of liability provision proposed by BellSouth. As any commercial undertaking carries some degree of a risk of liability or exposure for the performing party, such risks (along with the contractual, financial and/or insurance protections and other risk-management strategies routinely found in business deals to manage these issues) are a natural and legitimate cost of doing business, regardless of the nature of the services performed or the prices charged for them. As Petitioners are merely requesting that BellSouth accept some measure, albeit a modest one relative to universally-regarded commercial practices, of accountability and contractual responsibility for performance and do not seek to expose BellSouth to any particular risks or excess levels of risk that would not otherwise fall within the general commercial-liability coverage afforded by any typical insurance policy, the incremental cost or exposure for these ordinary-course, insurable risks is nonexistent or minimal to BellSouth beyond possible costs incurred for the insurance premiums, financial reserves and/or other risk-management measures already maintained by BellSouth in the usual conduct of its business, costs that would in any event likely constitute joint and common costs already factored into BellSouth's UNE rates.

Petitioners' proposal is structured on a "rolling" basis, such that no Party will incur liabilities that in aggregate amount exceed a contractually-fixed percentage of the actual revenue amounts that such Party will have collected under the Agreement up to

the date of the particular claim or suit. Thus, for example, an event that occurs in Month 12 of the term of the Agreement would, in the worst case, result in a maximum liability equal to 7.5% of the revenue collected by the liable Party during those first 12 months of the term. This amount is fair and reasonable, and in fact, is far less than that would be at issue under standard liability-cap formulations – starting from a minimum (in some of the more conservative commercial contexts such as government procurements, construction and similar matters) of 15% to 30% of the total revenues actually collected or otherwise provided for over the entire term of the relevant contract — more universally appearing in commercial contracts. Petitioners' proposed risk-vs.-revenue trade-off has long been a staple of commercial transactions across all business sectors, including regulated industries such as electric power, natural resources and public procurements and is reasonable in telecommunications service contracts as well.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth maintains that an industry standard limitation of liability should apply, which limits the liability of the provisioning party to a credit for the actual cost of the services or functions not performed, or not properly performed. This position is flawed because it grants Petitioners no more than what long-established principles of general contract law and equitable doctrines already command: the right to a refund or recovery of, and/or the discharge of any further obligations with respect to, amounts paid or payable for services not properly performed. Such a provision would not begin to make Petitioners whole for losses they incur from a failure of BellSouth

systems or personnel to perform as required to meet the obligations set forth in the Agreement in accordance with the terms and subject to the limitations and conditions as agreed therein. It is a common-sense and universally-acknowledged principle of contracting that a party is not required to pay for nonperformance or improper performance by the other party. Therefore, BellSouth's proposal offers nothing beyond rights the injured party would otherwise already have as a fundamental matter of contract law, thereby resulting in an illusory recovery right that, in real terms, is nothing more than an elimination of, and a full and absolute exculpation from, any and all liability to the injured party for any form of direct damages resulting from contractual nonperformance or misperformance. Additionally, it is not commercially reasonable in the telecommunications industry, in which a breach in the performance of services results in losses that are greater than their wholesale cost — these losses will ordinarily cost a carrier far more in terms of direct liabilities vis-à-vis those of their customers who are relying on properly-performed services under this Agreement, not to mention the broader economic losses to these carriers' customer relationships as a likely consequence of any such breach. Petitioner's proposal for a 7.5% rolling liability cap is therefore more appropriate as a reasonable and commercially-viable compromise and should be adopted.

***Item No. 5, Issue No. G-5** [Section 10.4.2]: 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?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

***Item No. 6, Issue No. G-6** [Section 10.4.4]: How should indirect, incidental or consequential damages be defined for purposes of the Agreement?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

Item No. 8, Issue No. G-8 [Section 11.1]: What language should be included in the Agreement regarding a Party's use of the other Party's name, service marks, logo and trademarks?

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

Item No. 9, Issue No. G-9 [Section 13.1]: Under what circumstances should a party be allowed to take a dispute concerning the interconnection agreement to a Court of law for resolution first?

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

Item No. 10, Issue No. G-10 [Section 17.4]: ***This issue has been resolved.***

Item No. 11, Issue No. G-11 [Sections 19, 19.1]: ***This issue has been resolved.***

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell on this issue, as though it were reprinted here.

Item No.13, Issue No. G-13 [Section 32.3]: ***This issue has been resolved.***

Item No. 14, Issue No. G-14 [Section 34.2]: ***This issue has been resolved.***

Item No. 15, Issue No. G-15 [Section 45.2]: ***This issue has been resolved.***

Item No. 16, Issue No. G-16 [Section 45.3]: ***This issue has been resolved.***

RESALE (ATTACHMENT 1)

Item No. 17, Issue No. 1-1 [Section 3.19]: ***This issue has been resolved.***

Item No. 18, Issue No. 1-2 [Section 11.6.6]: ***This issue has been resolved.***

NETWORK ELEMENTS (ATTACHMENT 2)

Item No. 19, Issue No. 2-1 [Section 1.1]: ***This issue has been resolved.***

Item No. 20, Issue No. 2-2 [Section 1.2]: ***This issue has been resolved.***

Item No. 21, Issue No. 2-3 [Section 1.4.2]: ***This issue has been resolved.***

Item No. 22, Issue No. 2-4 [Section 1.4.3]: ***This issue has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 23/ISSUE 2-5.

A. As an initial matter, it bears noting that this issue is one that the Parties agreed to amend as though it were a Supplemental Issue raised during the abatement period. Given that we have not had sufficient time to respond to BellSouth's newly proposed language on this and related Attachment 2 issues with BellSouth and to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own. In the event UNEs or Combinations are no longer offered pursuant to, or are not in compliance with, the terms set forth in the Agreement, including any transition plan set forth therein, it should be BellSouth's obligation to identify the specific service arrangements that it insists be transitioned to other services pursuant to Attachment 2.

There should be no service order, labor, disconnection or other nonrecurring charges associated with the transition of section 251 UNEs to other services.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. To the extent that UNEs or Combinations are no longer offered under this Agreement, BellSouth should be responsible for identifying any CLEC service arrangements that it seeks to transition from section 251 UNEs or Combinations to section 271 UNEs or Other Services pursuant to Attachment 2. It is logical that the Party seeking a change should be responsible for identifying such change to the other Party. Any other result would place the burden on the Party that does not necessarily think that a service change is desirable or necessary.

At bottom, there will be costs involved with identifying such service arrangements. If BellSouth seeks to avail itself of unbundling relief, it should not seek to put the costs of doing so squarely on the Joint Petitioners. Indeed, since it is BellSouth that stands to garner all of the benefit from conversions from section 251 UNEs to other services, it should shoulder most, if not all, of the costs associated with implementing those changes. Since BellSouth stands to be the sole beneficiary, BellSouth also has the appropriate incentive to devote sufficient resources to generate requests in a manner that is acceptably timely to BellSouth. The process proposed by Joint Petitioners fairly apportions order generation costs and leaves the timing of the process under BellSouth's control (BellSouth is free to devote the resources to generate the requests immediately, within 30 days or within whatever time period it can manage given its own resource allocation and demand issues evident at the time). Under the Joint

Petitioners' proposal, BellSouth would bear the burden of identifying and requesting any conversion to which it believes it is entitled. Joint Petitioners would bear the appreciable burden of verifying that list, selecting alternative service arrangements (or disconnection), and submitting spreadsheets, LSRs or ASRs, as appropriate.

Notably, Joint Petitioners' proposal creates a helpful check and balance in that CLEC verification of BellSouth's request will either generate conversion requests, disconnection requests, or disputes about whether a particular arrangement must be converted. It is unlikely that BellSouth would not or could not without undue burden create a list of arrangements it thinks it is entitled to no longer provide as UNEs. There is no compelling reason why that list should not serve as the starting point for this process. This way, if there is to be a dispute, the scope of it will be known to both sides sooner, rather than later and neither side gets to hide the ball.

It is also important to note that the Joint Petitioners recognize that they cannot unreasonably hold-up the post-transition period process of converting section 251 UNE arrangements to section 271 UNEs or other services. Therefore, the Joint Petitioners propose that if a CLEC does not submit a rearrange or disconnect order within 30 days of receipt of BellSouth's request, BellSouth may convert such arrangements or services without further advance notice, provided that the CLEC has not notified BellSouth of a dispute regarding the identification of specific service arrangements as being no longer offered pursuant to, or are not in compliance with, the terms set forth in the Agreement.

As indicated above, BellSouth is the sole beneficiary of unbundling relief. The only thing Joint Petitioners stand to gain is higher costs which they will have to absorb, share with, or pass on to Florida consumers and businesses. Since it is BellSouth that, in this context, seeks to avail itself of the benefits of unbundling relief, BellSouth should not impose additional charges on Joint Petitioners for converting services from section 251 UNEs to other services. Joint Petitioners do not seek to incur or create those costs – BellSouth does. Accordingly, Joint Petitioners should not be required to pay any order placement charges, disconnect charges or nonrecurring charges associated with a conversion to or establishment of an alternative service arrangement. BellSouth's proposal to saddle Joint Petitioners with the costs associated with its own desire to avail itself of the benefits of unbundling relief is unconscionable and should be squarely rejected.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. Joint Petitioners have not had adequate time to review and analyze BellSouth's newly proposed contract language related to this issue. So that we are in the same position as with other Supplemental Issues, Joint Petitioners have withdrawn our proposed language. Joint Petitioners will resubmit language to counter BellSouth's proposal as time permits (in this regard, we note that BellSouth was to have provided its language during the abatement period, so as to allow adequate time for Joint Petitioners to review, analyze and counter – and to allow the parties to meaningfully negotiate – Joint Petitioners received BellSouth's proposed language more than a month after the

abatement period ended and more than four months after BellSouth agreed that it would start the process by providing a new redline of Attachment 2).

Based on BellSouth's position statement only, it appears that BellSouth's proposed language has morphed into at least seven intertwined and complicated provisions. It appears that BellSouth has split the types of UNEs or Combinations subject to conversions into "Switching Eliminated Elements" and "Other Eliminated Elements". Joint Petitioners do not discern the need for this division and suggest that there likely is none. Indeed, the only difference we can detect is that so-called Switching Eliminated Elements may be converted to Resale. It is unclear to us why any so-called Other Eliminated Elements could not be converted to Resale at the best available rate minus the Commission -ordered resale discount.

Based on BellSouth's position statement, other likely problems with BellSouth's proposal include the various defined/capitalized terms included therein. As discussed with respect to Supplemental Issue S-4, Joint Petitioners do not agree that "Transition Period" set forth in FCC 04-179 was ordered and accordingly find it inappropriate to define the post-Interim Period transition plan as the one the FCC set forth for comment in FCC 04-179. Joint Petitioners also object to the term "Eliminated Elements" as it presumes that BellSouth is not subject to unbundling requirements in the absence of an FCC order and rules containing unbundling requirements. For reasons set forth with respect to Supplemental Issues S-6 and S-7, Joint Petitioners do not believe that such a presumption is valid, as it ignores the fact that the *USTA II*

decision did not strike section 251. Moreover, BellSouth has unbundling requirements under section 271 and may be compelled to unbundle pursuant to state law.

As explained in the rationale set forth in support of our position with respect to this issue, Joint Petitioners also find objectionable the burdens that BellSouth's proposal seeks to impose upon them – so that BellSouth can speedily avail itself of unbundling relief. For the reasons set forth above, BellSouth should take the initial steps to identify and request conversion of service arrangements it no longer believes it is obligated to provide as section 251 UNEs. Since BellSouth is the cost causer, BellSouth should not be able to saddle Joint Petitioners with the costs of such conversions. Instead, the Commission should expressly find that Joint Petitioners should not be required to pay any order placement charges, disconnect charges or nonrecurring charges associated with a conversion to or establishment of an alternative service arrangement.

Item No. 24, Issue No. 2-6 [Section 1.5.1]: ***This issue has been resolved.***

Item No. 25, Issue No. 2-7 [Section 1.6.1]: ***This issues has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 26/ISSUE 2-8.

A. The answer to the question posed in the issue statement is "YES". BellSouth should be required to "commingle" UNEs or Combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to section 271 of the Act.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners' proposed language seeks to ensure that BellSouth will provide UNEs and UNE Combinations commingled with services, network elements and any other offering it is required to provide pursuant to section 271, consistent with the FCC's rules, which do not allow BellSouth to impose commingling restrictions on stand-alone loops and EELs.

The FCC has defined "commingling" as 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. Commingling is different from combining (as in a UNE Combination). In the TRO, the FCC specifically eliminated the temporary commingling restrictions that it had

adopted and affirmatively clarified that CLECs are free to commingle UNEs and combinations of UNEs with services (*i.e.*, non-UNE offerings), and further clarified that BellSouth is required to perform the necessary functions to effectuate such commingling. The FCC has also concluded that section 271 places requirements on BellSouth to provide network elements, services and other offerings, and those obligations operate completely separate and apart from section 251. Clearly, elements provided under section 271 are provided pursuant to a method other than unbundling under section 251(c)(3). Therefore, the FCC's rules unmistakably require BellSouth to allow the Petitioners to commingle a UNE or a UNE combination with any facilities or services that they may obtain at wholesale from BellSouth, pursuant to section 271. In short, BellSouth's efforts to isolate – and thereby make useless section 271 elements – should be flatly rejected.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth interprets the FCC's rules as providing no obligation for it to commingle UNEs and Combinations with elements, services, or other offerings that it its required to provide to CLECs under section 271. BellSouth's language turns the FCC's commingling rules on their head, and nothing in the FCC's rules or the TRO supports its interpretation. In fact, the FCC specifically rejected BellSouth's creative but erroneous interpretation of the TRO (including paragraph 35 of the errata to the TRO) when it concluded that CLECs may commingle UNEs or UNE combinations with facilities or services that a it has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act.

Services obtained from BellSouth pursuant to section 271 obligations are obviously obtained from BellSouth pursuant to a method other than section 251(c)(3) unbundling, and therefore are not subject to any restrictions on commingling whatsoever. The Commission should therefore reject BellSouth's proposal as anticompetitive and unlawful.

Item No. 27, Issue No. 2-9 *[Section 1.8.3]: When multiplexing equipment is attached to a commingled circuit, should the multiplexing equipment be billed per the jurisdictional authorization (Agreement or tariff) of the lower or higher bandwidth service?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

Item No. 28, Issue No. 2-10 [Section 1.9.4]: ***This issue has been resolved.***

Item No. 29, Issue No. 2-11 [Section 2.1.1]: ***This issue has been resolved.***

Item No. 30, Issue No. 2-12 [Section 2.1.1.1]: ***This issue has been resolved.***

Item No. 31, Issue No. 2-13 [Section 2.1.1.2]: ***This issue has been resolved.***

Item No. 32, Issue No. 2-14 [Sections 2.1.2, 2.1.2.1, 2.1.2.2]: ***This issue has been resolved.***

Item No. 33, Issue No. 2-15 [Section 2.2.3]: ***This issue has been resolved.***

Item No. 34, Issue No. 2-16 [Section 2.3.3]: ***This issue has been resolved.***

Item No. 35, Issue No. 2-17 [Sections 2.4.3, 2.4.4]: ***This issue has been resolved.***

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Jerry Willis on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Jerry Willis on this issue, as though it were reprinted here.

Item No. 39, Issue No. 2-21 [Section 2.12.6]: ***This issue has been resolved.***

Item No. 40, Issue No. 2-22 [Section 2.14.3.1.1]: ***This issue has been resolved.***

*Item No. 41, Issue No. 2-23 2.16.2.3.2****This issue has been resolved.***

Item No. 42, Issue No. 2-24 [Section 2.17.3.5]: ***This issue has been resolved***

Item No. 43, Issue No. 2-25 *[Section 2.18.1.4]: Under what circumstances should BellSouth be required to provide CLEC with Loop Makeup information on a facility used or controlled by a carrier other than BellSouth?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

Item No. 44, Issue No. 2-26 [Section 3.6.5]: ***This issue has been resolved.***

Item No. 45, Issue No. 2-27 [Section 3.10.3]: ***This issue has been resolved.***

Item No. 46, Issue No. 2-28 *[Section 3.10.4]: Should the CLEC be permitted to incorporate the Fast Access language from the FDN and/or Supra interconnection agreements, respectively docket numbers 010098-TP and 001305-TP, for the term of this Agreement?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

Item No. 47, Issue No. 2-29 [Section 4.2.2]: (A) ***This issue has been resolved****; (B)* ***This issue has been resolved.***

Item No. 48, Issue No. 2-30 [Section 4.5.5]: ***This issue has been resolved.***

Item No. 49, Issue No. 2-31 [Section 5.2.4]: ***This issue has been resolved.***

Item No. 50, Issue No. 2-32 *[Sections 5.2.5.2.1, 5.2.5.2.3, 5.2.5.2.4, 5.2.5.2.5, 5.2.5.2.7]: How should the term "customer" as used in the FCC's EEL eligibility criteria rule be defined?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 50/ISSUE 2-32.

A. The high capacity EEL eligibility criteria should be consistent with those set forth in the FCC's rules and should use the term "customer", as used in the FCC's rules. The

term "customer" should not be defined in a manner that limits Petitioners' access to EELs, as BellSouth proposes. The FCC did not limit its term "customer" to the restrictive definition of End User sought by BellSouth. Use of the term "End User" as defined by BellSouth may result in a deviation from the FCC rules to which CLECs are unwilling to agree.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale for this position is simple: Petitioners want what the rule says, not anything else. Petitioners are unwilling to accept more limited access to EELs than which they are entitled to under the FCC's rules.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed replacement of "customer" with "End User" – a term upon which the Parties cannot agree on a definition (Item 2 / Issue G-2) improperly seeks to reduce the availability of EELs in a manner not intended by the FCC. In the absence of mutual agreement otherwise, the Commission must find that the express terms of the FCC rule govern.

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

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

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

Item No. 52, Issue No. 2-34 [Section 5.2.6.2.3]: ***This issue has been resolved.***

Item No. 53, Issue No. 2-35 [Section 6.1.1]: ***This issue has been resolved.***

Item No. 54, Issue No. 2-36 [Section 6.1.1.1]: ***This issue has been resolved.***

Item No. 55, Issue No. 2-37 [Section 6.4.2]: ***This issue has been resolved.***

Item No. 56, Issue No. 2-38 [Sections 7.2, 7.3]: ***This issue has been resolved.***

Item No. 57, Issue No. 2-39 [Sections 7.4]: (A) ***This issue has been resolved.*** *(B)* ***This issue has been resolved.***

Item No. 58, Issue No. 2-40 [Sections 9.3.5]: ***This issue has been resolved.***

Item No. 59, Issue No. 2-41 [Sections 14.1]: ***This issue has been resolved.***

INTERCONNECTION (ATTACHMENT 3)

Item No. 60, Issue No. 3-1 [Section 3.3.4 (KMC, NSC, NVX), 3.3.3 XSP]: ***This issue has been resolved.***

Item No. 61, Issue No. 3-2 [Section 9.6 and 9.7]: ***This issue has been resolved.***

Item No. 62, Issue No. 3-3 [Section 10.7.4, 10.9.5, and 10.12.4]: ***This issue has been resolved.***

Item No. 63, Issue No. 3-4 [Section 10.8.6, 10.10.6 and, 10.13.5]: ***This issue has been resolved by KMC Telecom V, Inc. and KMC Telecom III, LLC. The issue remains open for the other Joint Petitioners.***

Item No. 64, Issue No. 3-5 [Section 10.5.5.2, 10.5.6.2, 10.7.4.2 and 10.10.6]: ***This issue has been resolved.***

Item No. 65, Issue No. 3-6 *[Section 10.8.1, 10.10. 1, and 10.13]: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 65/ISSUE 3-6.

A. The answer to the question posed, in the issue statement is "NO". BellSouth should not be permitted to impose upon CLECs a Transit Intermediary Charge ("TIC") for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic.

The TIC is a non-TELRIC-based additive charge which exploits BellSouth's market power and is discriminatory.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners' reasoning for refusing to agree to BellSouth's proposed TIC is threefold. First, BellSouth has developed the TIC predominantly to exploit its monopoly legacy and overwhelming market power. Only BellSouth is in the position of providing transit service capable of connecting all carriers big and small. BellSouth is in this position because of its monopoly legacy and continuing market dominance. To ensure connectivity necessary to allow Florida consumers to choose among carriers big or small, it is essential that this means of interconnection among parties be preserved and not jeopardized by the imposition of non-cost-based rates.

Second, the rate BellSouth seeks to impose – appropriately called the TIC (like its insect namesake, this charge is parasitic and debilitating) – appears to be purely "additive". The Commission has never established a TELRIC-based rate for it. BellSouth already collects elemental rates for tandem switching and common transport to recover its costs associated with providing the transiting functionality. These elemental rates are TELRIC-compliant which, by definition, means that they not only provide BellSouth with cost recovery but they also provide BellSouth with a reasonable profit. BellSouth has recently developed the TIC simply to extract additional profits over-and-above profit already received through the elemental rates.

Third, BellSouth's attempted imposition of the TIC charge on Petitioners is discriminatory. BellSouth does not charge TIC on all CLECs and it appears that,

even when it does, it can set the rate at whatever level it desires. Although the TIC proposed by BellSouth in the filed rate sheet exhibits to Attachment 3 is $0.0015, BellSouth had threatened to nearly double that rate, if Petitioners did not agree to it during negotiations. For these reasons, the Commission must find that the TIC charge proposed by BellSouth is unlawfully discriminatory and unreasonable.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's language provides for recovery of the TIC. It is BellSouth's position that the proposed rate is justified because BellSouth incurs costs beyond those for which the Commission-ordered rates were designed to address, such as the costs of sending records to third parties identifying the originating carrier. BellSouth, however, has not demonstrated that the elemental rates that have applied for nearly eight (8) years to BellSouth's transiting function do not adequately provide for BellSouth cost recovery. If these rates no longer provide for adequate cost recovery, BellSouth should conduct a TELRIC cost study and propose a rate in the Commission's next generic pricing proceeding. BellSouth should not be permitted unilaterally to impose a new charge without submitting such charge to the Commission for review and approval.

Q. WHY IS ITEM 65/ISSUE 3-6 APPROPRIATE FOR ARBITRATION?

A. BellSouth's position statement states that Issue 3-6 should not be included in this Arbitration because "it involves a request by the CLECs that is not encompassed" in section 251 of the 1996 Act. This statement is incorrect. Transiting is an interconnection issue firmly ensconced in section 251 of the Act. Moreover, this

functionality has been included in BellSouth interconnection agreements for nearly 8 years – it is not now magically unrelated to its obligations under section 251 of the Act. In addition, transiting functionality is something BellSouth offers in Attachment 3 of the Agreement, which sets forth the terms and conditions of BellSouth's obligations to interconnect with CLECs pursuant to section 251(c) of Act. Finally, the Parties have discussed and debated the TIC, although to no resolution, throughout the negotiations of this Agreement. For these reasons, there is no doubt that Issue 3-6 is properly before the Commission.

Item No. 66, Issue No. 3-7 [Section 10.1]: ***This issue has been resolved.***

Item No. 67, Issue No. 3-8 [Section 10.2, 10.2.1, 10.3]: ***This issue has been resolved.***

Item No. 68, Issue No. 3-9 [Section 2.1.12]: ***This issue has been resolved.***

Item No. 69, Issue No. 3-10 [Section 3.2, Ex. A]: ***This issue has been resolved***

Item No. 70, Issue No. 3-11 [Sections 3.3.1, 3.3.2, 3.4.5, 10.10.2]: ***This issue has been resolved.***

Item No. 71, Issue No. 3-12 [Section 4.5]: ***This issue has been resolved.***

Item No. 72, Issue No. 3-13 [Section 4.6]: ***This issue has been resolved.***

Item No. 73, Issue No. 3-14 [Sections 10.10.4, 10.10.5, 10.10.6,10.10.7]: ***This issue has been resolved.***

COLLOCATION (ATTACHMENT 4)

Item No. 74, Issue No. 4-1 [Section 3.9]: ***This issue has been resolved.***

Item No. 75, Issue No. 4-2 [Sections 5.21.1, 5.21.2]: ***This issue has been resolved.***

Item No. 76, Issue No. 4-3 [Section 8.1, 8.6]: ***This issue has been resolved.***

Item No. 77, Issue No. 4-4 [Section 8.4]: ***This issue has been resolved.***

Item No. 78, Issue No. 4-5 [Section 8.6]: ***This issue has been resolved.***

Item No. 79, Issue No. 4-6 [Sections 8.11, 8.11.1, 8.12.2]: ***This issue has been resolved.***

Item No. 80, Issue No. 4-7 [Section 9.1.1]: ***This issue has been resolved.***

Item No. 81, Issue No. 4-8 [Sections 9.1.2, 9.1.3]: ***This issue has been resolved.***

Item No. 82, Issue No. 4-9 [Sections 9.3]: ***This issue has been resolved.***

Item No. 83, Issue No. 4-10 [Sections 13.6]: ***This issue has been resolved.***

ORDERING (ATTACHMENT 6)

Item No. 84, Issue No. 6-1 [Section 2.5.1]: ***This issue has been resolved.***

Item No. 85, Issue No. 6-2 [Section 2.5.5]: ***This issue has been resolved.***

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

Item No. 87, Issue No. 6-4 [Section 2.6]: ***This issue has been resolved.***

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

Item No. 89, Issue No. 6-6 [Section 2.6.25]: ***This issue has been resolved.***

Item No. 90, Issue No. 6-7 [Section 2.6.26]: ***This issue has been resolved.***

Item No. 91, Issue No. 6-8 [Section 2.7.10.4]: ***This issue has been resolved.***

Item No. 92, Issue No. 6-9 [Section 2.9.1]: ***This issue has been resolved.***

Item No. 93, Issue No. 6-10 [Section 3.1.1]: ***This issue has been resolved.***

Item No. 94, Issue No. 6-11 *[Sections 3.1.2, 3.1.2.1]: (A) Should the mass migration of customer service arrangements resulting from mergers, acquisitions and asset transfers be accomplished by the submission of an electronic LSR or spreadsheet?*

(B) If so, what rates should apply?

(C) What should be the interval for such mass migrations of services?

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

BILLING (ATTACHMENT 7)

Item No. 95, Issue No. 7-1 *[Section 1.1.3]: What time limits should apply to backbilling, over-billing, and under-billing issues?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 95/ISSUE 7-1.

A. There should be an explicit, uniform limitation on a Party's ability to engage in backbilling under this Agreement. The Commission should adopt the CLEC proposed language, which would limit a Party's ability to bill for services rendered no more than ninety (90) calendar days after the bill date on which those charges ordinarily would have been billed. For purposes of ensuring that a party could

reconcile backbilled amounts, the CLEC proposed language provides that billed amounts for services that are rendered more than one (1) billing period prior to the bill date should be invalid unless the billing Party identifies such billing as "backbilling" on a line-item basis. Finally, the CLEC proposed language provides an exemption to the ninety (90) day limit whereby backbilling beyond ninety (90) calendar days and up to a limit of six (6) months after the date upon which the bill ordinarily would have been issued may be invoiced under the following conditions: (1) charges connected with jointly provided services whereby meet point billing guidelines require either Party to rely on records provided by a third party and such records have not been provided in a timely manner; and (2) charges incorrectly billed due to erroneous information supplied by the non-billing Party. With respect to over-billing, the Parties have negotiated and separately agreed to a 2-year limit on filing billing disputes (thus, Petitioners do not believe that BellSouth properly has inserted this as a sub-issue here). With respect to under-billing, Petitioners believe that the sub-issue is covered by any provisions that address backbilling.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION THAT BACKBILLING SHOULD GENERALLY BE LIMITED TO NINETY DAYS?

A. It comes down to business and financial certainty. In order for CLECs to pay invoices in a timely manner and keep adequate financial records, there must be a limit on the Parties' ability to backbill for services rendered. The Parties should not have unlimited time to backbill each other in an attempt to recoup past amounts not properly billed. Neither CLECs nor BellSouth should be required to reopen their financial books because the other did not issue accurate invoices in a timely manner.

To allow backbilling more than 90 days would create too much business uncertainty between the Parties and ultimately lead to billing disputes. Accordingly, the Commission should adopt the CLEC proposed language which establishes a general 90 day limit on backbilling.

Q. ARE THERE ANY CIRCUMSTANCES IN WHICH BACKBILLING MORE THAN NINETY DAYS SHOULD BE PERMITTED?

A. Yes, Petitioners' proposed language contemplates that there may be circumstances under which the Parties may backbill for past due amounts beyond 90 days and up to 6 months. Such circumstances include backbilling for charges connected with jointly provided services whereby meet point billing guidelines require either Party to rely on records provided by a third party and such records have not been provided in a timely manner; and charges incorrectly billed due to erroneous information supplied by the non-billing Party. Such exemptions to the 90 day backbilling limit would allow the Parties to recover past amounts not properly billed due to errors beyond their control while establishing a 6 month limit to avoid excessive backbilling. Petitioners propose a caveat, however, that any amount backbilled more than 1 billing period must be clearly identified as "backbilling" on a line-item basis. This requirement would allow the Parties to easily identify backbilled amounts, and reconcile invoices and will likely decrease the number of billing disputes between the Parties.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. BellSouth's proposed language provides that all charges incurred under the Agreement are subject to the state's statute of limitations or applicable Commission

rules. BellSouth's language is inadequate because it fails to provide uniform, workable parameters by which the Parties can invoice each other for services rendered in prior billing periods. As discussed below, the statute of limitations vary greatly among the states in the BellSouth territory and, thus, do not provide an effective limit to backbilling.

In Florida, the statute of limitations is 5 years, and the Commission's rules establish a 12 month limit on "customer" backbilling. Although BellSouth has represented that a 12 month limitation would apply, it recently retracted those representations and now asserts that a 5 year statute of limitations would apply.

In either case, a lengthy backbilling period would create too much business uncertainty between the Parties and would force the CLECs to devote substantial time and resources to review and reconcile past bills in order to verify backbilled amounts. Moreover, it is unlikely that CLECs would be able to successfully backbill its customers for such amounts as most customers would not understand, much less accept, a substantially late bill for services the customer cannot verify were actually rendered.

Q. HAVE THE PARTIES AGREED TO LANGUAGE IN ANOTHER PART OF THE AGREEMENT THAT ADDRESSES OVER-BILLING?

A. Yes, the Parties have effectively addressed over-billing by limiting the filing of billing disputes to amounts no more than 2 years old. Specifically, section 2.1.7 of Attachment 7 states, "[n]otwithstanding the foregoing, new billing disputes may not be filed pertaining to a bill when a period of two (2) years from the bill issue date has elapsed." BellSouth agreed to a uniform cap of two (2) years for billing disputes even

through such timeframe is longer than the statute of limitations in Florida, Louisiana, and South Carolina, and shorter than the statute of limitations in Tennessee and the other states in the BellSouth region. BellSouth's position with regard to billing disputes is squarely contradictory to its position for backbilling, and BellSouth has not provided any compelling reasons why it will not agree to a uniform time limit for backbilling as it done with respect to billing disputes.

***Item No. 96, Issue No. 7-2** [Section 1.2.2]: (A) What charges, if any, should be imposed for records changes made by the Parties to reflect changes in corporate names or other LEC identifiers such as OCN, CC, CIC and ACNA? (B) What intervals should apply to such changes?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

Item No. 98, Issue No. 7-4 [Section 1.6]: ***This issue has been resolved.***

Item No. 99, Issue No. 7-5 *[Section 1.7.1]: What recourse should a Party have if it believes the other Party is engaging in prohibited, unlawful or improper use of its facilities or services, abuse of the facilities or noncompliance with the Agreement or applicable tariffs?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

Item No. 105, Issue No. 7-11 [Section 1.8.9]: ***This issue has been resolved.***

Item No. 106, Issue No. 7-12 [Section 1.9.1]: ***This issue has been resolved.***

BONA FIDE REQUEST/NEW BUSINESS REQUEST (BFR/NBR)

(ATTACHMENT 11)

Item No. 107, Issue No. 11-1 [Sections 1.5, 1.8.1, 1.9, 1.10]: ***This issue has been resolved.***

SUPPLEMENTAL ISSUES

(ATTACHMENT 2)

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 108/ISSUE S-1.

A. Given that we have not had sufficient time to respond to BellSouth's newly proposed language on this and related Attachment 2 issues with BellSouth and to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

Joint Petitioners maintain that the Agreement should not automatically incorporate the "Final FCC Unbundling Rules", which for convenience, is a term the Parties have agreed to use to refer to the rules the FCC intends to release in the near term in WC Docket No. 04-313. After release of the Final FCC Unbundling Rules, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by those rules, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Our position reflects the process established by the Act, which requires the Parties to engage in good faith negotiations with respect to applicable legal requirements first and then allows for Commission arbitration of issues the Parties are unable to resolve

through good faith negotiations. In either case, interconnection agreements (existing ones – or new ones such as those pending in this arbitration) are not automatically revised to incorporate a new FCC order. Instead, language must be negotiated or arbitrated, depending on the nature of the issues and the Parties' positions with respect thereto.

Over the years, our interconnection agreements with BellSouth have incorporated the requirements of applicable law existing at the time of contracting to a large but not uniform extent, with the Parties agreeing to displace applicable law with other terms and conditions in various circumstances. If, however, law was to develop after we have agreed upon terms (which will be the case with respect to the Agreements pending in this arbitration when the Final FCC Unbundling Rules are issued), Joint Petitioners and BellSouth have always agreed that new contract language is necessary to incorporate whatever was to be done with respect to that change in law – whether that be language indicating an intent to abide by the new law or to displace it with other standards which would govern the Parties' relationship in that context. Additional contract terms may also be necessary to govern how and when the Parties will go about meeting any new requirements from an operational perspective.

Our position also is practical. We do not know what the Final FCC Unbundling Rules will say or how they might impact those provisions of the Agreement already agreed to or those provisions at issue in this arbitration. Thus, we cannot simply deem incorporated something that is unknown and that, accordingly, will have

unknown impact. When the Final FCC Unbundling Rules are released, a process will need to be adopted to allow the Parties sufficient time to assess the FCC's order and new rules, propose and negotiate contract language relating thereto, and to identify specific issues which cannot be resolved timely through voluntary negotiations and that will need to be resolved through Commission arbitration. The language that results from those negotiations and that aspect of the arbitration is how the Final FCC Unbundling Rules should be incorporated into the Agreement. That language should be effective when all other terms and conditions of the Agreement are effective – which is ten calendar days after the date of the last signature executing the Agreement – neither the Agreement nor any of its terms can be effective prior to that date.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. Joint Petitioners have not had adequate time to respond to BellSouth's newly proposed contract language related to this issue. Joint Petitioners will submit language to counter BellSouth's proposal as time permits (in this regard, we note that BellSouth was to have provided its language during the abatement period, so as to allow adequate time for Joint Petitioners to review, analyze and counter – and to allow the parties to meaningfully negotiate – Joint Petitioners received BellSouth's proposed language more than a month after the abatement period ended and more than four months after BellSouth agreed that it would start the process by providing a new redline of Attachment 2).

As we understand BellSouth's proposal, BellSouth inappropriately seeks to upend the process established by the Act which requires good faith negotiations with respect to existing applicable legal requirements first and then allows for Commission arbitration of issues the Parties are unable to resolve through good faith negotiations. The Agreement should not be "deemed amended" to "automatically incorporate" the so-called and yet-to-be released Final FCC Unbundling Rules. We do not, as of the date of this filing, know what those rules will say. Even if we did, we do not know whether the Parties will agree on their meaning and on what language should be incorporated into the Agreement with respect thereto. In this regard, it is important to note that the Parties to this arbitration generated many issues for arbitration despite having had the opportunity to review relevant rules and orders and to negotiate with regard to contract language related thereto. We do not anticipate that the Final FCC Unbundling Rules will prove much different. While the Parties may be able to agree on some contract language with respect thereto, it also is possible that they will not be able to agree on all contract language proposals and that arbitration by the Commission will be needed in that regard. How the timing of all this will work out remains to be seen.

BellSouth's proposal also ignores the fact that the Act provides that Parties may voluntarily negotiate to abide by standards other than those set forth in applicable law. Thus, the Parties may voluntarily agree to abide by standards other than those set forth in the Final FCC Unbundling Rules. Such negotiations, for a variety of reasons, have resulted in numerous instances in the new Agreement where the Joint Petitioners and BellSouth voluntarily agreed to abide by standards that differ from

those set forth in applicable law. Some examples from the pending Agreements would be interconnection facilities compensation (for KMC and NuVox/NewSouth), certain aspects of intercarrier/reciprocal compensation, and collocation power (other than in Tennessee).

BellSouth's proposal to "automatically incorporate" unknown rules also is contrary to language and principles upon which the Parties already have agreed will be incorporated into section 17.4 of the General Terms and Conditions of the Agreement. The principle is that changes in law will be addressed via written amendment to the agreement that will be negotiated or, if necessary, resolved through arbitration. The Parties already have agreed that changes in law will not have springing or retroactive effect, as amendments are required (General Terms and Conditions section 17.3) and such amendments will be effective as of the date of the last signature, or 10 days after the last signature, if rates are incorporated into the amendment (General Terms and Conditions section 1.6). The Parties also already have agreed to language to ensure that the terms of the Agreement and any amendments thereto have no retroactive effect. Specifically, section 3.1 of the General Terms and Conditions states that "[n]otwithstanding any prior agreement of the Parties, the rates, terms and conditions of this Agreement shall not be applied retroactively prior to the Effective Date". The Parties thereby eliminated practical difficulties or even impossibilities and destabilizing uncertainty created by retroactive application of the Agreement's provisions.

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 109(A)/ISSUE S-2(A).

A. Given that we have not had sufficient time to respond to BellSouth's newly proposed language on this and related Attachment 2 issues with BellSouth and to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

Joint Petitioners' position with respect to Issue S-2(A) is much the same as that described in the above testimony regarding Issue S-1. More specifically, Joint Petitioners maintain that the Agreement should not automatically incorporate an "intervening FCC order" adopted in CC Docket 01-338 or WC Docket 04-313. By "intervening FCC order", we mean an FCC order released in CC Docket 01-338 or WC Docket 04-313 that addresses unbundling issues but does not purport to be the "final" unbundling order released as a result of the notice of proposed rulemaking ("NPRM") released as document FCC 04-179 on August 20, 2004 or an FCC order further addressing the interim rules adopted in the FCC's order also released as document FCC 04-179 on August 20, 2004. After release of an intervening FCC order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the intervening FCC order, or to other standards, if they

mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale here is the same as that described within the written testimony related to Issue S-1. Automatic incorporation of an intervening order would undermine and circumvent the negotiation process established by the Act. The Act requires the Parties to engage in good faith negotiations with respect to applicable legal requirements first and then allows for Commission arbitration of issues the Parties are unable to resolve through good faith negotiations. In either case, interconnection agreements (existing ones – or new ones such as the ones pending in this arbitration) are not automatically revised to incorporate a new FCC order. Instead, language must be negotiated or arbitrated, depending on the nature of the issues and the Parties' positions with respect thereto.

Over the years, our interconnection agreements with BellSouth have incorporated the requirements of applicable law existing at the time of contracting to a large but not uniform extent, with the Parties agreeing to displace applicable law with other terms and conditions in various circumstances. If, however, law was to develop after we have agreed upon terms (which will be the case with respect to the Agreements pending in this arbitration in the event that the FCC does release an intervening order), Joint Petitioners and BellSouth have always agreed that new contract language

is necessary to incorporate whatever was to be done with respect to that change in law – whether that be language indicating an intent to abide by the new law or to displace it with other standards which would govern the Parties' relationship in that context. Additional contract terms may also be necessary to govern how and when the Parties will go about meeting any new requirements from an operational perspective.

Our position also is practical. We do not know what such an intervening FCC order will say or how it might impact those provisions of the Agreement already agreed to or those provisions at issue in this arbitration. Again, we cannot simply deem incorporated something that may never come to be and is otherwise unknown and that, accordingly, would have unknown impact. If and when such an order is released, a process will need to be adopted to allow the Parties sufficient time to assess the FCC's order and new rules, propose and negotiate contract language relating thereto, and to identify specific issues which cannot be resolved timely through voluntary negotiations and that will need to be resolved through Commission arbitration. The language that results from those negotiations and that aspect of the arbitration is how an intervening FCC order should be incorporated into the Agreement. That language should be effective when all other terms and conditions of the Agreement are effective – which is ten (10) calendar days after the date of the last signature executing the Agreement – neither the Agreement nor any of its terms can be effective prior to that date.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. **Joint Petitioners have not had adequate time to respond to BellSouth's newly proposed contract language related to this issue. Joint Petitioners will submit** language to counter BellSouth's proposal as time permits (in this regard, we note that BellSouth was to have provided its language during the abatement period, so as to allow adequate time for Joint Petitioners to review, analyze and counter – and to allow the parties to meaningfully negotiate – Joint Petitioners received BellSouth's proposed language more than a month after the abatement period ended and more than four months after BellSouth agreed that it would start the process by providing a new redline of Attachment 2).

As we understand BellSouth's proposal, BellSouth inappropriately seeks to upend the process established by the Act which requires good faith negotiations with respect to existing applicable legal requirements first and then allows for Commission arbitration of issues the Parties are unable to resolve through good faith negotiations. The Agreement should not be "deemed amended" to "automatically incorporate" an intervening FCC order. We do not, as of the date of this filing, know what that order – or any rules which may accompany it – might say. Even if we did, we do not know whether the Parties will agree on their meaning and on what language should be incorporated into the Agreement with respect thereto. In this regard, it is important to note that the Parties to this arbitration generated many issues for arbitration despite having had the opportunity to review relevant rules and orders and to negotiate with

regard to contract language related thereto. We do not anticipate that an intervening FCC order would prove much different. While the Parties may be able to agree on some contract language with respect thereto, it also is possible that they will not be able to agree on all contract language proposals and that arbitration by the Commission will be needed in that regard. How the timing of all this will work out remains to be seen.

BellSouth's proposal also ignores the fact that the Act provides that Parties may voluntarily negotiate to abide by standards other than those set forth in applicable law. Thus, the Parties may voluntarily agree to abide by standards other than those set forth in an interim FCC order. Such negotiations, for a variety of reasons, have resulted in numerous instances in the new Agreement where the Joint Petitioners and BellSouth voluntarily agreed to abide by standards that differ from those set forth in applicable law. Some examples from the pending Agreements would be interconnection facilities compensation (for KMC and NuVox/NewSouth), certain aspects of intercarrier/reciprocal compensation, and collocation power (other than in Tennessee).

BellSouth's proposal to "automatically incorporate" an unknown FCC order also is contrary to language and principles upon which the Parties already have agreed will be incorporated into section 17.4 of the General Terms and Conditions of the Agreement. The principle is that changes in law will be addressed via written amendment to the agreement that will be negotiated or, if necessary, resolved through

arbitration. The Parties already have agreed that changes in law will not have springing or retroactive effect, as amendments are required (General Terms and Conditions section 17.3) and such amendments will be effective as of the date of the last signature, or 10 days after the last signature, if rates are incorporated into the amendment (General Terms and Conditions section 1.6). The Parties also already have agreed to language to ensure that the terms of the Agreement and any amendments thereto have no retroactive effect. Specifically, section 3.1 of the General Terms and Conditions states that "[n]otwithstanding any prior agreement of the Parties, the rates, terms and conditions of this Agreement shall not be applied retroactively prior to the Effective Date". The Parties thereby eliminated practical difficulties or even impossibilities and destabilizing uncertainty created by retroactive application of the Agreement's provisions.

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 109(B)/ISSUE S-2(B).

A. Given that we have not had sufficient time to respond to BellSouth's newly proposed language on this and related Attachment 2 issues with BellSouth and to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

Joint Petitioners' position with regard to Issue No. S-2(B) is much the same as their position with regard to Issue No. S-1 and S-2(A). The only difference here is that now we are dealing with the intervening order of a state commission. Like the Final FCC Unbundling Rules, as well as any intervening FCC order, a State Commission

intervening order should not be automatically incorporated into the Agreement. Upon release of an intervening State Commission intervening order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the intervening State Commission order, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale here is the same as that found in the testimony related to Issue No. S-1 and S-2(A). Automatic incorporation of an intervening State Commission order would undermine and circumvent the negotiation process established by the Act. The Act requires the Parties to engage in good faith negotiations with respect to applicable legal requirements first and then allows for Commission arbitration of issues the Parties are unable to resolve through good faith negotiations. In either case, interconnection agreements (existing ones – or new ones such as the ones pending in this arbitration) are not automatically revised to incorporate a new State Commission order. Instead, language must be negotiated or arbitrated, depending on the nature of the issues and the Parties' positions with respect thereto.

Over the years, our interconnection agreements with BellSouth have incorporated the requirements of applicable law existing at the time of contracting to varying extents, with the Parties agreeing to displace applicable law with other terms and conditions in various circumstances. If, however, law was to develop after we have agreed upon

terms (which will be the case with respect to the Agreements pending in this arbitration in the event that the Commission does release an intervening order), Joint Petitioners and BellSouth have always agreed that new contract language is necessary to incorporate whatever was to be done with respect to that change in law – whether that be language indicating an intent to abide by the new law or to displace it with other standards which would govern the Parties' relationship in that context.

Our position also is practical. We do not know what such an intervening Commission order will say or how they will impact provisions of the Agreement already agreed to or those at issue in this arbitration. If and when such an order is released, a process will need to be adopted to allow the Parties time to assess the order and new rules, propose and negotiate contract language relating thereto, and to identify specific issues which cannot be resolved timely through voluntary negotiations and that will need to be resolved through arbitration. The language that results from those negotiations and that aspect of the arbitration is how an intervening State Commission order should be incorporated into the Agreement. That language should be effective when all other terms and conditions of the Agreement are effective – which is the date of the last signature executing the Agreement – neither the Agreement nor any of its terms can be effective prior to that date.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. Joint Petitioners have not had adequate time to respond to BellSouth's newly proposed contract language related to this issue. Joint Petitioners will submit

language to counter BellSouth's proposal as time permits (in this regard, we note that BellSouth was to have provided its language during the abatement period, so as to allow adequate time for Joint Petitioners to review, analyze and counter – and to allow the parties to meaningfully negotiate – Joint Petitioners received BellSouth's proposed language more than a month after the abatement period ended and more than four months after BellSouth agreed that it would start the process by providing a new redline of Attachment 2).

That being said, Joint Petitioners acknowledge that this sub-issue arises from Joint Petitioners' assumption (based on previous conversations with BellSouth) that BellSouth's proposed language is inadequate. Thus, the issue will likely arise from Joint Petitioners' proposed language. Joint Petitioners, however, cannot counter-propose language without having had an adequate opportunity to review and analyze BellSouth's proposed language first. Nevertheless, as we understand BellSouth's general proposal with respect to these supplemental issues, BellSouth seeks only to have the Agreement automatically revised (in undetermined ways and with undisclosed language) to incorporate various *federal* decisions – some of which may never even materialize. Joint Petitioners are of the view that the Commission (as well as its counterparts across the southeastern United States) has ample jurisdiction to address many issues relating to BellSouth's obligations to provide access to unbundled network elements and to create applicable law with respect to those issues (including the adoption of unbundling obligations under both state and federal law). As with any federal orders, such State Commission orders would not be automatically incorporated into the Agreement. (Strangely, BellSouth appears to agree with us on

this point – which suggests that they advocate their "automatically incorporated" position only with respect to orders they anticipate will be favorable to BellSouth.) Joint Petitioners maintain that, as with any other aspect of relevant new law, a new State Commission order would be subject to the same negotiation and arbitration process used to arrive at contract language in any other context.

Q. DOES BELLSOUTH'S POSITION STATEMENT DEMONSTRATE A MISAPPREHENSION OF THE ISSUE?

A. Yes. BellSouth seems to think that there is a dispute about whether a State Commission can modify FCC orders – and the one in FCC 04-179 (part of which is the so-called Interim Rules order and part is a the so-called Final Rules NPRM) in particular. Joint Petitioners never stated to BellSouth that they held the view that State Commissions maintained editorial privileges or otherwise could modify an FCC order including the one that appears in FCC 04-179. In discussing this issue, BellSouth counsel insisted on framing the manner in this light and Joint Petitioners (through counsel) resisted for obvious reasons. At bottom, the issue comes down to what the State Commissions can or cannot do. Joint Petitioners do not see the FCC order in FCC 04-179 as a general preemption of State Commission authority. The most anybody could reasonably argue (in our view) is that, for a period lasting no longer than up to March 12, 2005, the State Commissions may not approve interconnection agreements based on post September 12, 2004 State Commission orders that do anything with respect to so-called "frozen elements", other than to raise rates for them.

In all other respects, the Commission has power to create its own unbundling rules and requirements, so long as such rules do not conflict with federal unbundling requirements. If and when the Commission adopts an order doing so, the Parties will need to negotiate and perhaps arbitrate contract language incorporating the requirements of such an order (or other standards mutually agreed to) into the Agreement.

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 110/ISSUE S-3.

A. Given that we have not had sufficient time to respond to BellSouth's newly proposed language on this and related Attachment 2 issues with BellSouth and to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

In the event that FCC 04-179 is vacated or modified, the Agreement should not automatically incorporate the court order. Upon release of such a court order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the court order (to the extent the court order effectuates a change in law with practical consequences), or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be

the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Again, the rationale here is the same as that found in the testimony related to Issue No. S-1, S-2(A), and S-2(B). Automatic incorporation of a vacatur or modifying decision would undermine and circumvent the negotiation process established by the Act. The Act requires the Parties to engage in good faith negotiations with respect to applicable legal requirements first and then allows for Commission arbitration of issues the Parties are unable to resolve through good faith negotiations. In either case, interconnection agreements (existing ones – or new ones such as the ones pending in this arbitration) are not automatically revised to incorporate a court order. Instead, language must be negotiated or arbitrated (to the extent the court order effectuates a change in law with practical consequences), depending on the nature of the issues and the Parties' positions with respect thereto.

Over the years, our interconnection agreements with BellSouth have incorporated the requirements of applicable law existing at the time of contracting to varying extents, with the Parties agreeing to displace applicable law with other terms and conditions in various circumstances. If, however, law was to develop after we have agreed upon terms (which will be the case with respect to the Agreements pending in this arbitration in the event that the FCC does release an intervening order), Joint Petitioners and BellSouth have always agreed that new contract language is necessary to incorporate whatever was to be done with respect to that change in law – whether

that be language indicating an intent to abide by the new law or to displace it with other standards which would govern the Parties' relationship in that context.

Our position also is practical. We do not know what such a court order would say or how it would impact provisions of the Agreement already agreed to or those at issue in this arbitration. If and when such an order is released, a process will need to be adopted to allow the Parties time to assess the order, propose and negotiate contract language relating thereto (again, only to the extent the court order effectuates a change in law with practical consequences), and to identify specific issues which cannot be resolved timely through voluntary negotiations and that will need to be resolved through arbitration. The language that results from those negotiations and that aspect of the arbitration is how an intervening court order should be incorporated into the Agreement. That language should be effective when all other terms and conditions of the Agreement are effective – which is the date of the last signature executing the Agreement -- neither the Agreement nor any of its terms can be effective prior to that date.

Q. WHY IS THE LANGUAGE THAT BELLSOUTH HAS PROPOSED INADEQUATE?

A. Joint Petitioners have not had adequate time to respond to BellSouth's newly proposed contract language related to this issue. Joint Petitioners will submit language to counter BellSouth's proposal as time permits (in this regard, we note that BellSouth was to have provided its language during the abatement period, so as to allow adequate time for Joint Petitioners to review, analyze and counter – and to

allow the parties to meaningfully negotiate – Joint Petitioners received BellSouth's proposed language more than a month after the abatement period ended and more than four months after BellSouth agreed that it would start the process by providing a new redline of Attachment 2).

As we understand BellSouth's proposal, BellSouth inappropriately seeks to upend the process established by the Act which requires good faith negotiations with respect to existing applicable legal requirements first and then allows for Commission arbitration of issues the Parties are unable to resolve through good faith negotiations. The Agreement should not be "deemed amended" to "automatically incorporate" a court order that has not yet and may never materialize. We do not, as of the date of this filing, know what such an order would say or what impact it could have. Even if we did, we do not know whether the Parties will agree on the order's meaning and on what language, if any, should be incorporated into the Agreement with respect thereto (again, the court order could result in a change in law with no practical effect). In this regard, it is important to note that the Parties to this arbitration generated many issues for arbitration despite having had the opportunity to review relevant rules and orders and to negotiate with regard to contract language related thereto. We do not anticipate that any new court decision would prove much different. While the Parties may be able to agree on some contract language with respect thereto, it also is possible that they will not be able to agree on all contract language proposals and that arbitration by the Commission will be needed in that regard. How the timing of all this will work out remains to be seen.

BellSouth's proposal also ignores the fact that the Act provides that Parties may voluntarily negotiate to abide by standards other than those set forth in applicable law. Thus, the Parties may voluntarily agree to abide by standards other than those set forth in an intervening court order. Such negotiations, for a variety of reasons, have resulted in numerous instances in the new Agreement where the Joint Petitioners and BellSouth voluntarily agreed to abide by standards that differ from those set forth in applicable law. Some examples would be interconnection facilities compensation, certain aspects of intercarrier/reciprocal compensation, and collocation power (other than in Tennessee).

BellSouth's proposal to "automatically incorporate" an unknown court decision also is contrary to language and principles upon which the Parties already have agreed will be incorporated into the General Terms and Conditions of the Agreement. The principle is that changes in law will be addressed via written amendment to the agreement that will be negotiated or, if necessary, resolved through arbitration. The Parties have agreed that changes in law will not have springing or retroactive effect, as amendments are required and such amendments will be effective as of the date of the last signature, or 10 days after the last signature, if rates are incorporated into the amendment. The Parties also have agreed to language to ensure that the terms of the Agreement and any amendments thereto have no retroactive effect. Specifically, section 3.1 of the General Terms & Conditions states that "[n]otwithstanding any prior agreement of the Parties, the rates, terms and conditions of this Agreement shall

not be applied retroactively prior to the Effective Date". The Parties thereby eliminated practical difficulties or even impossibilities and destabilizing uncertainty created by retroactive application of the Agreement's provisions.

Item No. 111, Issue No. S-4: *At the end of the Interim Period, assuming that the Transition Period set forth in FCC 04-179 is neither vacated, modified, nor superceded, should the Agreement automatically incorporate the Transition Period set forth in the Interim Order? If not, what post Interim Period[3] transition plan should be incorporated into the Agreement?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

---

[3] INTERIM PERIOD – as set forth in ¶29 of the FCC 04-179, is defined as the period that ends on the earlier of (1) March 12, 2005 or (2) the effective date of the final unbundling rules adopted by the FCC pursuant to the Notice of Proposed Rulemaking described in the FCC 04-179

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton Russell on this issue, as though it were reprinted here.

Item No. 115, Issue No. S-8: ***This issue has been resolved.***

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, for now, it does. Thank you.

PRELIMINARY STATEMENTS

WITNESS INTRODUCTION AND BACKGROUND

KMC: Marva Brown Johnson

Q. PLEASE STATE YOUR FULL NAME, TITLE, AND BUSINESS ADDRESS.

A. My name is Marva Brown Johnson. I am Senior Regulatory Counsel for KMC Telecom Holdings, Inc., parent company of KMC Telecom V, Inc. and KMC III LLC. My business address is 1755 North Brown Road, Lawrenceville, Georgia 30043.

Q. IN YOUR DIRECT TESTIMONY, YOU WERE ASKED A SERIES OF QUESTIONS REGARDING YOUR POSITION AT KMC, YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND AND THE COMMISSIONS BEFORE WHICH YOU PREVIOUSLY HAVE TESTIFIED. IF ASKED THOSE SAME QUESTIONS TODAY, WOULD YOUR ANSWERS BE THE SAME?

A. Yes, the answers would be the same.

Q. PLEASE IDENTIFY ALL ISSUES FOR WHICH YOU ARE OFFERING TESTIMONY.

A. I am sponsoring testimony on the following issues.[1]

---

[1] The following issues have been settled: 1/G-1, 3/G-3, 8/G-8, 10/G-10, 11/G-11, 13/G-13, 14/G-14, 15/G-15, 16/G-16, 17/1-1, 18/1-2, 19/2-1, 20/2-2, 21/2-3, 22/2-4, 24/2-6, 25/2-7, 27/2-9, 28/2-10, 29/2-11, 30/2-12, 31/2-13, 32/2-14, 33/2-15, 34/2-16, 35/2-17, 39/2-21, 40/2-22, 41/2-23, 42/2-24, 43/2-25, 44/2-26, 45/2-27, 47/2-29, 48/2-30, 49/2-31, 50/2-32, 51/2-33(A), 52/2-34, 53/2-35, 54/2-36, 55/2-37, 56/2-38, 57/2-39, 58/2-40, 59/2-41, 60/3-1, 61/3-2, 62/3-3, 63/3-4 (KMC only), 64/3-5, 66/3-7, 67/3-8, 68/3-9, 69/3-10, 70/3-11, 71/3-12, 72/3-13, 73/3-14, 74/4-1, 75/4-2, 76/4-3, 77/4-4, 78/4-5, 79/ 4-6, 80/4-7, 81/4-8, 82/4-9, 83/4-10, 84/6-1, 85/6-2, 86/6-3(A),

General Terms and Conditions	2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 9/G-9, 12/G-12
Attachment 2: Unbundled Network Elements	23/2-5, 26/2-8, 36/2-18, 37/2-19, 38/2-20, 46/2-28, 51/2-33(B)&(C)
Attachment 3: Interconnection	65/3-6
Attachment 6: Ordering	86/6-3(B), 88/6-5, 94/6-11
Attachment 7: Billing	96/7-2, 97/7-3, 100/7-6, 101/7-7, 102/7-8, 103/7-9, 104/7-10
Supplemental Issues	108/S-1 thru 114/S-7

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to offer support for the CLEC Position, as set forth herein, and associated contract language on the issues indicated in the chart above by rebutting the testimony provided by various BellSouth witnesses.

87/6-4, 89/6-6, 90/6-7, 91/6-8, 92/6-9, 93/6-10, 95/7-1, 98/7-4, 99/7-5, 105/7-11, 106/7-12, 107/11-1, and 115/S-8.

GENERAL TERMS AND CONDITIONS[2]

Item No. 1, Issue No. G-1 [Section 1.6]: ***This issue has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 2/ISSUE G-2.

A. The term "End User" should be defined as "the customer of a Party".

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT THIS ISSUE IS NOT APPROPRIATE FOR ARBITRATION. [BLAKE AT 4:17-19]

A. For all the reasons stated in our direct testimony, we cannot understand why BellSouth continues to insist that this issue is not appropriate for arbitration. This issue arose from the Parties' negotiation of EEL eligibility criteria from the TRO. During those negotiations, it became evident that BellSouth was scheming to use a restrictive definition of End User to artificially curtail its obligations and restrict Joint Petitioners' rights. Our discussions then turned to the definition in the General Terms and to various other uses of the term which is widely scattered throughout the Agreement. We would not agree to BellSouth's proposed re-wording of the FCC's EEL eligibility criteria nor would we agree to a definition of End User that was clearly going to be employed as a means to clandestinely reduce BellSouth's unbundling obligations and Joint Petitioners' rights to UNEs made available through

[2] Please note that the disputed contract language for all unresolved issues addressed in this testimony is attached to Joint Petitioners Direct Testimony filed with the Commission on January 10, 2005 as **Exhibit A**. Because this is a dynamic process wherein the Parties continue to negotiate, Joint Petitioners intend to file an updated version of Exhibit A and an updated issues matrix prior to the hearing.

the FCC's TRO. If BellSouth does not want to arbitrate the issue, it can accept our position and our proposed definition.

Q. DOES BELLSOUTH PROVIDE ANY LEGITIMATE JUSTIFICATION TO SUPPORT ITS INSISTENCE ON A RESTRICTIVE DEFINITION OF END USER?

A. No. BellSouth has no legitimate justification for insisting on a definition of End User which it has sought to use in a manner that could be construed to limit its obligations and restrict Joint Petitioners' rights. Ms. Blake's claim that ISPs are not End Users is illustrative of the problems BellSouth seeks to create with its definition. *See* Blake at 5:23-24. As explained in our direct testimony, BellSouth's claim regarding ISPs is belied by the fact that the Parties agree to treat ISPs as End Users in Attachment 3 of the Agreement and that the industry has treated them as End Users for more than 20 years. If an ISP is our customer, it is the ultimate user of the telecommunications services we provide. The same holds true if our customer is a landlord, university, doctor's office, bakery, factory or another carrier. Our negotiations with BellSouth revealed that BellSouth sought to use its definition to attempt to inappropriately curb Joint Petitioners' right to use UNEs as inputs to their own wholesale service offerings. There is no sound legal or policy foundation for BellSouth's position.

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT THE JOINT PETITIONERS' DEFINITION OF END USER CREATES UNCERTAINTY AS IT COULD REFER TO ANY CUSTOMER? [BLAKE AT 6:8-11]

A. We disagree with BellSouth's assertion that it is our proposed definition that would create uncertainly. Our definition is simple and avoids the mischief that BellSouth seeks to create with respect to who is or isn't an "ultimate" user of telecommunications. To us, that inquiry is meaningless. Our definition is intentionally designed to refer to any customer of either Party so as to permanently upend BellSouth's attempt to essentially trick us into giving up rights to use UNEs as wholesale service inputs.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, Joint Petitioners have received a commitment from BellSouth that its proposed definition will not be used to artificially limit BellSouth's obligations and Joint Petitioners' rights with respect to UNEs (*i.e.*, BellSouth will not attempt to create limitations on our ability to use UNEs as wholesale service inputs). The parties are in the process of attempting to resolve this issue by using a new End User definition and by visiting each use of the term End User and determining whether it should be used, replaced, or augmented.

Item No. 3, Issue No. G-3 [Section 10.2]: ***This issue has been resolved.***

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

Item No. 5, Issue No. G-5 *[Section 10.4.2]: 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?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

Item No. 6, Issue No. G-6 *[Section 10.4.4]: How should indirect, incidental or consequential damages be defined for purposes of the Agreement?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

Item No. 8, Issue No. G-8 [Section 11.1]: ***This issue has been resolved.***

Item No. 9, Issue No. G-9 [Section 13.1]: Under what circumstances should a party be allowed to take a dispute concerning the interconnection agreement to a Court of law for resolution first?

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

Item No. 10, Issue No. G-10 [Section 17.4]: ***This issue has been resolved.***

Item No. 11, Issue No. G-11 [Sections 19, 19.1]: ***This issue has been resolved.***

Item No. 12, Issue No. G-12 *[Section 32.2]: Should the Agreement explicitly state that all existing state and federal*

laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

Item No. 13, Issue No. G-13 [Section 32.3]: ***This issue has been resolved.***

Item No. 14, Issue No. G-14 [Section 34.2]: ***This issue has been resolved.***

Item No. 15, Issue No. G-15 [Section 45.2]: ***This issue has been resolved.***

Item No. 16, Issue No. G-16 [Section 45.3]: ***This issue has been resolved.***

RESALE (ATTACHMENT 1)

Item No. 17, Issue No. 1-1 [Section 3.19]: ***This issue has been resolved.***

Item No. 18, Issue No. 1-2 [Section 11.6.6]: ***This issue has been resolved.***

NETWORK ELEMENTS (ATTACHMENT 2)

Item No. 19, Issue No. 2-1 [Section 1.1]: ***This issue has been resolved.***

Item No. 20, Issue No. 2-2 [Section 1.2]: ***This issue has been resolved.***

Item No. 21, Issue No. 2-3 [Section 1.4.1]: ***This issue has***

been resolved

Item No. 22, Issue No. 2-4 [Section 1.4.3]: ***This issue has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 23/ISSUE 2-5.

A. In the event UNEs or Combinations are no longer offered pursuant to, or are not in compliance with, the terms set forth in the Agreement, including any transition plan set forth therein, it should be BellSouth's obligation to identify the specific service arrangements that it insists be transitioned to other services pursuant to Attachment 2. There should be no service order, labor, disconnection or other nonrecurring charges associated with the transition of section 251 UNEs to other services.

Q. DOES BELLSOUTH PROVIDE ANY JUSTIFICATION FOR ITS POSITION THAT THE JOINT PETITIONERS SHOULD FOLLOW ITS PROPOSED CONVERSION PLAN?

A. No. Ms. Blake does not provide any justification or support for BellSouth's position on this issue, but merely restates BellSouth's position. The fact is that BellSouth cannot justify why it is that it insists that Joint Petitioners must identify service arrangements that BellSouth wants converted or disconnected or why it insists that it should be the Joint Petitioners that should pay a host of charges to implement Bellsouth's request to initiate orders for conversions and disconnections.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Joint Petitioners' proposal is a compromise that places the administrative and financial burden of implementing the conversions/disconnections on both Parties. The Joint Petitioners' proposal requires work on both sides, but places the original identification obligation on BellSouth, which is logical considering it has the resources and incentive to expeditiously identify service arrangements it believe must be converted or disconnected in order to transition to the terms of the Agreement.

Item No. 24, Issue No. 2-6 [Section 1.5.1]: ***This issue has been resolved.***

Item No. 25, Issue No. 2-7 [Section 1.6.1]: ***This issue has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 26/ISSUE 2-8.

A. BellSouth should be required to "commingle" UNEs or Combinations of UNEs with any service, network element, or other offering that it is obligated to make available pursuant to Section 271 of the Act.

Q. IS BELLSOUTH'S RELIANCE ON THE FCC'S TRO ERRATA APPROPRIATE? [BLAKE AT 27:5-28:9]

A. No. In fact, BellSouth's reliance is misplaced. There is no FCC rule or order that states that BellSouth is permitted to place commingling restrictions on section 271 elements. The FCC's errata was nothing more than an attempt to clean-up stray language from a section of the TRO addressing the commingling of section 251 UNEs with services provided for resale under section 251(c)(4). BellSouth's attempt to create by implication an affirmative adoption of commingling restrictions with respect to section 271 elements cannot withstand scrutiny, as it simply cannot be squared with the FCC's commingling rules and the TRO language accompanying those rules.

Q. DOES THE D.C. CIRCUIT'S *USTA II* HOLDING REGARDING SECTION 271 PROHIBIT THE COMMINGLING OF UNES, UNE COMBINATIONS, AND SERVICES? [BLAKE AT 28:14-29:16]

A. No. The D.C. Circuit's *USTA II* holding discussed *combining*, not *commingling*. BellSouth's reliance on the D.C. Circuit as grounds to reject Petitioners' commingling language is therefore misplaced.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. As stated in the Joint Petitioners direct testimony, the TRO concluded that CLECs may commingle UNEs or UNE combinations with facilities or services it has obtained from ILECs pursuant to a method other than unbundling under 251(c)(3) of

the Act. section 271 is another method of unbundling and BellSouth's attempt to isolate and render useless section 271 elements must be squarely rejected.

Item No. 27, Issue No. 2-9 [Section 1.8.3]: ***This issue has been resolved.***

Item No. 28, Issue No. 2-10 [Section 1.9.4]: ***This issue has been resolved.***

Item No. 29, Issue No. 2-11 [Section 2.1.1]: ***This issue has been resolved.***

Item No. 30, Issue No. 2-12 [Section 2.1.1.1]: ***This issue has been resolved.***

Item No. 31, Issue No. 2-13 [Section 2.1.1.2]: ***This issue has been resolved.***

Item No. 32, Issue No. 2-14 [Sections 2.1.2, 2.1.2.1, 2.1.2.2]: ***This issue has been resolved.***

Item No. 33, Issue No. 2-15 [Section 2.2.3]: ***This issue has been resolved.***

Item No. 34, Issue No. 2-16 [Section 2.3.3]: ***This issue has been resolved.***

Item No. 35, Issue No. 2-17 [Sections 2.4.3, 2.4.4]: ***This issue has been resolved.***

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Jerry Willis on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Jerry Willis on this issue, as though it were reprinted here.

Item No. 39, Issue No. 2-21 [Section 2.12.6]: ***This issue, including both subparts, has been resolved.***

Item No. 40, Issue No. 2-22 [Section 2.14.3.1.1]: ***This issue has been resolved.***

Item No. 41, Issue No. 2-23 [Sections 2.16.2.2, 2.16.2.3.1-5, 2.16.2.3.7-12]: ***This issue has been resolved.***

Item No. 42, Issue No. 2-24 [Section 2.17.3.5]: ***This issue***

has been resolved.

Item No. 43, Issue No. 2-25 [Section 2.18.1.4]: ***This issue has been resolved.***

Item No. 44, Issue No. 2-26 [Section 3.6.5]: ***This issue has been resolved.***

Item No. 45, Issue No. 2-27 [Section 3.10.3]: ***This issue has been resolved.***

Item No. 46, Issue No. 2-28 *[Section 3.10.4]: Should the CLEC be permitted to incorporate the Fast Access language from the FDN and/or Supra interconnection agreements, respectively docket numbers 010098-TP and 001305-TP, for the term of this Agreement?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

Item No. 47, Issue No. 2-29 [Section 4.2.2]: ***This issue has been resolved as to both subparts.***

Item No. 48, Issue No. 2-30 [Section 4.5.5]: ***This issue has been resolved.***

Item No. 49, Issue No. 2-31 [Section 5.2.4]: ***This issue has been resolved.***

Item No. 50, Issue No. 2-32 [Sections 5.2.5.2.1, 5.2.5.2.3, 5.2.5.2.4, 5.2.5.2.5, 5.2.5.2.7]: ***This issue has been resolved.***

Item No. 51, Issue No. 2-33 *[Sections 5.2.6, 5.2.6.1, 5.2.6.2, 5.2.6.2.1, 5.2.6.2.3]: (A)* ***This issue has been resolved.***   *(B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include?*   *(C) Who should conduct the audit and how should the audit be performed?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

Item No. 52, Issue No. 2-34 [Section 5.2.6.2.3]: ***This issue has been resolved.***
Item No. 53, Issue No. 2-35 [Section 6.1.1]: ***This issue has been resolved.***
Item No. 54, Issue No. 2-36 [Section 6.1.1.1]: ***This issue has been resolved.***
Item No. 55, Issue No. 2-37 [Section 6.4.2]: ***This issue has been resolved.***
Item No. 56, Issue No. 2-38 [Sections 7.2, 7.3]: ***This issue has been resolved.***
Item No. 57, Issue No. 2-39 [Sections 7.4]: ***This issue has been resolved.***
Item No. 58, Issue No. 2-40 [Sections 9.3.5]: ***This issue has***

INTERCONNECTION (ATTACHMENT 3)

Item No. 60, Issue No. 3-1 [Section 3.3.4 (KMC, NSC, NVX), 3.3.3 XSP)]: ***This issue has been resolved.***

Item No. 61, Issue No. 3-2 [Section 9.6 and 9.7]: ***This issue has been resolved.***

Item No. 62, Issue No. 3-3 [Section 10.7.4, 10.9.5, and 10.12.4]: ***This issue has been resolved.***

Item No. 63, Issue No. 3-4 [Section 10.8.6, 10.10.6 and, 10.13.5]: ***This issue has been resolved by KMC Telecom V, Inc. and KMC Telecom III LLC. The issue remains open for the other Joint Petitioners.***

Item No. 64, Issue No. 3-5 [Section 10.5.5.2, 10.5.6.2 and 10.7.4.2]: ***This issue has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 65/ISSUE 3-6.

A. BellSouth should not be permitted to impose upon Joint Petitioners a Transit Intermediary Charge ("TIC") for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic. The TIC is a non-TELRIC based additive charge which exploits BellSouth's market power and is discriminatory.

Q. PLEASE EXPLAIN WHY PETITIONERS' LANGUAGE IS APPROPRIATE WITH REGARD TO THE TIC CHARGE?

A. The Petitioners' language – which excludes the TIC – is appropriate for the obvious reason that any charges for BellSouth's transiting services should be at TELRIC-

based rates. Moreover, the Commission has never established a TELRIC-based rate for the TIC charge and BellSouth already collects Commission-approved TELRIC-compliant elemental rates for switching and common transport to recover its costs associated with providing the transiting functionality.

Q. IS BELLSOUTH CORRECT IN ITS ASSERTION THAT IT IS NOT REQUIRED TO PROVIDE A TRANSIT TRAFFIC FUNCTION BECAUSE IT IS NOT A SECTION 251 OBLIGATION UNDER THE ACT? [BLAKE AT 41:6-42:3]

A. No, BellSouth is not correct. As explained in our direct testimony, transiting is an interconnection obligation firmly ensconced in section 251 of the Act. Moreover, this transiting functionality has been included in BellSouth interconnection agreements for nearly 8 years. BellSouth already has agreed to continue providing transit services to Joint Petitioners under the Agreement – thus, once again, this issue is not about whether BellSouth will provide transit services to Joint Petitioners.

In any event, we believe that BellSouth's transiting service is certainly an obligation under section 251 of the Act and subject to the TELRIC pricing requirements that accompany those obligations. We are aware of no FCC or Commission order that finds that transiting is not a section 251 obligation. Notably, transiting functionality is something BellSouth regularly offers in Attachment 3 of its interconnection agreements, which sets forth the terms and conditions of BellSouth's obligations to interconnect with CLECs pursuant to section 251(c) of Act.

It also is worth noting that this issue has been addressed by the North Carolina Commission in response to a Verizon Petition for Declaratory Ruling that Verizon is not required to provide InterLATA EAS traffic transit between third party carriers (Docket No. P-19, Sub 454). BellSouth filed a brief in support of Verizon's position. In consideration of Verizon's Petition, the North Carolina Commission concluded that Verizon is "obligated to provide the transit service as a matter of law." The Commission agreed with the arguments set forth by the proponents of the transiting obligation, specifically that the transiting function follows directly from an ILEC's obligation to interconnect under 47 U.S.C. §§251(a)(1), 252(c)(2).

Q. BELLSOUTH CLAIMS THAT IN PROVIDING THE TRANSIT TRAFFIC FUNCTION, IT INCURS COSTS BEYOND THOSE THAT THE TELRIC-RATES RECOVERS, SUCH AS COST OF SENDING RECORDS TO CLECS IDENTIFYING THE ORIGINATING CARRIER. PLEASE RESPOND. [BLAKE AT 41:21-42:3]

A. BellSouth has provided this function as part of its interconnection agreements for nearly 8 years and has not claimed to us, prior to this negotiation/arbitration, that the elemental rates for tandem switching and common transport do not adequately provide for BellSouth's cost recovery. As is typically the case with new interconnection costs, if BellSouth now believes the current rates no longer provide for adequate cost recovery, BellSouth should conduct a TELRIC cost study and propose a rate in the Commission's next generic pricing proceeding. BellSouth, however, should not be permitted unilaterally to impose a new charge without submitting such charge to the Commission for review and approval.

Q. BELLSOUTH ARGUES THAT CLECS HAVE THE OPTION TO CONNECT DIRECTLY WITH OTHER CARRIERS AND DO NOT NEED TO USE BELLSOUTH TO PROVIDE A TRANSIT FUNCTION. PLEASE RESPOND. [BLAKE AT 41:12-17]

A. While Joint Petitioners could theoretically directly interconnect with every carrier in the state, it is neither economical nor practical to expect them to do so. The more economically rational and practical alternative is for Joint Petitioners to use BellSouth's transiting function as they have always done. As BellSouth itself states, CLECs use BellSouth transiting because it is more economical and efficient than direct trunking. *See* Blake at 41:17-19. Different CLECs have different network configurations and needs, and, therefore may choose to connect directly with other carriers or utilize BellSouth's transiting function. Regardless of a CLEC's choice, BellSouth should make its transiting function available to all CLECs on a non-discriminatory basis at TELRIC-based rates.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No.

Item No. 66, Issue No. 3-7 [Section 10.1]: ***This issue has been resolved.***

Item No. 67, Issue No. 3-8 [Section 10.2, 10.2.1, 10.3]: ***This issue has been resolved.***

Item No. 68, Issue No. 3-9 [Section 2.1.12]: ***This issue has been resolved.***

Item No. 69, Issue No. 3-10 [Section 3.2, Ex. A]: ***This issue,***

in both subparts, has been resolved.

Item No. 70, Issue No. 3-11 [Sections 3.3.1, 3.3.2, 3.4.5, 10.10.2]: ***This issue has been resolved.***

Item No. 71, Issue No. 3-12 [Section 4.5]: ***This issue has been resolved.***

Item No. 72, Issue No. 3-13 [Section 4.6]: ***This issue has been resolved.***

Item No. 73, Issue No. 3-14 [Sections 10.10.4, 10.10.5, 10.10.6.10.10.7]: ***This issue has been resolved.***

COLLOCATION (ATTACHMENT 4)

Item No. 74, Issue No. 4-1 [Section 3.9]: ***This issue has been resolved.***

Item No. 75, Issue No. 4-2 [Sections 5.21.1, 5.21.2]: ***This issue has been resolved.***

Item No. 76, Issue No. 4-3 [Section 8.1]: ***This issue has been resolved.***

Item No. 77, Issue No. 4-4 [Section 8.4]: ***This issue has been resolved.***

Item No. 78, Issue No. 4-5 [Section 8.6]: ***This issue has been resolved.***

Item No. 79, Issue No. 4-6 [Sections 8.11, 8.11.1, 8.12.2]: ***This issue has been resolved.***

Item No. 80, Issue No. 4-7 [Section 9.1.1]: ***This issue has been resolved.***

Item No. 81, Issue No. 4-8 [Sections 9.1.2, 9.1.3]: ***This issue has been resolved.***

Item No. 82, Issue No. 4-9 [Sections 9.3]: ***This issue has been resolved.***

Item No. 83, Issue No. 4-10 [Sections 13.6]: ***This issue has***

been resolved.

ORDERING (ATTACHMENT 6)

Item No. 84, Issue No. 6-1 [Section 2.5.1]: ***This issue has been resolved.***

Item No. 85, Issue No. 6-2 [Section 2.5.5]: ***This issue has been resolved.***

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

Item No. 87, Issue No. 6-4 [Section 2.6]: ***This issue has been resolved.***

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

Item No. 89, Issue No. 6-6 [Section 2.6.25]: ***This issue has been resolved.***

Item No. 90, Issue No. 6-7 [Section 2.6.26]: ***This issue has been resolved.***

Item No. 91, Issue No. 6-8 [Section 2.7.10.4]: ***This issue has been resolved.***

Item No. 92, Issue No. 6-9 [Section 2.9.1]: ***This issue has been resolved.***

Item No. 93, Issue No. 6-10 [Section 3.1.1]: ***This issue has been resolved.***

Item No. 94, Issue No. 6-11 *[Sections 3.1.2, 3.1.2.1]: (A) Should the mass migration of customer service arrangements resulting from mergers, acquisitions and asset transfers be accomplished by the submission of an electronic LSR or spreadsheet?*

(B) If so, what rates should apply?

(C) What should be the interval for such mass migrations of services?

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

BILLING (ATTACHMENT 7)

Item No. 95, Issue No. 7-1 [Section 1.1.3]: ***This issue has been resolved.***

Item No. 96, Issue No. 7-2 *[Section 1.2.2]: (A) What charges, if any, should be imposed for records changes made by the Parties to reflect changes in corporate names or other LEC identifiers such as OCN, CC, CIC and ACNA? (B) What intervals should apply to such changes?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

Item No. 98, Issue No. 7-4 [Section 1.6]: ***This issue has been resolved.***

Item No. 99, Issue No. 7-5 [Section 1.7.1]: ***This issue has been resolved.***

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

Item No. 105, Issue No. 7-11 [Section 1.8.9]: ***This issue has been resolved.***

Item No. 106, Issue No. 7-12 [Section 1.9.1]: ***This issue has been resolved.***

BONA FIDE REQUEST/NEW BUSINESS REQUEST (BFR/NBR)

(ATTACHMENT 11)

Item No. 107, Issue No. 11-1 [Sections 1.5, 1.8.1, 1.9, 1.10]: ***This issue has been resolved.***

SUPPLEMENTAL ISSUES

(ATTACHMENT 2)

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 108/ISSUE S-1.

A. Joint Petitioners maintain that the Agreement should not automatically incorporate the "Final FCC Unbundling Rules", which for convenience, is a term the Parties have agreed to use to refer to the rules the FCC released on Friday, February 4, 2005 in WC Docket No. 04-313. After release of the Final FCC Unbundling Rules, the Parties should endeavor to negotiate contract language that reflects an agreement to

abide by those rules, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. BEFORE BEGINNING ITS TESTIMONY ON THE SUPPLEMENTAL ISSUES, BELLSOUTH MAKES SOME PRELIMINARY COMMENTS, ONE OF WHICH IS THAT THE SUPPLEMENTAL ISSUES SHOULD BE DEFERRED TO A GENERIC PROCEEDING WHICH BELLSOUTH PETITIONED THE COMMISSION TO OPEN ON OCTOBER 29, 2004. [BLAKE AT 42:10-20] PLEASE RESPOND.

A. If BellSouth seeks to defer resolution of certain issues to another docket for subsequent incorporation in this case, it should file a motion in this docket seeking such referral to another. At this point, the Parties already have committed to negotiate and arbitrate issues arising in the post-*USTA II* regulatory framework in this proceeding. The Parties' commitment to do so was memorialized in the Parties' July 20, 2004 Joint Petition to Hold the Proceeding in Abeyance that was approved by the Commission on August 19, 2004. Pursuant to this agreement, the Parties have identified these supplemental issues to address the post-*USTA II* regulatory framework. It is our understanding from reviewing BellSouth's Petition for a Generic Proceeding, that the goal of such a proceeding is to amend existing interconnection agreements with Florida CLECs. However, as agreed to by the Parties, there will be no amendments to the Joint Petitioners' existing

interconnection agreement UNE provisions (Attachment 2). Rather, the Parties will continue to operate pursuant to those existing UNE provisions until they are able to move into new interconnection agreements (incorporating the post-*USTA II* regulatory framework) that result from the conclusion of this arbitration docket.

Should the Commission decide that it would like to resolve certain of the Parties' supplemental issues – or perhaps certain aspects of them – in a generic docket, it must carefully consider and adopt appropriate procedures for participation in that proceeding, but also for importing the results of that proceeding back into this one, so that the Agreement can be finalized and the arbitration concluded. In any event, the Commission should not do so until after the FCC has issued and released Final Unbundling Rules and BellSouth and CLECs have had a reasonable amount of time in which to attempt to negotiate relevant contract provisions and to identify arbitrations issues.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT THE *USTA II* DECISION VACATED THE FCC'S RULES WITH REGARD MASS MARKET SWITCHING, LOCAL SWITCHING, HIGH CAPACITY DEDICATED TRANSPORT, HIGH CAPACITY LOOPS AND DARK FIBER? [BLAKE AT 43:10-13]

A. No. BellSouth begins its testimony with an incorrect analysis of *USTA II*. As pointed out by BellSouth, the D.C. Circuit vacated the FCC's subdelegation to State Commissions to make impairment determinations and vacated and remanded the FCC's nationwide impairment findings with respect to mass market switching as

well as DS1, DS3 and dark fiber transport. *See* Blake at 43:16-24. As emphasized by the Joint Petitioners in their direct testimony, *USTA II* did not vacate the FCC's high capacity loop unbundling rules. *USTA II* also did not eliminate section 251, the FCC's impairment standard, section 271 or the Commission's ability under federal and state law to require BellSouth to provide access to DS1, DS3 and dark fiber loops and DS1, DS3 and dark fiber transport. *See* Falvey at 54:10-15; Russell at 66:20-67:2. Additionally, there are ample sources of federal and state law under which BellSouth is obligated to provide access to these UNEs, none of which were upended by *USTA II*.

Q. BELLSOUTH ASSERTS THAT THE FCC IN FCC 04-179 SET FORTH A COMPREHENSIVE 12-MONTH PLAN INCLUDING THE INTERIM PERIOD AND THE TRANSITION PERIOD. [BLAKE AT 44:20-45:5] PLEASE RESPOND.

A. As discussed in the Joint Petitioners direct testimony in response to Item No. 111/Issue S-4 and discussed in more detail in this rebuttal testimony on that same issue, the FCC did not adopt the "Transition Period" or plan for the six months following the Interim Period. The Transition Period was merely proposed by the FCC in FCC 04-179, as the FCC used the words "we propose" in paragraph 29. Moreover, upon release of FCC 04-179, Chairman Powell commented that the "Order only seeks comment on a transition that will not be necessary if the Commission gets its work done." Accordingly, it is the Joint Petitioners' position that the Parties should maintain the status quo and operate under their existing

agreements until a formal Transition Plan is adopted or the FCC issues Final Unbundling Rules.

Q. WHY SHOULDN'T THE FCC'S FINAL UNBUNDLING RULES BE AUTOMATICALLY INCORPORATED INTO THE AGREEMENT AS PROPOSED BY BELLSOUTH?

A. The first reason is simply because that is not the way our interconnection agreements work. BellSouth seeks to automatically incorporate future rules that are not in effect yet and for which the Parties have not considered their impact on the Agreement. The Joint Petitioners cannot deem incorporated rules that are not yet effective and that have been neither analyzed nor discussed between the parties. Such an approach is illogical. The logical and statutorily required approach is that after the FCC's Final Unbundling Rules are released, the Parties should be provided a reasonable opportunity to review and assess the new rules, negotiate proposed contract language, identify issues of disagreement and if such issues cannot be resolved through negotiation, they should be resolved by the Commission through arbitration. BellSouth points to paragraphs 22 and 23 of FCC 04-179, as support for its position that the FCC "clearly intended that its Final Unbundling Rules as well as the Transition Period would take effect without delay." *See* Blake at 45:2-4. A closer look at the quoted language, however, indicates that the FCC merely wanted to assure BellSouth and other ILECs that they could initiate change of law proceedings consistent with their governing interconnection agreements. Joint Petitioners' agreements with BellSouth simply do not contemplate or permit a "deemed amended" or "automatically incorporated" approach to changes of law. Instead they

reflect the standard and required process of negotiation and arbitration by the Commission. While that process does not happen overnight, it need not involve undue delay. Moreover, FCC 04-179 in no way upended the negotiation/arbitration process set forth in section 252 of the Act.

In addition to the Act's negotiations/arbitration mandate, there is support in numerous FCC orders and press statements regarding the important role of interconnection agreement negotiations and arbitrations. Specifically, in the TRO, the FCC specifically stated that "individual carriers should be allowed the opportunity *to negotiate specific terms and conditions* necessary to translate our rules into the commercial environment, and to resolve disputes over any new agreement language arising from differing interpretations of our rules." The FCC also commented in the TRO that it would refrain from "interfering with the contract process." In adopting the "All-or-Nothing-Rule" the FCC stated in paragraph 12 that "an all-or-nothing rule would better serve the goals of sections 251 and 252 to *promote negotiated interconnection agreements* because it would encourage incumbent LECs to make trade-offs in negotiations that they are reluctant to accept under the existing rule." Moreover Chairman Powell states, in support of the rule, "[t]hrough this action, the Commission advances the cause of facilities-based competition by permitting carriers to *negotiate individually tailored interconnection agreements* designed to fit their business needs more precisely." There is obviously strong support for negotiations and "meeting of the minds" in contract negotiations. BellSouth's proposed instant arbitration and automatic incorporation of the FCC

Final Unbundling Rules clearly contradicts the policy goals adopted by the FCC and is at odds with the Parties' agreements and the Act.

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENT THAT THE FCC'S FINAL UNBUNDLING RULES SHOULD NOT BE THE "SUBJECT OF LONG-DRAWN-OUT NEGOTIATIONS". [BLAKE AT 45:30]

A. The Joint Petitioners would prefer not to engage in "long-drawn-out" negotiations regarding the FCC's Final Unbundling Rules. Indeed, in the negotiations the Parties have had thus far with respect to the Agreement, Joint Petitioners have been frustrated by many delays – a good number of which are attributable to BellSouth (we do not claim perfection, either – the fact is that negotiating an interconnection agreement from scratch is a complicated and time consuming process). Indeed, BellSouth took more than 4 months to deliver its most recent redline of Attachment 2. We received it more than a month after the abatement period during which we were to spend time negotiating with respect to new Attachment 2 redlines ended.

Looking further at the Parties' current negotiations/arbitration experience as a base, it is important to note that the negotiations and arbitration schedule was mutually agreed to by the Parties, at times with some contention but ultimately without dispute. Moreover, it is BellSouth that initially proposed to abate the arbitration process for 90-days, not the Joint Petitioners. The Joint Petitioners agreed to the abatement, but the Commission should not be swayed by Ms. Blake's implication that Joint Petitioners have caused or will seek unreasonable delay.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT "FAILURE TO AUTOMATICALLY INCORPORATE THE FCC'S FINAL UNBUNDLING RULES INTO CLEC AGREEMENTS RESULTS IN DISCRIMINATION AGAINST FACILITIES-BASED CARRIERS THAT HAVE ALREADY MADE THEIR AGREEMENTS COMPLIANT WITH THE CURRENT LAW" OR THAT HAVE NEGOTIATED SO-CALLED "COMMERCIAL AGREEMENTS" WITH BELLSOUTH? [BLAKE AT 46:9-15]

A. Absolutely not. In fact, the flip side of BellSouth's argument is true. First of all, our current agreements are compliant with current law on BellSouth's unbundling obligations with respect to high capacity loops, high capacity transport and mass market switching – and the Agreement being arbitrated is fully TRO-compliant. With respect to BellSouth's so-called "commercial agreements", Joint Petitioners are unaware of any facilities-based carrier that has entered into one. Even if there were any, Joint Petitioners' rights should not be prejudiced, dictated or compromised by voluntary agreements between BellSouth and other carriers. Those carriers (if any) made their own business decisions – they are not discriminated against merely because we don't choose to make the same ones. The simple fact is that the Joint Petitioners have a right to negotiate the rates, terms and conditions of an interconnection agreement and have any disagreements resolved by the Commission. It would obviously be discriminatory to the Petitioners, if we had to agree to less than what we are entitled to under law based on a separate voluntarily agreement between BellSouth and another carrier.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. As stated in our direct testimony, the Joint Petitioners propose to incorporate the FCC's Final Unbundling Rules into the Agreement via the process established by the Act, that is, to engage in good faith negotiations and to allow the Commission to arbitrate any issues the Parties cannot resolve through negotiations. The bulk of BellSouth's testimony on this issue is used to make incorrect allegations that the Petitioners' proposal would result in "long-drawn-out" negotiations and result in discriminatory treatment for those facilities-based carriers that have already entered into commercial agreements with BellSouth. For the reasons stated above, BellSouth is in no position to complain about elongated or delayed negotiations and arbitrations. Nor can BellSouth pass the red-face test by asserting that following the negotiations and arbitrations procedures set forth in the Act will discriminate against carriers that attempt to opt-out of this process. Automatic incorporation of the FCC's Final Unbundling Rules would upend the negotiations and arbitration process established by the Act and consistently supported by the FCC. Accordingly, the Commission should maintain this process by adopting the Joint Petitioners' position.

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 109(A)/ISSUE S-2(A).

A. Joint Petitioners' position with respect to Item 109(A)/Issue S-2(A) is much the same as that described in the above testimony regarding Item 108/Issue S-1. More specifically, Joint Petitioners maintain that the Agreement should not automatically incorporate an "intervening FCC order" adopted in CC Docket 01-338 or WC Docket 04-313. By "intervening FCC order", we mean an FCC order released in CC Docket 01-338 or WC Docket 04-313 that addresses unbundling issues but does not purport to be the "final" unbundling order released as a result of the notice of proposed rulemaking ("NPRM") released as document FCC 04-179 on August 20, 2004 or an FCC order further addressing the interim rules adopted in the FCC's order also released as document FCC 04-179 on August 20, 2004. After release of an intervening FCC order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the intervening FCC order, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. WHAT IS WRONG WITH BELLSOUTH'S POSITION THAT IN ORDER TO EFFECTUATE AN INTERVENING FCC ORDER, THE INTERCONNECTION AGREEMENT MUST AUTOMATICALLY INCORPORATE THE FCC'S FINDINGS AS OF THE EFFECTIVE DATE OF THE ORDER? [BLAKE AT 47:17-19]

A. As discussed in our direct testimony on these supplemental issues and in the foregoing rebuttal testimony on Item 108/Issue S-1, the Act sets forth procedures for negotiating and arbitrating an interconnection agreement and BellSouth's automatic incorporation proposal would circumvent this process. The Parties have already agreed to contract language regarding the provision of UNEs in this Agreement. Therefore, as with the FCC's Final Unbundling Rules, should there be an intervening FCC order that alters the Parties' obligations with respect to providing UNEs, then the Parties should engage in good faith negotiations to formulate and revise contract language as needed and then allow for arbitration and resolution by the Commission of any issues that the Parties could not resolve through negotiations.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No.

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 109(B)/ISSUE S-2(B).

A. Joint Petitioners' position with regard to Item No. 109(B)/Issue No. S-2(B) is much the same as their position with regard to Item No. 108 and 109(A)/Issue No. S-1 and

S-2(A). The only difference here is that now we are dealing with the intervening order of a State Commission. Like the Final FCC Unbundling Rules, as well as any intervening FCC order, a State Commission intervening order should not be automatically incorporated into the Agreement. Upon release of an intervening State Commission order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the intervening State Commission order, or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT THE COMMISSION SHOULD NOT CONSIDER ITEM 109(B)/ISSUE S-2(B) BECAUSE IT EXCEEDS THE PARTIES' AGREEMENT WITH RESPECT TO THE 90-DAY ABATEMENT PERIOD? [BLAKE AT 48:4-6].

A. Absolutely not. The Parties' abatement agreement allows for the negotiation and identification of issues related to the "post-*USTA II* regulatory framework" which is a deliberately vague and expansive term. This abatement agreement was memorialized in the Parties' Joint Petition for Abatement, that was approved by the Commission on July 23, 2004. Neither the Petition nor the Commission's order (or any of the Parties underlying communications) support Ms. Blake's contention that "the parties agreed to only add to the arbitration new issues related to *USTA II* and the *Interim Rules Order*." *See* Blake at 48:7-8. FCC 04-179 is but one aspect of the post-*USTA II* regulatory framework. As BellSouth apparently recognizes from the

issues it proposed, the FCC's final rules order, intervening FCC orders, and even another court decision could become part of the post-*USTA II* regulatory framework. An order from the Commission addressing BellSouth's unbundling obligations would be no less a part of that framework. For these reasons, BellSouth's objection to the Commission's consideration of Item 109(B)/Issue S-2(B) is groundless and simply an attempt to improperly limit the scope of this arbitration to avoid addressing any possible Commission order.

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT ITEM 109(B)/ISSUE S-2(B) IMPROPERLY EXPANDS THE SCOPE OF THIS ISSUE AND WILL POSSIBLY RESULT IN A CONFLICTING STATE ORDER. [BLAKE AT 48:2-4]

A. There is no reason why a Commission order could not be considered an intervening order in this arbitration. The Parties have identified "hypothetical" FCC orders and court decisions as intervening orders, yet BellSouth argues that a Commission order is beyond the scope of this proceeding. BellSouth states that State Commissions are prohibited from issuing any order that conflicts with FCC 04-179 and, furthermore, can only issue an order raising rates for frozen elements. *See* Blake at 48:17-19. As an initial matter, the Joint Petitioners have never stated that the Commission may issue an order that conflicts with FCC 04-179 or any other FCC order. The Joint Petitioners appreciate the concept of preemption. However, FCC 04-179 is not a complete preemption of State Commission authority; the Commission retains the ability to order unbundling under federal and state law. As stated in our direct testimony, "[t]he most anybody could reasonably argue (in our view) is that, for a

period lasting no longer than up to March 12, 2005, the State Commissions may not approve interconnection agreements based on post September 12, 2004 State Commission orders that do anything with respect to so-called 'frozen elements', other than to raise rates for them." *See* **Johnson at 58:16-22.** Otherwise, the Commission has power to adopt unbundling rules to the extent it does not conflict federal unbundling requirements. Notably, the FCC has never adopted rules forbidding BellSouth from unbundling high capacity loops and transport. Moreover, it is difficult to anticipate how a Commission unbundling mandate could conflict with the lack of a similar federal mandate. Accordingly, should the Commission issue an order adopting unbundling rules or modifying the Parties' unbundling obligations, such order should be treated the same as the FCC's Final Unbundling Rules, an intervening FCC order or intervening court decision. That is, the Parties should negotiate contract language to reflect the change in law and the Commission should resolve any issues that could not be resolved by negotiations.

Ms. Blake also makes the sweeping (and erroneous) statement that the TRO decision "emphasizes and reiterates that states may not use state law to impose additional unbundling requirements." *See* Blake at 49:14-16 (referring to paragraphs 194 and 195 of the TRO). BellSouth's statement is overly broad to say the least and is an attempt to intimidate the Commission from using its sate law authority to order unbundling. Paragraphs 194 and 195 of the TRO state that state commissions cannot conflict with or "substantially prevent" implementation of section 251 of the Act. As stated above, the Joint Petitioners are not seeking the Commission to issue any order that conflicts with section 251 or any other federal law. However, in paragraph 653

of the TRO, the FCC also pointed out in the TRO that "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport and signaling regardless of any unbundling under section 271." Therefore, a Commission order that BellSouth must continue to provide unbundled access with respect to high-capacity and dark fiber loops and transport would not conflict with federal law or an FCC order as BellSouth attempts to assert.

BellSouth also points to paragraph 195 of the TRO, which states that a State Commission order that requires unbundling in the face of a finding of non-impairment or vice versa would likely conflict with the limits of section 251(d)(2) of the Act. However, as the Commission is aware, neither the FCC nor this Commission has made a finding of non-impairment with respect to high-capacity and dark fiber loops and transport at issue in this proceeding. Moreover, the FCC was very cautious with its statement and contemplated that conflicts would have to be assessed on a case-by-case basis.

Therefore, a Commission order requiring continued provision of these loops and transport would, again, not conflict with current federal law.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT ITEM 109 (B)/ISSUE S-2(B) WOULD RESULT IN BELLSOUTH HAVING TO CONTEND WITH CONTRADICTORY STATE AND FCC ORDERS? [BLAKE AT 51:6-15]

A. No, I do not. BellSouth's claim that it "would be unable to comply with FCC rules and orders and any contradictory state commission rules and orders for the same

subject matter", *see* Blake at 51:6-8, is groundless. As repeated both in the Petitioners' direct testimony as well as in this rebuttal testimony, the Petitioners are not seeking the Commission to act in any way that contradicts with federal law. Despite BellSouth's emphatic assertions to the contrary, the FCC has not completely stripped State Commissions of all their authority with regard to unbundling. The Commission has the power to order unbundling pursuant to section 251 and 271 of the Act as well as under state law. And, as discussed above, the Commission is well within its purview to order unbundling without conflicting with federal law. Indeed, there is no federal law that requires BellSouth not to unbundle DS1, DS3 and dark fiber loops or DS1, DS3 and dark fiber transport. Thus, what is contemplated is not a situation where the Commission says "you must" and the FCC says "you must not".

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. As with Issue 108/S-1, above, and as discussed with respect to Issue 110/S-3 below, the Joint Petitioners have a consistent position. That is, the Petitioners will work with BellSouth to incorporate any change of law pursuant to the procedures set forth in the Act. Whether it be incorporating the FCC's Final Unbundling Rules, an intervening FCC order, State Commission order or court decision, the Joint Petitioners will engage in good faith negotiations and arbitration of any unresolved issues by the Commission. The Joint Petitioners will not agree, however, to circumvent the process set forth in the Act and employed by the Parties since 1996 and "automatically incorporate" any of the above orders or decisions without

negotiations and arbitration. Such is a reasonable position, which is consistent with the Act and which should be upheld by the Commission. As long as the Commission does not issue an order that conflicts with federal law, there is no reason the Commission could not issue an order that impacts the Parties' unbundling obligations and that must be incorporated into the Agreement.

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 110/ISSUE S-3.

A. In the event that FCC 04-179 is vacated or modified, the Agreement should not automatically incorporate the court order. Upon release of such a court order, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the court order (to the extent the court order effectuates a change in law with practical consequences), or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

Q. DID BELLSOUTH OFFER ANY JUSTIFICATION FOR ITS POSITION WITH RESPECT TO ITEM 110/ISSUE S-3?

A. No. BellSouth provided no justification or rationale for its position, but simply reiterated its omnipresent "automatic incorporation" position with respect to an intervening court decision.

Q. DO YOU AGREE WITH BELLSOUTH'S ASSERTION THAT IN THE EVENT OF VACATUR, THE PARTIES SHOULD INVOKE THE TRANSITION PROCESS IDENTIFIED IN ITEM NO. 23 TO CONVERT VACATED ELEMENTS TO COMPARABLE, NON-UNE SERVICES? [BLAKE AT 52:10-14]

A. No, I do not. Joint Petitioners' disagree with BellSouth's proposed transition process (*see* Item 23/Issue 2-5).

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No.

> ***Item No. 111, Issue No. S-4*** *At the end of the Interim Period, assuming that the Transition Period set forth in FCC 04-179 is neither vacated, modified, nor superceded, should the Agreement automatically incorporate the Transition Period set forth in the Interim Order? If not, what post Interim Period[3] transition plan should be incorporated into the Agreement?*

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

---

[3] INTERIM PERIOD – as set forth in ¶29 of the FCC 04-179, is defined as the period that ends on the earlier of (1) March 12, 2005 or (2) the effective date of the final unbundling rules adopted by the FCC pursuant to the Notice of Proposed Rulemaking described in the FCC 04-179

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of James Falvey on this issue, as though it were reprinted here.

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

Q. ON THIS ISSUE, ARE YOU ADOPTING THE TESTIMONY OFFERED BY ANOTHER COMPANY'S WITNESS?

A. Yes, consistent with the May 12, 2004 Order Establishing Procedure, I am adopting the pre-filed testimony of Hamilton E. Russell III on this issue, as though it were reprinted here.

Item No. 115, Issue No. S-8: ***This issue has been resolved.***

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, for now, it does. Thank you.

(Transcript continues in sequence with Volume 3.)

STATE OF FLORIDA)

CERTIFICATE OF REPORTER

COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 10th day of May, 2005.

JANE FAUROT, RPR
Chief, Office of Hearing Reporter Services
FPSC Division of Commission Clerk and
Administrative Services
(850) 413-6732