BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint petition by NewSouth Communications Corp., NuVox Communications, Inc., 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.	DOCKET NO. 040130-TP ORDER NO. PSC-05-0975-FOF-TP ISSUED: October 11, 2005

The following Commissioners participated in the disposition of this matter:

RUDOLPH "RUDY" BRADLEY
LISA POLAK EDGAR

FINAL ORDER REGARDING PETITION FOR ARBITRATION

BY THE COMMISSION:

APPEARANCES:

NORMAN H. HORTON, Jr., Esquire, Messer, Caparello & Self, P.A., Post Office Box 1876, Tallahassee, Florida 32302-1876; and
JOHN J. HEITMANN, Esquire, STEPHANIE JOYCE, Esquire, and GARRET R. HARGRAVE, Esquire, Kelley Drye & Warren LLP, 1200 19th Street, NW, Suite 500, Washington, DC 20036
On behalf of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC. ("JOINT PETITITONERS").

DOCUMENT NUMBER-DATE
09747 OCT 11 05
FPSC-COMMISSION CLERK

NANCY B. WHITE, Esquire, c/o Nancy H. Sims, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301; and
R. DOUGLAS LACKEY, Esquire, JAMES MEZA III, Esquire, and ROBERT CULPEPPER, Esquire, Suite 4300, BellSouth Center, 675 W. Peachtree Street, NE, Atlanta, Georgia 30375
<u>On behalf of BellSouth Telecommunications, Inc. ("BST")</u>.

JEREMY L. SUSAC, Esquire; and KIRA SCOTT, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
<u>On behalf of the Commission ("STAFF")</u>.

Abbreviations and Acronyms

Act	Telecommunications Act of 1996
ASR	Access Service Request
BellSouth	BellSouth Telecommunications, Inc.
CABS	Carrier Access Billing System
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CO	Central Office
CPNI	Customer Proprietary Network Information
CSR	Customer Service Record
DA	Directory Assistance
DS0	Digital Signal, level Zero. DS0 is 64,000 bits per second.
DS1	Digital Signal, level One. A 1.544 million bits per second digital signal carried on a T-1 transmission facility.
DSL	Digital Subscriber Line
FCC	Federal Communications Commission
FPSC	Florida Public Service Commission
GTC	General Terms and Conditions
ICA	Interconnection Agreement
ILEC	Incumbent Local Exchange Carrier
ISP	Internet Service Provider
IXC	Interexchange Carrier
Joint Petitioners	Joint Petitioners
KMC	KMC Telecom V, Inc., KMC Telecom III, LLC
LEC	Local Exchange Carrier
LENS	Local Exchange Navigation System
LSR	Local Service Request
NewSouth	NewSouth Communications Corporation
NRC	Non-Recurring Charge
NuVox	NuVox Communications, Inc.
NXX	Central Office Code/Prefix
OSS	Operational Support Systems
TELRIC	Total Element Long-Run Incremental Cost
TRO	Triennial Review Order, FCC 03-36
TRRO	Triennial Review Remand Order, FCC 04-290

UNE	Unbundled Network Element
UNE-L	Unbundled Network Element-Loop
UNE-P	Unbundled Network Element-Platform
USOC	Universal Service Order Code
USTA II	DC Circuit Court of Appeals' TRO remand; *United States Telecom Ass'n. v. FCC,* 359 F.3d 554 (D.C. Cir. 2004)
xDSL	"x" distinguishes various types of DSL
Xspedius	Xspedius Management Co. Switched Services LLC and Xspedius Management Co. of Jacksonville LLC

I. CASE BACKGROUND

On February 11, 2004, the Joint Petitioners[1] filed their Joint Petition for Arbitration with BellSouth Telecommunications, Inc. (BellSouth) pursuant to the Telecommunications Act of 1996. On March 8, 2004, BellSouth filed its Answer to the Joint Petitioners' Petition. On July 20, 2004, both parties filed a Joint Motion to Hold Proceeding in Abeyance for 90 days. As a result, Order No. PSC-04-0807-PCO-TP, issued on August 19, 2004, revised the procedural schedule as set forth in Order No. PSC-04-0488-PCO-TP and required the parties to file an updated issues matrix on October 15, 2004.

An issue identification was held on November 15, 2004, at which time the parties agreed to the inclusion of all supplemental issues, with the exception of issues 113(b) and 114(b). Parties filed briefs in support of their positions regarding these two issues, and on January 4, 2005, Order No. PSC-05-0018-PCO-TP was issued granting the Joint Petitioners' request for inclusion of issues 113(b) and 114(b).

On March 25, 2005, BellSouth filed a Motion to Move Issues to BellSouth's Generic Docket (Motion). On April 1, 2005, the Joint Petitioners filed their Response in Partial Support of and Partial Opposition to BellSouth's Motion. On April 15, 2005, our staff held an informal conference call with the parties to discuss the motion and response.

By Order No. PSC-05-0443-PCO-TP, issued April 26, 2005, BellSouth's Motion was granted in part and denied in part. Pursuant to that Order issues 23, 108, 113 and 114 were moved from this docket to Docket No. 041269-TP, Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, by BellSouth Telecommunications, Inc. Upon resolution of these issues in Docket No. 041269-TP, the decisions are to be applied to Docket No. 040130-TP as if arbitrated. It was further ordered that issues 26, 36, 37, 38 and 51 would be addressed in this proceeding, while issues 109, 110, 111 and 112 were found moot.

Numerous issues were resolved by the parties during the pendency of this case. Pursuant to Order Nos. PSC-04-0488-PCO-TP, PSC-05-0065-PCO-TP, and PSC-05-0330-PCO-TP, an administrative hearing was held on April 26 through 28, 2005, to address the remaining issues.

On May 27, 2005, KMC filed its notice of withdrawal from the case. On July 12, 2005, Order No. PSC-05-0742-PCO-TP acknowledged KMC's notice, stating that the withdrawal pertains to KMC only and does not apply to the remaining petitioners. Pursuant to Order No. PSC-04-0488-PCO-TO, issued May 12, 2004, CLEC witnesses selected one main witness to testify to each issue or position where the CLECs have a joint position. As a result KMC's

[1] NewSouth Communications Corp. (NewSouth); NuVox Communications, Inc. (NuVox); KMC Telecom V, Inc. (KMC V) and KMC Telecom III LLC (KMC III)(collectively "KMC"); and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC (Xspedius Switched) and Xspedius Management Co. of Jacksonville, LLC (Xspedius Management) (collectively "Xspedius");(collectively the "Joint Petitioners" or "CLECs")

testimony represents the Joint Petitioners, not KMC specifically. Thus, it remains a part of the record in the case.

On July 6, 2005, BellSouth filed a letter stating that the parties have settled issues 2 and 104. Thus, these issues have been removed from this proceeding.

II. LIMITATION OF EACH PARTIES' LIABILITY

A. PARTIES' ARGUMENTS

The Joint Petitioners propose that the appropriate limitation on each party's liability should be an amount equal to 7.5% of the aggregate fees, charges or other amounts billed for any and all services provided or to be provided pursuant to the Agreement as of the day the claim arose. They propose that the negligent party would thus pay the damages proved before a competent tribunal. Joint Petitioners claim that they are not currently afforded this minimal relief in their interconnection agreements with BellSouth. They support their argument stating in their brief that, "an injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance." In addition, Joint Petitioners argue that "money paid by a party to a vendor for services rendered is subject to restitution if the party were injured by the vendor's conduct or performance." The Joint Petitioners claim that they are not even granted this minimal relief in their interconnection agreements when they suffer harm through BellSouth's negligence. They claim that this inequity does not exist in other commercial contracts and does not reflect the settled law of contracts.

The Joint Petitioners also argue in their brief that, historically, BellSouth has always been able to impose harsh liability terms. The Joint Petitioners claim in their briefs that BellSouth's negligence is the Joint Petitioners' burden. In their briefs, Joint Petitioners disagree with BellSouth's bill credits proposal, because it does not stand for the notion that liability caused by the negligent party should be eliminated. The Joint Petitioners also argue that issuing bill credits is not the industry standard, but is BellSouth's standard. The Joint Petitioners support this argument by referencing a NuVox-ALLTEL interconnection agreement in Hearing Exhibit 27 that diverges from BellSouth's standard. This agreement provides liability up to $250,000 for harm caused by negligence and does not limit recovery to bill credits. In sum, Joint Petitioners implicitly argue in their briefs that bill credits are not the industry standard and not a replacement for monetary damages resulting from negligence.

BellSouth claims that the Joint Petitioners' proposal is an attempt to deviate from standard industry practice regarding limitation of liability. BellSouth's central argument rests on a decision from the FCC Wireline Competition Bureau (Bureau).[2] BellSouth asserts that the Bureau has already determined that an incumbent local exchange carrier's (ILEC) liability is

[2] See, In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission, CC Docket No. 00-218, 17 FCC Rcd. 27,039. (Jul. 17, 2002).

parity when contracting with a competitive local exchange carrier (CLEC). BellSouth claims that the Bureau specifically stated in an Order resulting from a Virginia Arbitration that, "in determining Verizon's liability, it is appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers."[3] BellSouth also argues that pursuant to this rationale, BellSouth should treat the Joint Petitioners in the same manner as it treats its retail customers, which would result in BellSouth issuing the Joint Petitioners bill credits. BellSouth claims that this is exactly the standard that has governed the parties' relationship for the last eight years. BellSouth argues that even the Joint Petitioners concede that provision of bill credits is probably the current practice in the industry. In contrast, BellSouth argues that the 7.5% language proposed by the Joint Petitioners is not the industry standard. BellSouth points to Hearing Exhibit 15 and concludes that the Joint Petitioners want greater limitations of liability rights against BellSouth than what BellSouth provides for its own customers, and what the Joint Petitioners are willing to provide to their customers.

BellSouth also takes issue with Hearing Exhibit 27. First, BellSouth argues that the NuVox-ALLTEL Interconnection Agreement was not produced in discovery and, therefore, should not be given much credence. Moreover, BellSouth argues that this Commission should further discount Exhibit 27, because ALLTEL is a rural ILEC that does not have a Section 251(c) obligation to provide UNEs at cost-based rates.

BellSouth argues that interconnection agreements are not typical commercial agreements and therefore should not be treated as commercial contracts. BellSouth argues that even the Joint Petitioners' witness Russell concedes that the Mississippi Federal District Court held that interconnection agreements are not ordinary contracts and are not to be construed as traditional contracts. BellSouth argues that this Commission should reject the Joint Petitioners' proposal because it imposes costs on BellSouth that were not taken into consideration when establishing BellSouth's UNE costs. Rather, BellSouth argues that its UNE costs were determined using a limitation of liability to bill credits. Last, BellSouth argues that the Joint Petitioners' language regarding limitation of liability is unworkable and that each of the Joint Petitioners originally had different understanding of the language.

B. ANALYSIS

Although we find merit in both BellSouth's and the Petitioners' arguments, we agree with the reasoning of the FCC Wireline Competition Bureau regarding an incumbent local exchange company's liability when contracting with a competitive local exchange. The FCC Wireline Competition Bureau, acting through authority expressly delegated from the FCC to stand in the stead of the Virginia State Corporation Commission, found that:

> Verizon has no contractual relationship with WorldCom's customers, and therefore lacks the ability to limit its liability in such instances, as it may with its own customers. As the carrier

[3] Id.

> with a contractual relationship with its own customers, WorldCom is in the best position to limit its own liability against its customers in a manner that conforms with this provision.

See, 17 FCC Rcd 27039, 27382 (FCC 2002). We find that in this instance, BellSouth and the Joint Petitioners are in the best position to limit their liability with their customers.

Further, we find that BellSouth shall treat the Joint Petitioners in the same manner BellSouth treats its own retail customers. It is undisputed that BellSouth's liability to its own retail customers is limited to the issuance of bill credits; therefore, it is appropriate for BellSouth's liability to Joint Petitioners to be similarly limited. Further, even the Joint Petitioners concede that the provision of bill credits is probably the current practice in the industry. The Joint Petitioners will not be prejudiced by our approach because they admittedly limit their liability to their own customers to the issuance of bill credits. Id. However, even if this was not the case, we note that each of the parties to this proceeding has the ability to limit its liability to its customers through its own tariffs. If a party (e.g., a Joint Petitioner) chooses not to limit its liability through its own tariff, then that party shall assume the heightened risk itself, and not shift the risk to the other party to the interconnection agreement (e.g., BellSouth).

Under the Joint Petitioners' proposal, negligence would be limited to an amount equal to 7.5% of the aggregate fees, charges or other amounts billed for any and all services provided or to be provided pursuant to the Agreement as of the day the claim arose. We find that this record does not support a proposal limiting liability to 7.5% of the aggregate billings, and that bill credits are the appropriate limitation regarding each party's liability. The Petitioners argue that service contracts generally include such liability terms, and they cite to an agreement with a software company to support their argument. They also cite to their prefiled testimony where the Petitioners discuss contracts that cap liability at 15% to 30% of total revenues. Last, the Joint Petitioners cite to the NuVox-ALLTEL interconnection agreement that provides liability up to $250,000 for harm caused by negligence. In this instance, we do not deem it appropriate to compare an ILEC with Section 251(c) wholesale obligations with a rural ILEC that does not have Section 251(c) wholesale obligations. Theoretically, rural ILECs, such as ALLTEL, may charge higher prices for UNEs to take into account the possibility of additional liability, while BellSouth cannot.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that a party's liability should be limited to the issuance of bill credits in all circumstances other than gross negligence or willful misconduct.

III. ALLOCATION OF RISK

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their briefs that BellSouth seeks to have the Joint Petitioners pay any and all claims attributable to BellSouth's negligence, simply because BellSouth limits its liability completely in its tariffs. The Joint Petitioners presently have commercially reasonable limitation of liability terms in their tariffs and customer agreements, and do not plan to remove them. The Joint Petitioners assert in their briefs that they need to respond to the demands of a competitive market place wherein customers are insisting on less stringent limitations. Joint Petitioners argue in their briefs and Joint Petitioners' witness Russell testified at hearing, that BellSouth remains protected by existing provisions of the Agreement and applicable commercial law stipulating that a Party is precluded from recovering damages to the extent it has failed to act with due care and commercial reasonableness. Further, the Joint Petitioners argue that they are "often times competing to win [BellSouth] customers," as the Telecom Act of 1996 expressly permits, and if the Joint Petitioners are contractually obligated and confined by the terms of these interconnection agreements not to have different terms than those in the BellSouth tariff, then the Joint Petitioners are not on a level playing field.

BellSouth responds by stating the purpose of this issue is to put BellSouth in the same position that it would be in if the CLEC end user was a BellSouth end user. BellSouth claims it should not suffer any financial hardship as a result of Joint Petitioners' business decisions. (BellSouth BR at 18) The exact language BellSouth proposes is in its current interconnection agreement with the Joint Petitioners and has never been the subject of any dispute. BellSouth supports its point with Hearing Exhibit 6 and by stating that the Joint Petitioners currently have limitation of liability language in their tariffs and will enforce the tariff provisions limiting their liability. BellSouth also directs our attention to Joint Petitioners' Hearing Exhibit 4 which is witness Russell's deposition wherein he stated that unlimited liability is not a prudent business-move. BellSouth concludes that it is not limiting any third-party's rights, but rather is imposing obligations upon the Joint Petitioners in the event they make a business decision that would not limit their liability in accordance with industry standards. In addition, BellSouth argues that it needs this level of protection in light of the Joint Petitioners' position regarding indemnification. BellSouth concludes that the issue is further compounded by the fact that the Joint Petitioners' end users are not purchasing services out of BellSouth's tariffs and have no contractual relationship to BellSouth.

B. ANALYSIS

Each CLEC has the ability to limit its liability through its customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC shall bear the resulting risk. We note that all parties to this proceeding currently limit their liability via their tariffs. We find that there is no compelling reason to deviate from such practice. The appropriate method of limiting liability is through the parties' tariffs. The Joint Petitioners and BellSouth currently have limitation of liability language in their tariffs and can enforce the tariff provisions limiting their liability. Further, the Joint Petitioners concede that

with regard to limiting liability, the provision of bill credits is probably the current practice in the industry. In light of these facts, we do not find that deviating from the industry standard is necessary or appropriate in this instance. However, even if this was not the case, we note that each of the parties to this proceeding has the ability to limit its liability to its customers through its own tariffs. If a party chooses not limit its liability through its own tariff, then it must assume the risk of liability.

C. DECISION

Upon consideration and review, we find that CLECs have the ability to limit their liability through their customer agreements and/or tariffs. If a CLEC does not limit its liability through its customer agreements and/or tariffs, then the CLEC shall bear the resulting risk.

IV. DEFINITION OF DAMAGES CATEGORIES

A. PARTIES' ARGUMENTS

The Joint Petitioners seek to define the terms indirect, incidental and consequential damages in a manner that does not unfairly deprive any party of damages that are reasonably foreseeable. Specifically, the Joint Petitioners argue in their briefs and witness Russell testifies that damages to end users that are direct, proximate and reasonably foreseeable from BellSouth's performance of obligations set forth in the Agreement should be considered direct damages and not indirect or incidental. The Joint Petitioners argue that reasonably foreseeable damages are those for which contracting parties are responsible when they act negligently, recklessly or in a manner that violates the law. Joint Petitioners define consequential damages as "any loss resulting from general or particular requirements under the contract, of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise."

Joint Petitioners state that they rely on BellSouth's facilities. Any acts or omissions by BellSouth that are reasonably foreseeable directly impact the Joint Petitioners' ability to operate. For example, if an outage was caused by BellSouth's negligence, recklessness or willful misconduct, BellSouth should compensate Joint Petitioners for the losses incurred therefrom.

BellSouth argues in its brief that each party to the proceeding "agrees" that they should not be liable to each other for indirect, consequential or incidental damages. BellSouth, however, takes issue with the Joint Petitioners' language because BellSouth believes it is an attempt to preserve certain damage claims the Joint Petitioners' end users may have against BellSouth. BellSouth asserts in its brief that Joint Petitioners' witness Russell conceded at hearing that as a matter of law a company cannot impact the rights of third parties via a contract. BellSouth concludes in its brief that if it cannot legally limit the rights of a third-party end user through this interconnection agreement, then the Joint Petitioners' language is of no force and effect.

B. ANALYSIS

Upon review of the record and the parties' arguments, we find that there is no need to define these terms in an interconnection agreement. The issue of whether particular damages constitute indirect, incidental or consequential damages is best determined, consistent with applicable precedents, if and when a specific damage claim is presented to us or to a court. We note that third-party claims that solely involve damages would more than likely fall outside our jurisdiction.

For example, in Southern Bell Tel. & Tel. Co. v. Mobile America Corp, the court held, "Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, § 5(b), Fla.Const." 291 So.2d 199, 202 (Fla. 1974) In light of this decision, we will not define the aforementioned damages. We have previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to Section 364.162, Florida Statutes." See, PSC Order No. PSC-04-0972-TP, issued October 7, 2004. However, in the event a dispute falls outside our jurisdiction or the FCC's jurisdiction, then the claimant may seek relief in a court of competent jurisdiction. In that situation, it would then fall under the review of that court to define the terms based upon the applicable case law.

C. DECISION

Upon review and consideration of the record and the parties' briefs, we shall not define indirect, incidental or consequential damages for purposes of the Agreement. The decision of whether a particular type of damage is indirect, incidental or consequential shall be made, consistent with applicable law, if and when a specific damage claim is presented to this Commission, the FCC or a court of law.

V. INDEMNIFICATION

A. PARTIES' ARGUMENTS

The Joint Petitioners argue that parties must be responsible for damages caused by their own acts or omissions. The Joint Petitioners argue that their proposal provides that the party providing service must indemnify the other party for damages caused as a result of providing those services. They also argue in their brief that their proposal comports with industry practice as reflected in the Joint Petitioners' tariffs and contracts. Joint Petitioner witness Russell testified that, "A party that is negligent should bear the cost of its own mistakes." Joint Petitioner witness Russell also testifies that " . . .in virtually all other commercial-services contexts, the service provider, not the receiving party, bears the more extensive burden on indemnities." Joint Petitioners also argue in their brief that BellSouth witness Blake agrees that the party receiving service should indemnify the party providing service for damages caused by the receiving party's own unlawful conduct. The Joint Petitioners argue in their brief that the

parties' differences are with respect to the instances where the providing party is negligent. Further, the Petitioners claim that BellSouth incorrectly insists the receiving party should indemnify the providing party. Petitioners assert in their briefs that this is backwards, contrary to law and common sense. For example, the Joint Petitioners, cite to Xspedius' tariffs stating that the company does not indemnify customers for damages caused by "the negligent or intentional act or omission of the Customer, its employees, agents, representatives or invitees." The Joint Petitioners conclude that an injured party is entitled to relief from the causing party, and anything else would run contrary to longstanding legal principles.

BellSouth claims in its brief that the Joint Petitioners' position is asymmetrical and only benefits the Joint Petitioners (which is contrary to industry standards). BellSouth argues that "indemnity clauses [are] means for allocating foreseen risks, not as means to induce Parties to insure another against unanticipated and unbounded possibilities." BellSouth responds by arguing that the Joint Petitioners are attempting to change industry standard by requiring the party providing service to indemnify the receiving party for: (1) failure to abide by applicable law or (2) for injuries arising out of or in connection with the Agreement to the extent caused by the providing party's negligence. However, BellSouth argues that under the Joint Petitioners' proposal, the receiving party would only indemnify the providing party "against any claim for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications." BellSouth reasons that under this proposal, BellSouth will have virtually unlimited obligations to the Joint Petitioners, and the Joint Petitioners will have essentially no indemnification obligations to BellSouth. BellSouth fears that if it were sued by a third-party solely resulting from the Joint Petitioners' negligence, then it would have no indemnification rights against the Joint Petitioners. BellSouth also notes that the Joint Petitioners have already insulated their liability through the Joint Petitioners' tariffs. BellSouth also argues that pursuant to the FCC Wireline Bureau decision, it should not have to indemnify the Joint Petitioners.[4] BellSouth cites a Minnesota Arbitration Order[5] supporting the notion that the Petitioners' proposed language would make parties potentially liable for another party's conduct far removed from the ICA. BellSouth also claims that interconnection agreements are not typical commercial agreements and should not be construed as such. Further, BellSouth argues that its UNE rates were not established under the premise that it would have almost unlimited exposure via indemnification language in an interconnection agreement. Therefore, BellSouth reasons that the Joint Petitioners' proposal should be rejected because it does not comply with industry standards.

---

[4] 17 FCC Rcd 27039, 27382 (FCC 2002)

[5] 2003 WL 22870903 at 17.

B. ANALYSIS

Although we find merit in each of the parties' positions, we hold that a party shall be indemnified, defended and held harmless against claims, loss or damage to the extent reasonably arising from or in connection with the other party's gross negligence or willful misconduct. While both BellSouth's and the Joint Petitioners' arguments are very persuasive, we do not find a compelling reason to deviate from the usual practice of limiting liability through the use of its tariffs. Neither party shall be required to indemnify the other party for claims of negligence. This issue only applies to instances of gross negligence or willful misconduct by a party to the Agreement. We find that the carrier with a contractual relationship with its own customers is in the best position to limit its own liability against that customer in instances other than gross negligence and willful misconduct.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that a Party shall be indemnified, defended and held harmless against any claims, loss or damage to the extent reasonably arising from or in connection with the other Party's gross negligence or willful misconduct.

VI. FORUM FOR DISPUTE RESOLUTION

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their brief that they have a right to resolve disputes in a court of law, and they are not willing to give up that right. The Joint Petitioners also argue in their brief that BellSouth is seeking to limit Petitioners' right to seek relief in court to the extent that the jurisdiction or expertise of the dispute is not in the possession of this Commission or the FCC. Joint Petitioners also argue in their brief that BellSouth witness Blake testified that courts should not hear matters that fall within the jurisdiction of this Commission or FCC. The Joint Petitioners are concerned with BellSouth's witness' generalization contained in Hearing Exhibit 6 that, "there could be some facets that aren't relative to the interpretation or implementation [of an interconnection agreement]" that fall outside agency jurisdiction but "can't think of any specific examples." Thus, the Joint Petitioners argue in their brief that BellSouth's language would in effect deprive the Petitioners of their right to seek adjudication by a court of competent jurisdiction. In addition, the Joint Petitioners argue that the jurisdiction of the courts in Florida is set by Section 1 of the Florida Constitution which holds that "[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts." Florida Constitution § 1.

Further, Joint Petitioners argue that adjudication in a court of law may be more efficient. The Joint Petitioners are also concerned that BellSouth's position would have the parties litigating before nine different state commissions and the FCC. Joint Petitioners' witness Falvey

testified that this "often is able to force carriers into heavily discounted, non-litigated settlements."

BellSouth argues in its brief that if the dispute is outside the jurisdiction of this Commission or the FCC, then the parties can take the dispute to a court of competent jurisdiction. BellSouth argues in its brief that there can be no question we should resolve matters that are within its expertise and jurisdiction. Specifically, Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the Commission for approval. As such, BellSouth's position is that state commissions are in the best position to resolve disputes relating to the interpretation and enforcement of the agreement.

In addition, BellSouth points to the Eleventh Circuit decision[6] in its brief as support for its position. BellSouth argues in its brief that this decision used this rationale to find that state commissions have the authority under the Act to interpret interconnection agreements. The language of § 252 persuaded the 11th Circuit that in "granting the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce **in the first instance** and to subject their determination to challenges in the federal courts." Id. (emphasis added) BellSouth also argues in its brief that the Joint Petitioners' language would have us standing by or seeking intervention in a state court proceeding regarding interpretation and enforcement of interconnection agreements that we approved. Further, BellSouth asserts that the Joint Petitioners witness Falvey recognized our authority at the hearing, and conceded that state commissions are experts with respect to a number of issues in the agreement.

Last, BellSouth argues in its brief that the Joint Petitioners' position would not reduce litigation. BellSouth also argues in its brief that its position allows for the possibility of dispute resolution to a single forum, the FCC, to resolve a dispute(s).

B. ANALYSIS

The constitutional guaranty of due process demands that a party may petition a tribunal it deems to have jurisdiction over the claim. See, Black's Law Dictionary, Fifth Edition, p. 449, citing, Di Aaio v. Reid, 132 N.J.L. 17, 37 A.2d. 829, 830. It is our understanding that it would be incumbent on that tribunal to either exercise its jurisdiction, or to determine that it lacks jurisdiction. In light of this constitutional guarantee, we find that no tribunal shall be foreclosed to the Parties, and either Party shall be able to petition this Commission, the FCC or a court of competent jurisdiction.

However, we note that this Commission has primary jurisdiction over most disputes arising out of interconnection agreements, and is in the best position to resolve those disputes. For example, we have previously held that, "As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to

[6] See, BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services Inc., 317 F.3d 1270, 1277 (11th Cir. 2003).

Section 364.162, Florida Statutes." See, PSC Order No. PSC-04-0972-TP, issued October 7, 2004. In the event the dispute falls outside this Commission's or the FCC's jurisdiction, such as a claim for third-party damages, then the claimant could file in a court of competent jurisdiction.

We do not find merit in Joint Petitioners' argument that litigating before state commissions would force them into heavily discounted, non-litigated settlements with BellSouth. We find little, if any, efficiency gained in their position. For example, the Joint Petitioners would still have to file a complaint in the state in which they sought relief. We determine the only difference would be that the litigation take place in the court system of a state, rather than in that state's public service commission. Neither party shall be foreclosed in a forum, thus the Agreement will not define a specific forum. However, we strongly note that this Commission has primary jurisdiction over most disputes arising from interconnection agreements.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that either party shall be able to file a petition for resolution of a dispute in any available forum. However, we note that this Commission has primary jurisdiction over most disputes arising from interconnection agreements and that a petition filed in an improper forum would ultimately be subject to being dismissed or held in abeyance while we addressed the matters within our jurisdiction.

VII. APPLICABLE LAW

A. PARTIES' ARGUMENTS

The Joint Petitioners argue in their brief that it is undisputed that Georgia law will govern the agreement. Joint Petitioners argue that under Georgia contract law, all laws of general applicability that exist at the time of contracting will apply to the contract unless expressly repudiated via an explicit exception or displaced by conflicting requirements. Id. The Supreme Court of Georgia has held that "[l]aws that exist at the time and place of the making of a contract, enter into and form a part of it . . . and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter."[7] This comports with the United States Supreme Court holding that "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if fully they have been incorporated in its terms . . . "[8] The Joint Petitioners argue that due to this presumption, contracts are deemed to include any tenet of applicable law unless expressly excluded. In short, a "contract may not be construed to contravene a rule of law."[9] The Joint

[7] Magnetic Resonance Plus, In., v. Imaging Systems, Int'l, 273 Ga. 525, 543 S.E.2d 32, 34-35 (2001).

[8] Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n, 499 U.Su 117, 130 (1991).

[9] Van Dyck v. Van Dyck, 263 Ga. 161, 429 S.E.2d 914, 916 (1993).

Petitioners claim in their brief that parties could not be expected to expressly include all elements of generally applicable law into one contract. If this were expected, then contracts would result in tens of thousands of pages to the agreement. In conclusion, the Joint Petitioners argue that if BellSouth intends to comply with the law, then incorporating the law of the land should not be a problem.

BellSouth argues that this issue is about providing the parties with certainty in the interconnection agreement as to their respective telecommunications obligations. Specifically, BellSouth's concern is that, without relying on specific provisions, the Joint Petitioners will review a telecommunications rule or order, interpret it in a manner that BellSouth could not have anticipated and claim that such forms the basis of a contractual obligation. As indicated by Hearing Exhibit 7, BellSouth' proposal to address this is to include language in the agreement that,

> to the extent that either Party asserts that an obligation, right or other requirement, **not expressly memorialized herein**, is applicable under this Agreement by virtue of a reference to an FCC or Commission rule or order, or **with respect to substantive telecommunications law only** . . .

In addition, BellSouth argues that the Joint Petitioners concede that the interconnection agreement contains the Parties' interpretation of various FCC rules and decisions. Further, BellSouth argues that the Joint Petitioners agree that Parties should not be able to use the Applicable Law provision to circumvent what the Parties memorialize in this Agreement. Id.

BellSouth also argues that the Joint Petitioners' position - that the law in effect at the time of execution of the agreement is automatically incorporated into the Agreement, unless the Parties expressly agree otherwise – should be rejected. Taken to its logical extreme, the parties would only need a one-page interconnection agreement stating that parties agree to comply with Applicable Law, rather than the 500 page agreement currently in existence. BellSouth cites to the North Carolina Utility Commission's decision which expressly rejected this argument in the context of conducting an EEL audit. See, In re: BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp., Docket No. P-772, Sub 7, *Order Granting Motion for Summary Disposition and Allowing Audit* (Aug. 24, 2004).

B. ANALYSIS

The purpose of an agreement is to create specific obligations to do or not to do a particular thing. We find it is essential to have a document that contains specific terms and conditions. That being said, a provision in the Agreement stating when explicit language would apply, and when it would not, could cause more confusion. While the parties raise arguments over applicable law, we find these arguments are premature. These arguments are more appropriately addressed on a case-by-case basis as disputes arise.

C. DECISION

Upon consideration of the parties' briefs and the record, we find that the Agreement will not explicitly state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties. A provision including such a statement could be subject to various interpretations in the context of a dispute. Instead, the contract shall be interpreted according to its explicit terms if those terms are clear and unambiguous. If the contract language at issue in a dispute is deemed ambiguous, the terms shall be interpreted in accordance with applicable law governing contract interpretation.

VIII. COMMINGLING

The FCC has reversed its previous prohibition of commingling and defines, within the TRO, the meaning of the term and applicable conditions. The issue here is that BellSouth commits to commingling certain section 271 elements that are required to be provided under section 251(c)(3). However, BellSouth will not commit to commingling section 271 elements that are not required to be unbundled pursuant to section 251(c)(3). In that situation BellSouth will do so only under a commercial agreement; therefore, it asserts this aspect should not be included in a § 252 arbitration proceeding.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Mertz[10] employs the FCC's definition and explanation of commingling to form the basis of his argument. Specifically, commingling means "the connecting, attaching, or otherwise linking of a UNE or a UNE [c]ombination 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." Witness Mertz expresses that "clearly" the elements BellSouth provides under § 271 are obtained by a method other than unbundling under § 251(c)(3) and thus the Joint Petitioners should be allowed to commingle them. He argues that nothing regarding commingling in the TRO or the errata to the TRO supports BellSouth's position that it is not obligated to commingle § 271 elements with § 251 UNEs. Joint Petitioners witness Mertz also argues that the FCC concluded that § 271 requires Regional Bell Operating Companies, such as BellSouth, "to provide network elements, services, and other offerings, and those obligations operate completely separate and apart from section 251." Witness Mertz continues that BellSouth is incorrect in its interpretation of the commingling rule to the extent that its proposed language "turns the rule on its head."

Joint Petitioners witness Mertz argues that when the FCC issued an errata to paragraph 584 of the TRO, the elimination of the phrase "any network elements unbundled pursuant to section 271" was to "clean up stray language" dealing with the commingling of section 251

[10] Mr. James Mertz adopted all testimony, discovery responses, etc., of Joint Petitioner's witness Ms. Marva Brown Johnson.

UNEs with services provided for resale under section 251(c)(4). The inclusion of the phrase was inconsistent with the rest of the paragraph and the errata corrected the deficiency, he asserts. Witness Mertz states "BellSouth's attempt to create by implication an affirmative adoption of commingling restrictions with respect to section 271 elements cannot withstand scrutiny." In addition, he argues that the D.C. Circuit's *USTA II* holding does not prohibit commingling of UNEs and UNE combinations with § 271 offerings, because the D. C. Circuit's discussions concerning § 271 were directed at combining, not commingling. He concludes that elements utilized under § 271 fall within the "any other method" definition and are not obtained pursuant to § 251(c)(3) unbundling.

Witness Blake argues that BellSouth's position is "consistent" with the FCC's errata to paragraph 584 of the TRO, stating that there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available pursuant to § 271 of the Act. She explains that the TRO errata is significant in that the FCC took action to delete a sentence that specifically made reference to "any network elements unbundled pursuant to section 271." Witness Blake argues that the FCC, in striking the sentence, meant to exclude certain § 271 elements from commingling under § 251, and she states that BellSouth will only commingle § 271 elements under separate commercial agreements.

The BellSouth witness points to the D.C. Circuit's *USTA II* decision issued on March 2, 2004, as additional support for BellSouth's position. In the discussion concerning "Section 271 Pricing and Combination Rules" of the checklist items (loops, transport, switching, and call-related databases), the FCC and the D.C. Circuit agreed that there was no duty to combine network elements by the incumbent LEC. Witness Blake continues stating that "it is clear that both the FCC and D.C. Circuit have determined there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the 1996 Act."

Witness Blake asserts that "BellSouth's interpretation of its commingling requirement is based solely on the obligations stated in the TRO by the FCC." Citing paragraph 579 of the TRO, BellSouth's witness Blake argues that the Joint Petitioners are not prevented from commingling wholesale services purchased from its special access tariff with UNEs and UNE combinations obtained via § 251. However, when the Joint Petitioners are asking to commingle UNEs with "non-tariffed services provided only pursuant to BellSouth's Section 271 obligations, commingling is not required by Section 251 or 252 . . . ." Witness Blake contends that such commingling is outside the scope of an interconnection agreement and should be detailed in a separate agreement negotiated by the parties. Last, in its brief, BellSouth argues that under the Joint Petitioners' interpretation of BellSouth's commingling obligations, BellSouth could be required to combine § 271 switching with a UNE loop, thereby resurrecting UNE-P, which BellSouth contends it has no § 251 obligation to provide.[11] \

[11] We acknowledge that the 271 switching and 251 loop elements are priced differently..

B. ANALYSIS

The FCC devoted paragraphs 579 through 584, including numerous footnotes and several examples, to support its decision to address restrictions to commingling. We note that the Joint Petitioners and BellSouth provided the FCC's definition of commingling located in paragraph 579 of the TRO:

> The connecting, attaching, or otherwise linking of a UNE, or 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.

BellSouth's arguments above contain the details of the errata to the TRO concerning paragraph 584. In paragraph 584 of the TRO, the FCC said "as a final matter we require the incumbent LECs to permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act."[12] The FCC's errata to the TRO struck the portion of paragraph 584 referring to ". . . any network elements unbundled pursuant to section 271. . . ." The removal of this language illustrates that the FCC did not intend commingling to apply to section 271 elements that are no longer also required to be unbundled under section 251(c)(3) of the Act. Therefore, we find that BellSouth's commingling obligation does not extend to elements obtained pursuant to section 271. Further, we find that connecting a section 271 switching element to a section 251 unbundled loop element would, in essence, resurrect a hybrid of UNE-P. This potential re-creation of UNE-P is contrary to the FCC's goal of furthering competition through the development of facilities-based competition.

C. DECISION

Upon review and consideration, we find that BellSouth is required, upon a CLEC's request, to commingle or to allow commingling of UNEs or UNE combinations with any service, network element or other offering it is obligated to make available. However, this does not include offerings made available only under Section 271. We find that striking the reference to section 271 means BellSouth's commingling obligation does not extend to elements obtained pursuant to section 271.

[12] See TRO ¶ 584 before the TRO errata.

IX. LINE CONDITIONING - DEFINITION

In the UNE Remand Order,[13] the FCC concluded ILECs must provide access on an unbundled basis, to xDSL-capable stand-alone copper loops because CLECs are impaired without such loops. Such access may require ILECs to condition the local loop. Line conditioning involves removing any device, such as bridged taps and load coils, that could diminish the capability of the loop or subloop to deliver xDSL services. (47 C.F.R. § 51.319(a)(1)(iii)(A)) However, on copper loops over 18,000 feet, load coils are necessary to provide analog voice capability; thus, a dispute on whether such loops should be conditioned can arise. The parties do not appear to dispute that line conditioning involves removing devices from the loop, but appear to disagree on the rates, terms and conditions under which the ILEC must provide line conditioning.

A. PARTIES' ARGUMENTS

The Joint Petitioners witness Russell asserts that line conditioning should be defined in the Agreement pursuant to 47 C.F.R. § 51.319(a)(1)(iii)(A), which states:

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

He asserts that "this language does not provide Petitioners with anything more than what the FCC rules prescribe." (TR 51)

The Joint Petitioners point out in their brief that BellSouth has "signed interconnection agreements containing rates, terms and conditions for conditioning **all** copper loops. These agreements provided for conditioning copper loops of any length and removing bridged tap, without length restrictions, at TELRIC rates **already set by this Commission.**"[14] Further, the Joint Petitioners note that BellSouth has sought to limit the line conditioning obligations only after the TRO was issued. They believe that nothing in the text of the TRO suggests that ILEC line conditioning obligations were limited by that order.

BellSouth counters in its brief that the definition proposed by the Joint Petitioners excludes terminology that addresses its obligation to provide line conditioning at parity to that provided to its own customers or other telecommunications carriers, which was clarified within the TRO. BellSouth emphasizes that the Joint Petitioners' definition is unlimited in scope and would lead to BellSouth being required to provide superior access to the network than it affords its own customers or to other telecommunications carriers and finds such a position in violation

---

[13] Order No. FCC 99-238 issued November 5, 1999, CC Docket No. 96-98 Third Report and Order and Fourth Further Notice of Proposed Rulemaking. (UNE Remand Order).

[14] See Exhibit 24 of Joint Petitioners Brief (BellSouth/New South Agreement excerpt).

of BellSouth's nondiscrimination obligations under the Act. BellSouth points out that, although the Joint Petitioners have current agreements containing TELRIC rates for line conditioning, it is of no consequence because their current agreements are not TRO-compliant.

BellSouth witness Fogle proposes a definition using language from the TRO, defining line conditioning as "a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." He points to the FCC's discussion of line conditioning in TRO ¶ 643, which states:

> Line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers. As noted above, incumbent LECs must make the routine adjustments to unbundle loops to deliver services with parity with how incumbent LECs provision such facilities for themselves.

BellSouth's position is that "the FCC expressly equated its routine modification rules to its line conditioning rules in the TRO," pointing to ¶ 635, where the FCC stated, "In fact, the routine modifications we require today are substantially similar activities to those that the incumbent LEC currently undertake under our line conditioning rules." It noted that those sentiments were echoed in ¶ 250, which states, "As noted elsewhere in this Order, we find that line conditioning constitutes a form of routine network modification that must be performed at the competitive carrier's request to ensure that a copper local loop is suitable for providing xDSL service." BellSouth further explains that the mathematical definition for the term "properly," as used in ¶ 643 cited above, is distinctly a subset. BellSouth witness Fogle clarified that a subset means that it is wholly contained within the set; therefore, line conditioning is wholly contained within routine network modifications, or that line conditioning is a subset of routine modifications.

Joint Petitioners witness Falvey argues that this language from the TRO is contrary to the intent of the definition in the rule. He contends that no weight should be given to the language in the order. Joint Petitioners believe that neither the line conditioning rule, 47 C.F.R. § 51.319(a)(1)(iii), nor the routine modification rule, 47 C.F.R. § 51.319(a)(8), expresses any modification or limitation on line conditioning obligations, stating that "the two rules are distinct and do not cross reference each other." Witness Falvey admitted that the adoption of the Joint Petitioners' proposed language would require BellSouth to perform line conditioning at TELRIC prices in instances where it does not perform line conditioning for its own customers. In addition, Joint Petitioners witness Russell asserts that BellSouth's assessment that line conditioning is only for xDSL services contravenes 47 C.F.R. § 51.319(a)(1)(iii), which he claims "is neutral as to the services that can be provided over conditioned loops."

B. ANALYSIS

We find that neither definition provided by the parties is appropriate because both parties selected specific, but incomplete, text from the FCC rules and the TRO that they thought were supportive of their respective positions. BellSouth selected text from the TRO, while the Joint Petitioners selected text from the rules. We do not agree with this approach, but instead find that a definition must encompass all of the defining elements expressed throughout the rules, in order

to maintain the integrity and full meaning expressed in the rule. Neither text offered by the parties can be read in isolation.

We note that neither party disputes that line conditioning involves the removal of disruptive devices;[15] therefore, the removal of devices can certainly be included in the definition. They disagree on whether the TRO imposes limiting standards on line conditioning, such as parity or conditioning to enable xDSL services. We also note that the definition of line conditioning has evolved with the issuance of each FCC order and the definition expressed in the proposed agreement should comply with current law.

We find Hearing Exhibit 4 convincing and agree with Joint Petitioners witness Falvey that one would expect to find similarity between the FCC's discussion of line conditioning in the TRO and how it was incorporated into the rule. As reflected in Hearing Exhibit 4, he states that if the FCC meant for a limiting factor to be imposed on line conditioning, "It would appear in paragraph 1, front and center." We, therefore, refer to the first paragraph under 47 C.F.R. § 51.319(a)(1)(iii), which contains the text which the Joint Petitioners have submitted as their definition for line conditioning. The following is an excerpt from 47 C.F.R. § 51.31:

> **§ 51.319 Specific unbundling requirements.**
>
> (a) *Local loops.* An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the local loop on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section.
>
> . . .
>
> (1) *Copper loops.* An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the copper loop on an unbundled basis.
>
> . . .
>
> (iii) *Line conditioning.* The incumbent LEC shall condition a copper loop at the request of the carrier seeking access to a copper loop *under paragraph (a)(1) of this section*, the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is *suitable for providing digital subscriber line services*, including those provided over the high frequency portion of the copper loop or copper subloop, whether or not the incumbent LEC offers advanced services to the end-user customer on that copper loop or copper subloop.

---

[15] Such devices include, but are not limited to, bridged taps, load coils, low pass filters, and range extenders. (47 C.F.R. § 51.319(a)(1)(iii)(A)).

. . .

> (A) Line conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line service. Such devices include, but are not limited to, bridged taps, load coils, low pass filters, and range extenders. (emphasis added)[16]

This Commission notes that the first paragraph under 47 C.F.R. § 51.319(a)(1)(iii) refers to conditions "under paragraph (a)(1) of this section," that further clarifies the conditions under which the ILEC must condition a line. Paragraph (a)(1) begins, "An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the copper loop on an unbundled basis." (emphasis added) Additionally, we observe that the encompassing paragraph (a), states, "An incumbent LEC shall provide a requesting telecommunications carrier with *nondiscriminatory access* to the local loop on an unbundled basis." (emphasis added) We also note that each inclusive paragraph to the one selected by the Joint Petitioners as a defining paragraph for line conditioning includes a nondiscriminatory access restriction or obligation.

Witness Willis testifies that the FCC established the line conditioning rule under its section 251 authority provided by the Act. Section 251(c)(2)(C) requires incumbent LECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself. . ." (47 U.S.C. § 251(c)(2)) Section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers with "*nondiscriminatory access* to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252." (47 U.S.C. § 251(c)(3); emphasis added) Nondiscriminatory access has been the standard for accessing the loop since the issuance of Section 251(c)(3). As stated in paragraph 203 of the TRO, "In the UNE Remand Order, the Commission broadened the definition of the loop to include all features, functions, and capabilities of these transmission facilities," including line conditioning. As expressed in the line conditioning rules, the same nondiscriminatory access standard that applies to the loop also applies to line conditioning, which is an element of the loop.

However, as a result of the issuance of the Local Competition Order[17] and carried forward to the UNE Remand Order prior to the issuance of the TRO, the definition of nondiscriminatory access provided:

---

[16] "the high frequency portion of a copper loop under paragraph (a)(1)(i) of this section" refers to line sharing. The term "advanced services" is defined as "high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high quality voice, data. Graphics or video telecommunications using any technology." Line Sharing Order, 14 FCC Rcd at 20915, para. 4.

[17] Order No. FCC 96-325 issued August 8, 1996, CC Docket Nos. 96-98, 95-185, First Report and Order. (Local Competition Order).

> to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that the incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be *superior in quality* to that which the incumbent LEC provides to itself." (47 C.F.R. § 51.311 (c))[18] (emphasis added)

Such language was found by the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) to violate the plain terms of the Act,[19] so with the issuance of the TRO, this definition was revised, eliminating a "superior in quality" access standard. Nondiscriminatory access is now defined as:

> (a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the *same* for all telecommunications carriers requesting access to that network.
>
> (b) To the extent technically feasible, the quality of an unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be *at least equal in quality* to that which the incumbent *provides to itself.* (47 C.F.R. § 51.311)(emphasis added)

The Eighth Circuit concluded that the phrase "at least equal in quality" leaves open the possibility for the parties to negotiate agreements to provide a superior quality access, with the ILECs being *compensated* for the additional cost involved in providing superior quality; however, the ILECs are *not mandated* to meet such a standard.[20] With the "superior in quality" access standard now null and void, we find *parity alone reigns as the qualifying standard*, thereby becoming a limiting factor for line conditioning.

With the FCC redefining nondiscriminatory access as parity, we find that the ILEC is now obligated to provide access to the loop and its elements, which include line conditioning, "at least equal in quality to that which the incumbent provides to itself." (47 C.F.R. § 51.311) By the Joint Petitioners limiting their focus to the language contained in 47 C.F.R. § 51.319(a)(1)(iii)(A) and disregarding any encompassing paragraphs, their proposed definition omits the parity standard, leaving us to conclude that the definition is insufficient.

BellSouth's definition includes the parity standard, but it does so by equating line conditioning with routine modifications. Consequently, the parties engage in substantial argument over whether line conditioning is or is not a routine modification, which we find was to belabor the point of whether or not line conditioning is governed by a parity standard.

---

[18] 47 C.F.R. § 51.311 (c) (10-1-00 Edition).

[19] Iowa Utilities Bd. v. FCC, (Remand Decision) Nos. 96-3321(and consolidated cases) issued July 18, 2000, p. 22. before the United States Court of Appeals for the Eighth Circuit.

[20] See, Iowa Utils. Bd., 120 F.3d at 812-13.

Therefore, we find that discussion is irrelevant, in that the parity standard is now required. (47 C.F.R. § 51.311)

Joint Petitioners object to BellSouth's inclusion of the term xDSL in the definition, stating that 47 C.F.R. § 51.319(a)(1)(iii)(A) includes other high-speed switched wireline telecommunications services, including digital subscriber line service, and is not limited to any service or to xDSL capability. We note that higher-speed services could require more line conditioning than xDSL services. Lower speeds can tolerate more interference. However, we disagree with the Joint Petitioners' interpretation. When read in context, the phrase "high-speed switched wireline telecommunications capability, including digital subscriber line service," refers to the removal of devices. (47 C.F.R. § 51.319(a)(1)(iii)(A)) Those same devices are known to diminish high-speed switched wireline telecommunications capability in general. They are also known to diminish xDSL capability. The rule went on to state that "[s]uch devices include, but are not limited to, bridged taps, load coils, low pass filters, and range extenders," giving further evidence that the context of the previous statement was referring to devices. (47 C.F.R. § 51.319(a)(1)(iii)(A)) However, the encompassing paragraph, (a)(1)(iii), specifically addresses services, stating, "[t]he incumbent LEC *shall condition* a copper loop at the request of the carrier seeking access to a copper loop . . . to ensure that the copper loop or copper subloop is suitable *for provisioning digital subscriber line services.*" (47 C.F.R. § 51.319(a)(1)(iii), emphasis added)

We understand the rule and paragraph 642 of the TRO to require line conditioning in order to provide an xDSL-capable stand-alone copper loop. The FCC states throughout the TRO that line conditioning is for provisioning xDSL services.[21] We also believe that it was clearly the intent of the rule and footnote 624 of the TRO to focus on provisioning digital subscriber line services, services which are typically associated with the mass market, a market in which the FCC found impairment. We find that the FCC has established limits to line conditioning based on xDSL service suitability.

BellSouth's definition includes a standard of delivery for xDSL. However, this definition was taken from the order, leading the parties' arguments to center around whether the rules take precedence over the order or vice versa. We find this discussion is unnecessary to draw a conclusion on this issue. Seeing no conflict between the rule and the order, we prefer a definition derived from the rules. The parties are free to negotiate a definition provided it includes the limiting factors of nondiscriminatory access and xDSL capability expressed in the rules as a whole, as discussed in our analysis.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that the definition for line conditioning shall be taken from the FCC rules and contain the limiting conditions of nondiscriminatory access and suitability for xDSL delivery which appear

---

[21] TRO ¶ 7, ¶ 23, ¶ 26, Note 465, Note 624, ¶ 211, ¶ 215, Note 661, ¶ 249, ¶ 250, Note 746, Note 747, ¶ 255, ¶ 344, ¶ 347, ¶ 350, ¶ 642, ¶ 643, ¶ 644.

in the rules leading to the definition found in 47 C.F.R. § 51.319(a)(1)(iii)(A). If the parties through negotiation cannot agree on a definition that includes the stated conditions, then the following language shall serve as a default:

> Line Conditioning is defined as the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver xDSL capability,[22] to ensure that the copper loop or copper subloop is suitable for providing xDSL services[23] and provided the same for all telecommunications carriers requesting access to that network[24] and at least in quality to that which the incumbent provides to itself.[25]

X. LINE CONDITIONING - OBLIGATION

The parties appear to dispute whether BellSouth's obligations to provide line conditioning have been limited in any way due to the issuance of the TRO. Such limits, if any, would affect the rates, terms and conditions by which line conditioning would be provided.

A. PARTIES' ARGUMENTS

Joint Petitioners believe that line conditioning is a section 251(c)(3) obligation that has remained unchanged since prior to the issuance of the TRO. Joint Petitioners note that BellSouth signed current agreements which included TELRIC-compliant rates approved by the FPSC for removing load coils on loops in excess of 18,000 feet and removing bridged taps without respect to the length of the bridged tap. They believe that BellSouth must continue to perform line conditioning at those rates. Joint Petitioners further argue that "[n]othing in any FCC order allows BellSouth to treat [l]ine [c]onditioning in different manners depending on the length of the loop . . . [and] BellSouth's imposition of 'special construction' rates for [l]ine [c]onditioning is inappropriate . . . , [since] the work performed in connection with providing UNEs must be priced at TELRIC-compliant rates."

BellSouth witness Fogle counters by arguing that, while the law does not change line conditioning obligations based on loop length, its availability is governed by a parity standard; therefore, if loop lengths are a factor in providing parity, then loop lengths become a factor in line conditioning obligations. Witness Fogle testified that for its customers, "BellSouth adds or does not add load coils depending on the length of the copper loop . . . and has offered this same procedure to the Joint Petitioners." BellSouth understands parity to mean that it is obligated to

[22] See 47 C.F.R. § 51.319(a)(1)(iii)(A).

[23] See 47 C.F.R. § 51.319(a)(1)(iii).

[24] See 47 C.F.R. § 51.311(a).

[25] See 47 C.F.R. § 51.311(b).

provide the line conditioning it routinely performs for itself and believes that the Joint Petitioners seek "to obtain rights that exceed what BellSouth offers its own customers." Although the Joint Petitioners have current agreements containing TELRIC rates for line conditioning, BellSouth points out that it is of no consequence because their current agreements are not TRO-compliant.

Joint Petitioners object to line conditioning being limited to what BellSouth routinely conditions for itself. Joint Petitioners present that if BellSouth were permitted to condition loops based on what it does for its own customers, BellSouth would be able to "**eliminate all line conditioning completely**." They claim that if BellSouth determined that something was not *routinely* done for itself, then it would not do what was required by the rule.

BellSouth witness Fogle asserts that section 251(c)(3) of the Act and the TRO obligates BellSouth to provide nondiscriminatory access by "perform[ing] line conditioning functions . . . to the extent the function is a routine modification that BellSouth regularly undertakes to provide xDSL to its own customers," and the Joint Petitioners have not been denied this right. Witness Fogle notes that BellSouth "adheres to current industry technical standards that require the placement of load coils on copper loops greater than 18,000 feet in length to support high quality voice service. . . [and] does not remove load coils for BellSouth's retail end users served by copper loops of over 18,000 feet in length." He states that BellSouth also does not remove bridged tap at less than 2,500 feet for its own customers. Witness Fogle testifies that the Joint Petitioners' fears of all line conditioning being eliminated are "purely hypothetical." He expressed that although BellSouth is not obligated, by the parity standard expressed in TRO ¶ 643, to provide to the Joint Petitioners line conditioning beyond that provided to its own customers, BellSouth does offer to do so "via BellSouth's Special Construction tariffs on a time and materials basis." He notes that BellSouth's proposed language is found in other agreements with other carriers, such as with those CLECs who are members of the Shared Loop Collaborative.[26] Witness Fogle believes that BellSouth's proposed language for the interconnection agreement with the Joint Petitioners provides nondiscriminatory access as required by the law.

As to BellSouth's agreement with the Shared Loop Collaborative, the Joint Petitioners state that they are not bound by any agreements made by BellSouth and any other CLECs.

B. ANALYSIS

Joint Petitioners witness Falvey states that the ILEC is obligated to provide the CLEC with line conditioning wherever requested. It is our understanding that this position is derived from a standard that came into being after the issuance of the UNE Remand Order.[27] The rule that evolved from the UNE Remand Order held that the incumbent LEC was obligated to

[26] The following carriers were identified as some members of the Shared Loop Collaborative: Northpoint, Rhythms, Covad, AT&T, and MCI (Fogle TR 713-715, 718).

[27] Order No. FCC 99-238 issued November 5, 1999, CC Docket No. 96-98 Third Report and Order and Fourth Further Notice of Proposed Rulemaking. (UNE Remand Order).

provide line conditioning "wherever a competitor requests." (47 C.F.R. § 51.319 (a)(3))[28] However, that phrase has now been stricken from the rule and replaced with

> . . . at the request of the carrier seeking access to a copper loop under paragraph (a)(1) of this section, the high frequency portion of a loop under paragraph (a)(1)(i) of this section, or a copper subloop under paragraph (b) of this section to ensure that the copper loop or copper subloop is suitable for providing digital subscriber line services, including those provided over the high frequency portion of the copper loop or copper subloop . . . . (47 C.F.R. § 51.319(a)(1)(iii))

The Joint Petitioners consider the revision noted above as an expansion of "wherever a competitor requests." However, this paragraph is subsumed within paragraphs referring to an obligation to provision line conditioning on a nondiscriminatory basis. Nondiscriminatory access is now defined as:

> (a) The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be *the same* for all telecommunications carriers requesting access to that network.
>
> (b) To the extent technically feasible, the quality of an unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be *at least equal in quality* to that which the incumbent *provides to itself.* (47 C.F.R. § 51.311)(emphasis added)

However, parties are free to negotiate agreements to provide superior quality access, with the ILECs *being compensated* for the additional cost involved in providing superior quality; however, the ILECs are *not mandated* to provide service at such a standard.[29] With the FCC redefining nondiscriminatory access as parity, we find that the ILEC is now obligated to provide a quality of access to the loop and its elements, which includes line conditioning, "at least equal in quality to that which the incumbent provides to itself." (47 C.F.R. § 51.311)

Joint Petitioners object to BellSouth refusing to condition lines to enable xDSL on loops in excess of 18,000 feet, when it routinely conditions DS1 loops longer than 18,000 feet. BellSouth notes that Joint Petitioners witness Willis did acknowledge that NuVox was not ordering services that would require load coil removal on loops over 18,000 feet and were using DS1s to provide broadband services to customers regardless of loop length. Witness Willis also noted that the provisioning of DS1s or the line conditioning for such loops is not at issue in this dispute.

We note that in addition to parity, the rule also limits line conditioning to a standard of providing "suitability for digital subscriber line services." (47 C.F.R. § 51.319(a)(1)(iii)) This is

---

[28] 47 C.F.R. § 51.319 (a)(3)(10-1-00 Edition).

[29] See Iowa Utils. Bd., 120 F.3d at 812-13.

clarified in paragraph 643 of the TRO, which states, "[l]ine conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers." The FCC restates throughout the TRO that line conditioning is for provisioning xDSL services.[30] Further, in footnote 624 of the TRO, it states that DS0 loops are typically used to deploy xDSL services to customers associated with the mass market. As stated in paragraph 209 of the TRO, the enterprise market typically purchases high-capacity loops such as DS1. The FCC noted in paragraph 210 of the TRO that the economic considerations in provisioning DS1 loops vary from provisioning DS0 loops, and adopted loop unbundling rules specific to each loop type. The Joint Petitioners note one DS1 could provide the capacity of 24 DS0 loops. We find that in evaluating whether BellSouth is meeting its nondiscriminatory obligation to provide line conditioning suitable for xDSL services, we must focus on the conditions under which BellSouth's own customers obtain line conditioning for xDSL services. Therefore, we conclude that any line conditioning afforded to DS1 customers is irrelevant.

In paragraph 2 of the TRRO, the FCC "recognized the marketplace realities of robust broadband competition and increasing competition from intermodal sources, and thus eliminated most unbundling requirements for broadband architectures serving the mass market." The FCC used its section 251 unbundling authority in a more targeted manner, and in paragraph 2 of the TRRO, the FCC noted that it "impose[d] unbundling obligations only in those situations where [it found] that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition." In response to the USTA II court's directive, the FCC modified its "approach regarding carriers' unbundled access to incumbent LECs' network elements for provision of certain services," which it expressed in paragraph 22 of the TRRO. We find that as more and more elements become "de-listed" as network elements requiring unbundling, the obligation to provide line conditioning wanes accordingly. This limiting focus is reflected in the FCC's revision of the line conditioning rules to providing "suitability for digital subscriber line services." (47 C.F.R. § 51.319(a)(1)(iii))

We conclude that the rules obligate BellSouth to provide parity in the quality of access to the unbundled network element -- in this case, line conditioning. Further, we note that nondiscriminatory access has now been defined in paragraph 643 of the TRO as "at least equal in quality to that which the incumbent provides to itself," and understand the term parity to hold the same meaning. (47 C.F.R. § 51.311) This Commission finds that BellSouth has met the requirement of the law and that the request of the Joint Petitioners goes beyond what BellSouth provides for itself or to other carriers. Moreover, we find that to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders.

C. DECISION

---

[30] TRO ¶ 7, ¶ 23, ¶ 26, Note 465, Note 624, ¶ 211, ¶ 215, Note 661, ¶ 249, ¶ 250, Note 746, Note 747, ¶ 255, ¶ 344, ¶ 347, ¶ 350, ¶ 642, ¶ 643, ¶ 644.

Upon consideration and review of the record and arguments in the parties' briefs, we find that BellSouth's obligations with respect to line conditioning are to provide nondiscriminatory access and ensure digital subscriber line capability.

XI. LOAD COIL REMOVAL ON COPPER LOOPS OF 18,000 FEET OR MORE

Joint Petitioners witness Willis notes that BellSouth proposes to unload loops of less than 18,000 feet at TELRIC rates. There is no disagreement over this proposal. Witness Fogle points out in Hearing Exhibit 2 that load coils on loops less than 18,000 feet are not necessary to sustain the underlying voice service, and are removed by BellSouth to provide its own xDSL service. Pursuant to current network design standards, no load coils are anticipated on loops extending to 18,000 feet. However, load coils are required on loops with lengths exceeding 18,000 feet to support voice service. Once a loop extends beyond 18,000 feet, pursuant to current network design standards, it would require a minimum of three load coils with the first placed at 3,000 feet from the central office and subsequent load coils placed at 6,000 foot intervals thereafter. The Joint Petitioners do not dispute these facts. Where the parties differ is that BellSouth proposes to unload loops longer than 18,000 feet using its special construction process.[31]

A. PARTIES' ARGUMENTS

Joint Petitioners witness Willis proposes that rates for unloading loops longer than 18,000 feet should be at TELRIC, stating primarily that "[n]othing in any FCC order allows BellSouth to treat Line Conditioning in different manners depending on the length of the loop." Witness Willis further points out that the FCC's Line Sharing Order[32] held that ILECs are required to condition loops, regardless of the loop length, and the FCC reiterated this obligation in footnote 1947 of the TRO. Joint Petitioners note that the FPSC has already approved TELRIC rates for load coil removal on loops longer than 18,000 feet.[33] Joint Petitioners state in their brief that those rates are in their existing agreements with BellSouth and should remain applicable. Witness Willis believes that BellSouth is obligated by the FCC's line conditioning rules and the FPSC's order[34] to unload all loops at TELRIC-compliant rates, even those longer than 18,000 feet.

BellSouth witness Fogle states that the TRO provides for nondiscriminatory access, which is parity. Witness Fogle testifies that for its customers, "BellSouth adds or does not add

---

[31] Special construction provision is contained in a FCC tariff. Actual costs are calculated on an individual case basis.

[32] Order No. FCC 99-355 issued December 9, 1999, CC Docket Nos. 96-98, 98-147, Third Report and Order in CC Docket No. 98-147; Fourth Report and Order in CC Docket No. 96-98. (Line Sharing Order).

[33] See Order No. PSC-01-2051-FOF-TP (Appendix A, Element A.17), issued October 18, 2001.

[34] See PSC-01-1181-FOF-TP.

load coils depending on the length of the copper loop." He purports that BellSouth does not unload its facilities to provide digital subscriber line service capability for its own customers on loops longer than 18,000 feet and states that under its nondiscriminatory obligations under the Act, BellSouth should not be obligated to do so at TELRIC for the Joint Petitioners. However, BellSouth will remove load coils on loops extending beyond 18,000 feet upon request pursuant to its special construction process. Witness Fogle testifies that using this methodology, BellSouth is able to calculate the specific costs associated with removing and replacing an individual load coil. Witness Fogle notes that in some cases, the resulting cost could be "less than the TELRIC rate for removing load coils, if the load coil is on aerial cable and can easily be removed."

BellSouth witness Fogle argues that the Joint Petitioners have current agreements containing TELRIC rates for line conditioning, which are of no consequence because their current agreements are not TRO-compliant. Where the ILEC is not obligated to perform line conditioning, BellSouth notes that such line conditioning is not bound to TELRIC pricing. BellSouth confirmed, "state law . . . can provide no 'back door' for reimposition of TELRIC rates for network elements that the FCC has determined BOCs should not be required to make available at forward-looking prices."

Joint Petitioners reiterate that BellSouth acknowledges the definition of line conditioning in rule 47 C.F.R. § 51.319 (a)(1)(iii)(A) has not materially changed. They further propose that the text of the TRO does not express any limitations. Joint Petitioners believe that the parity standard, which BellSouth purports is applicable to line conditioning, is only relevant for routine network modifications. They express that the rules governing line conditioning and routine modifications "are distinct and do not reference each other." Furthermore, the Joint Petitioners point out, by using the special construction tariff, each request would have both a cost and interval for delivery calculated on an individual case basis, which they find unacceptable.

Joint Petitioners witness Willis contends that access to unloaded loops in excess of 18,000 feet is important for the deployment of Etherloop[35] and G.SHDSL,[36] which could provide broadband capabilities on such loops. He claims that without line conditioning on loops longer than 18,000 feet, these services will not work. Witness Willis states that the Petitioners have a "right to provide the service of their choice and to obtain loops that can carry those services."

BellSouth states in its brief that the Joint Petitioners' claims that Etherloop and G.SHDSL will not work on loop lengths in excess of 18,000 feet without line conditioning is pure speculation, pointing out that the job duties of the Joint Petitioners' sole witness, Jerry Willis, do not include the development of new technologies. BellSouth asserts that the Joint Petitioners' concerns regarding Etherloop and G.SHDSL are inaccurate, with witness Fogle testifying that

---

[35] "Etherloop . . . is a blending of DSL and Ethernet, combining the high data rates of DSL and the half-duplex communications model of Ethernet [providing] "burst" packet delivery capabilities." See, Hearing Exhibit 2

[36] G.SHDSL is a new standards-based single pair implementation of DS-1, offering symmetric bandwidths of between 192 Kbps to 2.3 Mbps, with a 30 percent longer loop reach than SDSL and is spectrally compatible with other DSL variants within the network, as set forth in Hearing Exhibit 2.

new technologies being developed to provide broadband services on copper loops in excess of 18,000 feet take into consideration the network limitations of the embedded loop in their development. BellSouth's brief notes that Joint Petitioners witness Willis did acknowledge that his firm, NuVox, was not ordering services that would require load coil removal on DS0 loops longer than 18,000 feet and were using DS1s to provide broadband services to customers regardless of loop length, also noting that the provisioning of DS1s or the line conditioning for such loops is not at issue in this dispute.

Joint Petitioners indicate that BellSouth removes load coils on DS1 loops exceeding 18,000 feet in length. They further conclude that BellSouth should be required to remove load coils on all loops. BellSouth witness Fogle objects, stating that BellSouth must apply the same criteria to the Joint Petitioners that are applied to its own retail customers and if BellSouth does not condition loops longer than 18,000 feet to enable xDSL delivery for itself, then by its parity obligation BellSouth should not be required to do so for the Joint Petitioners at TELRIC.

BellSouth reveals that receiving requests to condition loops of any length is rare, stating that BellSouth received only 14 requests from all CLECs throughout its entire nine-state region to remove load coils in 2004, with only two of those being for loops in excess of 18,000 feet; the Joint Petitioners, in particular, "did not request a single order to perform any form of line conditioning in 2004." BellSouth concludes that the Joint Petitioners' claims that BellSouth's proposed language will prevent them from deploying broadband services is not credible because the Joint Petitioners have not used nor have they presented any plans for using a technology that requires line conditioning. Further, the Joint Petitioners are currently providing broadband access to their customers at all lengths via alternative approaches that do not require line conditioning.

B. ANALYSIS

We agree with Joint Petitioners witness Willis that the FCC does not treat line conditioning in different manners depending on the length of the loop. In ¶ 86 of the Line Sharing Order, the FCC states in particular, incumbent LECs are required to condition any loop requested by a competitor, regardless of length, unless such conditioning would significantly degrade the customer's analog voice service provided by the incumbent. Further, the FCC states that "an incumbent LEC will rarely, if ever, be able to demonstrate a valid basis for refusing to condition a loop under 18,000 feet."[37] The FCC specifically addressed conditioning loops over 18,000 feet in its Line Sharing Reconsideration Order (LSRO).[38] The FCC in ¶ 34 of that Order considered comments that loading loops which exceed lengths of 18,000 feet was a "well-established engineering principle" and removing such devices would degrade voice service, since

[37] Line Sharing Order, 14 FCC Rcd at 20954, para 86.

[38] Order No. FCC 01-26 issued January 19, 2001, CC Docket No. 98-147, CC Docket No. 96-98, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98. (Line Sharing Recon Order).

loading was required to obtain minimally acceptable levels of voice quality. However, the FCC in ¶¶ 35-36 of the LSRO refused to make a "categorical finding" that loaded loops over 18,000 feet were ineligible for line sharing because conditioning would degrade the voice service:

> We reject . . . mak[ing] a categorical finding that loops over 18,000 feet . . . are ineligible for line sharing because conditioning them will significantly degrade the voice service. . . . [I]n some cases, unloaded loops longer than 18,000 feet may be able to support quality voice service. We also agree . . . that the simple loop length standard . . . is inappropriate because it does not focus on the quality of the voice service that can be provisioned over the line. AT&T suggests that the loss characteristics of a loop are a more relevant determination when considering voice degradation, with loss being a function *both* of the loop's length and the gauge of the loop wire. . . . [I]n fact, the differing positions on this point further support our finding in the Line Sharing Order that it is appropriate for state commissions to consider such various loop conditioning scenarios on a case-by-case basis. . . .
>
> . . . Our intent in requiring loops in excess of 18,000 feet to be conditioned, unless the incumbent LEC demonstrates that conditioning will significantly degrade voice service, was to prevent the incumbent LECs from refusing to condition the loop merely because the loop is over 18,000 feet.

We find that the FCC's refusal to make a "categorical" finding, leaves the FPSC the option to make such a finding.

We agree with Joint Petitioners witness Falvey that the FPSC previously set rates for line conditioning loops longer than 18,000 feet[39] after the issuance of the UNE Remand Order.[40] We also recognize that the FCC made no material changes to 47 C.F.R. § 51.319 (a)(1)(iii)(A), where line conditioning is described as the removal of devices from the copper loop. However, both parties fail to note that the FCC changed the definition of nondiscriminatory access in 47 C.F.R. § 51.311, which is a pivotal term used in the line conditioning rules.

As discussed in Section VIII herein, the "superior in quality" standard that became law after the issuance of the Local Competition Order[41] and that was carried forward to the UNE Remand Order, and was the basis for the line conditioning obligations prior to the issuance of the TRO. With the issuance of the TRO, this definition was revised, eliminating a "superior in quality" access standard. The FCC's rule 47 C.F.R. § 51.319 (a) states that nondiscriminatory access shall be provided to line conditioning as an element of the local loop. Nondiscriminatory

---

[39] See PSC-01-2051-FOF-TP.

[40] Order No. FCC 99-238 issued November 5, 1999, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking. (UNE Remand Order).

[41] Order No. FCC 96-325 issued August 8, 1996, CC Docket Nos. 96-98, 95-185, First Report and Order. (Local Competition Order).

access is *now* defined as "at least *equal* in quality to that which the incumbent provides to itself." (47 C.F.R. § 51.311, emphasis added) Nondiscriminatory access at this point carries the same definition as parity. Parity is currently the standard established by the FCC for access to the unbundled network. As stated in ¶643 of the TRO section discussing line conditioning, the FCC stated that the "incumbent LECs must make the routine adjustments to unbundled loops to deliver services *at parity* with how incumbent LECs provision such facilities for themselves." (emphasis added) Furthermore, the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) in its Remand Decision,[42] has found that the phrase "at least equal in quality" leaves open the possibility for the parties to negotiate agreements to provide a superior quality access, with the ILECs being compensated for the additional cost involved in providing superior quality, but ruled that the ILECs are not mandated to provide such a standard.[43] By changing what constitutes nondiscriminatory access, we find that the FCC now permits line conditioning to be treated in different manners depending on how the incumbent provides service to its retail customers, with access that exceeds parity provided at non-TELRIC rates.

In analyzing whether the Joint Petitioners are impaired[44] without access to unloaded loops longer than 18,000 feet, we consider

- The manner in which BellSouth provides advanced services[45] to its own customers on loops longer than 18,000 feet (parity),
- Whether the limitation on unloading loops longer than 18,000 feet poses any practical barriers to providing advanced services to customers, and
- Whether unloading loops longer than 18,000 feet poses serious interference with the incumbent's network operations.

Access to elements described in 47 C.F.R. § 51.319 is to be provided

> at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party. At a minimum, this requires the incumbent LEC to . . . [provide] the *same technical criteria and service standards* that are used within the incumbent LEC's network. (47 C.F.R. § 51.305(a)(3), emphasis added)

[42] Iowa Utilities Bd. v. FCC, (Remand Decision) Nos. 96-3321(and consolidated cases) issued July 18, 2000, p. 22. before the United States Court of Appeals for the Eighth Circuit.

[43] See, Iowa Utils. Bd., 120 F.3d at 812-13.

[44] When analyzing impairment, the cost of unbundling must be adequately weighed. (TRRO ¶ 8).

[45] The term "advanced services" is defined as "high speed, *switched*, broadband, wireline telecommunications capability that enables users to originate and receive high quality voice, data, graphics or video telecommunications using any technology." (Line Sharing Order, 14 FCC Rcd at 20915, ¶ 4. (emphasis added).

We find that in evaluating whether BellSouth is meeting its nondiscriminatory obligation to provide line conditioning, we must focus on all of the criteria under which BellSouth's own customers are bound in obtaining line conditioning. According to BellSouth witness Fogle, BellSouth does not remove load coils for its own xDSL customers on loops with lengths exceeding 18,000 feet, but offers to do so for other parties at non-TELRIC rates. In accord with what it has offered other carriers, BellSouth makes the same offer to the Joint Petitioners.

In footnote 16 of the TRRO, the FCC states that in evaluating impairment other alternatives may not be ignored. Additionally, in footnote 20 of the TRO, the FCC adds that consideration must be given whether practical barriers to competitive entry have been removed must be considered along with whether serious interference with the incumbent's network operations can be avoided. BellSouth witness Fogle states that BellSouth serves customers on loops over 18,000 feet with multiple other options for broadband services, including but not limited to the use of remote terminals, Digital Subscriber Line Access Multiplexers (DSLAM), fiber technology or the use of DS1s. It is our understanding that multiple options are available to the CLECs as well. We note that advanced services can and are being served with DS1 loops by the Joint Petitioners. Joint Petitioners witness Willis did acknowledge that NuVox was using DS1s to provide broadband services to customers regardless of loop length. BellSouth notes that Joint Petitioners were not ordering services that would require load coil removal on loops longer than 18,000 feet. Joint Petitioners suggested that BellSouth routinely conditions DS1 loops longer than 18,000 feet. Witness Willis also noted that the provisioning of DS1s or the line conditioning for such loops is not at issue in this dispute.

As read in footnote 624 of the TRO, DS0 loops are typically used to deploy xDSL services to customers associated with the mass market. DS0 loops exceeding lengths of 18,000 feet require load coils to provide voice service to those customers. In Hearing Exhibit 2, BellSouth presents that the loop tapers, becoming smaller and smaller, at longer lengths. Therefore, at greater distances, spare capacity and flexibility become more critical. As also indicated by Hearing Exhibit 2, the costs of unloading at those distances is far greater than at distances less than 18,000 feet, since cables less than 18,000 feet may be unloaded, whereas, those loops exceeding 18,000 feet have at minimum three load points and more as the loop lengthens. To reuse loops for voice service that are previously unloaded to enable advanced services would require reloading, which would require loading at three or more locations.[46] The costs of reloading these facilities is not included in TELRIC pricing.

The Joint Petitioners witness Willis further notes that one DS1 provides the capacity of 24 DS0 loops. Furthermore, in Hearing Exhibit 2, the Joint Petitioners provided evidence, as reflected by Hearing Exhibit 2, that one DS1 could be provided using one or two pairs; therefore,

[46] "Many bridged taps and load coils are permanently attached, often buried, connect hundreds of loops at a single junction, and not designed for easy access. To remove a load coil or bridged tap often involves digging up the splice case, locating and identifying the correct loop, performing the steps associated with . . . removing the bridged tap or load coil, and reclosing the cable/splice case, re-burying and possible re-landscaping the affected location, including replacing asphalt or concrete when necessary. . . All of this is possibly repeated when . . . the loop is abandoned by the current customer or CLEC, and BellSouth desires to return the loop to industry standard specifications." (Hearing Exhibit 2, Item No. 121(d))

we find that using DS0 loops rather than DS1 could increase network modifications 12 to 24-fold in an environment, as reflected by BellSouth in Hearing Exhibit 2, where pairs are less available, the network is less flexible and the likelihood of the facility being less accessible increases due to a likelihood that the cable is buried. It is our understanding that the Joint Petitioners do not appear to be hampered in accessing customers at distances greater than 18,000 feet to provide advanced services as evidenced by their current use of DS1 or other technology for those customers. Therefore, we find that practical barriers have been removed. Considering both the advantages and disadvantages of removing load coils on cables in excess of 18,000 feet, we find that unloading DS0 loops with lengths greater than 18,000 feet poses greater harm to the incumbent's network than any perceived advantage to the CLECs.

BellSouth notes in Hearing Exhibit 2 that standard ADSL technology, including the ADSL standard technology used by BellSouth, is designed to work with Carrier Serving Area (CSA) and Revised Resistance Design (RRD) standard networks. For this reason, BellSouth limits the removal of load coils to loops less than 18,000 feet in length for provisioning xDSL service to its customers. Since standardized xDSL technologies are designed to work in a standard network, modification of a copper loop beyond what is necessary to provide xDSL would be non-routine, extraordinary, and non-standard, which BellSouth believes it is not obligated to provide at TELRIC. BellSouth states that such costs would be rare and higher than standard, routine ordinary line conditioning activities that BellSouth is obligated to provide. BellSouth believes that current law does not require it to condition a loop that will significantly degrade its ability to provide voice services, substantially alter its network, or create significant operational issues. BellSouth believes that any conditioning that would create a non-standardized loop would fall into those categories.

In Hearing Exhibit 2, BellSouth suggests using the special construction tariffs as a convenient mechanism to handle the relatively few line conditioning requests received from the CLECs. Joint Petitioners have stated that using the special construction tariff would be prohibitively expensive, although no cost data was provided. Also in Hearing Exhibit 2, BellSouth witness Fogle noted "the only fair, just, and reasonable method of cost recovery must take into account the relative infrequency of these requests." He continues that "the costs associated with developing and maintaining a cost methodology . . . is not justified given the scarcity that line conditioning is requested by CLECs." BellSouth maintains that individual case-based pricing afforded by the special construction process is the appropriate process to address these rare, non-routine requests. Also within Hearing Exhibit 2, BellSouth states that this same individual case-based pricing is performed for other carriers and offered to the Joint Petitioners at parity to what is afforded to those other carriers.

We find the FCC's rules obligate BellSouth to provide nondiscriminatory access to line conditioning. BellSouth provides unrefuted evidence that it does not unload copper loops having lengths greater than 18,000 feet for its own customers. The Joint Petitioners acknowledge that BellSouth has offered the Joint Petitioners equal quality to what BellSouth provides to itself. Therefore, we deduce that the request of the Joint Petitioners goes beyond what BellSouth provides for itself or to other carriers. We conclude that to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders. We find that non-TELRIC

pricing for unloading DS0 loops longer than 18,000 feet does not pose any practical barriers to the Joint Petitioners providing advanced services.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that the Agreement shall contain specific provisions addressing the availability of load coil removal by loop length, specifically less than or greater than 18,000 feet, provided that the criteria established remains at parity with what BellSouth offers its own customers or other carriers.

XII. LINE CONDITIONING / REMOVAL OF BRIDGED TAPS

As reflected in the record, bridged tap is an offshoot of a cable pair that allows flexibility for the loop to terminate in more than one location. Bridged taps increase the electrical loss on the pair because signals traveling down the cable are also transmitted down each bridged tap or branch. Signal echoes can form if the end of the pair is not terminated, and in such cases, the echo could combine with the original signal and cause errors and signal loss. Most loops contain at least one bridged tap, and the effect of multiple bridged taps is cumulative. Premises wiring contains additional bridged taps, which contribute to signal loss.

BellSouth has proposed to remove at no charge cumulated bridged tap greater than 6,000 feet, so that the loop will have a maximum of 6,000 feet of bridged tap. Where the combined level of bridged tap is between 2,500 and 6,000 feet and serves no network design purpose, BellSouth has proposed to remove these spans at TELRIC; those rates are set forth in Exhibit A of Attachment 2 of the Interconnection Agreement. There is no disagreement over these two proposals. Where the parties differ is that BellSouth proposes to price the removal of unnecessary and non-excessive cumulated bridged taps totaling less than 2,500 feet and serving no network design purpose pursuant to BellSouth's Special Construction Process contained in its FCC Tariff No. 2.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Willis discusses four major points of dispute:

- There is no federal support to restrict ILECs' obligations to remove bridged tap based on length or location on the loop.
- BellSouth's position would preclude the removal of bridged tap totaling less than 2,500 feet, thereby significantly impairing the provision of high speed data transmission.
- BellSouth's use of the phrase "serv[ing] no network design purpose" would place the determination of this condition solely to BellSouth's discretion.
- BellSouth's proposal is deemed unworkable.

Joint Petitioners believe that "[f]ederal law provides, without limitation, that CLECs may request this type of Line Conditioning, insofar as they pay for the work required based on TELRIC-compliant rates."

Joint Petitioners witness Willis asserts that "the work performed in connection with provisioning UNEs must be priced at TELRIC-compliant rates." He objects to BellSouth's proposal to use its special construction rates for the following reasons:

- Those rates are not predetermined but are calculated on an individual case basis.
- Those rates are likely prohibitively expensive.
- Those rates preclude offering advanced services, including DSL.

BellSouth witness Fogle explains that the FCC only restricts ILECs' obligations to remove bridged tap according to length or location on the loop based on parity. Witness Fogle points to the FCC's discussion of line conditioning in ¶ 643 of the TRO, which states:

> Line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers. As noted above, incumbent LECs must make the routine adjustments to unbundle loops to deliver services with *parity* with how incumbent LECs provision such facilities for themselves.

BellSouth witness Fogle further testifies that since BellSouth does not routinely remove any bridged taps for its own retail DS0 or xDSL customers, then BellSouth is not obligated to do so for CLECs. In Hearing Exhibit 2, he stresses that "BellSouth uses ADSL technology, which is designed to work in the presence of bridged taps which are in compliance with Carrier Serving Area (CSA) and Revised Resistance Design (RRD) industry standards." Witness Fogle confirms that the proposal BellSouth presents for inclusion in the agreement is the same as one presented to another group of carriers, members of the Shared Loop Collaborative.

Witness Fogle asserts that BellSouth's line conditioning obligations are limited to providing xDSL capability, TRO ¶ 643 quoted above. He notes in Hearing Exhibit 2 that "all industry xDSL standards and most proprietary xDSL standards are designed to work on a standard network [deployed by BellSouth], which includes the presence of bridged taps."[47] He acknowledges that "BellSouth is not aware of any advanced data service that does not work with bridged taps."[48] As reflected within Hearing Exhibit 2, he further advises that "[t]he interference of a bridged tap with the specific deployment of a specific service must be determined on a case-by-case basis." To emphasize the lack of necessity to remove bridged taps, BellSouth points out the rarity of requests for bridged tap removal, noting that the Joint Petitioners have not requested any bridged tap removals in the past year.

As indicated by Hearing Exhibit 4, Joint Petitioners believe that the manner in which BellSouth removes bridged tap for its own customers is irrelevant. As seen in Hearing Exhibit 4, when asked whether the rule or the FCC's order states that BellSouth is to provide Joint Petitioners with the same standard that it provides to its own customers, the Joint Petitioners insisted that it does not. In their brief, Joint Petitioners deny that parity is a limiting factor, stating that "BellSouth's line conditioning obligations are not constrained by the routine network modification rule."

Joint Petitioners also contend that their perceived harm should outweigh considerations that BellSouth's policy was established in conjunction with members of the Shared Loop Collaborative, and BellSouth claims that its policies are consistent with industry standards for xDSL services. As reflected by Hearing Exhibit 2, Joint Petitioners witness Willis further points out that services the Joint Petitioners are seeking to deploy, specifically noting Etherloop and G.SHDSL technologies, are not Shared Loop services.

BellSouth indicates in Hearing Exhibit 2 that the current industry standards for the new technologies, Etherloop and G.SHDSL Long, require that they work with bridged taps; therefore, the Joint Petitioners are in no way prevented from developing such technologies. BellSouth further asserts that the effect of bridged taps on advanced data services is well known, and engineers from both sides can quickly determine the need for removal.

B. ANALYSIS

As indicated by Hearing Exhibit 2, Joint Petitioners and BellSouth acknowledge that we have set rates for bridged tap removal on loops of all lengths. Joint Petitioners object to imposing any new rates. Consistent with Hearing Exhibit 2, Joint Petitioners assert that BellSouth is obligated by the FCC's line conditioning rules and the FPSC's order to remove cumulative bridged taps totaling less than 2,500 feet and to do so at TELRIC-compliant rates. BellSouth's witness Fogle counters that the rates established by the FPSC for removing cumulative bridged taps totaling less than 2,500 feet are now not TRO-compliant. The BellSouth

[47] See EXH 2, BST-3, Response to Staff's 4th Interrogatories, Item No. 123 (a).

[48] See EXH 2, BST-3, Response to Staff's 4th Interrogatories, Item No. 124 (b).

witness emphasizes that the FCC clarified the obligation to provide line conditioning is at parity in ¶ 643 of the TRO.

In Hearing Exhibit 2, Joint Petitioners support their claim that the law has not changed, citing TRO ¶ 250, footnote 747, where the FCC stated that the line conditioning rules were readopted. The Joint Petitioners reiterate that the definition of line conditioning in the FCC's rules has not materially changed. Joint Petitioners object to BellSouth equating its line conditioning obligations with its routine network modification obligations. Joint Petitioners further oppose line conditioning being limited to what BellSouth routinely conditions for itself. They claim that if BellSouth determined that something was not routinely done for itself, then BellSouth would not do what was required by the rule. However, we find that there has been a change in law that affects line conditioning, in particular, the redefining of nondiscriminatory access in 47 C.F.R. § 51.311, to parity.

BellSouth witness Fogle states that BellSouth wants to avoid removing bridged tap that serves a network design purpose. As indicated in Hearing Exhibit 2, Joint Petitioners acknowledge that while removing bridged taps "may sound like a trivial exercise, the lack of proper documentation and opening and closing cable splices often makes the process of locating and removing bridged taps a time-consuming and therefore costly challenge." As also reflected by Hearing Exhibit 2, BellSouth understands ¶ 635 of the TRO to limit its obligations to make adjustments that present significant operational issues.

The Joint Petitioners also contend that the presence of bridged tap could reduce data throughput. Joint Petitioners' witness Willis stated that no lessening of data throughput was acceptable. We disagree, noting that other record evidence does not support this position. As reflected by portions of Hearing Exhibit 2, both Joint Petitioners and BellSouth admit that Etherloop reportedly works through multiple bridged taps. BellSouth noted that G.SHDSL standards state that the service works with bridged taps as well. Joint Petitioners further admitted that other advanced services could tolerate bridged taps; however, this would need to be reviewed on a case-by-case basis. In response to discovery in Hearing Exhibit 2, Joint Petitioners note that "short bridged taps have the greatest impact on wideband services, while long bridged taps have a greater impact on narrowband services." Therefore, we conclude that the retail service to be provided over the loop is the determining factor of the need to remove any amount of bridged tap to meet industry standards must be determined by.

As indicated in Hearing Exhibit 2, BellSouth maintains that industry standard-compliant equipment is designed to work in the presence of industry standard bridged taps, and only non-standard bridged taps should need to be removed. Witness Fogle further emphasized that industry standards should be the most appropriate measure for determining whether the loop is capable of handling the requested service. BellSouth expressed that to determine if bridged tap is interfering with the data service involves signal testing by BellSouth engineers.

Joint Petitioners counter BellSouth's remarks, stating that BellSouth's obligations should not be limited by industry standards Hearing Exhibit 2. They further contend that BellSouth does not have the right to decline conditioning based on its own assessment of whether the CLEC actually needs it in the manner requested. BellSouth in turn explains that both the ILEC

and CLEC can engage in cooperative testing to determine if the type of interference the CLEC is experiencing is of the nature caused by bridged taps or the CLEC can submit test measurements that would indicate the likelihood of bridged tap causing interference. However, BellSouth also noted that it anticipates that bridged tap would rarely be the cause of interference.

We find that the TRO imposed limiting conditions on the ILECs' line conditioning obligations. Furthermore, we contend that if the ILEC provides a loop that meets all of the industry standards to support the CLEC's requested retail xDSL service, then the ILEC's obligations are met. Additionally, if testing indicates that the existing bridged tap is not causing interference with a data service, then it is unnecessary to remove that bridged tap. Considering that paragraph 633 of the TRO expresses that the ILEC is to accommodate access "to the extent necessary," we find that any accommodation above necessity would be beyond the ILEC's obligation.

As reflected by Hearing Exhibit 2, Joint Petitioners witness Willis acknowledges that they have not yet deployed DSL technologies that would require the removal of bridged taps of less than 2,500 feet in length. Moreover, we find the evidence provided by the Joint Petitioners, did not indicate any plans to deploy any services that would require the removal of bridged tap of 2,500 feet or less, further supported by Hearing Exhibit 4. Joint Petitioners are currently using DS1 service to provide advanced services, and conditioning of DS1 loops is not disputed. Furthermore, Joint Petitioners witness Fury admits that the Joint Petitioners are not being prohibited from providing any service on the loop because of the existence of bridged tap of less than 2,500 feet.

Evaluating requests for removal of bridged taps, based on industry standards for the retail service being deployed over the loop, appears reasonable to us. We find the rules obligate BellSouth to provide nondiscriminatory access to the UNE -- in this case, line conditioning to remove bridged taps. The Joint Petitioners acknowledge that BellSouth has offered the Joint Petitioners parity access. We conclude that BellSouth has met the requirement of the law and that the request of the Joint Petitioners goes beyond what BellSouth provides for itself or other carriers. We find that to impose an obligation beyond parity would be inconsistent with the Act and the FCC's rules and orders. We see no reason to recommend a position other than what the law requires.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, BellSouth shall be required to remove bridged taps to ensure xDSL capability at parity with what it does for itself. Cumulative bridged taps greater than 6,000 feet shall be removed at no charge. Cumulative bridged taps between 2,500 feet and 6,000 feet shall be removed at no more than TELRIC rates. Bridged taps less than 2,500 feet may be removed based upon the rates, terms and conditions negotiated by the parties. If negotiations are not successful, BellSouth's Special Construction Process shall apply.

XIII. NOTICE REQUIREMENT OF AUDIT

BellSouth witness Blake agrees that notifying the CLEC of an upcoming audit is appropriate and states that an audit will only be conducted if BellSouth has cause to believe that circuits are out of compliance. The parties' testimony centers around the timeframe for a notice, and whether or not BellSouth must show to the Joint Petitioners BellSouth's basis for believing an audit is warranted.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Russell proposes that BellSouth be required to identify the specific circuits that are to be audited in the notice and "include all supporting documentation upon which BellSouth establishes the cause that forms the basis of BellSouth's allegations of noncompliance." Witness Russell claims that the Joint Petitioners' proposal is appropriate since BellSouth agrees that the audit must be based upon cause. Therefore, showing that cause to the Joint Petitioner would place no additional burden on BellSouth. Additionally, witness Russell states that although the TRO does not specifically require the ILEC to notify the CLEC of an audit, this Commission may order such a requirement observing that paragraph 625 of the TRO notes that, "states are in a better position to address that implementation." He continues that "[t]hese requirements – which BellSouth provides no sound reason for rejecting – will contribute dramatically to curtailing EEL audit litigation that currently is consuming too many of the Parties' and the Commission's resources."

Witness Russell claims that requiring BellSouth to identify the circuits that are to be audited, up front, and providing documentation to back up its belief that those circuits are noncompliant, will aid the CLEC being audited in evaluating the audit request, as well as avoiding unnecessary disputes and resolving "real disputes" efficiently. He maintains, "the Joint Petitioners have created a better proposal for eliminating, narrowing and more quickly resolving disputes over whether or not BellSouth has the right to proceed with an EEL audit." Finally, witness Russell suggests that providing this information will allow the CLEC to properly prepare for the audit.

Witness Russell also takes issue with BellSouth's language regarding the timeframe of the notice of the audit. The question is whether BellSouth should seek commencement of the audit in 30 days or whether it may affirmatively establish that the audit will begin in 30 days. Although the language may seem similar on the surface, witness Russell claims that BellSouth's language is "unnecessarily inflexible." He states that the CLEC may need more time to gather resources, records and personnel for an upcoming audit.

BellSouth witness Blake states that BellSouth will provide a notice at least 30 days prior to the audit, and the notice will state the cause that it has found that warrants such an audit. Witness Blake states that the audit should commence no earlier than 30 days from the date of the notice. "Naturally, there is room for negotiation as to the specific start date and time, and BellSouth will certainly consider extenuating circumstances that may not permit a CLEC to be

ready within 30 days. But in no case should the CLEC be permitted to unduly and unilaterally delay the start of the audit."

Witness Blake does not believe that identifying the circuits at issue is necessary or even appropriate. She claims that such a requirement "defeats the purpose of the compliance audit." She explains, "To require BellSouth to pre-identify specific circuits to be examined would provide an opportunity for a non-compliant CLEC to correct the mischaracterization of the EELs circuits in advance of the audit." Moreover, the findings of an audit "may dictate that the audit follow a direction not originally intended in the initial scope." Witness Blake agrees that the ultimate goal is to correct any mischaracterized circuits. However, an additional goal is to correct the underlying processes and procedures that are used in the accounting of EELs circuits. Further, witness Blake opines that requiring documentation to be included with the notice will only provide a non-compliant CLEC the opportunity to object to the audit. "The Joint Petitioners or any CLEC could say that is not good enough documentation so you can't audit."

B. ANALYSIS

In the UNE Remand Order,[49] the FCC required ILECs to provide unbundled access to enhanced extended links (EELs), combinations of "unbundled loop, multiplexing/concentrating equipment, and dedicated transport." In the Supplemental Order,[50] the FCC required CLECs to "provide a significant amount of local exchange service . . . to a particular customer" in order to be allowed access to an EEL. The FCC quickly added the safe harbor requirements in the Supplemental Order Clarification[51] to define the phrase "a significant amount of local exchange service," in order to limit the availability and ensure CLECs are using EELs for their intended purpose.

In paragraph 586 of the TRO, the FCC allows CLECs to convert to EELs, existing loop/transport combinations purchased originally as special access. Paragraph 579 of the TRO also allows commingling, which is combining special access circuits and unbundled network elements (UNEs). As set forth in ¶579 of the TRO, a commingled EEL, for instance, is a combination of loop and transport where one is special access and the other is a UNE. Both EELs and commingled EELs must satisfy the revised EEL eligibility criteria contained in ¶593 of the TRO, which include 911/E911 capability, termination into a collocation arrangement and local number assignment. Similar to the Supplemental Order Clarification, ¶623 of the TRO allows a CLEC to self-certify that it is in compliance with the EEL eligibility criteria, and the ILEC to verify compliance through the auditing process.

---

[49] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, FCC 99-238 ¶476, ¶480 (rel. Nov 5, 1999). (UNE Remand Order)

[50] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Supplemental Order, FCC 99-370, ¶9 (rel. Nov 24, 1999). (Supplemental Order)

[51] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Supplemental Order Clarification, FCC 00-183, ¶22 (rel. June 2, 2000). (Supplemental Order Clarification)

Self-certification, simply stated, is a CLEC attesting that the EEL in question meets the service eligibility criteria. Upon receipt of the self-certification, the FCC requires the ILEC to provide the facility to the requesting CLEC. Details of the self-certification process are not addressed by the FCC; in fact, it declined to specify the form of such certification, but did state in ¶624 of the TRO that a "letter sent to the incumbent LEC by a requesting carrier is a practical method." In footnote 1900 of the TRO, the FCC explained its reasoning: "The success of facilities-based competition depends on the ability of competitors to obtain the unbundled facilities for which they are eligible in a timely fashion. Thus, an incumbent LEC that questions the competitor's certification may do so by initiating the audit procedures set forth below." The audit procedures explained in the TRO are similar to those contained in the Supplemental Order Clarification.

The Joint Petitioners are asking this Commission to add steps to the auditing process which could hinder the process. One such step is the requirement that BellSouth identify the specific circuits that it wishes to audit and provide documentation to back up its claims. According to witness Russell, "Joint Petitioners have every right to insist that [the 'for cause' standard is] met before BellSouth proceeds with an intrusive and resource consuming audit of our business records." We understand the Joint Petitioners' concern of unwarranted audits; however, the FCC addressed those concerns in paragraph 628 of the TRO:

> To the extent the independent auditor's report concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit. We expect that this reimbursement requirement will eliminate the potential for abusive or unfounded audits, so that incumbent LEC[s] will only rely on the audit mechanism in appropriate circumstances.

By requiring the CLEC to reimburse the ILEC for the cost of the audit if the auditor found material noncompliance, the FCC in paragraph 627 of the TRO hoped to ensure a CLEC only ordered EEL circuits when it was entitled to them. If a CLEC is able to delay that process, we find the scale is unfairly tipped toward the CLEC. On the other hand, the FCC requires the ILEC to reimburse the CLEC for the CLEC's costs to comply with the audit, if the auditor finds material compliance. Again, the FCC in ¶628 of the TRO was attempting to "eliminate the potential for abusive or unfounded audits." If an ILEC were allowed to audit any CLEC at any time with no repercussions, then the scale is tipped toward the ILEC. We find the FCC's rules set out in the TRO achieve a reasonable balance, and that adding additional conditions is not appropriate and may upset this balance.

We agree with BellSouth that requiring BellSouth to identify specific circuits and to provide documentation to support its belief of noncompliance, could unnecessarily delay the audit. If the CLEC did not believe that BellSouth provided adequate documentation or that the documentation did not support an audit, the CLEC could object to the audit, possibly requiring our involvement to settle the dispute. After BellSouth performed the audit and found those specified circuits out of compliance, the CLEC could object to auditing the rest of the circuits,

even though Joint Petitioners witness Russell testifies, at hearing and in his deposition in Hearing Exhibit 2, that such an additional audit could be warranted. BellSouth witness Blake points out in response to one of our staff's interrogatory in Hearing Exhibit 2, "if a CLEC is in violation of the law, there [is] no amount of documentation that would be sufficient for the CLEC such that it would not object to the audit proceeding." We find this argument compelling.

Additionally, Joint Petitioners witness Russell's testimony provides contradictory statements. He indicates that the Joint Petitioners' proposal will reduce future disputes, but agrees that their proposal could lead to them as well. In order to ensure that the audit process is not hindered by such delays, we conclude that the notice need only include the information that BellSouth has agreed to provide.

Finally, the language regarding the timeframe for notice seems to be settled between the parties. Joint Petitioner witness Russell responded to one of our staff's interrogatory located within Hearing Exhibit 2, "The parties have reached an agreement with regard to this particular aspect of Item 51/Issue 2-33, and the language is no longer in dispute. The parties agree that any notice of audit will be delivered no less than thirty (30) calendar days prior to the date upon which BellSouth seeks to commence the audit." During BellSouth witness Blake's deposition she stated, "I don't believe . . . the disagreement is relative to the timing period as far as the number of days in the notice." Further, witness Blake confirmed in response to a late-filed deposition request, "There is no dispute between the Parties that the audit shall commence no sooner than 30 days after the Notice of Audit is sent to the CLEC."

Nevertheless, due to the uncertainty, we reach the following conclusion. The TRO is silent as to when a notice of audit should be sent, except to the extent that it refers to the Supplemental Order Clarification and adopts comparable procedures in ¶622 of the TRO. In footnote 1898 of the TRO, the FCC noted that in ¶¶31–32 of the Supplemental Order Clarification, it had "found 'that incumbent LECs must provide at least 30 days written notice to a carrier that has purchased [an EEL] that it will conduct an audit.'" We conclude that 30 days shall be ample time to prepare for an audit under normal operating parameters.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that BellSouth shall provide written notice to the CLEC 30 days prior to the date that BellSouth seeks to commence the audit. The notice shall include the cause that BellSouth believes warrants the audit, but need not identify the specific circuits that are to be audited or contain additional detailed documentation.

XIV. AUDITOR AND SCOPE OF THE AUDIT

The parties have agreed that the audit should be performed according to the AICPA standards as required by paragraph 626 of the TRO. The parties' testimony focuses on how the auditor should be selected.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Russell believes that the parties should mutually agree to the independent third-party auditor prior to conducting the audit. He maintains that past disputes regarding the independence of the auditor have consumed too many resources. Joint Petitioner witness Russell testifies, "BellSouth's language simply sets the stage for additional disputes . . . Joint Petitioners are unwilling to subject themselves to audits by entities whose independence is doubtful and reasonably challenged." He continues that to address this issue later "seems nonsensical." Moreover, he notes that agreement as to the auditor is required with regard to PIU and PLU[52] audits. Witness Russell testifies that he is "unaware of any litigation over the selection of an auditor that has resulted in the percentage interstate usage context."

BellSouth witness Blake asserts that BellSouth is unwilling to include language in the agreement that requires the parties' mutual agreement on the auditor, because it is not a requirement of the TRO or the FCC's rules, and such a requirement could delay the start of the audit. She explains that since the parties have agreed that the auditor must perform the evaluation in accordance with the standards established by the AICPA, which includes that the auditor be independent, mutually agreeing to an auditor prior to the audit will only lead to delay. Additionally, witness Blake testifies,

> BellSouth will select the auditor. As paragraph 627 of the TRO states, "In particular, we conclude that <u>incumbent LECs may obtain</u> and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria."

Finally, witness Blake comments, "If a CLEC is abusing the service eligibility requirements, these objections provide a simple path to delay the audit indefinitely."

Joint Petitioners witness Russell disputes BellSouth's exclusion of language regarding mutual agreement on the auditor. Witness Russell contends that this mutual agreement ensures equality in that if the CLEC is found materially noncompliant, the CLEC must reimburse BellSouth for the cost of the audit. "With this much at stake, the Commission should not find the Petitioners' proposal to agree to the auditor pointless, but rather essential to equality of the audit process." Additionally, "while BellSouth argues that this is simply a delay tactic, the Petitioners submit that BellSouth's refusal to agree to such a reasonable position is a tactic to keep CLECs out of the decision-making process, perhaps to their detriment."

---

[52] Percentage Interstate Usage and Percentage Local Usage.

BellSouth witness Blake raises three additional points of contention. The first concerns language that the Joint Petitioners had requested for a mutually agreeable location and timeframe. The second additional requirement that witness Blake finds objectionable is "'other requirements' for establishing the independence of the auditor." She does not mention or explain what these other requirements are, but states that the "AICPA standards govern each of these areas. No other requirements are needed." Witness Blake believes that these additional requirements would allow a CLEC to further delay the audit. According to BellSouth, the third and final point that witness Blake raised, regarding materiality, appears no longer to be in dispute.

Joint Petitioners witness Russell questions witness Blake's testimony regarding these other outstanding disputes, stating, "The only issue that remains is whether the Agreement will include a requirement that the independent auditor must be mutually agreed-upon." He claims that BellSouth has previously agreed to language regarding a mutually agreeable location. He continues, "We have no idea about (and neither address nor accept) the 'other requirements' and 'materiality' disputes Ms. Blake claims exists."

B. ANALYSIS

We note that the TRO does not offer specific guidance on this issue. BellSouth finds a reference to the ILEC obtaining an auditor in ¶626 of the TRO. However, we submit that this sentence appears primarily to be about the ILEC being required to pay for the audit. We find the inclusion of the words "may obtain" does not necessarily afford an ILEC the unilateral right to select the auditor. Consequently, we have not relied on this argument for our decision.

We find that the Joint Petitioners' request that an auditor be chosen and agreed to in advance is, on the surface, equitable. The Joint Petitioners do have a substantial interest in the outcome of the audit and the importance of the independence of the auditor is clear. Allowing the Joint Petitioners to participate in the selection of an auditor seems appropriate.

Nevertheless, BellSouth makes a strong argument that allowing the Joint Petitioners to veto the selection of the auditor could delay the audit significantly. Witness Blake testifies, "There would be no reason for the Joint Petitioners to ever agree to an auditor if it is going to catch them not complying with the law." As stated in Section XIV, we find that disrupting the audit significantly undermines the FCC's TRO rules regarding the self-certification process and the audit process. We opine that these processes shall be strictly adhered to as set forth in the TRO in order to ensure the balance is maintained between the ILEC's need for compliance and the CLEC's need for unimpeded access. If the audit process is hindered by postponement of an audit, the CLEC could continue to improperly obtain access to nonconforming facilities at unbundled rates.

We find that neither proposal would avoid disputes. We agree that if a CLEC is noncompliant, it could attempt to avoid the audit by withholding their agreement to the auditor. However, we question whether BellSouth's proposal would not result in a similar state of affairs. As indicated by Hearing Exhibit 2, in the Georgia EEL audit BellSouth notified NuVox (one of

the Joint Petitioners) that it would like to conduct an audit and named a specific auditor that it would like to use. NuVox objected to the independence of that auditor, suggested a different auditor, and after 3 years, the audit results have not been released.[53] We find NuVox had a right to object, and the parties ultimately agreed to the auditor that NuVox suggested. This is an indication that neither of the parties' proposals will ensure that disputes and delays are avoided.

The parties appeared at one point to be agreeable to establishing a list of auditors, from which BellSouth could choose the auditor and to which the CLEC would not object. Although BellSouth witness Blake maintains that any auditor will probably be objected to, she agreed to such a proposal during her deposition located in Hearing Exhibit 6, stating, "We could come up with a list of acceptable auditors that we could pick from." BellSouth objects to the Joint Petitioners' proposal solely because of the possible delay that could ensue; however, this compromise proposal should alleviate BellSouth's concerns. When prompted about including an agreed upon list in the agreement, Joint Petitioners witness Russell responded, "That's an excellent suggestion, possibly listing a schedule of potential auditors that the parties could suggest may be appropriate ahead of time to conduct the audit." The Joint Petitioners submitted a list of ten auditors. The exhibits included KPMG, Deloitte & Touche, BearingPoint, Ernst & Young, and PricewaterhouseCoopers. However, the Joint Petitioners withdrew their agreement as to one of the auditors on this list shortly before the hearing. Nevertheless, we continue to believe that such a procedure is reasonable. During the hearing, Joint Petitioners witness Russell stated, ". . . we are still willing to consider that proposal and do that." Although the Joint Petitioners no longer support KPMG as an acceptable auditor, they are apparently willing to accept the nine that remain. BellSouth submitted a shorter list of audit firms in Hearing Exhibit 2 (KPMG, ACA,[54] and Grant Thornton) that it has used in the past or may use in the future.

Although the parties referred to nationally-recognized firms, a definition was not provided. Nevertheless, we find that the parties shall negotiate a list of auditors to be included in the interconnection agreement consisting of at least four nationally-recognized firms from which BellSouth may choose any firm to conduct future audits. None of the firms shall have any conflicts of interest with the Petitioners or BellSouth. We suggest four firms, because in Hearing Exhibit 2, the parties reference the "big four," "big five," "big six," or "big eight" firms. As four is the least of these numbers, we trust that the parties will be able to reach agreement. The Joint Petitioners shall submit a suggested list to BellSouth within ten days of the effective date of this Order. If BellSouth agrees to this list, it shall be included in the new interconnection agreement. If any disputes arise, the parties shall negotiate to arrive at an acceptable list of firms. The list shall be included in the interconnection agreement submitted to us for approval. If the parties are unable to agree, then the list will be: Deloitte & Touche, BearingPoint, Ernst & Young, and PricewaterhouseCoopers, as suggested by the Joint Petitioners.

---

[53] *Order Granting in Part and Denying in Part BellSouth's Emergency Motion*, Document No. 82186, issued May 3, 2005, Docket No. 12778-U, In Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc., Georgia Public Service Commission, pp. 1 and 3.

[54] American Consultants Alliance. Joint Petitioner witness Russell objected to this auditor as not being AICPA compliant and not independent.

It is our understanding that even if BellSouth chooses one of the auditors on the list, the Joint Petitioners may still object to the auditor, invoking the dispute resolution procedures. Nevertheless, we find that this proposal constitutes a reasonable compromise between the parties' own proposals. We suggest that any objection to the selection of the auditor would be unfounded, since the Petitioners would have already agreed to the auditor. We find our decision minimizes this Commission's involvement and attempts to achieve an efficient and effective audit process.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we find that the audit shall be performed by an independent, third-party auditor selected by BellSouth from a list of at least four auditors included in the interconnection agreement. The list shall be developed as indicated in our analysis. Further, we find the audit shall be performed according to the standards of the American Institute of Certified Public Accountants (AICPA).

XV. TANDEM INTERMEDIARY CHARGE

BellSouth has agreed that it will provide the transit function. The transit function is the act of providing a transit service which is defined as local traffic originating on the Joint Petitioners' network that is delivered by BellSouth to a different telecommunications service provider's network for termination.[55] The disagreement lies in the rate that BellSouth seeks to charge for performing the transiting function. The Joint Petitioners argue that BellSouth is already being reimbursed through TELRIC pricing of tandem switching and the associated common transport and therefore should not be allowed to impose TIC. As reflected by Hearing Exhibit 2, BellSouth states that performing a transiting function is not a § 251 obligation subject to § 252 arbitration, is not recovered through TELRIC pricing, and as such the TIC is an appropriate "market rate."

A. PARTIES' ARGUMENTS

Witness Mertz states that there are three reasons the Joint Petitioners will not agree to BellSouth's proposed TIC. First, he claims BellSouth has developed the TIC to exploit its "monopoly legacy and overwhelming market power." He explains that BellSouth is the only carrier in a position capable of connecting all of the small and large carriers. He argues BellSouth has achieved this capability through its monopoly legacy and continued market dominance.

Second, witness Mertz alleges the TIC is more appropriately identified with "its insect namesake," that the charge is "parasitic and debilitating," and in its ballooning appearance purely

[55] See BellSouth General Subscriber Service Tariff A16.1.1.B and C.

"additive." He continues by stating that this Commission has never established a TELRIC-based rate for transit traffic. He contends BellSouth already collects "elemental rates for tandem switching and common transport to recover its cost associated with providing the transiting functionality." He also states BellSouth's TIC is simply another method to "extract additional profits over-and-above profit already received through the element rates." Witness Mertz elaborates that BellSouth fails to demonstrate that the elemental rates, that have been in effect for eight years, fail to provide for its cost recovery. In addition, he argues that if the rates are no longer adequate, BellSouth should conduct a TELRIC cost study and propose a new rate before this Commission in a generic pricing proceeding.

Third, he argues the TIC is discriminatory because BellSouth does not charge the TIC to all CLECs and in those instances where it does, it sets the rate at "whatever level it desires." Witness Mertz also alleges BellSouth threatened the Joint Petitioners with "nearly double" the proposed rate unless the Joint Petitioners agreed to it. He reasons that we "must find that the TIC proposed by BellSouth is unlawfully discriminatory and unreasonable."

Witness Mertz disputes BellSouth's argument that it incurs costs beyond those that the TELRIC rate recovers by stating that BellSouth for "nearly 8 years" has not claimed that the elemental rates it receives for tandem switching and common transport are not adequately providing for BellSouth's cost recovery. Additionally, it is "not economically rational and practical" for every carrier in the State of Florida to directly interconnect. He agrees with BellSouth witness Blake that CLECs use the BellSouth transiting functionality because it is more economical and efficient than directly interconnecting.

Witness Blake states that BellSouth has an obligation to interconnect with CLECs under § 251(c)(2) of the Act. However, BellSouth has no duty to provide "transit services" for other carriers. As supporting evidence, BellSouth cites to the FCC Wireline Competition Bureau's Memorandum Opinion and Order dated July 17, 2002, collectively known as the Virginia Arbitration Order.[56] In that Order, the Wireline Competition Bureau on delegated authority from the FCC, stated:

> We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit

[56] See In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, CC Docket No. 00-218, In the Matter of Petition of Cox Virginia Telecom Inc. Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Arbitration, CC Docket 00-249, and In the Matter of Petition of AT&T Communications of Virginia Inc. Pursuant to Section 252(3)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. CC Docket No. 00-251 Memorandum Opinion and Order dated July 17, 2002 (Virginia Arbitration Order).

> service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under 251(a)(1) of the Act to provide transit service would not require the service to be priced at TELRIC. (Emphasis added by BellSouth)

Witness Blake adds that footnote 1640 of the TRO does not require ". . . incumbent LECs to provide transiting." Should BellSouth agree to do so, it will be at "rates, terms and conditions" contained in separately negotiated agreements. Witness Blake also expresses that the CLEC can directly connect to other carriers but typically it elects to use the more efficient transiting function provided by BellSouth. The CLECs just want the functionality to be provided at TELRIC or "at no rate at all," she asserts.

In justifying the costs for the transiting functionality, witness Blake states that BellSouth incurs costs that are above and beyond those of the existing TELRIC price for tandem switching, because that price fails to recognize the cost of sending records identifying the originating carrier. Also, there are related costs BellSouth incurs while ensuring it is not being improperly billed regarding delivery of transit traffic to third-party carriers. Finally, witness Blake argues there is a cost associated with the resolution of billing disputes that are the result of the CLEC's failure to enter into "traffic exchange arrangements" with terminating carriers.

B. ANALYSIS

It is our understanding that transiting service is defined as local traffic originating on the Joint Petitioners' network that is delivered by BellSouth to a different telecommunications service provider's network for termination. As reflected by Hearing Exhibit 2, both parties have agreed that BellSouth will provide transit service in relation to calls that neither originate or terminate on BellSouth's network such that BellSouth acts as the intermediary. The Joint Petitioners and BellSouth, however, disagree as to whether BellSouth shall be allowed to assess a TIC for performing the transiting function.

The Joint Petitioners argue that the TIC is an additive charge. BellSouth acknowledged "this is an additive charge that gets applied in addition to the two TELRIC rates BellSouth already charges for transit service." BellSouth witness Blake explains that it will apply when the originating CLEC is not directly connected to the terminating carrier and therefore the CLEC elected to use BellSouth's transiting function. In this scenario, BellSouth argues it should be able to charge the Joint Petitioners (originating carriers) for that service. When BellSouth was queried on whether or not it had conducted any cost studies in support of the TIC, witness Blake responded that BellSouth had not. In addition, witness Blake said BellSouth does not believe it has an obligation to provide transit functionality at TELRIC pricing and that transit service is included in the interconnection agreement as a matter of convenience and could easily be pulled out and placed in a non-section 251 commercial agreement. The Joint Petitioners also question the basis for the costs associated with the TIC.

BellSouth asserts there is a cost associated with providing the billing records to the terminating carrier. The Joint Petitioners claim that they do not need the billing records BellSouth provides as part of the transit service because they have deployed sophisticated switches and signaling equipment which already provide that information when one of the Joint Petitioners is the terminating carrier. The fact the Joint Petitioners may not require the records would appear only to be in those instances where they are both the originating and terminating carriers. Accordingly, we recognize that the Joint Petitioners may not need the records as they have indicated. However, in those situations where the Joint Petitioners are only the originating carriers, the records BellSouth provides form a basis for the terminating carrier to determine the originating carrier and assess it the applicable charges for terminating the call. This prevents BellSouth from being billed incorrectly as the originating carrier when it was acting as the transit service provider. Therefore, we agree there is a cost associated with providing the billing records when performing a transit service. For those calls involving other terminating carriers the provision of the associated billing records are costs that BellSouth incurs in transiting the call.

The Joint Petitioners' argument that BellSouth should not be allowed to impose the TIC because it has not been imposed for the previous eight years is unconvincing. We recognize that the record indicates that there were parties to this proceeding that either could not find any instance in which BellSouth had charged a TIC to them, or had objected to the charge and had it removed by BellSouth. However, we find that the basis for the TIC has existed for some time as evidenced by its appearance in BellSouth's other interconnection agreements. Also, it would seem that BellSouth has attempted to implement the TIC in the past, but elected to forego charging the Joint Petitioners on earlier occasions. BellSouth should not be penalized for deciding to pursue the charge on prior occasions. Further, we find the TIC is not required to be TELRIC-based and is more appropriately, in this instant proceeding, a negotiated rate between the parties. A TELRIC rate is inappropriate because transit service has not been determined to be a § 251 UNE.[57] We agree with the reasoning of the FCC Wireline Competition Bureau in rendering the Virginia Arbitration Order that found no precedent to require the transiting function to be priced at TELRIC under § 251(c)(2). The Bureau went further in saying that if there was a duty to provide transiting under § 251(a)(1), it did not have to be priced at TELRIC.[58]

The fact that the TIC is an additive is also noted, and we understand there are costs associated with providing a transiting function, such as providing billing records to the terminating carrier and the cost of reconciling improper billing by the terminating carrier when BellSouth is the intermediary or transiting carrier. We recognize that the Joint Petitioners have sophisticated switches and may not need the billing records that BellSouth provides to the terminating carrier and also that they do not support the TIC because it is an additional cost. However, the Joint Petitioners did not indicate that all of their traffic requiring transiting would

[57] See TRO footnote 1640.

[58] *Id.* Virginia Arbitration Order.

be terminated to one of the Joint Petitioners. Therefore, we find BellSouth's cost for providing the billing records that it indicated were not being recovered through tandem switching and common transport charges and the fact that some transiting calls may require reconciliation when third party carriers improperly bill BellSouth must be recognized.

In addition, we note that the FCC, in footnote 1640 of the TRO, discusses shared transport being used by CLECs to perform transiting. The FCC stated "[t]o date the Commission's rules have not required incumbent LECs to provide transiting. . . ." Also contained within the footnote is a comment that the FCC will address transiting service issues at a later date, and we note the FCC has issued a Further Notice of Proposed Rule Making in the matter of *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, when transiting service issues are to be addressed.[59]

Further, we note, as did both parties, that other state commissions have reached consistent decisions on the TIC. As Hearing Exhibit 2 reflects the Georgia Public Service Commission decided that the TIC shall not be TELRIC-based, and the Joint Petitioners submitted there are a "few state commissions that have determined that the TIC should be priced at TELRIC." The Joint Petitioners and BellSouth witness Blake state the current rate under negotiation is $.0015 per minute of use. We are aware that BellSouth has filed a tariff, which is presumed to be valid, and section A.16.1.3 Rates and Charges indicates the transit traffic service rate is $.003 per minute of use. [60] We are of the opinion BellSouth's General Subscriber Service Tariff A16 applies unless an agreement exists. We note that transit traffic is being negotiated by the parties and that the separate agreement "in lieu of the tariff will apply."[61] Reiterating, the parties indicated that current negotiations had the proposed rate for the TIC at $.0015 per minute of use.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, BellSouth shall be allowed to charge the CLEC a Tandem Intermediary Charge (TIC) for transport of transit traffic when CLECs are not directly interconnected to third parties. Parties are strongly encouraged to continue negotiations beginning at a rate of $.0015 per minute of use.

---

[59] The record indicates that "third-party providers" exist offering CLECs alternatives to BellSouth's transit service.

[60] See BellSouth General Subscriber Service Tariff, A16.1 Transit Traffic Service. issued January 27, 2005, effective February 11, 2005.

[61] Id. Section A16.1.2 B.

XVI. DISPUTES OVER ALLEGED UNAUTHORIZED ACCESS TO CSR

Section 222 of the Act established customer proprietary network information (CPNI) privacy requirements and set restrictions on how telephone companies may use or disclose a customer's CPNI. CPNI includes personal data for each customer including Social Security number, address, phone number, and all features, services and products used by the customer. This data is typically found in a CSR. The associated FCC rule requires the protection of all CPNI and is structured to require the customer to "opt in" to the use of his/her private information for any purpose other than provision of the telecommunications service from which the CPNI is derived, or necessary related services. Both the Joint Petitioners and BellSouth have legal and contractual obligations to protect CPNI, and both parties have agreed to refrain from viewing and copying customer records without customer permission.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Falvey contends that disputes over alleged unauthorized access to CSR information should be handled in the same manner as other disputes arising under the General Terms and Conditions (GTC) of the Interconnection Agreement. According to the GTC, Falvey contends that if one party disputes the other party's assertion of noncompliance, the alleging party should notify the other party in writing of the basis for its assertion of noncompliance. If the alleged offending party fails to provide the other party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other party with proof sufficient to persuade the other party that it erred in asserting the non-compliance, the alleging party should proceed pursuant to the Dispute Resolution provisions set forth in the GTC of the Interconnection Agreement.

BellSouth witness Ferguson contends that BellSouth's proposed language balances the Joint Petitioners' right not to be suspended or terminated versus BellSouth's right to protect its network, information, and processes in the most expedient manner. According to witness Ferguson, BellSouth must be given the opportunity to protect the information that BellSouth is obligated to protect and to ensure that all of its CLEC customers have the nondiscriminatory access to operating support systems that BellSouth is obligated to provide. Moreover, witness Ferguson asserts that BellSouth needs to have necessary and timely recourse to limit a CLEC's access in order to protect BellSouth's customers and the customers of other CLECs, if BellSouth has reason to believe that a CLEC is abusing access to CSR information.

BellSouth is proposing to modify the Interconnection Agreement to ensure timely resolution of unauthorized access to CSR information. The proposed language allows for the suspension and eventual termination of CLEC services. The specifics of BellSouth's proposed modifications are: 1) If BellSouth alleges that a CLEC accessed CSR information without having obtained the proper authorization, BellSouth will send a written notice to the CLEC requesting an appropriate Letter of Authorization; 2) If, after receipt of the requested Letter of Authorization, BellSouth determines that the CLEC obtained CSR information without the proper authorization, or, if no Letter of Authorization is provided to BellSouth by the seventh

business day after the request, BellSouth will send a written notice to the CLEC specifying the alleged noncompliance; 3) In its written notice, BellSouth will state that it may suspend a CLEC's access to ordering systems by the fifth calendar day following the date of the notice of noncompliance if a CLEC fails to take corrective measures; and 4) At the same time, BellSouth would provide written notice that a CLEC's existing service may be terminated by the tenth calendar day following the date of the notice if unauthorized access to CSR information does not cease.

However, if, at any time, the offending CLEC disagrees or disputes the allegation of unauthorized access to CSR information, BellSouth agrees to proceed with the resolution of the dispute in accordance with the Agreement's GTC. Under the Agreement's GTC, BellSouth will continue to provide all services as were provided prior to the dispute. Further assurance is noted in BellSouth's response to one of our staff's interrogatories located in Hearing Exhibit 2. BellSouth stated that it would take no action to terminate the alleged offending party during any pending regulatory proceeding.

B. ANALYSIS

It is our understanding from Hearing Exhibit 2 that BellSouth is concerned about detecting and ceasing any pattern that demonstrates a proclivity for abusive or repeated unauthorized access to CSR information by a CLEC. If BellSouth is suspicious of a CLEC's ordering activity (i.e., accessing unauthorized CSR information), BellSouth may request a Letter of Authorization as proof. If no Letter of Authorization is provided, or if BellSouth believes the LOA is inadequate, BellSouth is proposing to add language to allow for the suspension or termination of a CLEC's access to pre-ordering and ordering systems.

BellSouth witness Ferguson claims that its proposed modified language to the Interconnection Agreement should have resolved this issue and further does not understand why the proposed language does not calm the Joint Petitioners' fears. We agree. The Joint Petitioners contend that BellSouth's proposed language is ambiguous. Witness Falvey testified that it is not clear whether BellSouth would get to "pull the plug" while a dispute is pending or whether the coercive pressure created by BellSouth's ambiguous language is all that it is seeking. As a result, the parties have failed to resolve this issue.

BellSouth's proposed modification to resolve disputes over unauthorized access to CSR information is essentially two-fold. The alleged ambiguity lies between BellSouth's proposed modification to preserve the right to suspend or terminate a CLEC's service, while at the same time, BellSouth is providing assurance that a CLEC's access to ordering systems would not be suspended or terminated while a dispute is pending. We agree with the Joint Petitioners' position that BellSouth is given the discretion to be the judge and "pull the plug" if it so elects; however, BellSouth also allows for a CLEC to dispute the allegation at any time and the CLEC's service will not be suspended or terminated while the dispute is being resolved. As asserted by BellSouth witness Ferguson, if the Letter of Authorization provided is disputed between the parties, the parties will bring the dispute before us for resolution, and service will not be terminated while the dispute is pending.

In sum, if access to CSR information is disputed and cannot be resolved, the parties agree to bring the dispute before a regulatory authority for resolution. The parties also agree that services will not be suspended while a dispute is pending. The parties disagree to BellSouth having the right to suspend or terminate a service if corrective action is not taken by the offending party. Under the scenario where an offending party does not dispute alleged unauthorized access to CSR information, BellSouth's proposed modifications to the Agreement's Dispute Resolution provisions seem fair and equitable to both parties and provide a viable option for settling disputes. We find BellSouth shall be permitted to suspend or terminate services if a CLEC fails to acknowledge a request for a Letter of Authorization and notice of noncompliance under the time lines proposed by BellSouth. However, if a CLEC disputes BellSouth's allegation, BellSouth does not have the right to suspend or terminate services.

C. DECISION

Upon consideration and review of the record and arguments in the parties' briefs, we conclude that in the event that the alleged offending party disputes the allegation of unauthorized access to CSR information (even after the party's inability to produce an appropriate Letter of Authorization), the alleging party shall seek expedited resolution from the appropriate regulatory body pursuant to the dispute resolution provision in the Interconnection Agreement's General Terms and Conditions section. The alleging party shall take no action to terminate the alleged offending party during any such pending regulatory proceeding. If the alleged offending party does not dispute the allegation of unauthorized access to CSR information, BellSouth may suspend or terminate service under the time lines proposed by BellSouth.

XVII. RATE FOR SERVICE DATE ADVANCEMENT

A. PARTIES' ARGUMENTS

Joint Petitioners argue that, because UNE ordering and provisioning must be provided to wholesale customers at TELRIC rates, this same standard should also rightfully extend to requests by the CLECs to expedite service. Joint Petitioners witness Falvey asserts that all UNE ordering must be priced at TELRIC rates applied uniformly to service expedites as well as normal service order requests and that petitioners are entitled to access the local network and obtain elements at forward-looking, cost-based rates. Witness Falvey contends that, in the circumstance when access is required on an expedited basis to meet a particular customer's need, CLECs should not be subject to arbitrary, inflated, and excessive BellSouth fees not set by this Commission and which do not comport with the TELRIC pricing standard. To the extent there are substantiated added costs associated with providing expedites, those costs should be recovered through TELRIC-based prices, which Joint Petitioners are willing to pay according to Hearing Exhibit 2.

Joint Petitioners witness Falvey disagrees with BellSouth's stance that the issue is inappropriate for this proceeding. He asserts that setting prices and arbitrating terms and

provisions associated with section 251 unbundling are squarely within this Commission's jurisdiction and appropriately brought before this arbitration proceeding. Witness Falvey testifies that governance of the manner in which BellSouth provisions UNEs is solidly within section 251 of the Telecommunications Act and that petitioners are entitled to access the local network and obtain elements at TELRIC rates.

As Joint Petitioners witness Falvey stated, UNEs must be provisioned at TELRIC-compliant rates. BellSouth does not dispute this fact. Witness Falvey contends that an expedite order for a UNE should not be treated any differently.

Witness Falvey further testified that the parties have previously negotiated and agreed to language providing for expedites, so BellSouth cannot now argue that rates for service cannot be arbitrated. Witness Falvey's conclusion is that the BellSouth tariff rate of $200 per element, per day, for expedited provisioning constitutes an unreasonable, excessive rate harmful to competition and consumers.

Witness Falvey concludes that this Commission has clearly determined that an interconnection agreement may encompass rates, terms and conditions that extend beyond an incumbent's section 251 obligations. Therefore, even if BellSouth's contention that charges for expedites are outside the scope of section 251 is accepted, it is irrelevant in this instance because it would not supplant our determinations previously made on the subject. According to witness Falvey, the issue is still within the scope of already established interconnection agreements.

BellSouth witness Blake argues that although the incumbent does have an obligation under section 251 of the 1996 Act to provide certain services in nondiscriminatory ("standard") intervals at cost-based prices, there is no section 251 requirement to provide service in less than the standard interval. Moreover, there is no requirement for BellSouth to provide faster service to its wholesale customers than that which is provided to its retail customers. She also contends that because BellSouth is not required to provide expedited service pursuant to the 1996 Act, the Petitioners' request is not appropriate for a section 251 arbitration and it should not, therefore, be included in the Agreement. Because it is not a section 251 requirement, witness Blake argues that TELRIC rates should not apply.

In BellSouth witness Blake's rebuttal testimony, she notes that charges for BellSouth service expedites are found in the company's FCC Tariff No. 1 which has FCC approval. They are the same charges imposed on retail customers requesting service in less than the standard interval and are an accurate reflection of costs incurred when extraordinary services are provided.

BellSouth witness Blake concedes that the point at issue is not whether it will provide service expedites to CLECs but what rate will be charged for such services. The company proposes to charge $200 per circuit per day, a rate equivalent to charges currently imposed on its own retail customers.

Witness Blake concludes that, as a practical matter, if BellSouth were to impose no charge or only a minor charge for expedited service requests, it is likely that most, if not all,

CLEC orders would be requested as expedites. This, in turn, would cause BellSouth to miss standard provisioning intervals and its recognized obligation to provide nondiscriminatory access. Therefore, Witness Blake contends that BellSouth's position on this issue is reasonable and provides parity of service between how BellSouth treats CLECs and how it treats its own retail customers.

B. ANALYSIS

We find the central, predominant question at issue here is that of parity. While other considerations have been raised, they are peripheral and fall subordinate to parity.

An absence of parity in provisioning of service expedites would open the door for a reasonable, valid TELRIC-rate argument by the Joint Petitioners. Substantiation of parity closes it, firmly.

According to 47 C.F.R. 51.307(a), there exists a requirement for an ILEC to provide a requesting carrier with nondiscriminatory access to UNEs at any technically feasible point. In the section of 47 C.F.R. 51.311(a), entitled "Nondiscriminatory access to unbundled network elements," it states that the quality of the UNE access that an incumbent provides shall be the same for all telecommunications carriers requesting access to the network. 47 C.F.R. 51.311(b) further asserts that the quality of a UNE that, ". . .an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself."

The Eighth Circuit opined that the phrase "at least equal in quality" leaves open the opportunity for parties to negotiate agreements for provision of access superior in quality to that which is normally provided, with the ILECs being compensated for the additional cost involved in providing superior quality. However, an ILEC is not mandated to provide such a standard.[62] With superior quality access as a standard rendered null and void, we hold that parity is the preeminent qualification.

Accordingly, where technical feasibility is not at issue, incumbents are required to provide access to UNEs *at parity* (as a minimum) to that provided to their retail customers. It is clear there is no obligation imposed or implied in Rule 51.311(b) that an incumbent render services to a CLEC superior in quality to those provided to a retail customer requesting similar services. So long as rates are identical for all requesting parties, CLEC and retail alike, parity exists in the provisioning structure for service expedites, and there is no conflict with Rule 51.311(b). We reiterate that current regulations do not compel an ILEC to provide CLECs with access superior in quality to that supplied to its own retail customers.

We support the idea that, by their nature, service expedites are extraordinary and BellSouth witness Blake's contention that such expedites logically lead to a concomitant,

[62] Iowa Utilities Bd. V. FCC. (Remand Decision) Nos. 96-3321 (and consolidated cases) issued July 18, 2000, p. 22. before the United States Court of Appeals for the Eighth Circuit

additional demand on resources is valid. Then, it follows that increased provider cost is a logical and reasonable by-product, one traditionally associated with improved or increased services. We agree with both parties that the service expedite rate BellSouth currently charges CLECs is identical to the tariffed rate imposed on its retail customers. In other words, parity exists. Additionally, there exists no requirement that an incumbent provide supportive evidence for its tariffed rates; tariffs are presumptively valid.

We find that services requested and provisioned to a superior standard (i.e. above parity) by the CLECs shall be compensated accordingly. There was no conclusive evidence provided by the Joint Petitioners that BellSouth routinely foregoes charges for its retail customers. If there had been such evidence, indicating discriminatory treatment, a TELRIC standard might be applicable.

BellSouth is treating CLECs and its own retail customers in an identical manner with regard to the pricing of service expedites. Parity exists, thus TELRIC simply does not apply in our opinion.

C. DECISION

BellSouth's tariffed rates for service expedites shall apply unless the parties negotiate different rates.

XVIII. PAYMENT DUE DATE

This issue examines the time frame the Joint Petitioners have for analyzing bills they receive from BellSouth and remitting payment. At issue is whether the time period for review should be based upon the date bills are issued (by BellSouth), or whether it should be based on date bills are received.

A. PARTIES' ARGUMENTS

Witness Russell asserts that the Joint Petitioners do not have adequate time to effectively and completely review the "enormous number of"[63] bills they receive from BellSouth. The witness contends the Joint Petitioners are seeking a full 30-day period from receipt of a complete and readable bill. As support for his position, the witness asserts that:

- BellSouth is consistently untimely in posting or delivering its bills;
- BellSouth's bills are often incomplete and sometimes incomprehensible;
- BellSouth issues numerous bills to the Joint Petitioners, bills that are often voluminous and complex; and

[63] In its brief, the Joint Petitioners claim that NuVox alone receives more than 1100 monthly bills from BellSouth.

- by the time a BellSouth bill is received, the period of time for review and remittance is only 19-22 days – a timeframe the Joint Petitioners believe is not typical, or commercially reasonable.

Witness Russell contends that it is imperative that the Joint Petitioners be given a full 30 days to review and pay their bills from BellSouth. In its brief, the Joint Petitioners cite to recent decisions from Georgia and Alabama that have some similarity with what the Joint Petitioners seek here. Witness Russell flatly rejects the claim of BellSouth's witness Morillo[64] that BellSouth has no way of knowing when a customer receives its bill, since tracking mechanisms that could be used by BellSouth are readily available. According to witness Russell, BellSouth has claimed that the configuration of its billing system cannot be modified on a customer-specific basis; he claims that BellSouth's assertion regarding its system limitations is not a reasonable justification for what he believes are unfair payment terms.

Witness Russell states that NuVox recorded when it received bills from BellSouth, and over a 12-month period, the results indicated it received its bills 3 to 30 days after the date printed on the bill. He states the average was 7 days. Because the date of receipt fluctuated, so too did the period of time that NuVox had to review the bill. A similar study was conducted by NewSouth and Xspedius, and the results were substantially similar, according to witness Russell. Witness Mertz, of KMC, testifies to first-hand knowledge that the date of receipt for BellSouth bills would fluctuate with KMC as well, although the company never formally collected data to quantify this as other Petitioners have. Although BellSouth presented evidence in the form of a performance report that showed excellent results,[65] witness Mertz contends that BellSouth's Service Quality Measurement (SQM) figures could be deceptive in that they reflect average results, and not the so-called "outliers." Consequently, witness Mertz believes average figures are likely to differ from individual results.

In practice, witness Russell states that the review and bill payment timeframes are "far from commercially reasonable." In its brief, the Joint Petitioners claim that BellSouth pays or disputes bills it receives based upon a 30-day cycle that begins upon receipt; the brief claims a disparity is evident because "BellSouth is not treating itself the way it seeks to treat Petitioners." In addition, witness Russell states that this Commission should consider how other state commissions in the BellSouth region have ruled on this topic, specifically in the context of BellSouth's arbitrations with ITC^DeltaCom.

Witness Russell believes the 30-day period of time from receipt of the bill that the Joint Petitioners are requesting is necessary, and notes the Joint Petitioners initially sought a 45-day interval, but revised their proposal to the current level in negotiations. A 30-day period

---

[64] BellSouth witness Kathy K. Blake adopted the testimony filed by Carlos Morillo.

[65] BellSouth's Service Quality Measurement Plan (SQM) describes in detail the measurements produced to evaluate the quality of service delivered to BellSouth's customers both wholesale and retail. Hearing Exhibit 19 is a 2-page excerpt of the SQM that witness Mertz analyzed while testifying.

essentially represents a billing cycle, according to witness Russell. The witness believes the language BellSouth has offered is not reasonable and states:

> BellSouth's proposed language provides that payment . . . must be made on or before the next bill date. This language is inadequate in that it does not account for the fact that there is typically a long gap between the time a bill is 'issued' and the date upon which it is made available to or delivered to a Petitioner. BellSouth's language makes no attempt to mitigate the problems caused in circumstances when its invoices are incomplete and/or incomprehensible. When this occurs, the CLEC already has a late start in paying the invoice and then may also need to spend extraordinary amounts of time attempting to reconcile . . . such invoices. Therefore, under BellSouth's proposal, Petitioners are not getting thirty (30) days to remit payment.

In practice, the short review window pressures the Joint Petitioners to pay on time, or face the financial consequence of being assessed late payment charges or requests for security deposits. Such pressures force CLECs to remit payment faster than almost any other business, according to the witness.

BellSouth witness Blake asserts that payment for all services that appear on a BellSouth bill should be due on or before the next bill date in immediately available funds. As indicated by Hearing Exhibit 2, the bill date is the date that appears on a bill, and the next bill date is essentially 30 days thereafter. In testimony and under cross-examination, BellSouth witness Blake briefly described how BellSouth's legacy billing systems function in producing and delivering bills. Witness Blake states that a bill release date usually follows the bill date by 3-4 days, since all of the account activity that occurred on or before the bill date is compiled for inclusion in that respective bill. Further in Hearing Exhibit 2, witness Blake also states that all retail and wholesale customers are billed in the same manner, and any sort of a rolling due date would be administratively cumbersome. The witness describes the bill generation process:

> When a bill is produced, there's a bill date on it. It is a set bill date. We pull the data onto the bill and it is the same each month. At the time we produce the bill its got the date on there, that same date. When it's released, whether electronically or manually, that date is already on the bill. And it's the same date every month; there's no guesswork. The Joint Petitioners as well as our customers will know what the due date is every month.

The BellSouth witness explains how bill payment impacts customer treatment (i.e., late payment charges), and also deposit-related issues. Witness Blake asserts that "the use of a constant bill date and payment due date is a standard business practice, and is consistent with BellSouth's billing practices that both this Commission and the FCC [approved of] in granting BellSouth long distance authority in Florida . . ." Those approvals were based on the respective findings that BellSouth's billing systems were nondiscriminatory. Witness Blake was also cross-examined on BellSouth's own payment history for invoices it receives from the Joint Petitioners, although in its brief, BellSouth contends this is "irrelevant."

Witness Blake stresses that whether a customer elects to receive a bill in an electronic format or not, that choice of delivery will have no impact on the transmission of the bill; she states, "the bill already has a date posted, printed, included in it that cannot be modified at the point in time that we transmit the bill." In essence, witness Blake regards this issue as a parity issue. As also indicated in Hearing Exhibit 2, she contends the Joint Petitioners are requesting something over and above what BellSouth provides for its retail customers, and are not willing to pay for the billing system modifications that would be needed to meet their request. The witness believes that the Joint Petitioners' request is unreasonable for two main reasons:

- BellSouth's legacy systems cannot provide multiple due dates on a single bill since all due dates and treatments are generated in a similar manner; and

- A bill due date based upon the customer's date of receipt relies upon an unknown variable – BellSouth has no way to know when a customer receives a bill.

Witness Blake was cross-examined on Hearing Exhibit 19, the SQM Report for BellSouth's Mean Time to Deliver Invoices performance measurement. As indicated in Hearing Exhibit 19 the report provides 12 months of Florida-specific performance averages for wholesale bills that BellSouth issued between April 2004 and March 2005. Witness Blake acknowledged that "outliers" would not be specifically identified in this report, but notes that the report presents "average" results that meet the standard. The standard for this measure is whether BellSouth is providing service at parity with retail – which it overwhelmingly is, according to the data in Hearing Exhibits 2 and 19. In addition, if bill delivery issues were presented to BellSouth on a case-by-case basis, BellSouth is amenable to granting an extension of the payment due date.

We note that in its brief, BellSouth offers a proposal in an effort to resolve this issue. We are unaware as to whether the Joint Petitioners acted upon this proposal.

B. ANALYSIS

The Joint Petitioners are requesting 30 days from receipt of a complete and readable bill to review and remit payments to BellSouth. We find the Joint Petitioners do not want BellSouth's "bill assembly" period of time to reduce the time they have to review and make payment for bills received from BellSouth. According to BellSouth witness Blake, "bill assembly" usually takes 3-4 days, and thereafter, electronic transmission can proceed on the release date. Additionally, the witness avers that this issue is really about "parity," and that BellSouth prepares bills for its wholesale customers in the same timeframe and manner as it does for its retail customers. Importantly, any conventional mailing timeframes or delays would begin after the 3-4 day timeframe for assembly. Also, the "bill date" will generally fall on the same date each month – a time period of approximately 30 days. We agree with witness Blake's assertion that this is a "parity" issue.

Joint Petitioners witness Russell states that other state commissions in the BellSouth region have ruled on this topic; he specifically references BellSouth's arbitrations with ITC^

DeltaCom in Georgia and Alabama. In each case, ITC^DeltaCom's general position was consistent with what the Joint Petitioners are seeking here - that BellSouth's bill date shall not be considered the starting point for their review. However, we find the respective cases are only moderately germane to this case, since each decision was somewhat different from the specific position the Joint Petitioners assert in Florida. Additionally, the parties agreed to something other than what the respective state commissions ordered, according to BellSouth witness Blake. BellSouth witness Blake did not provide a detailed response on what the parties agreed to, but notes that in Georgia, what the parties agreed to "was not based upon receipt date." We note that although Hearing Exhibit 32 is an excerpt of an ITC^DeltaCom-BellSouth interconnection agreement from Alabama, the excerpt does not provide information that is on-point.

Although the Joint Petitioners' proposal appears to introduce a fixed level of certainty to the bill review and payment timeframe, we find the practical implication could instead result in a degree of uncertainty. In its brief, BellSouth appears to agree; the brief characterizes the uncertainty as "an ever extending payment due date," and affirmed the reservations of witness Blake on whether current systems could be modified to accomplish billing in this manner. If so, the costs would be substantial, according to witness Blake. Information on the feasibility or a cost/benefit analysis for such a project was not provided, and therefore we cannot render an opinion on whether such system enhancements are worthwhile. Cost would certainly be a factor in making system changes, and the Joint Petitioners have stated an unwillingness to be responsible for such costs, a point BellSouth echoes in its brief. Because performance data indicate that BellSouth overwhelmingly meets its wholesale bill delivery standard using its current legacy systems, we find BellSouth would have little or no incentive to assume the cost burden of enhancing its billing system platforms. We find the performance data shows that BellSouth is meeting its objective to deliver bills to its wholesale customers at "parity" with its retail customers, and as such, we do not endorse the Joint Petitioners' proposal.

We are concerned about a phrase extracted from the Joint Petitioners' statement of position, the phrase "upon receipt of a complete and readable bill." Not only is "upon receipt" somewhat of a variable, we find the text that follows it (i.e., "a complete and readable bill") could be subject to interpretation or dispute as well. We find delays would result if an interpretation were necessary, and resources would have to be expended to address delays or disputes. As such, we are uncertain how such issues would impact the entire bill issuance and remittance process.

Because the payment of charges is an important component of developing and maintaining strong business relationships, we find a degree of certainty shall be established or maintained. In addition, we find it is reasonable to expect the billed party to promptly remit payment to the billing party, or at a minimum, remit payment before a subsequent bill date in order to avoid late payment charges. In its brief, BellSouth states that NuVox proudly touts its timely payment history with BellSouth. BellSouth believes this undermines the assertions from the Joint Petitioners that they need a full 30 days to review and pay bills. We agree and believe the status quo represents a stable platform that meets the desired performance objectives.

We find BellSouth's current bill rendering practices are reasonable. As noted in Hearing Exhibit 2 and 19, BellSouth's SQM performance results indicate that, on average, BellSouth is

delivering bills to its wholesale customers at "parity" with its own retail customers. We find BellSouth shall not be ordered to make substantive changes to its billing systems on behalf of the Joint Petitioners, and at its own expense, in order to exceed "parity" performance. If individual instances of untimely wholesale performance occur, BellSouth has expressed a willingness to make accommodations upon request. If overall performance is substandard, BellSouth would be subject to SEEM[66] remedy payments.

For these reasons, we conclude that the payment of charges for service shall be payable before the next bill date. Although not tasked with proposing specific language, we find the language proposal that BellSouth proffered in its brief would aptly address this issue.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find payment of charges for service shall be payable on or before the next bill date.

XIX. PAST DUE AMOUNTS WITH REGARD TO NOTICE OF SUSPENSION OR TERMINATION

This issue has been characterized by the Joint Petitioners as a "pull the plug" measure and by BellSouth as a measure for protection from financial risk.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Russell believes that requiring CLECs to pay past due amounts in addition to the amount listed on the past due notice is "unfair and potentially abusive." He asserts that CLECs should only have to pay the amount posted on the notice. The witness states that in order to avoid suspension or termination of service some "magic number" determined by BellSouth would have to be paid.

Witness Russell asserts that the Joint Petitioners are also concerned that problems could arise because of a "shell game," due to the erroneous posting by BellSouth of payments or disputes. The witness explains an error in posting could result in suspension or termination of CLEC service with possible harm to customers in Florida. Witness Russell maintains that in the past BellSouth did not post payments or disputes in a timely manner. The witness also states that NuVox has received notices in error from BellSouth.

[66] SEEM is an acronym for "Self -Effectuating Enforcement Mechanisms." SEEM remedy payments are an integral part of BellSouth's SQM plan.

BellSouth witness Blake[67] argues that treatment notices only apply when a CLEC fails to pay for the services it received. The witness does not believe the due date of the notice should be viewed as an extension of the payment due date on the original bill.

Witness Blake asserts that the Joint Petitioners, as with all CLECs, are currently required to pay all undisputed amounts that are past due as of the due date of the notice. The witness explains that an aging report containing all additional undisputed charges that will become past due during the 15 days between the notice date and suspension of service date is currently included with the suspension notice. In addition, BellSouth explains that it has modified its original language in Section 1.7.2 of Attachment 7 of the proposed Agreement to include information to requesting CLECs on the additional past due charges. As reflected in Hearing Exhibit 2, witness Blake notes that the recent change made in the collection process was "that the collection letter will no longer include any disputed amounts in the total amount due." Witness Blake contends that "concerns about guesswork to determine the amount to pay to avoid suspension or termination are eliminated" based on this change.

Witness Blake asserts that another aspect of the collection process is communication, written and oral, between the parties to eliminate guesswork on the amount of undisputed charges that are due to prevent suspension or termination of service.

B. ANALYSIS

We understand that the recent change in BellSouth's collection process which applies to all CLECs has not added new requirements for paying past due charges, but instead has eliminated any disputed charges from the amount past due in the collection letter, as is the case with the accompanying aging report. From our perspective, these changes address any concerns about guesswork in determining the amount required to be paid.

We find that the Joint Petitioners fail to show how they have been harmed by the current collection process of BellSouth. Even though Joint Petitioners witness Russell testifies at hearing that errors were made in posting of payments and in sending notices to his company, he never mentions any suspension of service. To the contrary, he acknowledges, "We have not had any collection or treatment process transactions."

We do not believe the Joint Petitioners should view the due date of a treatment notice as an automatic extension of the payment due date on the original bill. In our view, the treatment notice does not alter the fact that the original due date is controlling; the treatment process is merely a vehicle for transitioning from a past due status to suspension or termination. On this basis, we find it is reasonable to require that any other past due undisputed amounts be paid as well by the due date on the treatment notice. This approach is consistent with current practice, and we cannot find a compelling reason why BellSouth must treat the Joint Petitioners differently from other CLECs.

---

[67] BellSouth witness Blake adopted witness Morillo's direct testimony.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that a CLEC shall be required to pay past due undisputed amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination.

XX. DETERMINATION OF DEPOSIT

A. PARTIES' ARGUMENTS

Witness Russell believes this issue is important to the Joint Petitioners because deposits represent capital that is tied-up and not available for other purposes. He asserts that due to the lengthy and established business relationships of the Joint Petitioners with BellSouth, it is reasonable to treat them differently from other companies that have not had a business relationship with BellSouth. Witness Russell explains that because of BellSouth's concerns regarding other CLECs adopting the proposed Agreement, the Joint Petitioners propose a dual approach to establish the maximum deposit: two months' estimated billing for new CLECs and one and one-half months' for existing CLECs.

As an alternative, witness Russell notes that the Joint Petitioners are willing to accept the maximum deposit limits BellSouth agreed to in the ITC^DeltaCom Agreement, which are one month's billing for services billed in advance and two months' billing for services billed in arrears. The witness points out that in Florida this is consistent with the maximum deposit amounts for retail end users, which are one month for local service and two months for toll service.

Witness Russell states that his company, NuVox, has a "stellar" payment history with BellSouth but that BellSouth continues to hold a deposit. The Joint Petitioners characterize BellSouth's proposal as "unreasonable, discriminatory and more than could possibly be justified."

The Joint Petitioners' proposed language for Section 1.8.3 of the most recent draft interconnection agreement reads:

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

BellSouth witness Blake contends that having an existing business relationship does not reduce BellSouth's financial risk. She asserts, and reflected in Hearing Exhibit 3, that not all the Joint Petitioners have a "flattering" payment history. Witness Blake explains that last year all of the Joint Petitioners received suspension notices and one company's ordering access to LENS

was suspended. Hearing Exhibit 2 illustrates that payment arrangements were made with the Joint Petitioner and access was restored.

BellSouth witness Blake explains that a two-month deposit is necessary because it takes approximately 74 days from the first day of service to disconnection for nonpayment. She asserts that BellSouth is still providing service for two weeks that are not covered by a two-month deposit. This can also be seen in Hearing Exhibit 2.

Witness Blake notes that although BellSouth has agreed to different maximum deposit terms with ITC^DeltaCom, other billing and deposit sections of that Agreement have different provisions than the proposed Agreement. She explains that the Joint Petitioners were offered "the exact language we agreed with DeltaCom and they refused." Witness Blake further notes that Florida retail end users have a different deposit amount because of the rules of the Florida Public Service Commission regarding local end users.

BellSouth witness Blake explains that payment history is not the only criterion for determining whether a deposit is required, that other financial factors are involved, and that those factors have been agreed to by the parties and are not in dispute.

BellSouth's proposed language for Section 1.8.3 reads:

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

B. ANALYSIS

The parties agree that BellSouth has the right to demand a deposit if a Joint Petitioner does not meet the deposit criteria of Section 1.8.5 of Attachment 7 of the proposed Agreement. There are several undisputed sections of Hearing Exhibit 7 concerning deposits in Attachment 7 of the proposed Agreement:

- Section 1.8 gives BellSouth the right to secure the accounts of existing and new CLECs;
- Section 1.8.2 provides that the security can be cash, irrevocable letter of credit, or surety bond;
- Section 1.8.5 establishes factors to determine when BellSouth can secure the account of an existing CLEC: payment record, liquidity status, and bond rating; and
- Section 1.8.10 addresses refunds of deposits.

As illustrated by Hearing Exhibit 2 the Joint Petitioners either have no maximum deposit or a maximum of two months billing in their agreements with BellSouth. With no maximum, BellSouth can ask for two months' average billing; however, Joint Petitioners witness Russell responds that his company's deposit with BellSouth is less than two months billing.

Joint Petitioners witness Russell states that the maximum deposit should be based on the most recent six-month period. BellSouth witness Blake agrees with using the most recent six-month period. We note that even though the parties agree with using the six-month period, both neglect to address it in their post-hearing briefs. However, footnote 47 of BellSouth's revised post-hearing brief states, "BellSouth is not opposed to using billing associated with the most recent six month period to establish the maximum deposit amount."

We note that the Joint Petitioners oppose BellSouth's proposal for this issue because it ties up capital; however, they do not explain how the proposal adversely affects their business operations. They also voice their objections to the deposit based on payment history, but we concur with the reasoning of BellSouth that payment record is only one of the agreed upon criteria of Section 1.8.5.

Even more persuasive to us is BellSouth witness Blake's statements regarding the 74-day period from commencement of service to physically disconnecting service. Given BellSouth's exposure over the period from service installation to potential termination if payment is not received, we find that BellSouth's proposal for a maximum two-months deposit is certainly justified. Finally, as mentioned above, the Joint Petitioners and BellSouth agree that the most recent six months of data should be averaged to calculate any required deposit.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that the maximum deposit shall not exceed two months' estimated billing for new CLECs or two months' actual billing for existing CLECs based on average monthly billings for the most recent six-month period.

XXI. DEPOSIT IN RELATION TO PAST DUE AMOUNTS

A. PARTIES' ARGUMENTS

Joint Petitioners witness Falvey asserts at hearing that because BellSouth's payment record is often poor, and that under the instant Agreement the deposit provisions are not reciprocal, a deposit offset is appropriate. The witness states that the offset should be the past due, "aged thirty (30) days or more," amounts BellSouth owes a CLEC. The witness also contends that if BellSouth is late paying its invoices, "CLECs have no remedy in the security deposit context."

Witness Falvey maintains that the deposit reduction is necessary and disagrees with BellSouth's response that late payment charges and the Joint Petitioners' ability to suspend or terminate service are protection for their credit risk due to BellSouth's poor payment history. The witness states that BellSouth could request an additional amount equal to the offset after the

company establishes a good payment record and that whatever credit risk BellSouth is trying to shield itself from is reduced by the past due charges owed to the CLECs.

Joint Petitioners witness Falvey insists that the offset calculation should include disputed and undisputed past due amounts. The witness argues that during 2004 BellSouth had disputed $2,008,048.09 in reciprocal compensation payments and $679,577.56 in interconnection transport payments, and during this time overbilled Xspedius over $2 million. The witness explains that under the Joint Petitioners' proposed language for this issue reflected in Hearing Exhibit 2, his company will not have to pay an additional deposit to BellSouth.

The Joint Petitioners' proposed language for Section 1.8.3.1 reads:

> **The amount of security from an existing CLEC shall be reduced by amounts due [CLEC] by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in Section 1.8.5.1, and subject to the standard set forth in Section 1.8.5.** (emphasis in original; disputed language in bold)

BellSouth witness Blake[68] asserts that deposits are collected due to a risk of non-payment, not a risk of slow payment. The witness believes that the appropriate action for a CLEC to take in response to past due charges owed by BellSouth is the assessment of late payment charges or suspension/termination of service. Witness Blake notes that BellSouth is required to provide service to any requesting CLEC and must protect itself from risk, while the Joint Petitioners have no such obligation.

In response to Joint Petitioners' statements that BellSouth has a poor payment history, witness Blake asserts that it has paid 100% of its bills from Xspedius and 80% of its bills from KMC within 30 days of receipt for a recent six-month period. The witness explains that the delays in payment to KMC are due to problems KMC has in providing its invoices. The witness states that there are very few bills with NuVox and NewSouth because of the bill and keep provisions in their agreements.

Under cross-examination and as illustrated in Hearing Exhibit 21, Joint Petitioners witness Falvey acknowledges that the approximately $2.6 million for reciprocal compensation and transport were disputed charges in two April 2004 bills and that in the April 2005 bills BellSouth is approximately 99% current on the transport bill and owes $111,494.84 for reciprocal compensation, which includes $82,340.29 in current charges.

Witness Blake explains that even though BellSouth does not agree that a reduction is appropriate, the company is willing to reduce its deposit request by the undisputed past due

[68] BellSouth witness Blake adopted witness Morillo's direct testimony.

charges pursuant to Attachment 3 of the instant Agreement, provided that once the undisputed past due charges are paid by BellSouth the Joint Petitioner will pay an additional deposit amount for a total deposit equal to the original deposit request. Witness Blake argues, however, that such an offset provision is "confusing and cumbersome from both accounting and operational perspectives."

BellSouth's proposed language for Section 1.8.3.1 reads:

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

B. ANALYSIS

We find that reducing the deposit BellSouth requires from the Joint Petitioners by past due amounts owed by BellSouth is not appropriate. First, we recognize that the parties would have a difficult time agreeing on the details of such an approach. As noted previously, in an effort to compromise, BellSouth offered a deposit reduction offset proposal. However, the Joint Petitioners did not agree with BellSouth excluding disputed amounts from the CLEC offset. In addition, the parties disagree on when the offset amount should be paid. The Joint Petitioners' proposal requires BellSouth to establish a good payment record as defined in the Agreement before the offset is paid, while BellSouth's proposal requires the CLEC to pay the offset within ten days of receiving the undisputed past due amount.

Second, we find that the offset proposal could increase disputes between the parties and be administratively burdensome to administer. In response to our staff's interrogatory contained in Hearing Exhibit 2, BellSouth stated:

> . . . Mr. Falvey's testimony suggesting that security deposits be adjusted for BellSouth bills "aged thirty (30) days or more" could most certainly cause conflicts and disputes over deposit amounts, not to mention the confusion surrounding the accounting and classification of this on-going exchange of funds.

In response to one of our staff's interrogatory contained in Hearing Exhibit 3, the Joint Petitioners disagree and note that they do not believe there will be conflicts because deposit requests are made and generally negotiated only once or twice a year, and the appropriate offset or return of such offset would be established at those times. Just because this issue may only be raised once or twice a year does not necessarily lead to fewer disputes or conflicts. Again, given the fact the parties cannot agree on how an offset proposal could be implemented, even though it appears that there have been concessions and ongoing negotiations, we cannot assume that the

disputes would be eliminated going forward just because this matter would only be addressed once or twice a year.

Third, and perhaps most important, we find that requiring a deposit from the Joint Petitioners and the dispute of charges or late payments made by BellSouth are separate issues. A deposit required under the interconnection agreement is intended to protect the ILEC from the financial risk of non-payment for services provided to the CLEC. If BellSouth has a billing dispute or is late paying one of the Joint Petitioners, it should not impact the amount of deposit from the Joint Petitioners because the dispute or late payment by BellSouth in no way reduces the amount of services provided to the Joint Petitioners. Moreover, there are other remedies in place which address past due payments (disputed and undisputed) such as late payment charges, and suspension/ termination of service. As such, the amount of the deposit BellSouth requires from a Joint Petitioner shall not be reduced by past due amounts owed by BellSouth to CLEC.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that the amount of the deposit BellSouth requires from CLEC shall not be reduced by past due amounts owed by BellSouth to CLEC.

XXII. POSSIBLE TERMINATION OF SERVICE

This issue has been characterized by the Joint Petitioners at hearing as a "pull the plug" measure and by BellSouth as a measure for protection from financial risk.

A. PARTIES' ARGUMENTS

Joint Petitioners witness Russell asserts that BellSouth cannot bypass the dispute resolution provisions of the proposed Agreement by terminating CLEC services. He states that if the parties do not agree on a deposit request, then the proper recourse is the dispute resolution process; the Commission, not BellSouth, should resolve the dispute.

Witness Russell explains that termination of service is a drastic remedy and is only appropriate in two circumstances: 1) when the Commission orders the deposit and the CLEC does not pay it; and 2) when the CLEC agrees to the deposit and then does not pay.

Witness Russell also believes there could be occasions when a CLEC could dispute whether the deposit request was appropriate and that dispute could fall under Issue 103.

The Joint Petitioners' proposed language for Section 1.8.6 reads:

> In the event [CLEC] fails to remit to BellSouth any deposit requested pursuant to this Section **and either agreed to by [CLEC] or as ordered by the Commission** within thirty (30) calendar days **of such agreement or order**, service to [CLEC] may be terminated in accordance with the terms of Section 1.7 and subtending sections of this Attachment, and any security deposits will be applied to [CLEC]'s account(s). (emphasis in original; disputed language in bold) (BR JP-EXH A, p.19)

BellSouth witness Ferguson notes that the CLEC has 30 days to either dispute the request for a deposit, or pay the deposit. The witness does not believe that every deposit request that the CLEC does not agree with should have to go to this Commission, and sees the Joint Petitioners' proposal as a tactic to delay paying a deposit.

Witness Ferguson explains that the parties have agreed that BellSouth has a right to a deposit and have agreed on the criteria to determine the need for a deposit. The witness states that this provision only applies when a CLEC ignores a deposit request.

BellSouth's proposed language for Section 1.8.6 reads:

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

B. ANALYSIS

It is our understanding that this issue only provides a recourse for BellSouth when a CLEC does nothing after receiving a request for a deposit.

We are concerned that the Joint Petitioners either do not understand the issue or have tried to expand the issue to include dispute resolution provisions. It is our understanding that the Joint Petitioners' proposal would require BellSouth to acquire either the CLEC's or this Commission's approval before asking for a deposit. This process is counter to the already agreed upon language in section 1.8 which gives BellSouth the right to secure accounts with deposits.

We find that 30 calendar days is sufficient time for a CLEC to decide to dispute or pay a deposit request. In order to make such a decision, a CLEC would need to review the undisputed deposit criteria of Section 1.8.5 of Attachment 7: payment record for past 12 months, liquidity status, and bond rating, all of which shall be accomplished in 30 days or less.

C. DECISION

Upon consideration and review of the parties' briefs and the record, we find that BellSouth is entitled to terminate service to the CLEC pursuant to the above process for termination due to non-payment if the CLEC refuses to: (1) remit any deposit required by BellSouth; and (2) does not dispute the deposit request per Section 1.8.7 of the proposed Agreement, within 30 calendar days.

XXIII. CONCLUSION

We have conducted these proceedings pursuant to the directives and criteria of Sections 251 and 252 of the Act. We find that our decisions are consistent with the terms of Section 251, the provisions of FCC rules, applicable court orders and provision of Chapter 364, Florida Statutes.

The parties shall be required to submit a signed agreement that complies with this Order for approval within 30 days of issuance of this Commission's Order. This docket shall remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that the issues for arbitration identified in this docket are resolved as set forth within the body of this Order. It is further

ORDERED that pursuant to Order No. PSC-05-0443-PCO-TP, issued April 26, 2005, the resolution of the issues move from this docket to Docket No. 041269-TP are to be rolled back into Docket No. 040130-TP as if arbitrated. It is further

ORDERED that the parties are required to submit a signed agreement that complies with this Commission's decisions in this docket for approval within 30 days of issuance of this Commission's Order. It is further

ORDERED that this docket will remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

By ORDER of the Florida Public Service Commission this 11th day of October, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

JLS/KS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.