BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 040130-TP

In the Matter of

JOINT PETITION BY NEWSOUTH COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC, ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF JACKSONVILLE, LLC, FOR ARBITRATION OF CERTAIN ISSUES ARISING IN NEGOTIATION OF INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.

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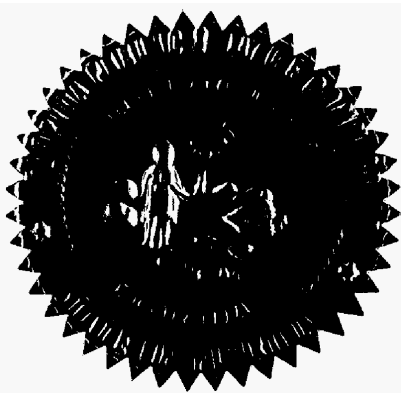

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VOLUME 7

Pages 791 through 1012

PROCEEDINGS:	HEARING
BEFORE:	COMMISSIONER RUDOLPH "RUDY" BRADLEY COMMISSIONER CHARLES M. DAVIDSON COMMISSIONER LISA POLAK EDGAR
DATE:	Wednesday, April 27, 2005
TIME:	Commenced at 9:30 a.m.

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

I N D E X

WITNESSES

EXHIBITS

NUMBER:		ID.	ADMTD.
26	Errata Sheet of Ms. Blake	796	
27	ALLTEL Interconnection Agreement	928	

P R O C E E D I N G S

(Transcript follows in sequence from Volume 6.)

COMMISSIONER BRADLEY: Next witness.

MR. MEZA: Yes, sir. BellSouth calls Kathy Blake to the stand.

COMMISSIONER BRADLEY: Ms. Blake has been sworn in?

MR. MEZA: I believe she has, sir.

THE WITNESS: Yes, sir.

Whereupon,

KATHY BLAKE

was called as a witness on behalf of Bellsouth Telecommunications, Inc., and having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MEZA:

Q Ms. Blake, could you please provide your name and address?

A Yes. My name is Kathy Blake, 675 West Peachtree Street, Atlanta, Georgia.

Q By whom are you employed and in what capacity?

A I work for BellSouth in the capacity of Director in Regulatory and External Affairs.

Q Did you cause to be filed in this proceeding direct and rebuttal testimony?

A Yes, I did.

Q Are you also adopting the testimony of Mr. Morillo previously filed in this case?

A Yes, for certain issues.

Q Do you have any changes or corrections to that testimony?

A Subject to the errata that I believe is being passed out right now.

Q Do you have any exhibits to that testimony?

A Yes, I had one to my direct testimony and one exhibit to my rebuttal testimony.

Q Do you have any changes to those exhibits?

A Other than the errata for the rebuttal, I was deleting the exhibit attached to my rebuttal.

COMMISSIONER BRADLEY: How do we deal with this errata. Is this --

MR. MEZA: I believe that we should mark it as a separate exhibit, sir.

COMMISSIONER BRADLEY: Okay.

MR. MEZA: That will probably be the easiest way to do it.

MR. SUSAC: Yes. That would be staff's recommendation, also, to mark as -- the next exhibit I'm showing is 26.

COMMISSIONER BRADLEY: Okay.

(Exhibit 26 marked for identification.)

MR. MEZA: I would also note for the record, Mr. Chairman, that as a result of the errata, BellSouth is withdrawing Exhibit 11.

COMMISSIONER BRADLEY: Okay. We'll mark number as 26 and you are going TO withdraw 11.

MR. MEZA: Yes, sir.

COMMISSIONER BRADLEY: Just for the record, okay.

MR. MEZA: Okay. Mr. Chairman, at this time I would like to ask that Ms. Blake's direct and rebuttal testimony be entered into the record as if read.

COMMISSIONER BRADLEY: Okay. Any objection?

MR. HEITMANN: None.

COMMISSIONER BRADLEY: Without objection, the prefiled testimony of Kathy K. Blake is admitted into the record as though read.

BELLSOUTH TELECOMMUNICATIONS, INC.

DIRECT TESTIMONY OF KATHY K. BLAKE

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 040130-TP

JANUARY 10, 2005

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH"), AND YOUR BUSINESS ADDRESS.

A. My name is Kathy K. Blake. I am employed by BellSouth as Director – Policy Implementation for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. PLEASE PROVIDE A BRIEF DESCRIPTION OF YOUR BACKGROUND AND EXPERIENCE.

A. I graduated from Florida State University in 1981 with a Bachelor of Science degree in Business Management. After graduation, I began employment with Southern Bell as a Supervisor in the Customer Services Organization in Miami, Florida. In 1982, I moved to Atlanta where I held various positions involving Staff Support, Product Management, Negotiations, and Market Management within the BellSouth Customer Services and Interconnection Services Organizations. In 1997, I moved into the State Regulatory Organization with various responsibilities for testimony preparation, witness

support and issues management. I assumed my currently responsibilities in July 2003.

Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?

A. The purpose of my testimony is to provide BellSouth's position on the numerous unresolved policy issues initially raised in the Joint Petition For Arbitration, filed February 11, 2004, with the Florida Public Service Commission ("Commission" or "FPSC") on behalf of NewSouth Communications Corporation ("NewSouth"), NuVox Communications, Inc. ("NuVox"), KMC Telecom V., Inc. ("KMC V") and KMC Telecom III LLC ("KMCIII") (together, "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Company Switched Services, LLC and Xspedius Management Company of Jacksonville, LLC (together, "Xspedius"). I henceforth refer to these companies as the "Petitioners" or "Joint Petitioners". I specifically address the issues that relate to the General Terms and Conditions section of the proposed Agreement as well as Attachments 2 and 3. Further, I provide supporting evidence that the interconnection agreement language proposed by BellSouth is the appropriate language that should be adopted for this interconnection agreement by the Commission.

On July 20, 2004, the Parties filed a Joint Motion for Abeyance with the Commission where the Parties asked for 90-day abatement of the arbitration proceeding so that they could include and address issues relating to the D. C.

Circuit's decision in *United States Telecom Ass'n v.* FCC, 359 F.3d 554 (D.C. Circuit 2004) ("*USTA II*") in this proceeding. During this 90-day abatement period, the Federal Communications Commission ("FCC") issued its *Order and Notice of Proposed Rule Making* in WC Docket No. 04-313, CC Docket No. 01-338 ("*Interim Rules Order*" or "FCC 04-179"). Consequently, the parties agreed to include issues relating to the *Interim Rules Order* into this arbitration proceeding as well.[1] In this regard, my Direct Testimony addresses several supplemental issues relating to *USTA II* and the *Interim Rules Order* ("Supplemental Issues"), which are identified as Issue Nos. S-1 through S-7[2] in the Revised Joint Issues Matrix filed on October 15, 2004.

Q. PLEASE IDENTIFY BELLSOUTH'S WITNESSES AND THE UNRESOLVED ISSUES THEY ADDRESS IN THEIR SUPPLEMENTAL DIRECT TESTIMONY.

A. The chart below identifies the BellSouth witnesses and the unresolved issues they address in whole or in part in their Direct Testimony:

Witness	Issue Nos.
Kathy Blake	G-2, G-4, G-5, G-6, G-7, G-8, G-9, G-12, 2-5, 2-8, 2-9, 2-32, 2-33, 3-4, 3-6 and Supplemental Issues S-1 through S-7
Carlos Morillo	6-5, 7-1, 7-3, 7-5, 7-6, 7-7, 7-8, 7-9, 7-10
Eric Fogle	2-18, 2-19, 2-20, 2-28

[1] On December 15, 2004, the FCC announced its findings in the Final FCC Unbundling Rules; however, as of date, the rules have not been released.

[2] Issue S-8 has been withdrawn by the Joint Petitioners. Furthermore, as set forth in my testimony, BellSouth does not agree that all of the asserted supplemental issues are appropriate for arbitration.

Scot Ferguson	2-25, 6-3
Eddie Owens	6-11, 7-2

Q. DO YOU HAVE ANY PRELIMINARY COMMENTS?

A. Yes. There are numerous unresolved issues in this arbitration that have underlying legal arguments. Because I am not an attorney, I am not offering a legal opinion on these issues. I respond to these issues purely from a policy perspective. BellSouth will address all legal arguments in its post-hearing brief.

UNRESOLVED ISSUES

Item 2; Issue G-2: How should "End User" be defined? (Agreement GT&C Section 1.7)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. As an initial matter, because the issue as stated by the Petitioners and raised in the General Terms and Conditions section of the Agreement has never been discussed by the Parties, the issue is not appropriate for arbitration. The only discussion between the parties regarding the definition of "end user" has been in the context of high capacity EELs. When the parties agreed to extend the arbitration window, it was also agreed that the scope of those negotiations included only issues that arose from the *TRO*. The language addressing "end user" in the General Terms section has been in the Agreement since the parties

began negotiations. This language applies to every single use of the term "end user" throughout the entire agreement, which includes eleven attachments, and was not introduced as a result of the *TRO*. The Petitioners have only become interested in the General Terms language since they reviewed the EELs provisions of the *TRO*. It is not appropriate now, particularly based on the parties' agreement otherwise, to go back and address the term "end user" as used in the General Terms section of the Agreement. Indeed, to do so would require the parties to negotiate, for the first time, the definition of end user as it applies throughout the agreement. If the parties must go through the entire agreement to negotiate each instance the term "end user" appears, there are approximately 300 references that would have to be addressed. Since this has never been negotiated in the more than 18 months that the parties have been meeting to discuss the interconnection agreement, it is not appropriate for the Commission to address the issue as it has been raised by the CLECs.

Q. WHAT IS BELLSOUTH'S PROPOSED DEFINITION OF "END USER"?

A. Notwithstanding the controversy about the appropriateness of addressing this issue, the term end user should be defined as it is customarily used in the industry; that is, the ultimate user of the telecommunications service.

Q. PLEASE EXPAND ON BELLSOUTH'S DEFINITION.

A. BellSouth's language makes clear that an end user is not an intermediary user of the service, such as an Internet Services Provider ("ISP"). Webster's

Dictionary defines "end" as "...the last part of a thing, i.e., the furthest in distance, latest in time, or last in sequence or series... ." In this instance, the "end user" is not necessarily the CLEC's customer, as the Petitioners' language suggests, because that customer may or may not be the end of the sequence or series. In other words, no matter how many wholesalers, enhancers, etc., are in the chain, the "end user" is the ultimate user of the service. For example, a manufacturer of breakfast cereal may have a grocery store chain as its customer, but the end user is the little boy eating his Wheaties at his breakfast table. In contrast, the Petitioners' language creates uncertainty. By defining an end user as any customer, even one who subsequently repackages the service to sell it to another, the Petitioners contradict the commonly understood meaning of the word "end." Put differently, under their definition, end user means every user, not just the one at the end of the process.

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

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The limitation on each Party's liability in circumstances other than gross negligence or willful misconduct should be the industry standard limitation, which limits the liability of the provisioning party to a credit for the actual cost of the services or functions not performed or improperly performed.

Q. PLEASE COMMENT ON THE PETITIONERS' PROPOSAL.

A. First, the Petitioners' proposal makes no sense. They propose that liability be 7.5% of whatever has been billed as of the day on which the claim arose.[3] Under the Petitioners' language, at the beginning of the Agreement, the limitation would function (because nothing would have been billed) to limit liability to $0.00. By the end of the three-year contract term, the potential liability would be massive. There is no rational basis for such a liability clause. In this instance, the limit is, by description, completely unrelated to the severity of the damage or to any other rational basis for limiting damages. Instead, the Petitioners propose an arbitrary approach that would limit damages based on the happenstance at the point during the contract at which the event in question occurs.

Further, the language proposed by the Petitioners would provide incentive to the Joint Petitioners to inappropriately delay the filing of a claim or inappropriately argue that the "day the claim arose" was at the end of the Agreement. Based on the amount of billing between the parties, the day the Joint Petitioners assert "the claim arose" could result in only a few dollars or result in several million dollars. The Joint Petitioners' proposal serves only to encourage CLECs to game the claims and litigation process to increase BellSouth's potential liability.

[3] Originally, the Joint Petitioners proposed that liability be capped at 7.5% of whatever has been billed in total since the beginning of the Agreement. The Joint Petitioners' current proposal, however, does nothing to cure the absurdity of the Joint Petitioners' position.

While the Joint Petitioners seek to convince this Commission that such a provision is reasonable because, they claim, such provisions are common in commercial agreements, what the Joint Petitioners fail to acknowledge or to bring to this Commission's attention is that Interconnection Agreements are not commercial agreements. The services that BellSouth is required to provide are mandated by law, the rates that BellSouth is permitted to charge are set by this Commission, and the terms and conditions under which these services are provisioned are dictated, in many instances, as a result of arbitration decisions. These are not commercial agreements but are instead interconnection agreements mandated under Sections 251 and 252 of the 1996 Act.

BellSouth is asking no more than the industry standard limitation and for the incorporation of limitation of liability language that is consistent if not identical to the language that the Joint Petitioners use with their own customers. For the foregoing reasons, BellSouth requests the Commission adopt BellSouth's proposed language containing industry standard limitations on liability and reject the Petitioners' proposed language.

Q. DO YOU HAVE ANY GENERAL COMMENTS ABOUT ITEMS 4-7 (ISSUES G-4 THROUGH G-7)?

A. Yes. It is important to note in addressing Items 4 through 7 that these issues are all integrally related and should be considered together. It is BellSouth's belief that, by attempting to increase BellSouth's exposure to liability through

decreased limitations of liability and expanding BellSouth's indemnification obligations to essentially cover all failures by BellSouth to perform exactly as the contract requires, Petitioners are attempting to have BellSouth incur the Petitioners' cost of doing business and have BellSouth bear the risk of the business decisions that Petitioners choose to make.

When viewed in a vacuum, some of Petitioners' positions may seem to be reasonable; even more so when viewed in the context of a truly commercially negotiated agreement free from regulation, where prices can be increased to account for increased liability exposure. However, such is not the case here. BellSouth is bound by the cost-based pricing standards of the 1996 Act and cannot change such prices at will to cover the additional costs that would be incurred should the Petitioners' language be adopted. In a legally mandated context, where prices are set based on TELRIC principles, and when taken together and viewed in the context of the Petitioners' end users being able to recover damages from BellSouth even when BellSouth has no relationship with the Petitioners' end users, it is clear that all the Petitioners' seek to do is put themselves at a competitive advantage over BellSouth and all other carriers by having BellSouth assume the risk of their business decisions.

Added to the Petitioners' desire to have all disputes handled by a court of law and the Petitioners' inclusion of several extremely broad provisions that no carrier could ever comply with in every case for the life of the contract (e.g., Item 12), it is clear the Petitioners have no intention of competing with BellSouth or any other carrier on a level playing field. There is no obligation

under the 1996 Act for BellSouth to subsidize the Petitioners' business plan, which would be the effect of the Petitioners' proposed language on these issues.

Item 5; Issue G-5: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks? (Agreement GT&C Section 10.4.2)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth believes that if a CLEC elects not to limit its liability to its end users/customers in accordance with industry norms, the CLEC should bear the risk of loss arising from that business decision. Further, if a CLEC wants to make a product more attractive by offering a service guaranty, there is nothing to stop the CLEC from doing so. It is not appropriate, however, to offer a product under terms that differentiate it from other providers' products and expect BellSouth to pay when BellSouth does not meet the service date the CLEC promised in its service guaranty.

Q. PLEASE PROVIDE AN EXAMPLE OF WHAT THE PETITIONERS ARE REQUESTING.

A. The Petitioners appear to be giving to their end users on the one hand, and taking from BellSouth on the other. For example, under the Petitioners' language, a CLEC could offer its end user $1,000.00 per loop if the CLEC

does not deliver the loop within the interval promised. If, for whatever reason, BellSouth were unable to deliver a loop within the stated interval, the CLEC would then pass on to BellSouth the CLEC's self-created liability to its customers. This approach is not only obviously unfair; it violates the spirit of the 1996 Act. BellSouth is required to provide service to the CLEC at parity to what it provides to its retail customers. Under the Petitioners' approach, the CLEC could promise its customer perfection to make the service more attractive, then hold BellSouth financially accountable if the wholesale input provided by BellSouth falls short of the perfect performance needed to meet the CLEC's guaranty to its customer.

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

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Indirect, incidental or consequential damages should be defined according to the pertinent state law. Although I am not an attorney, it is generally known that, in every state, there is a body of law that has developed as the courts have defined the parameters of what constitutes "indirect, incidental or consequential damages." This definition should control, not some different definition created by the Petitioners.

In contrast, the Petitioners have agreed that the contract should provide that there will be no liability for incidental, indirect or consequential damages, but they also attempt to define these terms in a way that contradicts that agreement. In other words, both parties agree that there should be no liability for these particular types of damages. The Petitioners, however, have proposed to write into the contract a lengthy and confusing set of circumstances under which liability would attach, even if the damages for which there would be liability are "indirect, incidental or consequential." Again, the result is that the agreed upon limitation of liability would be eviscerated.

If the parties agree that, for example, consequential damages should not be recoverable, then this agreement can really only be given full effect if **all** damages of this sort are excluded. However, it makes no sense to agree that there should be no liability for damages of a particular type, and then qualify that agreement to such an extent that it effectively ceases to exist. This, however, is exactly what the Petitioners are attempting to do.

Q. ARE YOU OPPOSED TO THE PETITIONERS' APPROACH FOR ANY OTHER REASON?

A. Yes, BellSouth is also opposed to the "qualifying" language proposed by the Petitioners because it is extremely vague and would be extremely difficult to

implement. The Petitioners have proposed to add a single clause of more than 100 words to this section of the Agreement that is so convoluted that it is virtually indecipherable. The result of this addition would be to create considerable confusion as to when the limitation of liability that the parties have otherwise already agreed upon would, or would not, apply.

Item 7; Issue G-7: What should the indemnification obligations of the parties be under this Agreement? (Agreement GT&C Section 10.5)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, except to the extent caused by the providing Party's gross negligence or willful misconduct, defended and held harmless by the Party receiving services hereunder against any claim, loss or damage arising from the receiving Party's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications, or (2) any claim, loss or damage claimed by the End User of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations arising out of this Agreement.

Q. PLEASE FURTHER EXPLAIN BELLSOUTH'S POSITION.

A. Although it is appropriate for the receiving party to indemnify the providing

party, it is not appropriate for the party providing the services to indemnify the party receiving services in this instance as the Petitioners are suggesting. It is important to consider that interconnection agreements mandated by Sections 251 and 252 of the 1996 Act are not commercial agreements. Contracts achieved through Sections 251 and 252 have a long history beginning with the 1996 Act and continuing through individual arbitration proceedings resolved in each of the states. What must be offered and the standards that apply to those offerings is, in part, drawn from the language of the 1996 Act, and in part, the result of eight years of decisions by the FCC and various state commissions. As noted under Issue G-4, the services included in a Section 251 agreement are provided on the basis of TELRIC pricing and TELRIC pricing does not include the cost of open-ended indemnification of the party receiving services. If one of the costs of providing UNEs and interconnection is damage payments that the Petitioners seek through their language, then those damages should also be recovered through the cost of UNEs and interconnection. However, this is not the case.

Further, although BellSouth is not dictating a course of action for the Petitioners, simply stated, if the Petitioners would limit their liability to their end users through their tariffs or contracts as telecommunications carriers, including the Petitioners, typically do, there would be no issue here to resolve.

Item 8; Issue G-8: What language should be included in the Agreement regarding a Party's use of the other Party's name, service marks, logo and trademarks? (Agreement GT&C Section 11.1)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth's position is that the CLECs' use of BellSouth's name should be limited to (1) factual references that are necessary to respond to direct inquiries from customers or potential customers regarding the source of the underlying services or the identity of repair technicians; and (2) truthful and factual comparative advertising that does not imply any agency relationship, partnership, endorsement, sponsorship or affiliation with BellSouth and that uses the name solely in plain-type, non-logo format. CLECs should not otherwise be entitled to use BellSouth's name, service mark, logo or trademark.

Q. WHY ARE YOU OPPOSED TO THE APPROACH PROPOSED BY THE PETITIONERS?

A. The Petitioners propose to add to the Agreement a provision saying, in effect, that trademark law, whatever it may be, would apply. While in concept this appears reasonable, BellSouth believes that this general citation to law would be insufficient in this particular instance. Based on past, real world experience, BellSouth believes that the Agreement should specifically spell out the limited circumstances under which the CLECs may use BellSouth's name.

Over the last several years, this area is one that has proven to be fraught with disagreement between BellSouth and CLECs as to what sort of comparative

advertising, and the specific use of BellSouth's name in that advertising, should be allowed. Although BellSouth does not object to its name being used in plain-type, non-logo format for the purposes of truthful, comparative advertising, its experience has been that some CLECs use BellSouth's name in their advertising in a way that does not meet this standard, that is, in a way that is not entirely truthful. The CLECs in these instances have, as one might suspect, asserted that their use of BellSouth's name is appropriate. The result is that there is a dispute that must be resolved, or in some cases, litigated. Given BellSouth's experience in this area, it only makes sense to utilize this experience to try to pro-actively avoid as many disputes as possible. Therefore, throughout negotiations, BellSouth has tried to reach an agreement with the Petitioners as to the parameters of acceptable comparative advertising. The Petitioners ultimately, have declined to accept these parameters, and want to revert back to the general language that trademark law applies, whatever it is. Again, BellSouth believes that, to avoid subsequent disputes (over interpretation of the law, or otherwise) it is important that the Agreement specifically spell out the circumstances under which the Petitioners may use BellSouth's name.

Item 9; Issue G-9: Under what circumstances should a party be allowed to take a dispute concerning the interconnection agreement to a Court of law for resolution first? (Agreement GT&C Section 13.1)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth's position is that the Commission or the FCC should resolve disputes as to the interpretation of the Agreement or as to the proper implementation of the Agreement. However, BellSouth has, in an effort to accommodate the Petitioners' desire to broaden the venues available to them, proposed language that would enable the Joint Petitioners to petition another dispute resolution venue for matters that lie outside the jurisdiction or expertise of the Commission or the FCC.

Q. WHAT IS THE RATIONALE FOR BELLSOUTH'S POSITION?

A. Interconnection agreements achieved through either voluntary negotiations or through compulsory arbitration are bound by Section 252 of the Act. Specifically, Section 252(e)(1) requires that any interconnection agreement adopted by negotiation or arbitration be submitted to the state commission for approval. As such, having approved an agreement, the state commission should also resolve any dispute regarding the agreement. The FCC, having regulatory oversight over ILECs and CLECs and their obligations under the Act, may also act in its regulatory capacity to resolve disputes resulting from interconnection agreements. It is the state commissions and the FCC that have the expertise in these matters. In contrast, other courts generally lack the technical expertise or background necessary to be the initial venue for a dispute resolution. Additionally, often the terms and conditions that are included in an interconnection agreement result from an arbitration decision or the language is crafted from a rule or order written by the FCC or this Commission. Clearly, the regulatory bodies that dictate how the services are to

be provisioned pursuant to an interconnection agreement are best suited to interpret and enforce those provisions. Should the issue eventually go to a court of law, the Parties, the state commission and/or FCC would be able to supply a full record of the dispute to the court to use during its deliberations.

BellSouth is not excluding courts of law "from the available list of venues available to address disputes under this agreement" as Petitioners' state. BellSouth's position is that courts of law should not be the first step in resolving a dispute arising out of these regulatory obligations when the state commission or the FCC possess the expertise to decide the matter. In fact, BellSouth's position is that, for those matters which lie outside the jurisdiction or expertise of the Commission or the FCC, the parties would be entitled to seek resolution of the dispute through another venue, such as a court of law.

Q. HAS THE COMMISSION PREVIOUSLY RULED THAT IT HAS THE AUTHORITY TO RESOLVE DISPUTES UNDER AN INTERCONNECTION AGREEMENT APPROVED BY THE COMMISSION?

A. Yes. In a previous arbitration proceeding between BellSouth and AT&T (Docket No. 000731-TP), the Commission addressed its role in resolving agreement disputes in the Final Order on Arbitration, issued on June 28, 2001, Order No. PSC-01-1402-FOF-TP. Specifically, as to whether a third party commercial arbitrator should be used to resolve disputes under the interconnection agreement, the Commission ruled that "[b]ased on the

evidence presented, we find that third party arbitration is neither speedy nor inexpensive. Moreover, nothing in the law gives us explicit authority to require third party arbitration. Consequently, we find that this Commission shall resolve disputes under the Interconnection Agreement." [Page 105].

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

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. No, such an explicit statement in the Agreement is not necessary. Although the Petitioners' position appears reasonable on its face, it is important to understand how this issue has arisen, as well as the subtext of the Petitioners' proposal.

Q. PLEASE FURTHER EXPLAIN BELLSOUTH'S POSITION.

A. It appears that the Petitioners' purpose with this issue is to insure that they get at least two opportunities to negotiate and/or arbitrate the terms of the contract. Once the initial terms of an agreement are settled and the parties sign the Agreement, the Agreement should control on all negotiated items. In an attempt to resolve this issue, BellSouth has offered to include the following language in the General Terms and Conditions of the parties' Agreement:

> This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right or other requirement not expressly memorialized in the agreement is applicable to the Parties by virtue of a reference to an FCC or Commission rule or order or Applicable Law in the Agreement, and such obligation, right or other requirement is disputed by the other Party, the Party asserting that such obligation, right or other requirement is applicable shall petition the Commission for resolution of the dispute and the Parties agree that any finding by the Commission that such obligation, right or other requirement exists shall be applied prospectively by the Parties upon amendment of the Agreement to include such obligation, right or other requirement and any necessary rates, terms and conditions. The Party that failed to perform such obligation, right or other requirement shall be held harmless from any liability for such failure until the obligation, right or other requirement is expressly included in this Agreement by amendment hereto.

The Joint Petitioners' proposed language provides them with the ability to search an order after finalizing the agreement to find language different from that in the agreement, and to use that difference to reopen negotiations or to assert a complaint even if the language that is in the agreement reflects the parties' attempt to implement the requirements of the order. In this manner, nothing is truly settled and the initial contract language is meaningless. The Petitioners should not be able to use this issue to get "two bites at the apple."

Q. PLEASE PROVIDE SUPPORT FOR BELLSOUTH'S POSITION.

A. There are sometimes instances in which, for example, there is a question of how to implement an FCC rule, and especially in light of language that appears in the order that first sets forth the rule. In this instance, the parties would normally review the ordering paragraphs and enter into discussions in an attempt to clarify the meaning of the rule and subsequently develop contract language. Although the Petitioners spent approximately 18 months fully negotiating every aspect of this Agreement, they still want additional language in the General Terms as a "catch-all" for anything they did not negotiate specifically.

There are countless examples of language in the Agreement where the parties have disagreed on the meaning of a rule and, in an effort to negotiate mutually agreeable, contractually binding provisions, the parties have looked to the order for clarification. In some instances, the parties have reached agreement and have drafted mutually agreeable contract provisions. In other cases, the parties were unable to agree and are now arbitrating the issue. Examples of those two scenarios where the Parties are either agreeing to language different from the rule or arbitrating the meaning of the rule based on the *TRO*, include language relating to the definition of interoffice transport, line conditioning, co-carrier cross connects, dedicated transport as it relates to reverse collocation, fiber to the home, and conversions from unbundled network elements to wholesale services.

What the Petitioners seek to do is create a third category, contract language that has been agreed to and that set forth the respective obligations of the

parties and yet may later be challenged by a Petitioner as not truly reflecting what the Parties had agreed to. In that manner, as explained above, the Petitioners would always get "two bites at the apple" - the first bite during contract negotiations and arbitration of those provisions where agreement was not reached and the second bite at some later, unspecified time, when they would seek out some aspect of an order and, based on their interpretation at that point in time, they would allege that BellSouth had violated its obligations under the Agreement. This would put BellSouth in the intolerable position of not knowing exactly what its contractual obligations are until the Petitioners alleged they had violated them. The main purpose of negotiation and arbitration is to resolve such issues at the initiation of the contract so that the parties can live up to its terms for the life of the contract.

In contrast to the Joint Petitioners' language, BellSouth's proposed language acknowledges an underlying obligation to provide services in accordance with applicable rules, regulations, etc. and that the parties have negotiated what those obligations are. However, in the unlikely event that an issue arises in the future wherein a party asserts that there is an obligation that has not been included in the agreement based on the law at the time the agreement was entered into, and the parties had not otherwise negotiated their obligations with respect thereto, then the parties will attempt to resolve that issue by amending the agreement to include such obligation. In the event that the parties cannot agree on what the obligation is, or if there even is an obligation, then the commission should resolve that dispute. In the event that an obligation exists that was not previously included in the interconnection agreement, the parties

should then amend the agreement *prospectively* to include such an obligation. To require either party to comply with an obligation that was not known, due to differing interpretations of the order, for example, would be inappropriate. BellSouth is not attempting to avoid its obligations under the law; it is simply trying to ensure that it knows what those obligations are so that it can comply with them.

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

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. If the Joint Petitioners fail to transition Mass Market Switching, Enterprise Market Loops or Dedicated Transport or high-capacity transport (as those terms are defined in Item 111) (collectively referred to as the "Eliminated Elements") prior to the expiration of the Transition Period (as defined in the *Interim Rules Order*) and the Joint Petitioners have not entered into a separate commercial agreement providing otherwise, BellSouth's position is as follows:

Eliminated Elements including Mass Market Switching Functions ("Switching Eliminated Elements")

If the Joint Petitioners submit an order to transition Switching Eliminated Elements to a comparable resale service within 30 days of the expiration of the Transition Period, the applicable nonrecurring and recurring charges set forth

in BellSouth's tariff, subject to the appropriate resale discounts, would apply for such a transition. If instead, the Joint Petitioners choose to disconnect the Switching Eliminated Element within this same time period, the applicable disconnect charge from the parties Agreement for the eliminated element for the end user in question would apply.

If the Joint Petitioners fail to submit an order to either transition or disconnect a Switching Eliminated Element within 30 days of the expiration of the Transition Period, BellSouth will transition the elements to a comparable resale service on behalf of the Joint Petitioners. In this situation, the Joint Petitioners will be charged the applicable nonrecurring and recurring charges set forth in BellSouth's tariff, subject to the appropriate resale discounts. In addition, the Joint Petitioners would be charged BellSouth's labor costs in identifying and processing the transition of the Switching Eliminated Elements to resale.

In the unlikely event that a comparable resale service is not available, BellSouth may disconnect the Switching Eliminated Elements and charge the applicable disconnect charge. BellSouth, however, is currently not aware of any existing Switching Eliminated Element that does not have a comparable resale service.

In all cases, until Switching Eliminated Elements have been transitioned or disconnected, the applicable recurring and nonrecurring rates for Switching Eliminated Elements shall apply as set forth in the Agreement.

Eliminated Elements Other than Switching Eliminated Elements ("Other Eliminated Elements")

If the Joint Petitioners submit an order to transition Other Eliminated Elements to a comparable service within 30 days of the expiration of the Transition Period, the applicable nonrecurring and recurring charges set forth in BellSouth's FCC No. 1 Tariff would apply. If instead, the Joint Petitioners choose to disconnect the Other Eliminated Elements within this same time period, the applicable disconnect charge from the parties' Agreement for the eliminated element for the end user in question would apply. Until such time as the Other Eliminated Elements are transitioned or disconnected, the rates, terms, and conditions set forth in the Agreement for the transitioned elements during the Transition Period will apply.

If the Joint Petitioners fail to submit an order to either transition or disconnect an Other Eliminated Element within 30 days of the expiration of the Transition Period, BellSouth may transition the elements to a comparable service on behalf of the Joint Petitioners. In this situation, the Joint Petitioners would be charged the applicable nonrecurring and recurring charges set forth in BellSouth's FCC No. 1 Tariff in addition to BellSouth's labor costs in identifying and processing the transition of the Other Eliminated Elements to a comparable service. The rates, terms and conditions for the comparable service will apply as of the date following the expiration of the Transition Period.

In the unlikely event a comparable service is not available, BellSouth may disconnect the Other Eliminated Element and charge the applicable disconnect charge. BellSouth, however, is currently not aware of any existing Other Eliminated Element that does not have a comparable service.

Vacatur of *Interim Rules Order*

In the event a court of competent jurisdiction modifies or vacates the *Interim Rules Order*, the Joint Petitioners shall immediately transition Switching Eliminated Elements and Other Eliminated Elements pursuant to the above process applies from the effective date of such vacatur or modification.

Final FCC Unbundling Rules

If the Final FCC Unbundling Rules do not require the unbundling of Mass Market Switching, Enterprise Market Loops or High Capacity Transport, the Joint Petitioners would be required to transition such elements pursuant to the process set forth above, subject to any modifications to the transition requirements set forth in the Final FCC Unbundling Rules; provided however, that if the Final FCC Unbundling Rules modify, are in conflict with, or are otherwise different from the rates, terms and requirements set forth in the Agreement, the Final FCC Unbundling Rules shall supercede the Agreement.

To the extent that BellSouth is no longer required to provide access to any network element on an unbundled basis pursuant to Section 251 of the Act, the Joint Petitioners would be required to follow the above transition process applied as of the effective date of the order eliminating such obligation

Item 26; Issue 2-8: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated

to make available pursuant to Section 271 of the Act? (Attachment 2, Section 1.7)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Consistent with the FCC's errata to the *Triennial Review Order*, 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. Unbundling and commingling are Section 251 obligations. Services not required to be unbundled are not subject to Section 251. When BellSouth provides an item pursuant only to Section 271, BellSouth is not obligated by the requirements of Section 251 to either combine or commingle that item with any other element or service. If BellSouth agrees to do so, it will be done pursuant to a commercial agreement.

Q. PLEASE EXPLAIN YOUR REFERENCE TO THE FCC's *TRIENNIAL REVIEW ORDER* ERRATA.

A. In its original *TRO* at paragraph 584, the FCC stated: "As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act." However, in its errata released September 17, 2003, the FCC specifically amended paragraph 584 to delete any reference to section 271. The amended sentence now reads as follows: **"As a final matter, we require** that incumbent LECs permit

commingling of UNEs and UNE combinations with other wholesale facilities and services, including any services offered for resale pursuant to section 251 (c)(4) of the Act."

In making this change, the FCC correctly noted that there are network elements identified in section 271 that are no longer subject to section 251 unbundling requirements. The FCC has clarified that BellSouth is only obligated to permit commingling between UNEs and UNE combinations (subject to section 251) and wholesale facilities and services.

Q. DID THE D.C. CIRCUIT'S DECISION, ISSUED ON MARCH 2, 2004, SUPPORT BELLSOUTH'S POSITION ON THIS ISSUE?

A. Yes. In its discussion of "Section 271 Pricing and Combination Rules", the D.C. Circuit agreed with the FCC's determination for checklist items four (loops), five (transport), six (switching) and ten (call-related databases) regarding TELRIC pricing and the duty to combine. First, the Court stated

> ...The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-252. ...
>
> But the FCC also found that the BOCs' unbundling obligations under the independent checklist items differed in some important respects from those under §§ 251-252. Two such differences are salient here. First, the Commission determined that TELRIC pricing was not appropriate in the absence of impairment; for elements for which unbundling was required only under § 271, the ruling criterion is the §§ 201-02 standard that

> rates must not be unjust, unreasonable, or unreasonably discriminatory. Order ¶¶ 656-64. Second, the Commission decided that, in contrast to ILEC obligations under § 251, the independent § 271 unbundling obligations didn't include a duty to combine network elements.

USTA, 359 F.3d at 588-589.

Further, the D.C. Circuit stated: "We agree with the Commission that none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 competitive checklist. Of course, the independent unbundling under § 271 is presumably governed by the *general* nondiscrimination requirements of § 202." Id. at 589. Therefore, it is clear that both the FCC and D.C. Circuit have determined that there is no requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the 1996 Act.

Item 27; Issue 2-9: When multiplexing equipment is attached to a commingled circuit, should the multiplexing equipment be billed under the jurisdictional authorization (Agreement or tariff) of the lower or higher bandwidth service? (Attachment 2, Section1.8.3)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. When multiplexing equipment is attached to a commingled circuit, the multiplexing equipment should be billed from the same jurisdictional authorization (Agreement or tariff) as the higher bandwidth service. Further,

the Central Office Channel Interface (COCI), necessary for the lower level service, will be billed from the same jurisdictional authorization (tariff or Agreement) as the lower bandwidth service.

Multiplexing (e.g., 3/1) is required to aggregate lower-level bandwidth circuits (DS1s) upon a higher-level bandwidth circuit (DS3) or voice grade/digital service upon a DS1. Multiplexing is an option of the higher-level bandwidth circuit and is ordered with it. It is necessary in order to channelize the DS3 for use with lower-level circuits, which is at parity with how retail services are provisioned. Further, each lower-level bandwidth circuit requires a COCI in order to interface with the multiplexer. Therefore, the COCI is ordered with the lower-level bandwidth circuit, which is also at parity with how retail services are provisioned. Thus, the COCI is an option associated with the lower-level bandwidth.

Item 50; Issue 2-32: How should the term "customer," as used in the FCC's EEL eligibility criteria rule, be defined? (Attachment 2, Section 5.2.5.2.1-7)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Because BellSouth is not obligated to provide new high-capacity EELs after the Interim Period and must maintain existing high-capacity EELs during the Transition Period (as set forth in Items 111 and 112), this issue is only relevant during this twelve-month time period, and the Commission should find as

follows:[4]

The term "customer" as used in the FCC's EEL eligibility criteria should be defined as the end user of an EEL. The high capacity EEL eligibility criteria apply only to End User circuits since a loop is a component of the EEL and the FCC definition of a loop requires that it terminate to an "end-user" customer premises.

Q. WHAT IS BELLSOUTH'S RATIONALE FOR ITS POSITION?

A. Again, an EEL is a loop-transport combination as specified in paragraph 575 of the *TRO*. Defining a loop, the FCC stated, "Specifically, the local loop network element is a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an *end-user* customer premises." *TRO* at n. 620 (emphasis added). An EEL, therefore, must terminate to an end user's customer premises.

BellSouth understands that the Joint Petitioners' concern with this issue is that they believe BellSouth's definition would prohibit an ISP customer from being considered an end user. While ISP providers are not end users, as that term is typically used in the industry, BellSouth has agreed to include language specifically stating that the Joint Petitioners may use loops, and therefore EELs to serve ISP customers. Additionally, BellSouth has proposed language to

[4] To the extent the Final FCC Unbundling Rules require BellSouth to continue to provide DS1 or DS3 loops or transport and to the extent the Final FCC Unbundling Rules do not change the EELs eligibility criteria, this issue would be relevant for the time period following the Final Unbundling Rules.

clarify that the EEL eligibility criteria apply to the use of EELs for both wholesale and retail purposes. With the concessions that BellSouth has made to the Joint Petitioners on this language, BellSouth is unsure why the Joint Petitioners are unwilling to resolve it.

Item 51; Issue 2-33: (B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed? (Attachment 2, Sections 5.2.6, 5.2.6.1, 5.2.6.2, 5.2.6.2.1 & 5.2.6.2.3)

Q. WHAT IS BELLSOUTH'S POSITION ON ITEM 51B?

A. Because BellSouth is not obligated to provide new high-capacity EELs after the Interim Period and must maintain existing high-capacity EELs during the Transition Period (as set forth in Issues 111 and 112), this issue is only relevant during this twelve-month time period, and the Commission should find as follows:[5] BellSouth will provide notice to CLECs stating the cause upon which BellSouth rests its allegations of noncompliance with the service eligibility criteria at least 30 calendar days prior to the date of the audit.

Q. WHAT IS BELLSOUTH'S POSITION ON ISSUE 51C?

[5] To the extent the Final FCC Unbundling Rules require BellSouth to continue to provide DS1 or DS3 loops or transport and to the extent the Final FCC Unbundling Rules do not change the EELs eligibility criteria, this issue would be relevant for the time period following the Final Unbundling Rules.

A. The audit shall be conducted by an independent auditor and the auditor must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA). The auditor will perform an "examination engagement" and issue an opinion regarding the CLEC's compliance with the qualifying service eligibility criteria. The independent auditor's report will conclude whether the CLEC has complied in all material respects with the applicable service eligibility criteria. Consistent with standard auditing practices, such audits require compliance testing designed by the independent auditor, which typically include an examination of a sample selected in accordance with the independent auditor's judgment.

BellSouth will select the auditor. As paragraph 627 of the *TRO* states, "In particular, we conclude that incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." (emphasis added). Paragraph 627 goes on to describe the situation in which the CLEC would be responsible for the cost of the audit.

Q. THE PETITIONERS' PROPOSED LANGUAGE ATTEMPTS TO ADD ADDITIONAL REQUIREMENTS. PLEASE RESPOND.

A. The Petitioners language attempts to add four requirements: 1) a third-party, mutually agreed-upon auditor; 2) a mutually agreeable location and timeframe; 3) "other requirements" for establishing the independence of the auditor; and, 4) a redefinition of "materiality." None of these supposed requirements appear

in the *TRO*.

Q. PLEASE ADDRESS EACH OF THE PETITIONERS' ADDITIONAL REQUIREMENTS.

A. First, I address the Petitioners' request for a "third-party, mutually agreed-upon auditor." Next, because they are interrelated, I address as a group the "other requirements" for establishing the independence of the auditor. At Section 5.2.6.2, the Petitioners' proposed language advocates a third-party, mutually agreed upon auditor. This is a pointless step designed only as a delaying tactic. Because the *TRO* requires, and the parties agree, that the audit should be conducted according to AICPA standards, neither the specific auditor nor the independence of the auditor should be a factor. AICPA standards govern each of these areas. No other requirements are needed. If a CLEC is abusing the service eligibility requirements, these objections provide a simple path to delay the audit indefinitely.

Second, the Petitioners also call for a mutually agreeable location and timeframe. Again, these provide convenient "outs" for the CLEC to delay an audit, and BellSouth should not be required to expend the resources to force an audit to which it has an unqualified annual right. In addition, the AICPA standards provide widely agreed upon and used procedures for conducting audits. Further specifications here are pointless.

Finally, the Miriam-Webster Online Dictionary (http://www.miriamwebster.com/cgi-bin/dictionary) defines "comply" as, "to

conform or adapt one's actions to another's wishes, to a rule, or to necessity" and "material" as, "having real importance or great consequences." So, read another way, the FCC said the auditor "will conclude whether the competitive LEC [has conformed to the rule] in all [important] respects ..." *TRO* at ¶ 626. The CLEC will have either conformed to the rules in all the important respects or it will not. The Petitioners' proposal would rewrite the FCC's statement in a way that simply doesn't make sense. It would state that if some non-compliance is found, the auditor "will conclude [the extent to which] the competitive LEC [has conformed to the rule] in all [important] respects ..." *Id.*

Item 63; Issue 3-4: Under what terms should CLEC be obligated to reimburse BellSouth for amounts BellSouth pays to third party carriers that terminate BellSouth transited/CLEC originated traffic? (Attachment 3, Sections 10.10.6 – KMC; 10.8.6 – NSC & NVX; 10.13.5 – XSP)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Both BellSouth and the Petitioners appear to agree that the CLECs should reimburse BellSouth for third party charges when such charges are covered by the agreement between BellSouth and the terminating carrier. However, BellSouth's position is that the originating carriers (the Joint Petitioners in this case) are responsible for the payment of intercarrier compensation to the terminating carriers, and the originator of the traffic rather than the transit provider must ensure that the terminating carrier is appropriately compensated. There may be instances where BellSouth's interconnection agreement with the

terminating carrier does not specifically address Transit Traffic, but in the absence of an agreement between the originating carrier and the terminating carrier, the terminating carrier will look to BellSouth for payment. In the event that a terminating third party carrier imposes on BellSouth any charges or costs for the delivery of Transit Traffic originated by a CLEC, the CLEC should reimburse BellSouth for all charges paid by BellSouth.

Q. PLEASE PROVIDE THE RATIONALE FOR BELLSOUTH'S POSITION.

A. In instances where a CLEC originates a call and BellSouth, as the transit provider, delivers that call to an Independent Company ("ICO"), certain ICOs charge BellSouth terminating access even though BellSouth is not the toll provider for the originating CLEC's end user and is not receiving toll revenue from that end user. ICOs have agreements with BellSouth for jointly provided services, which were executed prior to the 1996 Act and, thus, do not address transit traffic from and to CLECs because none existed at that time. BellSouth has attempted to renegotiate these agreements and, in some cases, BellSouth has requested that the ICOs cease billing BellSouth for such traffic because "transit traffic" is not covered by the agreement between the ICO and BellSouth. Consequently, BellSouth must ensure that its new contracts protect it against being drawn into the middle of a dispute between the ICOs and any carrier sending traffic to the ICOs' end users over BellSouth's network. Such protection ensures that BellSouth will not be financially penalized for its good business practice of delivering – not blocking – transit traffic.

It is the responsibility of each carrier, pursuant to Section 251(a) of the Act, to interconnect directly or indirectly with all other carriers. The CLECs certainly may opt to interconnect with the ICOs indirectly if an intermediary carrier, such as BellSouth, is willing to provide transiting functions. However, it is still the obligation of the originating carrier to make arrangements with the terminating carrier with respect to delivery of and compensation for such transit traffic. BellSouth is unwilling to provide a transit function if the financial obligation to compensate rests with BellSouth and not the originating carrier, which in this case would be the Joint Petitioners. Such an outcome is not required by the 1996 Act, and is clearly contrary to reasonable business practices. Furthermore, although it has been suggested that BellSouth should simply refuse to pay ICOs for such traffic, this solution is not practical given the longstanding agreements between the ICOs and BellSouth. The Petitioners have also suggested that BellSouth should refuse to pay the ICOs in the instance where the originating carriers have not entered into agreements or compensation arrangements with the ICOs for terminating such traffic. The Petitioners make this suggestion without indicating that they will agree to enter into compensation arrangements with the ICOs, thus, the Petitioners' suggested course of action would leave the terminating carriers, i.e., the ICOs, with no way to recover the costs associated with terminating the Petitioners' traffic.

Q. PLEASE EXPLAIN WHY BELLSOUTH IS NOT REQUIRED TO ACT AS A TRANSIT SERVICES PROVIDER FOR CLECS OR ANY OTHER CARRIERS.

A. Although BellSouth clearly has an obligation to interconnect with other carriers under section 251(c)(2) of the 1996 Act, it is BellSouth's position that ILECs do not have a duty to provide transit services for other carriers. Indeed, in its *Virginia Opinion and Order*[6] released July 17, 2002, the Wireline Competition Bureau of the FCC acknowledged that the FCC has never imposed a duty to provide transit services, stating as follows:

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

Id. at ¶ 117 (emphasis added).

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[6] 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 No. 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 Opinion and Order*).

Although the Wireline Competition Bureau of the FCC made a similar finding at ¶ 119 of the *Virginia Opinion and Order* regarding WorldCom, it also made an additional finding regarding Verizon's duty to serve as a billing intermediary, stating as follows:

> WorldCom's proposal would also require Verizon to serve as a billing intermediary between WorldCom and third-party carriers with which it exchanges traffic transiting Verizon's network. We cannot find any clear precedent or Commission rule requiring Verizon to perform such a function. Although WorldCom states that Verizon has provided such a function in the past, this alone cannot create a continuing duty for Verizon to serve as a billing intermediary for the petitioners' transit traffic. We are not persuaded by WorldCom's arguments that Verizon should incur the burdens of negotiating interconnection and compensation arrangements with third-party carriers. Instead, we agree with Verizon that interconnection and reciprocal compensation are the duties of all local exchange carriers, including competitive entrants.

Id. at ¶ 119.

Furthermore, the *TRO* clearly reaffirmed the fact that the FCC's "rules have not required incumbent LECs to provide transiting." *See TRO,* at fn 1640.

Consistent with the 1996 Act and the FCC's *TRO* and *Virginia Opinion and Order*, BellSouth is only willing to agree to provide a transiting function where it can receive compensation for the use of its network in switching and transporting the CLEC's traffic, and where BellSouth is not responsible for any compensation to the terminating carrier. However, where the CLEC has failed

to make arrangements with the terminating carrier to compensate the terminating carrier for such traffic, and the terminating carrier imposes costs and charges on BellSouth, BellSouth should be able to seek reimbursement from the originating CLEC.

Q. DOES BELLSOUTH REVIEW AND DISPUTE THIRD PARTY BILLS IN THE SAME MANNER THAT IT REVIEWS AND DISPUTES BILLS FOR ITS OWN TRAFFIC FROM THE SAME PARTY?

A. Yes. BellSouth reviews, disputes and pays third party invoices in a manner that is at parity with its own practices for reviewing, disputing and paying such invoices. If BellSouth believes the ICO has inappropriately billed BellSouth for calls, BellSouth will dispute such charges and seek reimbursement from the ICO. BellSouth does review, dispute and pay ICO bills for the CLECs' transit traffic in the same manner as it does for its own traffic in Florida, subject to the terms of the agreements between BellSouth and the ICOs. However, by insisting that BellSouth be responsible for disputing bills of all ICOs for all CLEC and CMRS transit traffic, the CLECs are attempting to impose on BellSouth, at BellSouth's own cost and expense, the obligation to become embroiled in the middle of disputes between CLECs and ICOs – disputes that would never occur if the CLECs would make arrangements with terminating ICOs for termination of the CLEC originated traffic, as the 1996 Act requires.

Item 65; Issue 3-6: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and

ISP-Bound Transit Traffic? (Attachment 3, Sections 10.10.1 – KMC; 10.8.1 – NSC; 10.13 - XSP)

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. First, BellSouth is not required to provide a transit traffic function because it is not a Section 251 obligation under the 1996 Act. Therefore, should BellSouth agree to provide the transit traffic function, it should be at rates, terms and conditions contained in a separately negotiated agreement. However, if BellSouth agrees to include this function in its Agreement, that fact should not be used to penalize BellSouth and impose rates for a service that, pursuant to a separate agreement, the Commission would not even be privy to. BellSouth should be able to impose upon a CLEC a Tandem Intermediary Charge for local transit and ISP-bound transit traffic because BellSouth: (1) is not obligated to provide the transit function to a CLEC; and (2) the CLEC has the ability, and, indeed, the right pursuant to Sections 251(a) & (b) of the 1996 Act, to request direct interconnection to other carriers. Interestingly, many CLECs use the transit function because they find it more efficient and economical than direct trunking. However, they want this more efficient, more economical alternative at a cheaper rate, like TELRIC, or at no rate at all. Additionally, BellSouth incurs costs beyond those for which the Commission-ordered TELRIC rates were designed to address, such as the costs of sending records to the CLECs identifying the originating carrier, the costs of ensuring that BellSouth is not being billed for a third party's transit traffic, and the costs that BellSouth has incurred and continues to incur due to disputes arising from

the failure on the part of the CLECs to enter into traffic exchange arrangements with terminating carriers. BellSouth does not currently charge the CLECs for these records and does not recover those costs in any other form.

SUPPLEMENTAL ISSUES

Q. SHOULD THE COMMISSION DEFER RESOULTION OF THE SUPPLEMENTAL ISSUES IN THIS ARBITRATION PROCEEDING?

A. Yes. While BellSouth believes that it is appropriate to include issues relating to *USTA II* and the *Interim Rules Order* in this arbitration proceeding, BellSouth submits that the Commission should defer resolution of the Supplemental Issues to the generic proceeding BellSouth petitioned the Commission to establish on October 29, 2004 ("Generic Proceeding").The Generic Proceeding will address issues relating to the *Triennial Review Order*, *USTA II*, and the *Interim Rules Order* and includes issues that are similar if not identical to Supplemental Issues Nos. S1 through S-6.[7] To avoid duplicative efforts and unnecessary costs in litigating the same issues in multiple proceedings, the Commission should defer these Supplemental Issues to the Generic Proceeding and incorporate its findings there into this case.

In the event the Commission decides not to defer these issues to the Generic Proceeding (which it should), I provide BellSouth's position for each of the

[7] Issue No. S-7 (Item 114) is not appropriate for arbitration because it exceeds the scope of the parties' agreement regarding what could be raised as a Supplemental Issue.

Supplemental Issues below.

Item 108,[8] Issue S-1: How should the Final FCC Unbundling Rules be incorporated into the Agreement?

Q. WHAT ARE THE "FINAL FCC UNBUNDLING RULES"?

A. The Final FCC Unbundling Rules are the permanent rules that the FCC will issue in response to *USTA II's* vacatur of certain FCC unbundling rules ("Final FCC Unbundling Rules" or "Final Unbundling Rules"). Specifically, in *USTA II*, the D.C. Circuit vacated the FCC's rules associated with the unbundling of mass market local switching, high capacity dedicated transport, and high capacity loops, including dark fiber. The D.C. Circuit summarized the vacated FCC unbundling rules as follows:

> We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the subdelegation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). *We also vacate and remand the Commission's nationwide impairment determinations with respect to these elements.*[9]

In the *Interim Rules Order*, the FCC set forth a comprehensive 12-month plan, consisting of two phases to stabilize the market while it prepares its Final

[8] The Issues Matrix, filed with this Commission on October 15, 2004, mistakenly included two Item 107s. Issue S-1 should be Item 108 and the item numbers for the issues that follow, S-2, S-3, etc., should follow sequentially. My testimony reflects the correct numbering of the issues.

Unbundling Rules. First, the FCC required ILECs to continue to provide unbundled access to mass marketing switching, enterprise market loops, and high capacity dedicated transport under the rates, terms and conditions set forth in CLEC interconnection agreements as of June 15, 2004 until the earlier of (1) the FCC issuing its Final Unbundling Rules; or (2) six months after Federal Register publication of the *Interim Rules Order* (March 12, 2005) (this period is defined hereafter as the "Interim Period").[10] Second, in the event the FCC fails to establish its Final Unbundling Rules prior to March 12, 2005, the FCC established "transitional measures" for an additional six months ("Transition Period") that would allow CLEC to serve existing customers with the vacated elements but at higher rates. *Id.*

This issue addresses how the FCC's Final Unbundling Rules should be incorporated into the parties' agreement.

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The Agreement should automatically incorporate the Final FCC Unbundling Rules immediately upon those rules becoming effective for the following reasons.

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9 *USTA II,* 359 F.3d at 594 (emphasis added).

10 *See Interim Rules Order* at ¶ 1. The FCC further stated that the rates, terms, and conditions frozen as of June 15, 2004 during the Interim Period could be superseded by (1) voluntary agreements; (2) intervening FCC order; and (3) a state commission order raising the rates for network elements. *See Interim Rules Order* at ¶1.

First, as established in the *Interim Rules Order*, the FCC clearly intended that its Final Unbundling Rules as well as the Transition Period would take effect without delay. Specifically, in paragraph 22 of the *Interim Rules Order*, the FCC stated:

> In order to allow a speedy transition in the event we ultimately decline to unbundled switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements. To that end, we do not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs of section 251 obligations with respect to some or all of the elements, but under any such presumption, the result of such proceedings must reflect the transitional structure set forth below.

The FCC restated this general principal in paragraph 23 of the *Interim Rules Order*: "Thus, whatever alterations are approved or deemed approved by the relevant state commission may take effect quickly if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order." *Interim Rules Order* at ¶ 23.

Contrary to the Joint Petitioners' position, there is nothing in the *Interim Rules Order* to even suggest that the FCC contemplated that its Final Unbundling Rules would be the subject of long-drawn-out negotiations and dispute resolution proceedings before being made applicable, which is exactly what the

Joint Petitioners request. To the contrary, the *Interim Rules Order* makes it clear that the FCC intended for the speedy incorporation of its Final Unbundling Rules. BellSouth's position advances this expressed intention and unambiguous instruction while the Joint Petitioners' position only advances unnecessary delay. The Joint Petitioners' position is not surprising given that they appear to have no incentive to make their Agreement compliant with the current status of the law.

Second, the failure to automatically incorporate the FCC's Final Unbundling Rules into CLEC agreements results in discrimination against facilities-based carriers that have already made their agreements compliant with the current law. It also discriminates against those carriers that have negotiated commercial agreements with BellSouth based upon the presumption that all carriers will be subject to the FCC's Final Unbundling Rules without unnecessary delay. Delaying the implementation of the current status of the law by requiring negotiations and protracted dispute resolution only benefits those CLECs that have no incentive to abide by the Final FCC Unbundling Rules.

Item 109, Issue S-2: Should the Agreement automatically incorporate any intervening order of the FCC adopted in WC Docket 04-313 or CC Docket 01-338 that is issued prior to the issuance of the Final FCC Unbundling Rules to the extent any rates, terms or requirements set forth in such an order are in conflict with, in addition to, or otherwise different from the rates, terms and requirements set forth in the Agreement?

Q. WHAT DOES THIS ISSUE ADDRESS?

A. In the *Interim Rules Order*, the FCC recognized that the rates, terms, and conditions frozen as of June 15, 2004 during the Interim Period could be superseded by an intervening order of the FCC (e.g., an order addressing a pending petition for reconsideration). *See Interim Rules Order* at ¶ 29.[11] This issue addresses how the parties should incorporate such intervening orders into their Agreement.

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. For the same reasons discussed above, if the FCC enters an intervening order prior to issuing the Final FCC Unbundling Rules, the requirements of the intervening order should take precedence over rates, terms and conditions in the Agreement that are inconsistent with the rates, terms and conditions set forth in the intervening order. In order to effectuate this, the Agreement should automatically incorporate the findings contained in an intervening order on the effective date of such order.

Q. DO YOU HAVE ANY COMMENTS REGARDING THE JOINT PETITIONERS' ISSUE STATEMENT AND POSITION?

[11] For example, on October 14, 2004, the FCC granted BellSouth's *TRO* Motion for Reconsideration and found that BellSouth did not have an obligation to unbundle fiber-to-the-curb loops. *See Order on Reconsideration*, FCC 04-248, CC Docket 01-338, (rel. Oct. 18, 2004). This order would be considered an intervening order under the *Interim Rules Order*.

A. Yes. With their issue statement, the Joint Petitioners' are improperly expanding the scope of this issue to include consideration of an intervening and potentially conflicting state commission order. The Commission should refuse to consider the issue because it exceeds the parties' agreement regarding the type of issues that could be raised after the 90-day abatement period. Specifically, the parties agreed to only add to the arbitration new issues related to *USTA II* and the *Interim Rules Order*. The Joint Petitioners' issue regarding how an intervening and potentially conflicting state commission order should be incorporated is beyond the scope of the parties' agreement. In addition, the issue is purely hypothetical in nature and not sanctioned by the *Interim Rules Order*, which specifically recognized the possibility that the FCC and only the FCC would issue an intervening order (which it has) during the Interim Period and that any such order would supersede the FCC's findings in the *Interim Rules Order*.

Further, while I am not an attorney, it is my understanding that state commissions are prohibited from ordering anything that conflicts with the *Interim Rules Order*. In fact, the *Interim Rules Order* identified the only type of state commission order that is permissible – one that increases rates for the frozen elements: "[The frozen] rates, terms, and conditions shall remain in place during the interim period, except to the extent that they are or have been superseded by ... (3) (with respect to rates only) a state public utility commission order raising the rates for network elements." *See Interim Rules Order* at ¶ 29. Thus, unless the Commission increases rates for the frozen

elements, the Commission is prohibited from issuing any intervening orders that conflicts with the *Interim Rules Order*.

Further, BellSouth's position is consistent with the Telecommunications Act of 1996 (the "Act"). The unbundling requirements of Section 251 are ***federally*** mandated and do not reference ***state*** law. The reason for this is obvious -- state law is not allowed to frustrate the national regulatory scheme as implemented by the FCC. Although a state commission has the authority to enforce state access and interconnection obligations, it may do so only to the extent "consistent with the requirements" of federal law and so as not to "substantially prevent implementation" of the requirements and purposes of federal law. *See* 47 U.S.C. §251(d)(3).

While the Act is clear on this point, the FCC's *TRO*[12] decision emphasizes and reiterates that states may not use state law to impose additional unbundling requirements. The FCC specifically discussed the potential impact of state law on the federal unbundling regime, noting:

> We also find that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, is limited by the restraints imposed by subsections 251(d)(3)(B) and (C). We are not persuaded by AT&T's argument that a state commission may impose additional unbundling obligations in the context of its review of an interconnection agreement without regard to the federal scheme.... Therefore, we find that the most reasonable interpretation of Congress' intent in enacting sections 251 and

[12] See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338; dated February 20, 2003 and released August 21, 2003 ("*TRO*").

> 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.
>
> ... If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has: either found no impairment - and thus found that unbundling that element would conflict with the limits in section 251(d)(2) - or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)l. Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation.
>
> It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.

TRO at ¶¶ 194, 195. The FCC's reasoning flatly contradicts the Joint Petitioners' expected position that the Commission should require BellSouth to adhere to state-imposed unbundling requirements, regardless of whether such requirements violate or are inconsistent with federal law.

Finally, any state commission order requiring additional unbundling obligations under state law would be invalid without the state commission performing an impairment analysis. This analysis cannot be conducted in the context of a Section 252 arbitration proceeding that addresses BellSouth's federal obligations under the Act. Consequently, the Commission should reject the Joint Petitioners' attempt to convert this Section 252 arbitration into an impairment proceeding under state law and find simply that only an intervening FCC order should be automatically incorporated into the parties'

Agreement.[13]

Q. DO YOU HAVE ANY PRACTICAL CONCERNS WITH THE JOINT PETITIONERS' ISSUE?

A. Yes. Practically speaking, BellSouth would be unable to comply with FCC rules and orders and any contradictory state commission rules and orders for the same subject matter. It is not sound public policy to have competing requirements for the provision of telecommunication service as it would result in a patchwork regulatory environment consisting of potentially ten different rules pertaining to the same services. Such an inefficient environment not only conflicts with the Act and the FCC's express findings but also results in state commissions frustrating the national regulatory scheme implemented by Congress through the Act.

Item 110, Issue S-3: If FCC 04-179 is vacated or otherwise modified by a court of competent jurisdiction, how should such order or decision be incorporated into the Agreement?

Q. WHAT DOES THIS ISSUE ADDRESS?

A. This issue addresses the possibility that the D.C. Circuit or another court of

[13] Pursuant to the *Interim Rules Order*, if the Commission issues an order increasing rates for frozen elements during the *Interim Period*, this order should be automatically incorporated into the Agreement as well.

competent jurisdiction invalidates or vacates the *Interim Rules Order* as a result of the Mandamus Petition filed by the United States Telecommunications Association ("USTA") and certain Regional Bell Operating Companies ("RBOCs").

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. In the event a court of competent jurisdiction vacates all or part of the *Interim Rules Order*, there will be no valid impairment findings with respect to the vacated elements. Accordingly, the parties' Agreement should automatically incorporate the status of the law on the date the order or decision invalidating all or part of the *Interim Rules Order* becomes effective and the parties should invoke the transition process identified in Item No. 23 to convert vacated elements to comparable, non-UNE services. As set forth in my testimony regarding Item No. 23, this transition process maintains the status quo for a minimum of 30 days, rather than disconnecting such services at the end of the Transition Period, and provides for an orderly transition of those elements to comparable services pursuant to BellSouth's tariffs or a commercial agreement. Such a result benefits all parties as it updates the Agreement to incorporate the current status of the law while at the same time providing the Joint Petitioners with a meaningful opportunity to continue receiving the affected services.

Item 111, Issue S-4: At the end of the Interim Period, assuming that the Transition Period set forth in FCC 04-179 is neither vacated, modified, nor superceded, should

the Agreement automatically incorporate the Transition Period set forth in the Interim Order?

Q. WHAT IS THE TRANSITION PERIOD?

A. The Transition Period, as defined in the *Interim Rules Order*, is the six month period following the expiration of the Interim Period (*i.e.* March 12, 2005 or earlier in the event the FCC issues its Final Unbundling Rules prior). The Transition Period only applies if the Final FCC Unbundling Rules are not in effect at the end of the Interim Period or if the Final FCC Unbundling Rules do not find impairment with respect to one ore more of the frozen elements. During the Transition Period, vacated elements for which there has been no finding of impairment will be available to CLECs for their existing customer base but at higher prices. *See* Interim Rules Order at ¶¶ 1, 29. However, during the Transition Period, CLECs are prohibited from adding any new customers at the rates, terms, and conditions set forth in the Transition Period. *Id.* at ¶ 29.

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. For the reasons identified in response to Item 108, if the Final FCC Unbundling Rules are not in effect at the expiration of the Interim Period, the FCC's Transition Period should automatically be incorporated into the parties' Agreement. Again, the FCC's intent in establishing the two-phase, 12 month approach was to stabilize the market while preparing its Final Unbundling

Rules. As found by the FCC, the "twelve-month transition described [in the Interim Rules Order] is essential to the health of the telecommunications market and the protection of consumers." *Id.* at ¶ 17. Additionally, in describing the Transition Period, the FCC stated that it has a "commitment to provide certainty and steadiness in the market . . . beyond the six-month interim period . . . ." *Id.* at ¶¶ 17, 29. Refusing to find that the Transition Period is automatically incorporated into the parties' Agreement upon it becoming effective and instead requiring negotiation and the resulting dispute resolution frustrates this intent as it effectively prohibits the parties' from operating under the Transition Period. In fact, it is quite possible that the Transition Period will expire prior to the time any change of law negotiations/proceedings would be concluded, which is clearly not what the FCC intended.

Q. DO YOU AGREE WITH THE JOINT PETITIONERS' POSITION THAT THE TRANSITION PERIOD IS NOT BINDING ON THE PARTIES?

A. No. While the FCC's NPRM requests comments regarding the need for additional transitional requirements, there can be no doubt that the FCC contemplated and intended for the Transition Period to apply at the expiration of the Interim Period if there were no Final FCC Unbundling Rules at that time, or if there was otherwise no finding of impairment for the vacated elements. The fact that the FCC asked for comments regarding what additional transition requirements should be implemented in the Final FCC Unbundling Rules does not negate that fact that the Transition Period was ordered in the

Interim Rules Order and is an essential component of the FCC's plan to provide stability and market certainty during its twelve month transition plan.

Further, it is unclear why the Joint Petitioners oppose the automatic incorporation of the Transition Plan in the absence of Final FCC Unbundling Rules. Indeed, without it, the Joint Petitioners will have no legal right to obtain new vacated elements after March 12, 2005.

Item 112, Issue S-5: (A) What rates, terms, and conditions relating to switching, enterprise market loops, and dedicated transport were "frozen" by FCC 04-179? (B) How should these rates, terms and conditions be incorporated onto the Agreement?

Q. WHAT DOES THIS ISSUE ADDRESS?

A. The *Interim Rules Order* requires BellSouth to (1) continue to provide unbundled access to mass market switching, enterprise market loops, and high capacity dedicated transport under the same rates, terms, and conditions that applied to the Joint Petitioners' Agreement as of June 15, 2004 for the Interim Period (unless superceded by a voluntary negotiated agreement, an intervening FCC order, or a state commission order increasing rates) (referred to as the "Frozen Rates, Terms, and Conditions"); and to (2) continue to make those elements available during the Transition Period for the Joint Petitioners to serve existing customers (subject to the conditions set forth in the *Interim Rules Order*). *See Interim Rules* Order at ¶ 1. This issue addresses what

specific rates, terms and conditions were frozen by the FCC in the *Interim Rules Order*.

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The rates, terms, and conditions for the following subject elements were frozen by the FCC in the *Interim Rules Order* as specifically set forth in the attached Exhibit KKB-1. This exhibit represents BellSouth's proposed language for this issue and is in addition to the general definitions presented below.

Mass Market Switching should be defined as mass market switching and all elements that must be made available when switching is made available. *See Interim Rules Order* at n.3. Mass market switching includes unbundled access to switching except when the CLEC: (1) serves an end user with four (4) or more voice-grade (DS0) equivalents or lines served by the ILEC in Density Zone 1 of the top 50 MSAs; or (2) serves an end user with a DS1 or higher-capacity service or UNE Loop. Examples of elements or services that must be made available when switching is made available include, but are not limited to, common transport, databases required to be provided when switching is unbundled, the function of combining a switch port with a loop, the provision of DUF records, and signaling. Accordingly, the corresponding rates, terms and conditions for these services would be frozen subject to the conditions and requirements set forth in the *Interim Rules Order*.

Enterprise Market Loops should be defined as those transmission facilities

between a distribution frame (or its equivalent) in the ILEC's central office and the loop demarcation point at an end user customer premises at the DS1 and DS3 level, including dark fiber loops. *TRO* at ¶ 249. The corresponding rates and the technical terms and conditions that are specific to these would be frozen subject to the conditions and requirements set forth in the *Interim Rules Order*.

Dedicated Transport should be defined as the transmission facilities connecting ILEC switches and wire centers in a LATA at a DS1 and DS3 level, including dark fiber transport. *TRO* at ¶ 359. The corresponding rates and the technical terms and conditions for these elements would be frozen subject to the conditions and requirements set forth in the *Interim Rules Order*.

Item 113, Issue S-6: Did USTA II vacate the FCC's unbundling requirement, if any, relating to high-capacity loops and dark fiber?

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. To begin with, as stated in BellSouth's Brief in Opposition to Inclusion of Issues 112(B) and 113(B),[14] BellSouth objects to the inclusion of this issue in this arbitration for a multitude of reasons and will fully brief this issue in its post-hearing brief. Nonetheless, it is clear that *USTA II* vacated the FCC's impairment finding for DS1 and DS3 dark fiber elements. As a result,

[14] When BellSouth filed its Brief, the double numbering error had not been identified. The correct Item Numbers that BellSouth objects to are Item Numbers 113(B) and 114(B).

BellSouth has no 251 obligation to offer these elements including high-capacity loops, high-capacity transport and dark fiber. Notwithstanding any dispute the parties may have on this issue, the issue has been addressed by the *Interim Rules Order* and BellSouth will provide the subject elements pursuant to that *Order* until the Final FCC Unbundling Rules become effective.

Q. DO YOU HAVE COMMENTS REGARDING THE JOINT PETITIONERS' ISSUE STATEMENT AND POSITION?

A. Yes. The Joint Petitioners' position is that neither *USTA II* nor the *Interim Rules Order* affects their right to receive high-capacity loops, high-capacity transport and dark fiber on an unbundled basis. This position requires the Commission to disregard binding federal and FCC authority, is untenable, and is not supported by either *USTA* II or the *Interim Rules Order*. The simple fact is that *USTA II* vacated any requirement for BellSouth to unbundle and provide these high capacity transmission facilities at TELRIC prices and the *Interim Rules Order* addresses how these facilities will be provisioned for a twelve-month transition period for existing CLEC customers. The refusal of the Joint Petitioners to recognize the straightforward and clear wording of the *Interim Rules Order* reveals that their strategy is to use the Commission to circumvent orders of the FCC.

Further, for the reasons discussed in support of Item 109, the Commission is prohibited from establishing a "new" pricing regime for these elements that contradicts the *Interim Rules Order*. Thus, the Joint Petitioners' position

cannot be supported by the law and should be rejected as it is an attempt to convert this Section 252 arbitration into a state cost proceeding for UNEs that no longer exist and cannot be reinstated by a state commission. Notwithstanding the Joint Petitioners' position and assertion, BellSouth recognizes its obligation to offer its high-capacity loops and transport to CLECs pursuant to its Section 271 of the Act obligations. However, contrary to the Joint Petitioners' position, BellSouth is not obligated to provide such elements at TELRIC rates.

Item 114, Issue S-7 <<CLEC ISSUE STATEMENT>>: (A) Is BellSouth obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport? (B) If so, under what rates, terms and conditions? :

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. To begin with, as stated in BellSouth's Brief in Opposition to Inclusion of Issues 112(B) and 113(B), BellSouth objects to the inclusion of this issue in this arbitration for a multitude of reasons and will fully brief this issue in its post-hearing brief. Nonetheless, in my opinion, in their issue statement, the Joint Petitioners' are improperly expanding the scope of this issue to include consideration of an intervening, potentially conflicting state commission order.[15] The Commission should refuse to consider the issue because it exceeds the parties' agreement regarding the type of issues that could be raised

[15] Based on the Joint Petitioners' position statement, it appears that the Joint Petitioners intend to ask the Commission to issue an order invoking state law or interpreting federal law as part of this issue.

after the 90-day abatement period. Specifically, the parties agreed to only add to the arbitration new issues related to *USTA II* and the *Interim Rules Order*. The Joint Petitioners' issue regarding BellSouth's obligation to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport is beyond the scope of this arbitration.

Even if the Commission considers this issue, which it should not, the Commission should reject the Joint Petitioners' attempt to manipulate the Commission into addressing issues that have already been decided by *USTA II* or the *Interim Rules Order*. In fact, there can be no question that *USTA II* extinguished BellSouth's obligation to provide high-capacity transport.

Moreover, the Joint Petitioners' arguments regarding alternative sources of unbundling obligations cannot be supported by a cursory review of the authority they cite. For instance, contrary to the Joint Petitioners' position, there is no independent Section 251 obligation to specifically provide high capacity transport on an unbundled basis. Rather, Section 251 simply addresses BellSouth's obligation to provide interconnection and unbundled network elements under the Act. Further, with their interpretation of Section 251, the Joint Petitioners conveniently fail to recognize that Section 251's unbundling obligation is only triggered upon an impairment finding. As a result of *USTA II*'s vacatur of the FCC's rules relating to high-capacity transport, there is no longer a finding of impairment. With no finding of impairment, there is no current Section 251 unbundling obligation for high-capacity transport.

Likewise, BellSouth has no 271 obligation to unbundle the subject elements at TELRIC and the Commission is prohibited from ordering anything to the contrary. Again, this issue and the Joint Petitioners' positions in general are nothing more than the Joint Petitioners' attempt to circumvent the D.C. Circuit and the *Interim Rules Order* so that they can prolong an inapplicable pricing regime.

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes.

[Docs # 564045]

BELLSOUTH TELECOMMUNICATIONS, INC.

REBUTTAL TESTIMONY OF KATHY K. BLAKE

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 040130-TP

FEBRUARY 7, 2005

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH"), AND YOUR BUSINESS ADDRESS.

A. My name is Kathy K. Blake. I am employed by BellSouth as Director – Policy Implementation for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes. I filed Direct Testimony on January 10, 2005.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. My rebuttal testimony responds to portions of the direct testimony filed by James C. Falvey on behalf of Xspedius Communications, LLC on behalf of its operating subsidiaries, Marva Brown Johnson on behalf of KMC Telecom V, Inc. and KMC Telecom III LLC, Hamilton E. Russell, III, on behalf of NuVox Communications, Inc. and NewSouth Communications Corporation and Jerry

Willis on behalf of NuVox Communications and NewSouth Communications on January 10, 2005.

Q. ARE YOU ADDRESSING ANY ADDITIONAL ITEMS IN THIS REBUTTAL TESTIMONY??

A. Yes. I am adopting certain portions of the direct testimony of BellSouth witness Carlos Morillo. Specifically, I am adopting Item Nos. 88, 97, 100, 101, 102 and 104 and will be rebutting the Joint Petitioner's testimony for these issues. BellSouth witness Scot Ferguson will be adopting Item No. 103 of Carlos Morillo's direct testimony and will be rebutting the Joint Petitioners' testimony as it relates to this item.

SUPPLEMENTAL ISSUES

Q. SHOULD THE FLORIDA PUBLIC SERVICE COMMISSION ("COMMISSION") DEFER RESOULTION OF THE SUPPLEMENTAL ISSUES IN THIS ARBITRATION PROCEEDING?

A. Yes. As I previously asserted in my Direct Testimony, the Commission should defer resolution of the Supplemental Issues to the Generic Proceeding, Docket No. 041269-TP, filed November 1, 2004.[1] In the event the Commission

[1] As an initial matter, BellSouth's position is that all Supplemental Issues addressing BellSouth's federal obligations resulting from *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), the *Interim Rules Order*, issued by the FCC in WC Docket No. 04-313, CC Docket No. 01-338 or the Final Unbundling Rules should be deferred to the Commission's generic UNE proceeding. In no event, however, should issues addressing any state-law obligations be included in such a generic proceeding.

wishes to address the Supplemental Issues in this arbitration, BellSouth's position for each Supplemental Issue is set forth below.

Item 108, Issue S-1: How should the Final FCC Unbundling Rules be incorporated into the Agreement?

Q. WHAT IS THE JOINT PETITIONERS' POSITION AND HOW DO YOU RESPOND?

A. The Joint Petitioners' position on this issue is that the parties should engage in protracted negotiations and then dispute resolution at the Commission before the FCC issues its final unbundling rules ("Final FCC Unbundling Rules") and such rules become effective. Simply put, the Joint Petitioners' position does nothing more than promote delay, which is entirely inconsistent with the intent of the FCC as set forth in the *Interim Rules Order* (I fully explain and describe this intent in my Direct Testimony). Further, contrary to the Joint Petitioners' position, there is nothing in Section 251 of the Telecommunications Act of 1996 (the "Act") that specifically requires the Parties to engage in negotiations and then dispute resolution to address changes in the law as mandated by the FCC. And, in any event, BellSouth's position does not prohibit the parties from engaging in such negotiations and then amending the Agreement if the Parties ultimately agree to something other than what is mandated by the FCC.

More importantly, the Joint Petitioners' position presumes that the parties will disagree over what the FCC meant in issuing its new rules and that dispute

resolution will be required. However, as made clear by the Joint Petitioners concurrence with BellSouth's definition of switching (see Item 112) as well as with other issues that the parties have resolved, there will be portions of the Final FCC Unbundling Rules with which even the Joint Petitioners cannot disagree. Thus, there is no need to frustrate the FCC's stated intent by delaying the total effect of the Final FCC Unbundling Rules. For those limited issues where there is a good faith disagreement over what the FCC ordered, BellSouth will agree to resolve such a dispute before the Commission. However, BellSouth submits that these disputes will be limited and that there should be no dispute over what elements BellSouth is no longer required to unbundle.

It is interesting to note that the Joint Petitioners' position here appears to contradict their position regarding a similar, albeit resolved, issue concerning the effective date of future rate impacting amendments. In fact, for that issue, the Joint Petitioners objected to BellSouth's proposed language asserting that it provided BellSouth with the opportunity to delay the effectiveness of an amendment, and, according to the Joint Petitioners, injected a huge amount of uncertainty into a process that should be simple and straightforward.

For these reasons and those set forth in my Direct Testimony, the Commission should find that the Agreement would automatically incorporate the Final FCC Unbundling Rules immediately upon those rules becoming effective.

Item 109, Issue S-2: Should the Agreement automatically incorporate any

intervening order of the FCC adopted in WC Docket 04-313 or CC Docket 01-338 that is issued prior to the issuance of the Final FCC Unbundling Rules to the extent any rates, terms or requirements set forth in such an order are in conflict with, in addition to, or otherwise different from the rates, terms and requirements set forth in the Agreement?

Q. WHAT IS THE JOINT PETITIONERS' POSITION AND HOW DO YOU RESPOND?

A. The Joint Petitioners' position is that the parties should engage in protracted negotiations and then dispute resolution at the Commission before an intervening order becomes effective. For the reasons identified in responding to the Joint Petitioner's position as to Item 108, the Commission should reject their attempt to frustrate the FCC's intent by imposing unnecessary conditions as to when any intervening order of the FCC should be implemented and find that the Agreement should automatically incorporate the findings contained in an intervening order on the effective date of such order.

In addition, with their Issue Statement, the Joint Petitioners are improperly expanding the scope of this issue to include consideration of an intervening and potentially conflicting state commission order. As set forth in my Direct Testimony, the Commission should refuse to consider the issue because it exceeds the parties' agreement regarding the type of issues that could be raised after the 90-day abatement period. In addition, the issue is purely hypothetical in nature and not sanctioned by the *Interim Rules Order*, which specifically

recognized the possibility that the FCC and only the FCC would issue an intervening order (which it has) during the Interim Period and that any such order would supersede the FCC's findings in the *Interim Rules Order*.

Further, while I am not an attorney, it is my understanding that state commissions are prohibited from issuing orders containing provisions that conflict with the *Interim Rules Order*. In fact, the *Interim Rules Order* identified the only type of state commission order that is permissible – one that increases rates for the frozen elements: "[The frozen] rates, terms, and conditions shall remain in place during the interim period, except to the extent that they are or have been superseded by ... (3) (with respect to rates only) a state public utility commission order raising the rates for network elements." *See Interim Rules Order* at ¶ 29. Thus, unless the Commission increases rates for the frozen elements, the Commission is prohibited from issuing any intervening orders that conflict with the *Interim Rules Order*.

Further, BellSouth's position is consistent with the Act. The unbundling requirements of Section 251 are ***federally*** mandated and do not reference ***state*** law. The reason for this is obvious -- state law is not allowed to frustrate the national regulatory scheme as implemented by the FCC. Although a state commission has the authority to enforce state access and interconnection obligations, it may do so only to the extent "consistent with the requirements" of federal law and so as not to "substantially prevent implementation" of the requirements and purposes of federal law. *See* 47 U.S.C. §251(d)(3).

Finally, any state commission order requiring additional unbundling obligations under state law would be invalid without the state commission performing an impairment analysis. This analysis cannot be conducted in the context of a Section 252 arbitration proceeding that addresses BellSouth's federal obligations under the Act. Consequently, the Commission should reject the Joint Petitioners' attempt to convert this Section 252 arbitration into an impairment proceeding under state law and find simply that only an intervening FCC order should be automatically incorporated into the parties' Agreement.[2]

Item 110, Issue S-3: If FCC 04-179 is vacated or otherwise modified by a court of competent jurisdiction, how should such order or decision be incorporated into the Agreement?

Q. WHAT IS THE JOINT PETITIONERS' POSITION AND HOW DO YOU RESPOND?

A. The Joint Petitioners' position is that the parties should engage in protracted negotiations and then dispute resolution at the Commission before any vacatur or invalidation of the *Interim Rules Order* becomes effective. For the reasons identified in Item 108, the Commission should reject their attempt to delay and

[2] Pursuant to the *Interim Rules Order*, if the Commission issues an order increasing rates for frozen elements during the *Interim Period*, this order should be automatically incorporated into the Agreement as well.

prohibit the implementation of the current status of the law because, in such a scenario, BellSouth would have no obligation to continue to provide the vacated elements. It should also be noted that, in such a case, rather than disconnecting service, BellSouth's transition plan would apply, thereby providing the Joint Petitioners with the opportunity to receive comparable services at non-UNE pricing.

Simply put, in the event a court of competent jurisdiction vacates all or part of the *Interim Rules Order*, there will be no valid impairment findings with respect to the vacated elements. Accordingly, the parties' Agreement should automatically incorporate the status of the law on the date the order or decision invalidating all or part of the *Interim Rules Order* becomes effective and the parties should invoke the transition process identified in Item No. 23 to convert vacated elements to comparable, non-UNE services.

Item 111, Issue S-4: At the end of the Interim Period, assuming that the Transition Period set forth in FCC 04-179 is neither vacated, modified, nor superceded, should the Agreement automatically incorporate the Transition Period set forth in the Interim Order?

Q. WHAT IS THE JOINT PETITIONERS' POSITION AND HOW DO YOU RESPOND?

A. The Transition Period, as defined in the *Interim Rules Order*, is the six-month period following the expiration of the Interim Period (*i.e.* March 12, 2005 or

earlier in the event the FCC issues its Final Unbundling Rules prior). The Transition Period only applies if the Final FCC Unbundling Rules are not in effect at the end of the Interim Period or if the Final FCC Unbundling Rules do not find impairment with respect to one ore more of the frozen elements. During the Transition Period, vacated elements for which there has been no finding of impairment will be available to CLECs for their existing customer base but at higher prices. *See Interim Rules Order* at ¶¶ 1, 29. However, during the Transition Period, CLECs are prohibited from adding any new customers at the rates, terms, and conditions set forth in the Transition Period. *Id.* at ¶ 29.

Moreover, refusing to find that the Transition Period is automatically incorporated into the parties' Agreement upon it becoming effective and instead requiring negotiation and the resulting dispute resolution frustrates the FCC's intent as it effectively prohibits the parties' from operating under the Transition Period. In fact, it is quite possible that the Transition Period will expire prior to the time any change of law negotiations/proceedings would be concluded, which is clearly not what the FCC intended.

Furthermore, it is unclear why the Joint Petitioners oppose the automatic incorporation of the Transition Plan in the absence of Final FCC Unbundling Rules. Indeed, without it, the Joint Petitioners will have no legal right to obtain new vacated elements after March 12, 2005.

Item 112, Issue S-5: (A) What rates, terms, and conditions relating to switching,

enterprise market loops, and dedicated transport were "frozen" by FCC 04-179? (B) How should these rates, terms and conditions be incorporated onto the Agreement?

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The rates, terms, and conditions for the following subject elements were frozen by the FCC in the *Interim Rules Order*, as specifically set forth in the attached Exhibit KKB-1. This exhibit represents BellSouth's proposed language for this issue and is in addition to the general definitions BellSouth presented in my Direct Testimony.

Q. WHAT IS THE JOINT PETITIONERS' GENERAL POSITION?

A. The Joint Petitioners' position is that the rates, terms, and conditions associated with switching, dedicated transport, and enterprise loops, as those elements are defined in the Joint Petitioners' Current Agreements, should continue to apply during the Interim Period. Importantly, these definitions as well as the Current Agreements themselves have yet to be modified to address the FCC's *Triennial Review Order*, also referred to as the *TRO*. Thus, the Joint Petitioners' position is that BellSouth should be obligated to continue to provide switching, dedicated transport, and enterprise loops pursuant to rates, terms, and conditions that do not reflect the FCC's modification of said definitions in the *TRO*.

Q. DO YOU AGREE THAT THE *INTERIM RULES ORDER* REQUIRED THE PARTIES TO DISREGARD PORTIONS OF THE *TRO* THAT WERE NOT VACATED?

A. No, but that is exactly what the Joint Petitioners are recommending. Specifically, the Joint Petitioners take the position that *USTA II*'s vacatur of only certain portions of the *TRO* means that those portions *TRO* that were not vacated are frozen by the *Interim Rules Order*. With such an argument, the Joint Petitioners are now attempting to avoid the implementation of the non-vacated portions of the *TRO*. It is clear, however, that the non-vacated portions of the *TRO* were not impacted by *USTA II* and thus were not frozen by the *Interim Rules Order*. In addition to being inconsistent with the intent of the *Interim Rules Order*, such a position is also inconsistent with the practice of the Parties, as they have reached agreement regarding how some non-vacated elements of the *TRO* will be implemented in the new Agreement.

A good example of this is the Parties' agreement on the language that relieves BellSouth from providing fiber to the home loops ("FTTH"). The *Interim Rules Order* clearly provides for the amendment of the frozen terms and conditions as a result of an intervening FCC Order. Under the Joint Petitioners' theory, while the *TRO* eliminated the obligation to unbundle FTTH, BellSouth would not be permitted to avail itself of that relief; however, based on the FCC's two intervening orders expanding on the FTTH relief (addressing FTTH to multiple dwelling units ("MDU") and fiber to the curb ("FTTC")) BellSouth would be relieved of those obligations. This result is

completely nonsensical and is not supported in any manner by the *Interim Rules Order*. It should be noted that, had the Joint Petitioners amended their Current Agreements to make them *TRO*-compliant, this would not be an issue. Instead, because the Joint Petitioners' goal throughout this proceeding has been to delay those changes in the law that are not CLEC-beneficial, they are now attempting to promote antiquated definitions of enterprise loops and dedicated transport that fail to take into account rulings from the FCC that were not impacted by *USTA II*.

Q. WHAT IS THE JOINT PETITIONERS' POSITION REGARDING THE DEFINITION OF SWITCHING AND HOW DO YOU RESPOND?

A. The Joint Petitioners appears to agree with BellSouth's definition of mass market switching. Thus, it appears that this is no longer an issue.

Q. WHAT IS THE JOINT PETITIONERS' POSITION REGARDING THE DEFINITION OF DEDICATED TRANSPORT AND HOW DO YOU RESPOND?

A. The Joint Petitioners argue that the pre-*TRO* definition of dedicated transport that was in effect on June 15, 2004 in the Current Agreement should apply during the Interim Period. This definition of dedicated transport, however, was modified by the *TRO*. Specifically, in the *TRO*, the FCC excluded entrance facilities and Optical Carrier ("OCn") level transmission facilities from the definition of dedicated transport. Dedicated transport, as defined by the FCC

in the *TRO*, was the only dedicated transport that the D.C. Circuit addressed and ultimately vacated in *USTA II*. Because the *Interim Rules Order* only froze those rates, terms, and conditions associated with the vacated elements, the frozen rates, terms, and conditions are only those that correspond to the DS1 and DS3 elements that were reviewed by the D.C. Circuit as a result of the *TRO* -- transmission facilities connecting ILEC switches and wire centers in a LATA, including dark fiber transport. Stated another way, the only rates, terms, and conditions that are frozen are those that were vacated, which by necessity were those that the FCC addressed through its *TRO* definition of dedicated transport. To hold otherwise, would allow the Joint Petitioners to receive more through the *Interim Rules Order* than what the D.C. Circuit actually reviewed and what the FCC actually ordered. Simply put, it is beyond reason to suggest that the FCC intended to "freeze" rates, terms, and conditions that exceed the scope of what was vacated by *USTA II*. Moreover, to the extent that the Joint Petitioners argue that the definition of dedicated transport should be frozen and, therefore, that they should be entitled to frozen rates, terms and conditions for all levels of dedicated transport, the *Interim Rules Order* would prohibit the Joint Petitioners from ordering new DS0 level dedicated transport after the Interim Period and prohibit the Joint Petitioners from maintaining DS0 level dedicated transport after the Transition Period. Why the FCC would have eliminated an unbundling obligation through its *Interim Rules Order* that was unaffected by the *USTA II* decision is inconceivable and, yet, would be the result of the Joint Petitioners' self serving and nonsensical interpretation of the *Interim Rules Order*.

Q. WHAT IS THE JOINT PETITIONERS' POSITION REGARDING THE DEFINITION OF ENTERPRISE MARKET LOOPS AND HOW DO YOU RESPOND?

A. The Joint Petitioners appear to agree with BellSouth with regard to the definition of enterprise market loops. Notwithstanding the Parties' apparent agreement, the Joint Petitioners contend that the antiquated pre-*TRO* definition of enterprise market loops that was in effect on June 15, 2004 in the Current Agreement should apply during the Interim Period. Specifically, the *TRO* defined enterprise market loops as those transmission facilities between a distribution frame (or its equivalent) in the ILEC's central office and the loop demarcation point at an end user customer premises at the DS1 and DS3 level, including dark fiber loops. *TRO* at ¶ 249. This definition of "enterprise market loops" was the only definition that the D.C. Circuit addressed and ultimately vacated in its review in *USTA II* of the FCC's rules in the *TRO* regarding BellSouth's obligation to provide enterprise market loops on an unbundled basis. Because the *Interim Rules Order* only froze those rates, terms, and conditions associated with the vacated elements, the frozen rates, terms, and conditions are only those that are associated with transmission facilities between a distribution frame (or its equivalent) in the ILEC's central office and the loop demarcation point at an end user customer premises at the DS1 and DS3 level, including dark fiber loops. Stated another way, the only rates, terms, and conditions that are frozen are those that meet the FCC's *TRO* definition of enterprise market loops.

To hold otherwise, would allow the Joint Petitioners to receive more through the *Interim Rules Order* than what the D.C. Circuit actually reviewed and would conflict with the non-vacated portions of the *TRO*. For instance, if the Commission adopts the Joint Petitioners' position, the Joint Petitioners would obtain fiber to the home and fiber to the curb loops during the Interim Period, even though the FCC removed any obligation of BellSouth to provide these loops in the *TRO* and its *TRO Reconsideration Order*. It is beyond reason to suggest that the FCC intended to "freeze" rates, terms, and conditions that exceed the scope of what was vacated or even addressed in *USTA II* (the fiber to the curb ruling in the *TRO Reconsideration Order* was issued after *USTA II* and the *Interim Rules Order*).

Q. HOW DO YOU RESPOND TO JOINT PETITIONER WITNESS RUSSELL'S ASSERTION ON PAGE 61 OF HIS TESTIMONY THAT THE INTERIM RULES ORDER AMENDMENT IS NOT APPLICABLE TO THEM?

A. The Joint Petitioners erroneously claim that they are immune from complying with their change of law obligations in their Current Agreements to implement the *Interim Rules Order* as a result of an alleged agreement between the Parties. Contrary to the Joint Petitioners' claim, there is no such agreement. Specifically, as part of the 90-day abatement agreement to address issues relating to *USTA II* in this arbitration proceeding, the parties also agreed to not proceed with a change of law proceeding to implement *USTA II* and its progeny. This limited decision does not and did not encompass any agreement

to avoid the change of law process for the *Interim Rules Order* or the Final FCC Unbundling Rules.[3] Simply put, BellSouth never agreed to what the Joint Petitioners assert. Indeed, the FCC had not even issued the *Interim Rules Order* at the time the Parties reached the agreement regarding the 90-day abatement. Further, the Parties' agreement to continue operating under the Current Agreement until the new Agreement came into place was not to "freeze" the Joint Petitioners current UNE attachment, as intimated by the Joint Petitioners. Rather, it was to address the Joint Petitioners' concern that BellSouth would "bump" the Joint Petitioners from their Current Agreement during the 90-day abatement. In any event, requiring the Joint Petitioners to incorporate the *Interim Rules Order* and the Final FCC Unbundling Rules into their Current Agreement would not violate such an agreement as they would still be operating under their Current Agreement until moving to the new Agreement. BellSouth will fully address this matter in its Post-Hearing Brief if this matter ultimately becomes an issue in this proceeding.

Item 113, Issue S-6: Did USTA II vacate the FCC's unbundling requirement, if any, relating to high-capacity loops and dark fiber?

Q. ON PAGE 61 OF HIS TESTIMONY JOINT PETITIONER WITNESS FALVEY ARGUES THAT *USTA II* DID NOT VACATE THE FCC RULES WITH REGARD TO THE PROVISION OF UNBUNDLED ACCESS TO

[3] Although I am not a lawyer, I understand that "progeny" is a defined, legal term that means, "a line of opinions succeeding a leading case <*Erie* and its progeny>" as defined by the 2000 edition of *Black's Law Dictionary*. The *Interim Rules Order* is not an opinion of a court or state commission reaffirming or restating the D.C. Circuit's findings in *USTA II* and thus does not comply with the above-definition.

DS1, DS3, AND DARK FIBER LOOPS. HOW DO YOU RESPOND?

A. The Joint Petitioners devote numerous pages of their testimony arguing a position that is not supported by a clear reading of *USTA II*. The simple fact is that *USTA II* vacated the FCC's impairment finding that resulted in the requirement for BellSouth to unbundle and provide high capacity transmission facilities at TELRIC prices. Pursuant to the Act, there can be no obligation to unbundle any element unless the FCC has found impairment. In fact, the FCC recognized that *USTA II* eliminated impairment findings for these facilities and thus issued *Interim Rules Order* to address how these facilities will be provisioned for a twelve-month transition period for existing CLEC customers. The refusal of the Joint Petitioners to recognize the straightforward and clear wording of the *Interim Rules Order* reveals that their strategy is to use the Commission to circumvent orders of the FCC. Furthermore, the Joint Petitioners are attempting to expand the scope this issue to address BellSouth's Section 271 obligation or state requirements. BellSouth fully addressed these arguments in my Direct Testimony. Fundamentally, however, a Section 252 arbitration proceeding is not the proper forum to address these arguments and the Commission should reject them.

Item 114, Issue S-7 <<CLEC ISSUE STATEMENT>>: (A) Is BellSouth obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport? (B) If so, under what rates, terms and conditions? :

Q. ON PAGE 70 OF HIS TESTIMONY, MR. RUSSELL ADMITS "THAT THE

COMMISSION IS NOW WITHOUT THE POWER TO MAKE [SIC] FINDING OF NON-IMPAIRMENT FOR PURPOSES OF SECTION 251" AND THEN, IMMEDIATELY IN THE NEXT SENTENCE, "REQUEST THAT THE COMMISSION REQUIRE UNBUNDLING OF DEDICATED TRANSPORT UNES PURSUANT TO SECTION 251." HOW DO YOU RESPOND?

A. Under their interpretation of Section 251, the Joint Petitioners conveniently fail to recognize that Section 251's unbundling obligation is only triggered upon an impairment finding. As a result of *USTA II*'s vacatur of the FCC's rules relating to high-capacity transport, there is no longer a finding of impairment. With no finding of impairment, there is no current Section 251 unbundling obligation for high-capacity transport.

Likewise, and as I discussed in my Direct Testimony, BellSouth has no Section 271 obligation to unbundle the subject elements at Total Element Long Run Incremental Cost ("TELRIC") and the Commission is prohibited from ordering anything to the contrary. Again, this issue and the Joint Petitioners' positions in general are nothing more than the Joint Petitioners' attempts to circumvent the D.C. Circuit and the *Interim Rules Order* so that they can prolong an inapplicable pricing regime. Notwithstanding the Joint Petitioners' position and assertions, BellSouth recognizes its Section 271 obligation to offer its high-capacity transport to CLECs.

UNRESOLVED ISSUES

Item 2; Issue G-2: How should "End User" be defined? (Agreement GT&C Section 1.7)

Q. JOINT PETITIONERS' WITNESS JOHNSON STATES ON PAGES 5-6 OF HER TESTIMONY THAT BELLSOUTH'S PROPOSED LANGUAGE IS AMBIGUOUS AND SOMEHOW ATTEMPTS TO LIMIT WHO CAN OR CANNOT BE A CLEC'S CUSTOMER. PLEASE RESPOND.

A. First, there is nothing ambiguous about BellSouth's proposed definition. The end user is the actual user of the service, i.e., the customer. BellSouth's language makes clear that an end user is not an intermediary user of the service. Webster's Dictionary defines "end" as "...the last part of a thing, i.e., the furthest in distance, latest in time, or last in sequence or series....". In this instance, the "end user" is not necessarily the CLEC's customer, as the Petitioners suggest, because that customer may or may not be the end of the sequence or series. In other words, no matter how many wholesalers, enhancers, etc., are in the chain, the "end user" is the ultimate user of the service. For example, a manufacturer of breakfast cereal may have a grocery store chain as its customer, but the end user is the little boy eating his Wheaties at his breakfast table. In contrast, the Joint Petitioners' language does create uncertainty. By defining an end user as any customer, even one who subsequently repackages the service to sell it to another, the Joint Petitioners contradict the commonly understood meaning of the word "end." Put

differently, under their definition, "end user" means every user, not just the one at the end of the process.

Contrary Ms. Johnson's assertion at page 6 of her testimony, BellSouth is in no way attempting to limit who can or cannot be a CLEC's customer. CLECs can serve any customer they desire within the limits of the law and of their regulatory certification. The issue is not whom CLECs serve, but rather what service qualifies for UNEs and UNE prices. Not every customer a CLEC serves is eligible to be served by Enhanced Extended Links ("EELs"). The provisions of the Act were not designed to allow CLECs to re-wholesale to another carrier. The Joint Petitioners would change the industry-accepted definition of end user in order to improperly expand the categories of customers that can be served via UNEs.

Q. AT PAGES 7-8 OF HER TESTIMONY, MS. JOHNSON, ALLEGES THAT BELLSOUTH USES DIFFERENT DEFINITIONS OF END USER WHERE IT SUITS BELLSOUTH. PLEASE RESPOND.

A. The instance Ms. Johnson is referring to regards service provided to an Internet Service Provider ("ISP"). This is a unique, isolated instance in which the Joint Petitioners are attempting to take a narrow exception where an ISP is referred as an end user customer and translate it into a rule that would enable them to serve an entity other than an end user with an EEL. The discussion particular to ISPs that the Joint Petitioners refer to (for example, KMC's Section 10.6.1 of Attachment 3) follows a more general discussion in Section 10.6 which

addresses NPA/NXX Codes within a rate center assigned to end users outside of the Local Access Transport Area ("LATA") where that rate center is located. Although in hindsight, use of the term end user as applied to an ISP is clearly inappropriate, it is obvious its purpose in Section 10.6.1 is to highlight the fact that a CLEC cannot collect local reciprocal compensation payments for non-local traffic, whether it is from an end user or from an ISP.

It is important to remember that the FCC defines an EEL as a combination of local loop and transport and the FCC further defines a local loop as terminating at an end user customer's premises. The Joint Petitioners' position would result in an EEL no longer being an EEL, and a loop no longer being a loop, by the FCC's definition. Under the Joint Petitioners' interpretation, they could provision an EEL to another carrier and say that the facility between BellSouth and the "customer's" central office is a loop, thus allowing them to, in actuality, designate a transport-to-transport combination as an EEL. In fact, a transport-to-transport combination is not an EEL, because an EEL is only transport connected to a local loop, and a local loop terminates at an end user customer's premises.

Q. AT PAGE 7, MS. JOHNSON REFERS TO "OTHER APPARENT COMPLICATIONS RAISED BY BELLSOUTH'S PROPOSED DEFINITION." PLEASE RESPOND.

A. Ms. Johnson raises this point in reference to the FCC's eligibility criteria established for EELs. This point is addressed more fully in my Direct

Testimony under Issue 2-32.

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

Q. IS JOINT PETITIONERS' POSITION CONSISTENT WITH THEIR OWN TARIFFS?

A. No. The Joint Petitioners' position is a one-sided approach that benefits only the Joint Petitioners and is inconsistent with how they treat their own customers. In fact, consistent with BellSouth's position on this issue, the Joint Petitioners' own retail tariffs limit their liability to the actual cost of the services or function not performed. This fact proves that (1) the Joint Petitioners are attempting to impose an obligation on BellSouth that they are not willing to take on with respect to their own customers and (2) the Joint Petitioners are attempting to use the limitation of liability provision as a means to generate revenue. Indeed, given the fact that their own tariffs limit their respective liability to the actual cost of the services or function not performed, receiving 7.5% of amounts collected from BellSouth potentially results in an undeserved financial windfall for the Joint Petitioners. The simple fact is that, contrary to their position, the Joint Petitioners employ standard limitation of liability language with their respective customers. This is the same language that BellSouth is requesting and that should be adopted by the Commission.

Q. ON PAGES 11-12, MS. JOHNSON CONTENDS THAT BELLSOUTH'S PROPOSED LANGUAGE "IS NOT COMMERCIALLY REASONABLE IN THE TELECOMMUNICATIONS INDUSTRY." HAS THE FCC ADDRESSED THE SCOPE OF LIABILITY IN THE CONTEXT OF INTERCONNECTION AGREEMENTS?

A. Yes. In its decision in CC Docket No. 00-218, the FCC held:

> Specifically, we find that, in determining the scope of Verizon's liability, it is appropriate for Verizon to treat WorldCom in the same manner as it treats its own customers. Verizon has no duty to provide perfect service to its own customers; therefore, it is unreasonable to place that duty on Verizon to provide perfect service to WorldCom. In addition, we are not convinced that Verizon should indemnify WorldCom for all claims made by WorldCom's customers against WorldCom. Verizon has no contractual relationship with WorldCom's customers, and therefore lacks the ability to limit its liability in such instances, as it may with its own customers. As the carrier with 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 to this provision.[4]

The above-findings by the FCC are consistent with BellSouth's position on this issue.

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

[4] FCC Memorandum Opinion and Order, released July 17, 2002 in CC Docket No. 00-218, ¶709

Q. IS BELLSOUTH ATTEMPTING TO "DICTATE THE TERMS OF SERVICE BETWEEN PETITIONERS AND THEIR CUSTOMERS" AS ALLEGED ON PAGE 8 OF MR. RUSSELL'S TESTIMONY?

A. Absolutely not. Except as otherwise controlled by a state or federal law or rule, the Joint Petitioners are free to establish whatever terms and conditions they please with their customers. BellSouth is simply stating that, if the Petitioners make a business decision not to limit their liability in their tariffs and contracts, that is their decision and the Petitioners should bear the business risk resulting from the decision. Any liability that may occur as a result of that decision should be borne by the CLECs and not by BellSouth.

Q. YOU MENTIONED ABOVE, IN REGARDS TO ISSUE G-4, THAT THE JOINT PETITIONERS' TARIFFS INCLUDE LIMITATION OF LIABILITY PROVISIONS. IF THAT IS THE CASE, THEN WHY IS THIS AN ISSUE?

A. BellSouth is at a loss as to why Joint Petitioners continue to object to the proposed language because, consistent with industry standard, they all have standard limitation of liability provisions that severely limit their financial exposure. Given this fact, it is unclear why this is even an issue, unless of course, the Joint Petitioners intend to remove such provisions and rely upon BellSouth to fund their customers' claims against the Joint Petitioners.

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

Q. DO YOU HAVE ANY COMMENTS REGARDING THE JOINT PETITIONERS' POSITION?

A. Yes. With their stated position, the Joint Petitioners are attempting to provide their end users (either directly or vis-à-vis the Joint Petitioners) a right to receive indirect, incidental, or consequential damages against BellSouth. The Joint Petitioners' end users are not a party to this Section 251 Interconnection Agreement and should not be given any rights against BellSouth, who is not their service provider. Further, pursuant to the Joint Petitioners' tariff filings, the Joint Petitioners, themselves, prohibit their end users from recovering indirect, incidentals or consequential damages against them. Thus, it appears that the Joint Petitioners are creating litigation opportunities for their end users against BellSouth for damages they are insulated from.

Q. IN HIS TESTIMONY, MR. RUSSELL CONTENDS THAT BELLSOUTH'S POSITION IS INTERNALLY INCONSISTENT BECAUSE THERE ARE OTHER LEGAL MATTERS, SUCH AS INDEMNIFICATION, THAT BELLSOUTH SEEKS TO DEFINE WITHIN THE CONTEXT OF THE AGREEMENT (PAGES 12-13). HOW DO YOU RESPOND?

A. The comparison that the Petitioners are attempting to make is not valid. Again, while I am not a lawyer, it is my understanding that although the term

"indemnification" has a particular legal meaning, it is not so well defined that one can simply place language in a contract, for example, that "Party A agrees to indemnify Party B," and have both parties know precisely what is expected of them. Instead, it is necessary to set forth the specifics of who is indemnifying whom for what and under what circumstances. In contrast, the issue of what constitutes consequential damages is a purely legal issue that is defined in every state by a body of case law that has evolved over a long period of time. It is, therefore, possible for parties to simply say that consequential damages will be excluded, because the existing case law has defined what constitutes this type of damages with such specificity that no further negotiation of what does or does not constitute these damages is needed or warranted.

If the Petitioners' position is that there should be liability for indirect, incidental or consequential damages, then they can certainly argue for this position (although BellSouth does not agree that this should be the case). It makes no sense, however, for the Petitioners to agree that there should be no liability for these types of damages, and then try to alter the legally operative terms so that, at least in some instances, the result would be exactly the opposite of what the parties have agreed upon.

Item 7; Issue G-7: What should the indemnification obligations of the parties be under this Agreement? (Agreement GT&C Section 10.5)

Q. ON PAGE 16 OF HIS TESTIMONY, MR. RUSSELL CONTENDS THAT

BELLSOUTH'S PROPOSAL DEVIATES FROM "GENERALLY-ACCEPTED CONTRACT NORMS". HOW DO YOU RESPOND?

A. As I discussed in my Direct Testimony, what must be offered and the standards that apply to those offerings is, in part, drawn from the language of the Act, and in part, the result of eight (8) years of decisions by the FCC and various state commissions. The services included in a Section 251 agreement are provided on the basis of TELRIC pricing and TELRIC pricing does not include the cost of open-ended indemnification of the party receiving services. If one of the costs of providing UNEs and interconnection is damage payments that the Petitioners seek through their language, then those damages should also be recovered through the cost of UNEs and interconnection. However, this is not the case. Thus, the Petitioners' reliance upon commercial agreements is misplaced.

Q. PLEASE COMMENT ON MR. RUSSELL'S CLAIM ON PAGE 16 THAT "BELLSOUTH'S PROPOSAL IS COMPLETELY ONE-SIDED."

A. The Joint Petitioners' claim that the Commission must reject BellSouth's language because it is one-sided rings hollow because of other provisions advanced by the Joint Petitioners that are one-sided in favor of them. For example, the Joint Petitioners' limitation of liability language favors only the Joint Petitioners because they primarily purchase service from BellSouth. In addition, the Joint Petitioners do not dislike one-sided limitation of liability language with their customers as they all have limitation of liability language

in their tariffs that equal or exceed the language BellSouth proposes.

Item 9; Issue G-9: Should a party be allowed to take a dispute concerning the interpretation or implementation of any provision of the agreement to a Court of law for resolution without first exhausting its administrative remedies? (Agreement GT&C Section 13.1)

Q. MR. FALVEY ASSERTS AT PAGES 9-10 OF HIS TESTIMONY THAT BELLSOUTH'S POSITION DOES NOT ADEQUATELY ACCOMMODATE PETITIONER'S ABILITY AND DESIRE TO BRING MATTERS BEFORE A COURT OF LAW. IS THAT AN ACCURATE READING OF BELLSOUTH'S POSITION?

A. **No, it is not. BellSouth recognizes that certain** issues and disputes may not fall squarely under the expertise of either the FCC or this Commission. In those cases, CLECs should be permitted to seek relief in a court of law. However, BellSouth maintains that Petitioners should not forego resolution of issues at the appropriate regulatory body unless it is obvious, or has been determined, that neither the FCC nor this Commission has expertise or jurisdiction over the dispute. Additionally, often the terms and conditions that are included in an interconnection agreement result from an arbitration decision or the language is crafted from a rule or order written by the FCC or this Commission. Clearly, the regulatory bodies that dictate how the services are to be provisioned pursuant to an interconnection agreement are best suited to interpret and enforce those provisions. To prematurely bring a dispute to a court of law that

might otherwise be addressed and resolved by a regulatory agency is to risk that the court will remand the case to the appropriate body.

Q. ON PAGE 9, MR. FALVEY CLAIMS THAT BELLSOUTH'S PROPOSAL COULD BE USED TO EFFECTIVELY FORCE CLECS TO RE-LITIGATE THE SAME ISSUE IN NINE (9) DIFFERENT STATES. HOW DO YOU RESPOND?

A. I am somewhat confused by the Mr. Falvey's contention as the Joint Petitioners have no problem arbitrating in nine (9) states. Further, the Joint Petitioners' position is entirely inconsistent with their statement in Direct Testimony that "the Commission and the FCC are obviously the expert agencies with respect to a number of (if not the majority of) the issues that might arise." (Falvey's Direct Testimony at pages 7-8.) Given this admission, the Joint Petitioners should have no objection to BellSouth's language. And, if the Joint Petitioners want to resolve interpretation and implementation of disputes in a single proceeding, the Joint Petitioners can file a proceeding at the FCC.

Q. ON PAGE 10, MR. FALVEY ALSO CLAIMS THAT BELLSOUTH'S PROPOSAL WOULD CAUSE "NEEDLESS BIFURCATION OF CLAIMS". HOW DO YOU RESPOND?

A. The Joint Petitioners' position results in the same outcome. If either party to the Agreement filed for dispute resolution with a court of law for resolution of

issues relating to the implementation or interpretation of the Agreement, the most likely outcome would be for the court to defer the case to the state commission for resolution. Such action would require both parties to incur unnecessary cost and would cause substantial delay in resolving the dispute.

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

Q. ON PAGE 19 OF HIS TESTIMONY, MR. RUSSELL CLAIMS THAT BELLSOUTH'S PROPOSED LANGUAGE IS INADEQUATE BECAUSE IT PURPORTS TO ADOPT PRINCIPLES THAT DIFFER FROM GEORGIA CONTRACT LAW AND FOR THAT MATTER, BLACK-LETTER CONTRACT LAW. HOW DO YOU RESPOND?

A. Although I am not an attorney, and as I discussed in my Direct Testimony, BellSouth's proposed language acknowledges an underlying obligation to provide services in accordance with applicable rules, regulations, etc. and that the parties have negotiated what those obligations are. However, in the unlikely event that an issue arises in the future wherein the parties dispute whether there is an obligation regarding substantive telecommunications law that has or has not been included in the agreement, and the parties further dispute whether they had or had not negotiated their obligations with respect thereto, then the parties will attempt to resolve those issues by amending the agreement to define and incorporate include such obligation. In the event that

the parties cannot agree on what the obligation is, or whether such obligation exists under the law, then the Commission should resolve that dispute. In the event that an obligation exists that was not previously included in the interconnection agreement, the parties should then amend the agreement *prospectively* to include such an obligation. To require retrospective compliance in such circumstances would be inappropriate. BellSouth is not attempting to avoid its obligations under the law; it is simply trying to ensure that its obligations are sufficiently defined so that it can comply with them and so that it can expect compliance.

Q. ON PAGE 20 OF MR. RUSSELL'S TESTIMONY, THE JOINT PETITIONERS OBJECT TO BELLSOUTH'S REVISED PROPOSED LANGUAGE CONTENDING THAT "BELLSOUTH IS ADDING AN ADMINISTRATIVE LAYER, A POTENTIAL PROCEEDING TO DETERMINE WHETHER A PARTY IS OR IS NOT BOUND BY APPLICABLE LAW." HOW DO YOU RESPOND?

A. Contrary to the Mr. Russell's contention, it is the Joint Petitioners' proposed language that instigates the need for on-going litigation. In fact, NuVox and NewSouth have attempted to exploit a similar provision in their current interconnection agreements with BellSouth in an attempt to circumvent the provision in those agreements regarding how audits will be conducted to verify compliance with the EEL eligibility criteria. The Joint Petitioners' proposed "catch-all" language seeks to memorialize the "two bites at the apple" strategy they have taken in the NuVox and NewSouth EELs audit disputes. The first

bite occurs during the contract negotiations (resulting in the agreed-upon EEL audit language in the Current Agreement, for example) and the second bite occurs if and when the agreed-upon language creates results that are unfavorable to the Joint Petitioners. The Joint Petitioners want to have a ready option at such times to canvass all laws, presumably from any source, to see if a better result for them might be obtained. This is a fundamental difference in business approaches between the Joint Petitioners and BellSouth. BellSouth organizes itself around its obligations. The Joint Petitioners, at least in this effort, seek to keep obligations fluid for purposes that appear to be inconsistent with the Act.

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

Q. **WHAT IS THE JOINT PETITIONERS' POSITION ON THIS ISSUE AND** HOW DO YOU RESPOND?

A. The main theme of the Joint Petitioners' position and testimony on this issue seems to be to delay or avoid any action that impedes their ability to continue to obtain vacated elements at the supra-discounted rates they currently enjoy. This position is most certainly rooted in their apparent belief that there is no advantage or incentive to converting the vacated elements and incurring the associated rate changes any sooner than is absolutely necessary. While that position may make sense to the Petitioners, it does little to further the

implementation of the intent of the FCC's rules or to address this arbitration issue before the Commission.

Contrary to the Joint Petitioners' position, the CLECs should be responsible for ensuring that they are not violating the Agreement that they have negotiated, executed and agreed to abide by. Therefore, it should be the Joint Petitioners' obligation to identify the arrangements that are no longer offered or are not in compliance with the terms of the Agreement and, therefore, must be transitioned. Additionally, it is reasonable to expect the Joint Petitioners to have sufficient records and the ability to research them in order to identify those arrangements that no longer comply with the terms of the Agreement since they have ordered the services in question.

Further, only the Joint Petitioners know whether if their plan is to disconnect the facility completely or convert the facility to a BellSouth resold service or access service or to a service offered under a commercial agreement with BellSouth. The Joint Petitioners have options with respect to the facilities they require to provide services to end users, and they also have options as to whether they choose to self-provision those facilities, buy the facilities from BellSouth or purchase facilities from a third party. Because BellSouth cannot select such options for the Joint Petitioners, the Joint Petitioners must not only identify the noncompliant facilities, but must also instruct BellSouth, via the appropriate ordering mechanism, as to whether they choose to disconnect the facility or to replace it with a comparable service.

Q. AT PAGE 17 OF MS. JOHNSON'S TESTIMONY, SHE STATES THAT BELLSOUTH'S LANGUAGE WOULD "... PLACE THE BURDEN ON THE PARTY THAT DOES NOT NECESSARILY THINK THAT A SERVICE CHANGE IS DESIRABLE OR NECESSARY." PLEASE RESPOND.

A. **Both the Joint Petitioners and BellSouth are equally bound by the Agreement.** Both parties have an obligation to honor the requirements and spirit of the Agreement. The Petitioners' tactic of "catch us if you can" is not appropriate. BellSouth should not be solely responsible for compliance with the Agreement. Because the non-compliant services are owned by the Joint Petitioners, the Joint Petitioners are in the best position to identify those services.

Item 26; Issue 2-8: Should BellSouth be required to commingle UNEs or Combinations with any service, network element or other offering that it is obligated to make available pursuant to Section 271 of the Act? (Attachment 2, Section 1.7)

Q. ON PAGE 22 OF MS. JOHNSON'S TESTIMONY, SHE ASSERTS THAT BELLSOUTH SHOULD BE REQUIRED TO COMMINGLE UNES OR COMBINATIONS OF UNES WITH ANY SERVICE, NETWORK ELEMENT, OR OTHER OFFERING THAT IT IS OBLIGATED TO MAKE AVAILABLE PURSUANT TO SECTION 271 OF THE ACT. HOW DO YOU RESPOND?

A. Ms. Johnson's position is without merit. As I discussed in my Direct

Testimony, BellSouth's position is consistent with the FCC's errata to the *Triennial Review Order*, in that there is **no** requirement to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the Act. **Unbundling and** commingling are Section 251 obligations. **Services not required to be** unbundled are not subject to Section 251. When BellSouth provides an item pursuant only to Section 271, BellSouth is not obligated by the requirements of Section 251 to either combine or commingle that item with any other element or service. If BellSouth agrees to do so, it will be done pursuant to a commercial agreement.

Q. ON PAGE 23 OF HER TESTIMONY, MS. JOHNSON CLAIMS THAT "NOTHING IN THE FCC'S RULES OR THE *TRO* SUPPORT [BELLSOUTH'S] INTREPRETATION." IS THIS TRUE?

A. No. BellSouth's interpretation of its commingling requirements is based solely on the obligations stated in the *TRO* by the FCC. Specifically, paragraph 579 states "competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services."

Contrary to their belief, the Joint Petitioners are not prevented from

commingling wholesale services purchased from BellSouth's Special Access tariff with UNEs and UNE combinations provided pursuant to Section 251. However, there is no requirement for BellSouth to commingle UNEs or UNE combinations with services, network elements or other offerings made available only pursuant to Section 271 of the Act. To the extent 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 Sections 251 or 252 of the Act and, therefore, such commingling is outside the scope of an Interconnection Agreement. Any agreement to commingle such a 271 service should be addressed, if at all, by a separate agreement negotiated between the parties.

Item 51; Issue 2-33: (B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed? (Attachment 2, Sections 5.2.6, 5.2.6.1, 5.2.6.2, 5.2.6.2.1 & 5.2.6.2.3)

Q. WHAT IS BELLSOUTH'S POSITION WITH RESPECT TO THE AMOUNT OF TIME BETWEEN THE NOTICE TO THE CLEC OF BELLSOUTH'S INTENTION TO CONDUCT AN AUDIT AND THE START DATE OF THE AUDIT?

A. BellSouth's position is that the audit should commence 30 days from the date that BellSouth notifies the CLEC that it will conduct an audit. 30 days is ample time for the CLEC to identify the necessary personnel to assist with the

audit and to make arrangements to receive the auditors. 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.

Q. IN MR. RUSSELL'S TESTIMONY ON PAGE 31, HE SUGGESTS REQUIRING BELLSOUTH TO PRE-IDENTIFY THE SPECIFIC CIRCUITS TO BE EXAMINED IN THE COURSE OF AN AUDIT AND RELAY THAT INFORMATION TO THEM PRIOR TO THE COMMENCEMENT OF THE AUDIT. PLEASE COMMENT.

A. As an initial matter, a requirement to identify specific circuits beforehand defeats the purpose of the compliance audit. The purpose of an EELs audit is to assess, via an independent, third party auditor, the extent to which carriers are complying with the rules for determining the usage of EELs circuits. 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. This attempt by Petitioners to limit the BellSouth audit solely to a list of pre-identified circuits would negate the effectiveness of the audit. During the conduct of an audit, findings may dictate that the audit follow a direction not originally intended in the initial audit scope. If the audit were restricted to specific circuits, such additional questions or examinations could not be followed and any errors corrected. A non-compliant CLEC could simply refuse to comply

with any audit request that does not directly relate to the specific circuits identified, thus delaying the correction of erroneous EELs accounting.

While correcting mischaracterized circuits as a result of an audit is, and should be, a goal of both BellSouth and the CLEC, of equal concern to BellSouth is the ability to audit a CLEC's underlying processes and procedures used to develop allocation factors in general, including EELs factors, in order to determine the extent to which those processes may result in systematic errors in the accounting for EELs circuits.

Item 63; Issue 3-4: Under what terms should CLEC be obligated to reimburse BellSouth for amounts BellSouth pays to third party carriers to terminate CLEC originated traffic? (Attachment 3, Sections 10.10.6 – KMC; 10.8.6 – NSC & NVX; 10.13.5 – XSP)

Q. ON PAGES 20-21 OF HIS TESTIMONY, MR. FALVEY STATES THAT ANY REIMBURSEMENT TO BELLSOUTH FOR TERMINATION CHARGES THAT BELLSOUTH PAYS THIRD-PARTY CARRIERS FOR CLEC-ORIGINATED TRAFFIC SHOULD BE LIMITED TO THOSE CHARGES BELLSOUTH IS CONTRACTUALLY OBLIGATED TO PAY OR OBLIGATED TO PAY PURSUANT TO COMMISSION ORDER. HOW DO YOU RESPOND?

A. To begin with, as I stated in my Direct Testimony, BellSouth and the Joint Petitioners appear to agree that the CLECs should reimburse BellSouth for

third party charges when such charges are covered by the agreement between BellSouth and the terminating carrier.

However, regardless of whether or not BellSouth has a contractual obligation or an obligation to pay Independent Companies ("ICOs") for the delivery of the Joint Petitioners' transit traffic, BellSouth is unwilling to provide a transit function if the financial obligation to compensate rests with BellSouth and not the originating carrier, which in this case would be the Joint Petitioners. Such an outcome is not required by the Act, and is clearly contrary to reasonable business practices. In the event that a terminating third party carrier imposes on BellSouth any charges or costs for the delivery of Transit Traffic originated by a CLEC, the CLEC should reimburse BellSouth for all charges paid by BellSouth. BellSouth's position is that the originating carriers (the Petitioners in this case) are responsible for the payment of intercarrier compensation to the terminating carriers, and the originator of the traffic rather than the transit provider must ensure that the terminating carrier is appropriately compensated. Mr. Falvey's suggestion that BellSouth should refuse to pay the ICOs in the instance where the originating carriers have not entered into agreements or compensation arrangements with the ICOs for terminating such traffic is disingenuous. Mr. Falvey makes this suggestion without indicating that Petitioners will agree to enter into compensation arrangements with the ICOs, thus, the Petitioners' suggested course of action would leave the terminating carriers, i.e., the ICOs, with no way to recover the costs associated with terminating the Petitioners' traffic. Importantly, adopting the Joint Petitioners' position would require BellSouth to be unnecessarily engaged in compensation

disputes between CLECs and ICOs in cases where BellSouth's retail customers neither originated nor received calls.

Q. IF THE JOINT PETITIONERS AGREE (FALVEY, PAGE 20) THAT THEY SHOULD REIMBURSE BELLSOUTH FOR TERMINATION CHARGES BELLSOUTH PAYS THIRD PARTY CARRIERS THAT TERMINATE JOINT PETITIONER-ORIGINATED TRAFFIC TRANSITED BY BELLSOUTH, THEN WHY IS THERE STILL AN ISSUE?

A. In my opinion, this is still an issue because as long as the Joint Petitioners avoid establishing agreements directly with the carriers that terminate their traffic, they can continue to rely upon BellSouth to carry the traffic on their behalf. It is the obligation of the originating carrier (in this case the Joint Petitioners) to make arrangements with the terminating carrier with respect to delivery of and compensation for such transit traffic. However, where the originating carrier has failed to make arrangements with the terminating carrier to compensate the terminating carrier for such traffic, and the terminating carrier imposes costs and charges on BellSouth, BellSouth should be able to seek reimbursement from the originating carrier for those charges.

The Joint Petitioners' concern that BellSouth will "overpay" and the CLECs will "over-reimburse" is unfounded. Clearly, the best way a CLEC can mitigate such a concern is for the CLEC to negotiate compensation arrangements directly with the ICO. BellSouth reviews, disputes and pays third party invoices in a manner that is at parity with its own practices for

reviewing, disputing and paying such invoices. If BellSouth believes the ICO has inappropriately billed BellSouth for calls, BellSouth will dispute such charges and seek reimbursement from the ICO.

Item 65; Issue 3-6: Should BellSouth be allowed to charge the CLEC a Tandem Intermediary Charge for the transport and termination of Local Transit Traffic and ISP-Bound Transit Traffic? (Attachment 3, Sections 10.10.1 – KMC; 10.8.1 – NSC)

Q. MS. JOHNSON'S TESTIMONY CLAIMS, AT PAGE 31, THAT THE TANDEM INTERMEDIARY CHARGE IS "PURELY 'ADDITIVE'." MS. JOHNSON ALSO CLAIMS AT PAGE 32 THAT, IF CURRENT TELRIC CHARGES FOR TANDEM SWITCHING AND COMMON TRANSPORT DO NOT COVER ALL COSTS, BELLSOUTH SHOULD CONDUCT A TELRIC STUDY OF THOSE ADDITIONAL COSTS AND PROPOSE A RATE IN THE NEXT GENERIC PRICING PROCEEDING. PLEASE RESPOND.

A. First, as stated in my direct testimony, the tandem intermediary charge is not "purely 'additive'". For example, BellSouth pays Telcordia for messages that are not recovered in tandem switching and common transport charges. BellSouth pays Telcordia for all messages, whether they are access records or end user billing records that are sent and received through Centralized Message Distribution System ("CMDS"). More importantly, *CLECs can connect directly with other carriers in order to exchange traffic. They do not need BellSouth to pass such traffic for them.* For whatever efficiencies they gain,

the CLECs have elected to have BellSouth perform a transit traffic function for them. Because the transit traffic function is not a Section 251 obligation, it is not subject to Section 252 cost standards (TELRIC); therefore, submitting a TELRIC cost study for this function to a state commission is not appropriate. As stated previously, CLECs that elect to have BellSouth perform this function should negotiate the rates, terms and conditions of transit traffic in a separate agreement.

Item 88; Issue 6-5: What rate should apply for Service Date Advancement (a/k/a service expedites)? (Attachment 6, Section 2.6.5)

Q. PLEASE ADDRESS MR. FALVEY'S CONTENTIONS AT PAGES 26-27 OF HIS TESTIMONY THAT BELLSOUTH'S EXPEDITE CHARGES ARE INFLATED, WERE NOT SET BY THE COMMISSION AND DO NOT COMPORT WITH THE TELRIC PRICING STANDARD.

A. First, BellSouth's expedite charges are set forth in BellSouth's FCC No. 1 Tariff, Section 5 (which is an FCC-approved tariff). These are the same charges that BellSouth's retail customers are charged when a retail customer requests service in less than the standard interval. Such rates reflect the value of the expedited service being provided. To the extent that a CLEC wants expedited service, the CLEC should pay the same rates as BellSouth's retail customers. Regarding the contention that expedite charges should reflect TELRIC pricing, the Petitioners are incorrect. As noted above, BellSouth's obligation is to provide UNEs within the standard interval. BellSouth has no

obligation to provide CLECs with expedited service. Because expedited service is not an obligation under Section 251, the cost-based pricing standards of Section 252(d) do not apply.

As a practical matter, if there were no charge or only a minor charge for expedited service requests, it is likely that most CLEC orders would be expedited, causing BellSouth to miss its standard intervals and its obligations to provide non-discriminatory access. The result would be most, if not all, orders would either be expedited or late, due to the volume of expedite orders that preempt other scheduled orders with standard intervals. 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.

Item 97; Issue 7-3: When should payment of charges for service be due? (Attachment 7, Section 1.4)

Q. AT PAGE 40 OF HIS TESTIMONY, MR. RUSSELL COMPLAINS THAT PETITIONERS NEED AT LEAST 30 CALENDAR DAYS TO REVIEW AND PAY INVOICES. IS THAT REASONABLE?

A. No. There is no legitimate reason to allow the Petitioners a full thirty calendar days after receiving a bill to make payment. BellSouth invoices each CLEC every 30 days, just as it does for retail customers. The bill date is the same each month and each CLEC is aware of its billing due date. Moreover, a CLEC can elect to receive its bills electronically so as to minimize any delay in bill

printing and receipt. To the extent a CLEC has questions about its bills, BellSouth cooperates with that CLEC to provide responses in a prompt manner and resolve any issue. It is reasonable for BellSouth to expect that payment will be due and payable before the next bill date. Furthermore, in a given month if special circumstances warrant, a CLEC may request an extension of the due date and BellSouth does not unreasonably refuse to grant such a request.

All customer's due dates and treatment notices are generated the same way; therefore, it is not realistic to do something different for one customer versus another. Any such change would require substantial modifications to BellSouth's billing systems; would involve substantial costs, and would apply to all customers. Incurring such substantial costs to meet the special payment due date request of the Joint Petitioners is unnecessary and unwarranted given the fact that this Commission and the FCC have determined that BellSouth's billing practices are non-discriminatory in granting BellSouth long distance authority in Florida. In short, it has already been determined that BellSouth's *existing* billing practices give efficient CLECs a meaningful opportunity to compete in the local market. Further, BellSouth's failure to submit bills in a timely manner under its *existing* billing practices subjects BellSouth to SEEM penalties.

BellSouth has no way to know when a customer that chooses to receive paper bills actually receives the bills; thus, it is not reasonable to expect that payment due dates and collection activities could be based upon the date the customer

receives the bill. BellSouth offers electronic transmission of bills, which would allow the Joint Petitioners to receive bills sooner and allow more time for review to the extent electronic billing is utilized by the Joint Petitioners.

Q. AT PAGE 41, MR. RUSSELL ALLEGES THAT BELLSOUTH IS "CONSISTENTLY UNTIMELY IN POSTING OR DELIVERING ITS BILLS" AND THAT THERE ARE CIRCUMSTANCES WHEN BELLSOUTH'S INVOICES ARE "OFTEN INCOMPLETE AND SOMETIMES INCOMPREHENSIBLE." PLEASE COMMENT.

A. Regarding the unfound allegation of untimely bills, I will provide a brief, high-level explanation of BellSouth's bill generation processes. First, it is important to know that the established customer/service-specific bill date is most always the same date from month-to-month. This consistent bill date serves both BellSouth, from the efficient application of its billing systems and processes, as well as BellSouth's interconnection customers, through the ability to predict the arrival of BellSouth bills in order to maximize the use of CLEC resources.

The bill for the previous month's service is not generated on the bill date, however, because it is necessary to ensure that there is a complete accounting of all charges attributed to services provided prior to the bill date and that those charges have been posted—a period of 3 to 4 days. The bill is then generated on the 3rd or 4th business day following the bill date. For customers who choose electronic delivery, the bill is delivered on the day the bill is generated. For customers who choose to receive paper bills, the bill is mailed to those

customers on the "bill generation" date. Obviously, paper bills will take longer to reach the CLEC due to varying mail delivery times. Therefore, the difference between the billing cycle dates (the same dates each month) and the length of time it takes for the electronic or paper bill to arrive at the CLEC represents the amount of time that the CLEC has available to review and pay its bill. That period may be as many as 26 days in the case of an electronic bill generated in 3 days in a month with 31 calendar days. Similarly, the time available for CLECs to review and pay paper bills will vary from about 25 days in cases where the mail delivery time is only two days, to a shorter interval depending on actual mail delivery schedules. Clearly, CLECs currently receiving paper bills can increase the time available to review and pay bills simply by converting to electronic bill delivery.

Regarding the allegation of "incomplete and sometimes incomprehensible" bills, the Joint Petitioners do not support this allegation with examples or other factual evidence. If the CLECs would provide such evidence, BellSouth will be glad to investigate. Further, if the Joint Petitioners believe that they have insufficient time to review their bill or that BellSouth's bills are "incomprehensible," then they may take advantage of the help offered by BellSouth to assist the CLECs in understanding the bills from BellSouth. CLECs should also be prepared to dedicate sufficient resources to allow them to understand the bill and to timely pay it. Finally, it should be noted that to the extent BellSouth fails to remit timely bills within the Commission established interval, BellSouth pays the CLEC a SEEM penalty. Thus, the CLECs are being adequately compensated in those rare instances where

BellSouth's delivery of a bill may be delayed.

Item 100; Issue 7-6: To avoid suspension or termination, should CLEC be required to pay additional amounts that become past due after the Notice of Suspension or Termination for Nonpayment is sent? (Attachment 7, Section 1.7.2)

Q. MR. RUSSELL STATES AT PAGE 44 THAT ONLY THE PAST DUE AMOUNTS EXPRESSLY AND PLAINLY INDICATED ON THE NOTICE OF TERMINATION SHOULD BE REQUIRED TO BE PAID TO AVOID SUSPENSION OR TERMINATION. PLEASE COMMENT.

A. As an initial matter, it is important to recognize that payment of non-disputed charges is due by the Payment Due Date, which is clearly posted on every invoice/bill that the CLEC receives from BellSouth. In no way is appropriate for the due date reflected on a Notice of Suspension to serve as a "revised" Payment Due Date. Once an invoice/bill becomes past due, BellSouth begins taking action, such as sending Suspension Notices, in an effort to collect the amounts that the CLEC owes BellSouth.

Recently, BellSouth modified its collection processes so that treatment notices for past due amounts for Integrated Billing System ("IBS") billed services (non-designed, i.e., UNE-P, etc.), are handled the same as treatment notices for past due amounts for Carrier Access Billing System ("CABS") billed services (i.e., designed services). As such, if a notice is sent to a customer for undisputed past due balances, and during that treatment process, additional

undisputed charges become past due, BellSouth will require the customer to pay the amount on the notice, plus any additional undisputed amounts that have become past due in order to avoid suspension or termination of services.

Q. WOULD YOU EXPLAIN IN MORE DETAIL THE REQUIREMENT TO PAY ALL UNDISPUTED PAST DUE AMOUNTS FOLLOWING THE ISSUANCE OF A SUSPENSION NOTICE?

A. Yes. Attached as Exhibit KKB-2, I have illustrated three separate bills for a given CLEC in the month of March. The first bill, for $1000, has a bill date of March 1st with a Payment Due Date of April 1st. The second bill, for $500, has a bill date of March 2nd with a Payment Due Date of April 2nd. And, finally, the third bill, for $800, has a bill date of March 4th with a Payment Due Date of April 4th.

In the event that the CLEC did not pay the first bill by the April 1st due date, the CLEC would receive a collection notice, in the form of a Suspension Notice, indicating that the CLEC must pay the outstanding undisputed amount from the March 1st bill date within 15 days of the April 1st due date, or April 16th, in order to avoid suspension of ordering systems access.

If the CLEC subsequently did not pay the second and third bills, as well by the respective April 2nd and April 4th due dates, the CLEC would be required to pay all outstanding undisputed amounts, i.e., $1000 + $500 + $800 by the April 16th Suspension Notice Due Date notification in order to avoid

suspension of ordering systems access. The Joint Petitioner position that they should only be required to pay the past due amount for a specific account in order to avoid suspension, with no regard to any other outstanding past due balances, is nothing more than a self-serving attempt to extend the payment due date by at least 15 days.

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

Q. AT PAGE 47 OF HIS TESTIMONY, MR. RUSSELL STATES THAT EXISTING CLECS SHOULD BE SUBJECT TO ONLY ONE AND ONE HALF MONTH'S BILLING AS A DEPOSIT THAT IS BASED UPON THE MOST RECENT SIX MONTH PERIOD. PLEASE ADDRESS THESE POINTS.

A. First, BellSouth would agree to use the Petitioners' most recent six-month period to establish the deposit amount. However, BellSouth does not agree with only one and one-half month's billing as a deposit. BellSouth's policy of requiring a deposit of no more than two months of a CLEC's estimated billings is consistent with industry standards. Most telecommunications companies require deposits from their customers to reduce potential losses if a customer ceases to pay its bills. BellSouth is no different. BellSouth is simply using sound business criteria for determining the credit risk of our customers to protect the Company from excessive bad debt. Two months is necessary because BellSouth must wait approximately 74 days before it can disconnect a

customer for non-payment. Having a deposit that covers two months of billing still leaves BellSouth at risk of covering 14 days of billing. In today's telecom world, reserving the right to require a deposit of two month's billing is necessary and demonstrates sound business rationale.

Q. MR. RUSSELL ALSO ASSERTS THAT DEPOSIT TERMS SHOULD TAKE INTO ACCOUNT THAT THE CLECs INVOLVED IN THIS ARBITRATION HAVE ESTABLISHED BUSINESS RELATIONSHIPS WITH BELLSOUTH WITH SIGNIFICANT BILLING HISTORY. DO YOU AGREE?

A. Yes, in determining whether any Joint Petitioner is required to pay a deposit, the agreed-upon deposit criteria terms does take into account the parties' billing history and other objective financial measurements. As such, BellSouth is at a loss as to why this is still an unresolved issue for the Joint Petitioners. In any event, the payment history for some of the Joint Petitioners is not as flattering as they suggest and, in any event, having an established business relationship does not necessarily limit or minimize BellSouth's risk in providing service to high-credit risk customers, as established by independent, objective credit evaluation tools as well as the customers' own data.

Q. DO THE JOINT PETITIONERS HAVE ESTABLISHED POLICIES REGARDING THE EQUIVALENT AMOUNT OF DEPOSIT THAT MAY BE REQUIRED?

A. Yes, in some instances. But the Joint Petitioner's deposit policies vary significantly from company to company and from state to state. The tariffed provisions range from no specific deposit amount required to those that specify a deposit amount not to exceed two and one-half months of a customer's estimated monthly billing.

Q. AT PAGE 49, MR. RUSSELL ARGUES THAT EXISTING CLECS SHOULD HAVE A LESSER DEPOSIT THAN NEW CLECS. DO YOU AGREE?

A. No. Mr. Russell's assertion overlooks the fact that a new CLEC may be in stronger financial shape than an existing CLEC and that the financial health of an existing CLEC can deteriorate. Further, Mr. Russell argues that a one and one-half month actual billing deposit proposal is reasonable given the Joint Petitioners' long, substantial business relationships with BellSouth. During the last 2 years, however, a very large number of BellSouth's customers have made timely payments up until the day they filed bankruptcy. Payment history is an indication of how a customer performed in the past, but not how it will perform in the future. A compilation of data including how the debtor pays other suppliers, management history, company history, financial information, and bond rating (indicates the company's ability to obtain financing) all help paint a picture of how a company will perform in the future. A long relationship does not guarantee a low credit risk. For example, WorldCom, Adelphia, Cable and Wireless and Global Crossing all had a long relationship with BellSouth, and with credible payment histories, yet filed for bankruptcy

with little notice.

Further, in the event a CLEC fails to pay (after maintaining a good payment history or otherwise), BellSouth is faced with a lengthy process before it can disconnect service. In addition to the period of time for which the CLEC did not pay, BellSouth may be required to provide an additional month (or more) of service while notice is being given and the disconnection process is taking place. This results in at least two months of outstanding debt, even if the CLEC made timely payments prior to that point. As stated previously, a deposit of two months billing is necessary and demonstrates sound business rationale.

That is the fundamental reason why BellSouth requires a deposit from carriers. That is, deposits are needed to recognize and mitigate the possibility that a CLEC may not be able to fulfill its financial obligations in the future, regardless of the intentions of the CLEC and regardless of outward appearances of financial health. BellSouth relies on CLEC payment history as well as both internal and independent, third-party financial risk assessment to ultimately establish, or modify, the level of deposit required from a CLEC. BellSouth's intention is not to collect excessive deposits, but rather to collect a deposit amount that is relative to the risk that the CLEC will not honor its payment obligations in the future. For BellSouth to do otherwise would not protect the interests of BellSouth's shareholders, employees or other business partners.

The two-month requirement proposed by BellSouth is very reasonable given

that BellSouth will refund, return or release any security deposit within 30 calendar days of determining that the customer's creditworthiness indicates a deposit is no longer necessary. At least one Joint Petitioner should be aware of this fact as BellSouth refunded over $800,000 of a deposit to one of the Joint Petitioners in 2003.

It is also worthwhile to note that the Florida PSC recently affirmed the right of BellSouth to collect deposits under the terms of its Agreement with IDS Telecom LLC[5]. Specifically, the Florida PSC ruled that BellSouth is entitled to request a deposit from IDS in accordance with the language of Attachment 7 of its Agreement. Attachment 7 provides that the deposit amount not exceed two months' estimated billing.

Q. SHOULD THE TIMELINESS OF PAYMENTS BY THE CLEC BE THE PREDOMINANT CRITERIA FOR SETTING THE AMOUNT OF DEPOSIT THAT BELLSOUTH REQUIRES?

A. No. While the payment history of a CLEC is an important factor in the determination of the required deposit, other independent financial indicators play an equally important role and, in some cases, may outweigh, even a "good" payment history by the CLEC. The Joint Petitioners obviously agree with BellSouth on this point as the parties have reached agreement on

[5] See Florida Public Service Commission Order No. PSC-04-0824-PAA-TP, Docket No. 040488-TP, issued August 23, 2004 in re: Complaint of BellSouth Telecommunications, Inc. against IDS Tel(e)com LLC to enforce interconnection agreement deposit requirements.

objective and specific deposit criteria.

Q. PLEASE EXPLAIN YOUR ANSWER.

A. There are numerous examples in recent years of perceived financially healthy companies suddenly in serious financial trouble. A high-profile example is Enron, but also includes many telecommunications companies such as Adelphia, MCI, Global Crossing and others. Their financial difficulties may be due to the economy, industry changes, faulty company strategy or accounting irregularities. The point being that nearly all of these entities were perceived as financially healthy and, in most respects, were current in their payment of financial obligations. It was only after the existence of financial problems was released to the media that the public, and creditors, became aware of the possibility that the firm in jeopardy may not be able to fulfill its payment obligations.

That is why BellSouth relies on both internal and independent, third-party financial risk assessment tools, as well as a CLEC's payment history, to ultimately establish, or modify, the level of deposit required from a CLEC. Again, BellSouth's intention is not to collect excessive deposits but to collect a deposit amount that will minimize BellSouth's risk in providing service to customers.

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

(Attachment 7, Section 1.8.3.1)

Q. AT PAGE 43 OF HIS TESTIMONY, MR. FALVEY STATES THAT THE JOINT PETITIONERS HAVE CONCEDED TO GIVE UP THE RIGHT TO RECIPROCAL DEPOSITS. HOWEVER, IF THEY DO NOT COLLECT DEPOSITS, PETITIONERS SAY THEY SHOULD "AT LEAST HAVE THE ABILITY TO REDUCE THE AMOUNT OF SECURITY DUE TO BELLSOUTH BY THE AMOUNTS BELLSOUTH OWES CLEC(s) THAT HAVE AGED THIRTY (30) DAYS OR MORE." PLEASE RESPOND.

A. Mr. Falvey's proposal is administratively unmanageable and overly simplistic. Further, the Joint Petitioners' proposal fails to exclude amounts that are subject to a valid billing dispute. The Joint Petitioners' provide no explanation as to how it could be accomplished. Security deposits are established due to a risk of non-payment, not a risk of slow-payment. Deposit amounts relate directly to the risk of default. BellSouth has never defaulted on its payments for undisputed amounts. Because BellSouth is not buying UNEs and other services from CLECs, there is no reciprocal need for BellSouth to pay a deposit.

The problem the Petitioners seek to resolve is not a default issue for which a deposit would be required; it is a slow payment issue. Slow payment should be treated through suspension/termination of service or the application of late payment charges as noted above.

As a general matter, a CLEC's deposit should not be reduced by past due

amounts owed by BellSouth to the CLEC. The CLEC's remedy for addressing non-disputed late payment by BellSouth should be suspension/termination of service or assessment of interest/late payment charges similar to BellSouth's remedy for addressing late payment by the CLEC. KMC has already pursued one of these options with BellSouth – they can bill BellSouth for late payment charges today.

BellSouth is within its rights to protect itself against uncollectible debts on a non-discriminatory basis. BellSouth *must* protect against unnecessary risk while providing service to all requesting CLEC providers. The Joint Petitioners are not faced with the same obligation.

Notwithstanding the above, BellSouth is willing to agree that, in the event that a deposit or additional deposit is requested of the Joint Petitioners, such deposit request shall be reduced by an amount equal to the undisputed past due amount, if any, that BellSouth owes the Joint Petitioners for reciprocal compensation payments pursuant to Attachment 3 of the Interconnection Agreement at the time of the request by BellSouth for a deposit. However, when BellSouth pays the Joint Petitioners the undisputed past due amount, BellSouth would be unsecured to the extent of that amount unless there is an obligation on the Joint Petitioner's part to provide the additional security necessary to establish the full amount of the deposit that BellSouth originally required. Consequently, any such obligation to offset undisputed past due amounts owed by BellSouth against a deposit request would only be reasonable if BellSouth would be secured in the full amount upon payment by

BellSouth of any undisputed past due amount. However, as a practical matter, BellSouth believes that such an arrangement would be confusing and cumbersome from both accounting and operational perspectives.

Q. MR FALVEY FURTHER STATES AT PAGE 43, THAT BELLSOUTH DOES NOT HAVE A GOOD PAYMENT RECORD; THUS, REDUCED DEPOSIT AMOUNTS IS A REASONABLE MEANS TO PROTECT THE PETITIONERS' FINANCIAL INTERESTS. PLEASE RESPOND.

A. In its discovery response, BellSouth provided an analysis of the payment of bills for a recent 6-month period. The analysis demonstrates that BellSouth has paid 100% of the invoices received from Xspedius Communications and Xspedius Corporation within 30 days of receipt of these invoices. In the same 6-month period, BellSouth has paid 80% of the invoices received from KMC within 30 days of receipt of these invoices. There have been numerous delays by KMC in providing their invoices to BellSouth causing delays in payments and additional work effort to verify and pay these invoices. Both KMC and BellSouth have been working together to resolve these delays and progress has been made on the receipt and payment of current and future invoices. BellSouth has not received an appreciable number of invoices from either NuVox or NewSouth during the period since the advent of bill and keep clauses in their interconnection agreements with BellSouth.

Item 104; Issue 7-10: What recourse should be available to either Party when the Parties are unable to agree on the need for or amount of a reasonable deposit?

(Attachment 7, Section 1.8.7)

Q. WITH REGARD TO POSTING A BOND, MR. RUSSELL STATES AT PAGE 52 THAT "...BELLSOUTH'S PROPOSED LANGUAGE WOULD EFFECTIVELY ALLOW BELLSOUTH TO OVERRIDE THE DISPUTE RESOLUTION PROVISIONS OF THE AGREEMENT BY TERMINATING SERVICE TO A CLEC IF CLEC DOES NOT POST A PAYMENT BOND..." PLEASE RESPOND.

A. BellSouth has a responsibility to ensure that risk of nonpayment is minimized and posting a bond or requiring the Joint Petitioners to pay into an escrow account serves to minimize BellSouth's risk. In the past two years there have been instances in which BellSouth has asked a state commission to require a CLEC to pay a deposit where the CLEC has not done so. In some of these instances, while BellSouth was waiting for state commission action, the CLEC filed for bankruptcy. The filing of bankruptcy stayed BellSouth's efforts to collect a deposit in such commission proceedings. In order for BellSouth to minimize the risk of financial loss, BellSouth requests this Commission require a CLEC to post a bond while a deposit dispute is pending.

BellSouth shall not terminate service during the pendency of such a proceeding before this Commission provided that the Joint Petitioners post a payment bond for half of the amount of the requested deposit during the pendency of the proceeding. It would not be reasonable to expect BellSouth to remain completely, or inadequately, unsecured during the pendency of a proceeding --

the purpose of which is to resolve a dispute regarding the need for a deposit or additional deposit. In fact, to allow such a situation would simply encourage CLECs that are on the verge of filing bankruptcy to file a complaint in order to delay the payment of a deposit while they ready themselves for bankruptcy filing. A requirement that the CLEC post a payment bond for half of the requested deposit amount takes into consideration the disagreement between the parties with respect to the need for or the amount of a deposit request but also protects BellSouth during the resolution of any dispute over the amount of the deposit.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

BY MR. MEZA:

Q Ms. Blake do you have a summary?

A Yes, I do.

Q Can you please provide it?

A Certainly. Good afternoon. I'm here to present BellSouth's position on several unresolved policy issues in this arbitration proceeding. Item Number 4, limitation of liability. BellSouth's position is that the limitation on each party's liability in circumstances other than gross negligence or willful misconduct should be the industry standard limitation, which limits the liability of the provisioning party to a credit for the actual cost of the services or functions not performed or improperly performed. BellSouth's proposed limitation of liability language is consistent with limitation of liability language set forth in both the Joint Petitioners and BellSouth's tariffs with its own end users.

Item Number 5, limitation of liability in the end user tariffs. The purpose of this provision is to put BellSouth in the same position it would be in if the Joint Petitioner's end user was a BellSouth end user. BellSouth is not attempting to dictate what limitation of liability provisions the Joint Petitioners can have in their end user tariffs or contracts. BellSouth's proposed language provides that if a CLEC elects not to limit its liability to its end users or customers in accordance with industry norms, the CLEC

should bear the risk of loss arising from that business decision.

Item 6, indirect, incidental, or consequential damages and how they should be defined. Because this agreement extends no rights to either party's end users, BellSouth's position and the Joint Petitioners appear to agree, is that the language proposed by the Joint Petitioners has no force or effect. As such, the Joint Petitioners' proposed language is unnecessary and should be rejected.

Item 7, dealing with indemnification obligations. BellSouth believes the party receiving services should indemnify the party providing service from, one, any claim, loss or damages from claims for libel, slander, or invasion of privacy arising from the content of the receiving party's own communications; or, two, any claim, loss, or damage claimed by the end user of the party receiving services arising out of the agreement. The Joint Petitioners position which seeks to have the party providing the service indemnify the party receiving the service for essentially all liability is inappropriate and does not reflect the standard in the industry.

Item 9, court of law for resolution of disputes. BellSouth's position is that this Commission or the FCC should resolve disputes as to the interpretation of the agreement or as to the proper implementation of the agreement. However, in an effort to accommodate the Petitioners' desire to broaden the

venues available to them, BellSouth has proposed language that would enable the Joint Petitioners to petition another dispute resolution venue for matters that lie outside the jurisdiction or expertise of this Commission or the FCC. The Joint Petitioners rejected BellSouth's reasonable proposal.

Item 12, applicable law. The intent of the agreement is to memorialize the parties' mutual agreement with respect to their obligations under the act and applicable FCC and Commission rules and orders. The Joint Petitioners' proposed language would endow them the ability to search in the FCC or Commission order, after finalizing the agreement, to find language different from that in the agreement and to use that difference to reopen negotiations or to assert a complaint, even if the language that is in the agreement reflects the parties attempt to implement the requirements of the order.

BellSouth does not believe that such an explicit statement in the agreement is necessary. In an effort to resolve this issue, BellSouth has proposed language that would address an assertion by either party that an obligation, right, or other requirement not expressly memorialized in the agreement is applicable to the parties. Again, the Joint Petitioners rejected BellSouth's proposal.

Item 26, commingling 251 UNEs with 271 elements. Consistent with the FCC's errata to the triennial review order, 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 Act. When BellSouth provides an item pursuant only to Section 271, BellSouth is not obligated by the requirements of Section 251 to either combine or commingle that item with any other element or service. If BellSouth agrees to do so, it should be done pursuant to a commercial agreement.

Item 51 pertains to the notice requirement for EEL audit and the selection of the auditor. The first part of this issue is whether BellSouth must identify in the notice of the audit the specific circuits that it has cause to believe are not in compliance with the FCC's service eligibility criteria. The Joint Petitioners' attempt to limit the audit solely to a list of pre-identified circuits negates the effectiveness of an audit. The TRO contains no such requirement, and adoption of their proposal will only lead to delay.

The second part of this issue pertains to the selection of an independent auditor. The parties agree that any selected auditor must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants, which requires that the auditor be independent. As such, there is no need to agree to the auditor prior to the audit, and adoption of their proposal will only lead to delay.

Item 65, tandem intermediary charge for transit

traffic. The Joint Petitioner is able to directly interconnect with other carries in order to exchange traffic and not rely upon BellSouth to provide the transit function. Consistent with its Virginia arbitration opinion, the Wireline Competition Bureau of the FCC and other state commissions have declined to find that ILECs have a Section 251(c)(2) duty to provide transit service at TELRIC rates.

Item 88, payment for service expedites. BellSouth has no obligation to expedite the provisioning of any service. As such, the Joint Petitioners' desire for expedite intervals at TELRIC prices is not justified and should be denied. In cases where users desire an expedited provisioning interval, it is reasonable to expect that they will pay an amount for the expedited provisioning of the service request. BellSouth has no obligation under Section 251 of the Act to provide expedited service at cost-based rates.

Item 97, payment due date. Payment for all services identified on the bill should be due on or before the next bill date or the payment due date, such that the bill date and the payment due date fall on the same day of the month. To rule otherwise would result in a rolling due date that could become administratively cumbersome and confusing to providers and their customers. 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 in granting BellSouth long distance authority in Florida have determined are nondiscriminatory.

Item 100, additional amount due after notice of suspension. In the case of a notice of suspension or termination, BellSouth's position is that CLECs should be required to pay all amounts that are past due as of the date of the pending suspension or termination action. The Joint Petitioners know what is due, and BellSouth has the right and responsibility to protect itself from this increased risk. Given BellSouth's proposed language, the Joint Petitioners' concerns about guesswork to determine the amounts to pay to avoid suspension or termination are eliminated.

Item 101, the basis for a deposit amount. The Joint Petitioners argue for more favorable treatment with respect to required deposits for existing CLECs. For example, those with established history. Required deposit amounts are based on a number of independent, objective financial criteria of which timely payment of bills is only one of many considerations that BellSouth reviews. Further, an existing CLEC can have a poor history of timely paying its bills. As recent history demonstrates very clearly, it is quite possible for a business to be in serious financial difficulty while at the same time being current in its payments to creditors.

Item 102, reduction of deposits by amounts owed or due by BellSouth. The amount of deposit BellSouth requires

from a specific CLEC should not be reduced by any past due amounts owed by BellSouth to the CLEC. In the spirit of compromise, BellSouth has offered a reasonable offset provision that is limited to undisputed amounts owed for services provided pursuant to Attachment 3, and is determined at the same time that deposit determinations are made. The Joint Petitioners rejected this because they want to include disputed amounts, which is unacceptable.

Item 104 is what recourse should the parties -- should the parties not agree to the deposit amount. With respect to what recourse should be available to either party when the parties are unable to agree on the need for or amount of a reasonable deposit, it is BellSouth's position that if the Joint Petitioner does not agree with the amount or need for deposit requested by BellSouth, the Joint Petitioner should post a bond for half of the requested amount and file a petition with the Commission for resolution of the dispute. In the past there have been instances where CLECs have disputed BellSouth's right to obtain a deposit. This provision is designed to minimize this exact risk.

Thank you. That concludes my summary.

MR. MEZA: Ms. Blake is available for cross-examination.

CROSS EXAMINATION

BY MR. HEITMANN:

Q Good afternoon, Ms. Blake.

A Good afternoon.

Q Ms. Blake, let's start with Issue Number 4.

A Okay.

Q Would you agree with me that Issue Number 4 is about what cap will be included in the agreement regarding liability for a party's negligence in performing its obligations under the agreement?

A Yes. That's the general issue about the limitation of liability language.

Q And would you agree with me that there is no liability under the agreement unless a party is negligent?

A Yes. If there is a failure to provide the service according to the terms of the agreement, or the service is not properly performed, that would be the liability BellSouth would have.

Q Isn't it true that BellSouth seeks to eliminate all liability for damage caused by its own negligent acts?

A No, I wouldn't agree with that. BellSouth believes the appropriate limitation of liability would be for the billed credit for the service not performed or improperly performed.

Q Would you agree with me that issuing bill credits is different from accepting liability for damages caused?

A Not necessarily. I think in the context of this interconnection agreement between the parties and under the

context of the requirements pursuant to our obligations under the act, our limitation of liability limited to bill credits is the standard in the industry and is appropriate for this agreement.

Q Would you agree with me that if BellSouth's negligence caused a fire in one of the Joint Petitioner's collocation spots, that a bill credit for the collocation charges for the month likely would not cover the damages if all the Joint Petitioner's equipment was lost?

A Again, I can't really speak to all the details of that hypothetical situation and what other possible remedies may be available, whether it is gross negligence. If it was gross negligence that caused the fire, then that is not covered by limitation liability.

Q But my question was with respect to negligence causing that fire in that collocation, Ms. Blake.

A Then if we failed to provide the collocation according to the limitation of liability provisions that we are seeking here and that is consistent with what is out there in the industry, it would be limited to whatever collocation rates we were billing you for for that collocation space that was not provided.

Q So if BellSouth's negligence caused the fire that caused all of the Joint Petitioner's equipment in the collocation to burn up in smoke, BellSouth's position is that

all it would need to do is simply not charge the Joint Petitioners for renting that space that month?

A That would be the limitation of our liability. I guess, again, not being an attorney and all the other remedies that may be available in that regard relative to gross negligence, or if it is determined there is gross negligence and the fire getting it started at BellSouth's -- due to BellSouth's fault, you know, I don't know that I can speak to all of that. Again, if there is a fire in a collocation space, I would imagine it would impact more than just the Joint Petitioner's collocation space. It would probably impact the whole central office and there would be -- everybody would be impacted by that.

Q But you would have no liability to anybody, correct?

A Our liability would be based on the limitations set forth in this agreement that we are negotiating with the Joint Petitioners, and is consistent with the limitation of liability that is available to all in our standard agreement.

Q Now, you have said that your proposal on limitation of liability is the industry standard. I would like to pass an exhibit out to you and discuss this with you.

MR. HEITMANN: Mr. Chairman, if I could have this marked as the next exhibit, and it can be called ALLTEL Interconnection Agreement.

BY MR. HEITMANN:

Q Ms. Blake, do you see that what I have given to you is an --

COMMISSIONER BRADLEY: Okay. I need to give it a number.

MR. HEITMANN: I apologize, Mr. Chairman.

COMMISSIONER BRADLEY: Number 27.

(Exhibit 27 marked for identification.)

COMMISSIONER BRADLEY: Okay. You may proceed.

MR. HEITMANN: Thank you.

BY MR. HEITMANN:

Q Ms. Blake, do you see what I have given to you is an excerpt of the interconnection agreement between ALLTEL South Carolina and NewSouth?

A Yes, I see that. It appears to be what it is.

Q And if you could turn to what is marked in the upper right-hand side as general terms and conditions, Page 5. Do you see that this interconnection agreement contains a limitation of liabilities provision in Section 7.1?

A Yes, I see that section.

Q Could you take a minute to review that provision?

MR. MEZA: Mr. Chairman, I'm going to lodge an objection to this line of questions.

COMMISSIONER BRADLEY: Beg your pardon?

MR. MEZA: I would like to lodge an objection to this exhibit.

COMMISSIONER BRADLEY: Okay.

MR. MEZA: If I may, sir, we asked the Joint Petitioners to provide in discovery interconnection agreements that contain identical or similar language to the language that they are proposing for this issue, and their response was they didn't have any.

And based upon the date of this fax, September 24th, 2004, I believe that to be an incorrect statement. This is the first time that I have seen this document, even though they provided this response that they didn't have any documents on December 7th of 2004, three months after the date of this fax.

COMMISSIONER BRADLEY: Response?

MR. HEITMANN: Mr. Chairman, if I could respond. BellSouth asked for all interconnection agreements with identical or similar limitation of liability provisions, and we objected. If Mr. Meza is suggesting that this is identical to the language we have proposed for Issue Number 4, I'll submit to you that it is certainly not identical. The purpose of this is debatable whether it is similar or not, but the purpose of this line of cross-examination is to establish that it is certainly different from BellSouth's language which BellSouth states is the industry standard.

MR. MEZA: Well, I think Mr. Heitmann just said that he conceded that it is not identical. And if it is not similar, then it is irrelevant. And if it is similar, then

they should have produced it when I asked for it and not provide it on cross-examination approximately five months after they said they didn't have any documents.

MR. HEITMANN: Mr. Chairman, I didn't say it was similar. I think Mr. Meza is implying it is similar and that is up for him to do so. I'm simply stating it is different than what BellSouth claims is the industry standard, and this is an ILEC, ALLTEL, with many interconnection agreements and this is its standard language.

COMMISSIONER BRADLEY: Is it identical --

MR. HEITMANN: No.

COMMISSIONER BRADLEY: -- similar, or is it dissimilar?

MR. HEITMANN: I would say it is identical. I do not think it is similar, because we have a percent cap that ties risks to revenues the Joint Petitioners have proposed. This contract proposes a limitation of liability in the greater of a set dollar amount, $250,000, or the aggregate annual charges. This is, in fact, much, much more expansive limitation of liability provision than the Joint Petitioners are proposing for this arbitration.

COMMISSIONER BRADLEY: I'm going to get my legal expert.

MR. MEZA: Thank you.

COMMISSIONER BRADLEY: Mr. Melson, I need a little

help from you.

MR. MEZA: Mr. Chairman, while you are debating that, I would refer you to BellSouth's North Carolina or the Joint Petitioners' response to BellSouth's North Carolina discovery, POD Number 6 and 7, where we asked this question.

COMMISSIONER BRADLEY: Mr. Melson, are you apprised of what's being discussed?

MR. MELSON: I heard most of it, although the volume is pretty low in the fish bowl out there today. It seems to me that the use of the exhibit is probably fair. To the extent that BellSouth has got some point they want to make about an interrogatory answer, it seems to me they can do that on redirect. You ultimately -- once you see the interrogatory answers and this witness' testimony -- can weigh all of it and give it the weight it deserves. But I'm not sure there is anything objectionable about this use of this exhibit.

COMMISSIONER BRADLEY: Okay. Well, I'm going to overrule the objection based on the advice that I just received from legal counsel, and with the understanding that BellSouth will have ample opportunity to refute as part of their redirect process.

You may proceed.

MR. HEITMANN: Thank you, Mr. Chairman.

BY MR. HEITMANN:

Q Ms. Blake, would you agree with me that ALLTEL is an

ILEC similarly situated to BellSouth?

A No, I would not. I believe ALLTEL is an ILEC; however, I believe they are a rural ILEC that is quite different from BellSouth.

Q Would you agree with me that they are an ILEC like BellSouth?

A They are an incumbent local exchange carrier. I guess that is the end of the similarities in that regard.

Q Okay. And would you agree with me that the limitation of liability language included in this ALLTEL interconnection agreement is, indeed, quite different from the limitation of liability language BellSouth proposes for the interconnection agreement at issue in this arbitration?

A I would say it is different. I believe there is quite a bit of distinctions between a rural CLEC that is probably exempt from providing UNEs at TELRIC rates; unlike BellSouth that has an obligation to provide unbundled network elements pursuant to our interconnection agreement with the Joint Petitioners. **I don't believe ALLTEL has that same** obligation in South Carolina.

Q Ms. Blake, do you know for a fact whether or not ALLTEL has an obligation to provide unbundled network elements in South Carolina at TELRIC prices?

A I don't believe they do, because I inquired as to whether there is a UNE cost study or UNE rates have been

established in South Carolina, and they have not for ALLTEL.

Q So as you sit here today you can state for a fact that ALLTEL is not subject to 251(c)(3)?

A They have a rule exemption, is my understanding, of the obligation to provide all of the obligations under 251(c(3). They have a duty to interconnect, which I believe if you look at the table of contents of this part of the agreement, you see the interconnection transit requirements. But I don't see anything in here relative to providing unbundled network elements from just the table of contents. Again, it is just an excerpt.

Q Now, Ms. Blake, have you ever seen this interconnection agreement or excerpt before today?

A No, I have not.

Q Now, Ms. Blake, with respect to the limitation of liability provision of Section 7.1, would you agree with me that it does not limit the liability of ALLTEL to bill credits?

A It does not appear to limit to bill credits. It appears to be the $250,000 amount.

Q Or the aggregate annual charges, correct?

A Yes, it does say that as well.

Q Would you agree with me that a limitation of liability provision that allows for a liability in the amount of $250,000 or the aggregate annual charges is, in fact, quite different from that which is proposed by the Joint Petitioners?

A I would say that -- yes, I would say the amount of $250,000. Again, the Joint Petitioners are proposing a percentage amount. This is a fixed amount or based on aggregate annual charges. So it could be depending on the amount of charges billed pursuant to this agreement.

Q Now, Ms. Blake, your provision that you claim is industry standard is industry standard for BellSouth in its tariffs, is that true?

A Yes, as BellSouth provides to its retail customers as well as to all of the interconnection agreements that BellSouth has with CLECs pursuant to its requirements under 251.

Q Now, BellSouth has customer service agreements; does it not?

A We do have the ability to offer customer service arrangements in competitive situations in response to a competitive offer.

Q And when I asked you in Louisiana whether BellSouth ever deviated from its so-called standard limitation of liability provisions in those customer service agreements, your answer was that you simply did not know, is that correct?

A I can't speak to 100 percent of the contract service arrangements, but I believe the norm is to deviate to the tariff price. So a contract service arrangement is typically entered into to compete on price.

Q But as you sit hear today, you cannot tell us with

any certainty that BellSouth does not ever, in response to competitive situations, negotiate its limitation of liability provisions in order to win customers?

A Again, I wouldn't have that knowledge. This agreement is entered into pursuant to our requirements of 251. It is different than a contract service arrangement. In that type of a competitive environment, we have obligations pursuant to this agreement that we don't possibly have with a contract service arrangement.

Q Now, Ms. Blake, in response to the ALLTEL contract and in your testimony, I believe you claim that TELRIC does not provide for recovery for the modest risk exposure contemplated by the Joint Petitioners' proposal. Is that a fair assessment?

A Yes. My understanding of the way the UNE rates were developed through the TELRIC and the cost dockets would not have accounted for the seven and a half percent, as Mr. Meza indicated at the beginning of this hearing, upwards to $8 million in one of the CLEC's case, based on the billings of the services that we provide to them. So I don't believe the cost studies were developed to account for that severe amount of risk.

Q Now, Ms. Blake, you say you don't believe cost studies were developed to account for up to $8.1 million of liability. Do you understand that in the hypothetical that Mr. Meza posed that in order to be liable, BellSouth would had

to have caused over $8.1 million worth of damage due to BellSouth's negligence?

A Yes, that is based on my understanding of the way the Joint Petitioners' language would work.

Q And if BellSouth doesn't pay for the $8.1 million worth of damages caused by its own negligence, who does BellSouth think should pay?

A I think BellSouth's liability should be limited to the bill credit for the services not performed or improperly performed.

Q Ms. Blake, that wasn't my question. Who do you think should get left holding the bag for the $8.1 million worth of damages caused by BellSouth's negligence?

A I don't know that BellSouth's negligence would have necessarily always caused 7.5 percent of the amounts paid or payable.

Q We are speaking of a hypothetical situation in which there is $8.1 million worth of damages due to BellSouth's negligence. Would you agree with me that under your position it is the Joint Petitioners who have to shoulder that burden?

A Under the terms of our agreement and our language, the limitation liability would limit it to a bill credit. If there are other damages beyond that, that would be the Joint Petitioners.

Q Now, Ms. Blake, you are not a TELRIC pricing expert,

are you?

A No, I'm not.

Q And you don't know -- in the past you have, when asked this question, you have not known whether BellSouth TELRIC studies included the joint and common costs such as insurance, correct?

A I know there is a component of our TELRIC studies that is for joint and common costs. However, because of the way our contracts and our standard offering has been relative to the interconnection agreements, we have never contemplated either currently or in the future of having such a liability amount as the Joint Petitioners are contemplating here.

Q Now, Ms. Blake, would you agree with me that the FCC's TELRIC pricing standards allow BellSouth to recover the costs of its providing access to UNEs in interconnection and collocation?

A Yes, that is my understanding of the basis of TELRIC.

Q Would you agree with me that there is nothing in the FCC TELRIC pricing rules that allows BellSouth to recover its cost of providing UNEs interconnection and collocation negligently?

A I don't know that the TELRIC pricing principles talk in any way about negligently offered or provided. It is based on the cost of providing the UNE.

Q Now, Ms. Blake, in your testimony, you suggest that

CLECs will, and Joint Petitioners in particular, will be able to game the system proposed by the Joint Petitioners by filing a claim late, is that correct?

A Yes, I believe I had that discussion based on our understanding of the Joint Petitioners' language.

Q And that is based on the Joint Petitioners' proposal that includes the phrase, "from the date the claim arose," correct?

A Yes.

Q And do you recall Joint Petitioners' testimony in this and the past five hearings indicating that the day the claim arose is the date of the incident?

A Yes, I believe there has been some clarity in that. However, our opinion and concern is that the Joint Petitioners could possibly wait until later into the term of the agreement to raise a claim. Again, I think the uncertainty and the complexity of their language is not warranted and is inappropriate.

Q Ms. Blake, would you agree with me that if liability is tied to the day the claim arose, the date the claim is raised is meaningless?

A Can you ask that again? I'm sorry.

Q Would you agree with me if liability exposure is tied to the day the claim arose, the date the claim is raised is meaningless?

A I'm not sure I can 100 percent answer that question. I think it depends on the situation that is being claimed, or the dispute, or --

Q Ms. Blake, if a circuit went down on account of BellSouth's negligence, do you think we would have any difficulty discerning what day it went down?

A In that situation I could agree that it would be the same day.

Q How about if one of the Joint Petitioners' collocations burned to the ground as a result of BellSouth's negligence, do you think we would have any difficulty discerning the day of the fire?

A Probably not.

Q Okay. And yet it is still your position that Joint Petitioners can somehow game the date a circuit goes down or a collo blows up, correct?

A Again, not knowing every situation that may arise, it could be a situation where it is not easy to prove the day the claim arose was the day of a particular event.

Q Now, Ms. Blake, another of your criticisms of the Joint Petitioners' proposal is that our language is, quote, unrelated to the severity of the damage. And I'm quoting from Page 7 of your direct testimony. Let me ask you this: How is BellSouth's bill credit policy in any way related to the damages caused by BellSouth's negligence?

A The bill credit limitation of liability provides for a credit if we failed to provide the service that you paid us for. If we didn't deliver that service to you, then we will provide a bill credit for the function or service not performed or improperly performed, as opposed to the Joint Petitioners seven and a half percent of what's been paid or payable could be several hundred thousand dollars based on a one-day outage. There is quite a difference between a bill credit for one day out of service versus a hundred thousand dollars.

Q But, in that example, wouldn't you agree with me that BellSouth's negligence caused several hundred thousand dollars worth of damages, correct?

A Not necessarily. **In the case of a DS-3 going down** for one day, I don't see how that could equate to a hundred thousand dollars if during three months of billing have been done for that based on that CLEC's billings to us. I mean, based on their seven and a half percent, it would be over a hundred thousand dollars, an example, versus about a thousand dollars in bill credits.

Q Now, Ms. Blake, wouldn't you agree with me that the Joint Petitioners' proposal actually ties risks to revenues, and that as revenues increase, risk increases proportionally, correct?

A I think your seven and a half percent is tied to the amounts that you pay us. So if you want to consider that the

revenue BellSouth's derives from the services we provide to you, I guess you could say that.

Q Right. So, for example, in Mr. Meza's $8.1 million hypothetical, although your maximum exposure should you be negligent to the tune of $8.1 million or more, is that much, you actually receive revenues under that example from one of the Joint Petitioners to the tune of over $90 million, is that correct?

A Right. And we actually provided you the hundred-and-something million dollars of service less any bill credits that would be due for not providing that service, and that is what the difference should be.

Q Ms. Blake, if you charged the Joint Petitioners for $90 million for services, how is it that you provide Joint Petitioners with $100 million worth of services?

A Well, we provided you a hundred million dollars worth of services. If we failed to provide you on one day for service, we would give you a bill credit for that day, and so we would back out that one day's value of that service from the hundred million dollars in that weird example.

Q Now, Ms. Blake, I have seen in BellSouth's brief, particularly in Tennessee, that it appears to be BellSouth's position that the Joint Petitioners somehow could reap a financial windfall from their proposal. Is that BellSouth's position?

A Again, I think the example I alluded to earlier, a hundred thousand dollars for one day out of service versus a thousand dollar bill credit is quite a difference that could be a windfall.

Q And if BellSouth's negligence caused that one hundred thousand dollars worth of damages, how would that be a windfall for the CLEC?

A I guess it is debatable that there would be a hundred thousand dollars worth of damages.

Q Would you agree with me that a CLEC wouldn't be rewarded damages unless the Florida Commission, the FCC, or a court of law decided damages were due?

A Again, I'm not aware of what the process would take as far as to determine the awarding of damages. Again, based on my understanding of the Joint Petitioners' language and considering BellSouth's proposed language that is consistent with the standard in the industry, we feel our language is appropriate and consistent.

Q Now, Ms. Blake, in your direct testimony you also criticize the Joint Petitioners' proposal with the following: You say petitioners are attempting to have BellSouth incur petitioners' cost of doing business and bear the risks of petitioners. And so, let me ask you this. **And that is Page** 9 of your direct testimony. How is it that BellSouth's negligence is the Joint Petitioners' cost of doing business?

A The services BellSouth provides pursuant to this contract and our obligations under the Act, BellSouth believes it is appropriate for our liability to be limited to a bill credit consistent with what we do for our retail customers, and the Joint Petitioners do with their retail customers. I think because this is not a commercial agreement, and we don't have the flexibility to negotiate specific rates to help cover that increased risk, we feel it is appropriate to limit the liability to a bill credit.

Q Ms. Blake, do you understand that by arbitrating this issue the Joint Petitioners are affirmatively making a business decision not to get left holding the bag in 100 percent of the circumstances where BellSouth's negligence causes them damages?

A I'm not real sure why you are arbitrating this issue. It has been in your interconnection agreement for the last eight years. I mean, I will leave your reason for arbitrating this issue to you.

Q All righty. Ms. Blake, when you say that BellSouth is not going to incur the Joint Petitioners' cost of doing business, how is it again that BellSouth's negligence becomes the Joint Petitioners' cost of doing business?

A Well, if you will recall, if you go back a page, this line of questioning, or this question and answer in my testimony is relative to Issues 4 through 7, which involves more than just limitation of liability. It encompasses Items

5, 6, and 7, which deals with indemnification, and Item 5 specifically, whether they choose to not limit their liability to the maximum extent allowed by law. If that is a business decision they want to make, then BellSouth should not be bearing the risk of that decision.

Q It sounds like you want to go to Item 5. Let's do that.

Would you agree with me Issue Number 5 is one in which BellSouth seeks to impose upon Joint Petitioners certain indemnity obligations in an effort to shield BellSouth from claims from Florida consumers and businesses related to BellSouth's negligence, gross negligence, willful misconduct for violation of the contract?

A No, I don't think I can agree with your characterization of the wording of the issue that is in dispute here. If I may, I think the issue pertains to if the CLEC chooses not to limit their liability to the maximum extent allowed by law, should they indemnify BellSouth in the event that one of their end users seeks damages from BellSouth by their not limiting their liability.

Q So you would agree with me that BellSouth, in this instance, is insisting that Joint Petitioners indemnify them from claims by third parties based on BellSouth's negligence, gross negligence, or willful misconduct?

A Not necessarily. The intent of BellSouth's language

is to put BellSouth in the same position as if the Joint Petitioner's end user was BellSouth's end user. And in our tariffs with our end user we limit our liability to a bill credit. If the Joint Petitioners for some reason want to promise their end user a thousand dollar credit if they miss a due date, and the reason they miss that -- and they miss the due date, and their end user says give me my thousand dollars, then BellSouth would not be in that position if that was our end user.

So because of the failure that caused them to miss the due date, that end user would come after us, or the Joint Petitioners could say, okay, give me a thousand dollars to reimburse my end user, we would want to be held whole for the difference between whatever that thousand dollar promise was and a bill credit. We would be willing to provide the bill credit according to the limitation of liability for that day's out of service, or missing the due date, or whatever the agreement was.

Q Now, Ms. Blake, would you agree with me that if the Joint Petitioners had to incur yet another indemnity obligation it could be a potentially business impacting issue for them?

A I don't really see this as another indemnity. I think this is reimbursing BellSouth for the difference of any business decision the Joint Petitioners make by not limiting their liability versus if they have limited their liability to

the maximum extent allowed by law with their end user.

Q So, Ms. Blake, why don't we turn to the BellSouth contract proposal, and if you have your Revised Exhibit A, it would be -- Issue Number 5 starts on Page 2 and continues on Page 3.

A I have it.

Q Are you there?

A Yes.

Q And if this isn't an issue about indemnity obligation, Ms. Blake, why does BellSouth have indemnity language in this proposal?

A Well, indemnity and reimbursement is listed there together.

Q Okay. Would you agree with me that indemnity and reimbursement are at issue with Issue Number 5?

A Yes. That's BellSouth's language, which is consistent with the language that is in the current agreement today.

Q Now, Ms. Blake, we have established that you are -- actually, we haven't established this. Your proposal requires that the Joint Petitioners include in their tariffs and contracts with end users, customers, or any third parties, limitation liability provisions to the maximum extent permitted by applicable law, correct?

A No, it doesn't require the Joint Petitioners to do

that at all. It says a party may, at its sole discretion, provide in its tariff. Our provision in the last part of that language is to the extent that a party elects not to place in its tariffs or contracts such limitation of liability. That is where this provision kicks in. And the Joint Petitioners have that language in their contract. I think it has been discussed the last several days that they have got those provisions in there. I'm not aware of any reason to take that out of there.

Q Ms. Blake, were you here when the Joint Petitioners said that they do not always have limitation of liability language to the maximum extent permitted by applicable law in their customer service agreements?

A Yes, I have heard them say that, but I haven't seen any.

Q Have we seen any of BellSouth's customer service agreements in the course of these proceedings?

A Not that I'm aware of.

Q And you don't know the contents of those customer service agreements, do you?

A Again, I don't know the details of every contract service arrangement. I believe they are predominately based on reducing prices.

Q Right. But you don't know that BellSouth doesn't include limitation of liability language in its own customer service agreements that is, in fact, less than the maximum

extent permitted by applicable law, right?

A I don't know that 100 percent, correct.

Q Do you know what the maximum extent permitted by applicable law is?

A No, I do not.

Q Do you know what is meant by the capitalized term in your own proposal, applicable law?

A I believe applicable law is a defined term in the general terms in Section 32.1, I believe.

Q Can you describe for me what the applicable law would be with respect to limitation of liability?

A No, I could not. I'm not an attorney. I imagine it would be dependent upon whatever the state law, federal law -- again, I cannot.

Q Would you agree with me that the maximum extent permitted by applicable law in terms of limitation of liability is not set forth in Section 251 of the Telecommunications Act?

A Is limitation of liability a 251 obligation? I'm not sure I understand what you're asking.

Q Would you agree with me that Section 251 of the Telecommunications Act does not set a maximum limitation of liability?

A I don't believe I have ever seen limitation of liability discussed in Section 251 of the Act.

Q Okay. And do you think that any of the FCC's or the

Florida Commission's substantive telecom rules or orders addresses the maximum extent of liability or limitation of liability permitted by law?

A I would have no knowledge of that.

Q Okay. Now, with this provision, would you agree with me that BellSouth is trying to impose costs upon Joint Petitioners for deviating from BellSouth's tariff standard?

A Not at all. I think it is a choice the Joint Petitioners have to make whether they limit their liability to the maximum extent allowed by law; or if they choose not to, BellSouth wants the language it has proposed here, to be indemnified and reimbursed should the party decide not to do that.

Q Would you agree with me that if one of the Joint Petitioners wanted to respond to a request of a government agency, or any consumer here in the state of Florida, for limitation of liability provisions that allowed for more than bill credits, that they would have to factor into their decision BellSouth's proposal which would require them to indemnify BellSouth in such instances?

A That would be part of their business decision to make, yes.

Q So BellSouth in that context is seeking to impose additional costs upon Joint Petitioners, isn't that right?

A No, I would not agree with that. I will stand by my

previous answer.

Q Now, at the root of this issue, Ms. Blake, is BellSouth's fear that the Joint Petitioners' customers may sue BellSouth for damages resulting from BellSouth's own negligence; isn't that right?

A That could be the case. And, again, we want to limit our liability to the bill credit or no different than if that end user was our end user.

Q Can you explain for us how one of the Joint Petitioners' Florida customers could successfully sue BellSouth for damages resulting from BellSouth's negligence?

A Again, I'm not an attorney, and who can sue who in what cases I'm not versed in. But it could be a situation where the Joint Petitioners may be seeking reimbursement or payment for what promises they made to their end user, which may exceed a bill credit.

Q Now, you mentioned previously in your testimony today and in your direct testimony with respect to service guarantees that Joint Petitioners may or may not offer to their end users. Do you know of any that the Joint Petitioners actually offer to their end users?

A No, I don't have any knowledge of them, but it doesn't mean that they couldn't come up with something creative in that regard.

Q Is your concern purely hypothetical and based on what

ifs?

A It is somewhat in protecting as far as the adoptability of this agreement by other CLECs that may have service guarantees out there and different ways to win a customer or get the service from that customer by promising them a credit or some amount if they fail to deliver on time.

Q Now, Ms. Blake, if you have your revised Exhibit A, you may need to refer to it. But would you agree with me the Joint Petitioners actually have proposed no language for this issue?

A Yes, I see that.

Q And so you would agree with me that the Joint Petitioners' language does not give end users any rights versus BellSouth that they would otherwise have?

A But it takes away limitation of liability protection that BellSouth would have. If that was our end user it would be limited to a bill credit.

Q That wasn't my question.

A I'm sorry.

Q Would you agree with me that the Joint Petitioners' language doesn't give end users any rights that they wouldn't otherwise already have?

A With respect to Issue 5, there is no suggested language for the Joint Petitioners, so it can't give any rights or take any rights away because there is nothing there.

However, this issue is very much tied to the indemnification language that the Joint Petitioners have proposed, and in being able to be indemnified besides for libel, slander, and invasion of privacy, which would be the only occasion we would be indemnified by the Joint Petitioners under Item 7.

Q Why don't we stop at Issue Number 6 before we get to Item Number 7. And with respect to Issue Number 6, Ms. Blake, would you agree with me that this issue is about BellSouth's refusal to accept language clarifying that certain direct and reasonably foreseeable damages should not be classified as indirect, incidental, or inconsequential damages, correct?

A No, because I don't believe the Joint Petitioners' language clarifies anything.

Q Ms. Blake, do you recall your deposition taken in December in Raleigh by my colleague, Ms. Joyce?

A Yes, I do.

Q Isn't it true that you testified there that you don't know what incidental damages are?

A Again, I'm not an attorney, and I believe incidental, inconsequential, and indirect damages are -- my understanding they are very defined legal terms, and that is all BellSouth is seeking to be included in this agreement. It's consistent with that understanding.

Q So what is at issue in Item Number 6 is the definition of indirect, incidental, inconsequential damages,

and you were provided as the 30(B)(6) witness for BellSouth, and you don't understand what those terms mean?

A Well, I'm not an attorney. I have said that numerous times. I think our language is part of your language; your language is our language. However, the bolded sentences in this section here does nothing more than causes confusion in my opinion, my layman's opinion. And I think, as has been testified here over the last few days, this contract can have no force or effect to either party's end users. It is unnecessary language. It doesn't add any value. We can't give any rights or take any rights to either party's end user through this contract.

Q Now, would you agree with me that BellSouth in rejecting Joint Petitioners' proposed language is, in effect, trying to shield themselves from claims from end users or from the Joint Petitioners on behalf of their end users due to BellSouth's negligence, willful misconduct, or gross negligence?

A No, I would not agree with that. I think the language that is set forth in the beginning of both parties' section talks about except in cases of gross negligence or willful misconduct or intentional misconduct, under no circumstances shall a party be responsible or liable for indirect, incidental, or consequential damages. The parties agree on that. It is the added language that has no force or

effect and is unnecessary. We can't impact the rights of either party's end user.

Q Now, Ms. Blake, why don't we turn to that proposed language, which appears on Page 3 of the Revised Exhibit A. Do you have that in front of you?

A Yes, I'm there.

Q And, looking at the CLEC version, the Joint Petitioners' proposal, would you agree with me that the bolded part of that proposal is the part with which BellSouth will not agree?

A That is correct.

Q And do you see several lines into it where it talks about damages result directly and in a reasonably foreseeable manner?

A Yes.

Q Do you think that damages that result in a direct and reasonably foreseeable manner are indirect?

A Again, they may or may not be. I think that the language that BellSouth has proposed and that is part of the Joint Petitioners' language is very clear, and I think the added language that the Joint Petitioners make is they are trying to make sure their end user rights are not impacted or impaired, but we can't do that anyway. So I don't understand why it is necessary language.

Q Well, if you do understand that Joint Petitioners

don't want to impair their end users or customers' rights in any way, and you don't think that you can, why can't you agree to it?

A Because it is unnecessary language that doesn't add any value to this agreement. It is big enough as it is. And I don't know that it adds any value, and it could possibly lead to conflict and confusion in the future of what it means.

Q Now, one of the criticisms you have lodged at the Joint Petitioners' proposal is that it is long, correct?

A Yes.

Q You would agree with me that long language is always bad language?

A Not always.

Q Okay. Does BellSouth have some of its own proposals that are long?

A I'm sure we do.

Q Complicated?

A In a lot of people's minds, yes.

Q Now, you have also testified that the Joint Petitioners' proposal is vague, correct?

A Yes, I mean --

Q And do you have a copy of your deposition testimony with you from North Carolina?

A I believe I do.

Q Will you turn to Page 305 of your deposition

testimony? I would like to refer you to your testimony at Page 305, Lines 21 and 22, where Ms. Joyce asked the question, why do you believe the qualifying language is extremely vague? Do you see that?

A Yes, I see that.

Q And would you agree with me that the qualifying language being discussed in that particular question is the bolded language in the Joint Petitioners' proposal?

A Yes, it is.

Q Could you read your answer to Ms. Joyce's question starting at Line 23 and continuing on to the next page through Line 14?

A Sure.

"Answer: Well, I mean, again, not being an attorney and reading, you know, the long sentences, you know, it is 12 lines long that has been inserted and that is in dispute, and it is provided that this happens or any other provision construed to be imposing claims concurred by the end users or to the extent such damages directly -- result directly or in a reasonably foreseeable manner from the first party's performance service hereunder and were not or are not directly or proximately caused. I mean it just seems to go on, okay? Where are we when we get to the end of that bolded sentence? That seems very confusing, and I'm not sure what it is actually saying at the end of the day."

Q And do you see Ms. Joyce's next question on Line 15 of Page 306, where she asks: Would it be more clear if it were shorter?

A Yes, I see that.

Q Can you read your answer to that question?

A "Answer: It would be more clear if it wasn't there, and it's consistent with BellSouth's language."

Q Let's move to Issue Number 7. Ms. Blake, would you agree with me that Issue Number 7 is about the parties' indemnification provisions and what those should be under the interconnection agreement?

A Yes.

Q Now, with respect to this issue, it is BellSouth's position that Joint Petitioners must indemnify BellSouth for damages caused by BellSouth's negligence or other failure to perform its obligations under the agreement, correct?

A I believe it's a reciprocal based on the party receiving the service and providing the service dictates indemnification, not necessarily always BellSouth versus Joint Petitioners.

Q Now, with respect to BellSouth's gross negligence or willful misconduct, is it BellSouth's position that Joint Petitioners don't need to indemnify BellSouth, but they need to hold BellSouth harmless and defend BellSouth in cases of gross negligence or willful misconduct, correct?

A I think we have had this line of questioning before, Mr. Heitmann. I am not sure necessarily that that -- the placement of the except to the extent caused by the parties -- providing party's gross negligence or willful misconduct, the placement of that after the term indemnified or before defended and held harmless is anything I can really speak to here as far as the intent of that. I don't believe it was intended to do something different between those, indemnify, defend and hold harmless.

Q Okay. And now, in your direct testimony you claim that it is appropriate for the receiving party to indemnify the providing party, correct?

A Can you ask that again. I'm sorry, I was reading.

Q Yes. In your direct testimony you claim that it is appropriate for the receiving party to indemnify the providing party, correct?

A Yes.

Q And by that do you mean that if a Joint Petitioner is receiving services from BellSouth under the interconnection agreement it is appropriate for the Joint Petitioner to indemnify BellSouth for damages resulting from BellSouth's breach of the interconnection agreement, negligence, or gross negligence even?

A It would be based on the criteria we have got set forth in our language here as far as the -- for the receiving

party's use of the services provided under the agreement pertaining to claims, Items 1 and 2, as set forth in our language.

Q Let me try again.

A Okay.

Q If you can try to answer with yes or no.

A Okay.

Q Under your proposal if a Joint Petitioner is receiving services from BellSouth under the interconnection agreement, is it appropriate for the Joint Petitioner to indemnify BellSouth for damages resulting from BellSouth's breach of the interconnection agreement or BellSouth's negligence?

A Well, I guess if you are equating breach of the interconnection agreement relative to any claim or loss of the provisions set forth here, yes.

Q Now, would you agree with me -- and the provision I believe you have just referred to is in the proposed language by BellSouth which appears on Page 4 of Joint Petitioners' revised Exhibit A. Would you agree with me that the indemnification obligation under Subpart 2 for any claim, loss, or damage claimed by the end user or customer of the party receiving services arising from such company's use or reliance on the providing party's services, actions, duties, or obligations arising out of this agreement. Would you agree

with me that that indemnification obligation is actually quite broad?

A I don't know if I have a barometer to compare broad to versus other language. It is the language that is consistent with what is in the interconnection agreement today, standard limit indemnification language.

Q Now, you say standard. Is this BellSouth's standard?

A This is BellSouth's template agreement that we negotiate with Joint Petitioners, CLECs, et cetera. It's the standard that has been there for years.

Q Now, I believe in another context you have actually called your proposal industry standard, correct?

A Yes, as far as --

Q Do you still have a copy of the ALLTEL agreement with you there?

A Sure do.

Q And I refer your attention to Section 7.3.1 on Page 5 of the general terms and conditions included in that excerpt.

A 7.3.1?

Q Yes.

A Okay.

Q Did you have a second to review that?

COMMISSIONER BRADLEY: Mr. Heitmann, I'm going to take a 15-minute break to give the court reporter a little relief, and we will pick up in 15 minutes.

MR. HEITMANN: Excellent. Thank you.

(Recess.)

COMMISSIONER BRADLEY: We are back in session.

BY MR. HEITMANN:

Q Ms. Blake, continuing with Issue Number 7, I believe we were discussing BellSouth's characterization of its position as the industry standard, is that right?

A Yes.

Q And I believe that we were looking at the indemnification language from the ALLTEL/NewSouth interconnection agreement excerpt that you have in front of you?

A Yes.

Q And would you agree with me that Section 7.3.1 of that ALLTEL interconnection agreement, in fact, differs substantially from BellSouth's proposal?

A I would agree that it differs from BellSouth's proposal in the same way that this agreement is different than the interconnection agreement that we are arbitrating here. Like I said, regarding the limitation of liability, I don't believe ALLTEL has the same obligations under 251 to provide the services that BellSouth has under this interconnection agreement. So it's not a good comparison to what BellSouth has an obligation to provide.

Q By way of comparison, Ms. Blake, would you agree with

me that this indemnification provision is, in fact, similar to the indemnification provision proposed by the Joint Petitioners?

A Without looking at it and reading it through and comparing it, it appears to be somewhat. I mean, I believe the Joint Petitioners' indemnification language only limits the indemnification for the providing party to claims of libel, slander, and invasion of privacy. And I think this first paragraph maybe gives mutual indemnification beyond that which is not in the Joint Petitioners' language.

Q Let's turn to the Joint Petitioners' language which is on Page 4 of Exhibit A. And although this provision is reciprocal, like BellSouth's provision, it is written in terms of the providing party and the receiving party. Can you presume for me that BellSouth is the providing party, okay?

A Okay.

Q Is it your testimony that BellSouth cannot agree to indemnify Joint Petitioners when BellSouth is negligent, grossly negligent, or engages in willful misconduct?

A I think BellSouth's language has the exclusion of gross negligence and willful misconduct as the providing party.

Q Right. And BellSouth's language talks about when -- if the Joint Petitioners are the receiving party, when Joint Petitioners have to indemnify BellSouth. But my question, Ms. Blake, is actually about the Joint Petitioners' language.

A Okay.

Q And my question for you is based on the Joint Petitioners' language and the understanding that BellSouth in this instance is the providing party, is it your testimony that BellSouth cannot agree to indemnify Joint Petitioners when BellSouth is negligent, grossly negligent, or engages in willful misconduct?

A We cannot agree to the negligent part. We are agreeable to the gross negligence and willful misconduct, consistent with our language.

Q So BellSouth will indemnify Joint Petitioners when BellSouth is grossly negligent or engages in willful misconduct?

A Which is the part that is in our language as well, as far as gross negligence and willful misconduct.

Q Now, with respect to negligence, Ms. Blake, I believe that you have lodged the same criticism with respect to the indemnification provision that you had with respect to the limitation liability provision, and that TELRIC pricing does not permit BellSouth to take on a contract provision such as this, is that right?

A I don't know that I said TELRIC does not permit us to. I believe that the rates that have been established by the Commission have not accounted for that increased liability that would come with the Joint Petitioners' language.

Q Now, again, here to, any liability increase would only be as a result of BellSouth's negligence, correct?

A Can you ask that again? I'm sorry.

Q In this respect, as well, Ms. Blake, any increase in BellSouth's liability would be attributable to BellSouth's negligence, correct?

A Yes, it could be.

Q Okay. Now, Ms. Blake, under the interconnection agreement, are all the services and elements Joint Petitioners are going to buy priced at TELRIC?

A There are several issues that we are arbitrating relative to non-TELRIC prices based on providing functions or capabilities that we are not obligated to provide, such as expedites and routine network modification, line conditioning that are not at TELRIC prices or we are proposing that they not be at TELRIC prices.

Q And the TIC would be another example of a right that BellSouth is proposing that would not be at TELRIC, correct?

A Yes, that is correct.

Q And to the extent that pursuant to the triennial review remand order, Joint Petitioners are no longer able to access certain former 251 UNEs at TELRIC pricing. Those, too, would not be at TELRIC, correct?

A Nor would they be -- that is correct. And nor would they be provided pursuant to this interconnection agreement.

Q That is not Joint Petitioners' position, is it?

A I believe those are one of the supplemental issues that is being deferred to the change of law docket, if I'm correct on that.

Q Okay. Why don't we move to Issue Number 9. Would you agree with me that Issue Number 9 has evolved into an issue about the circumstances under which the parties may resort to a court of competent jurisdiction for resolution of disputes that may arise under the agreement?

A Yes.

Q And under the Joint Petitioners' current agreements, courts of competent jurisdiction are, in fact, included in the venues available for initial dispute resolution, correct?

A I believe that is a case for -- I'm not sure if it's for all three of the Joint Petitioners, but I have seen it in at least one of them I recall.

Q And to your knowledge, that has resulted in no harm or controversy, correct?

A Not that I'm aware of.

Q Yet BellSouth forced Joint Petitioners to arbitrate in order to preserve any aspect of their right to go to a court of law in the first instance, correct?

A I believe the intent of BellSouth's language is to have the Commission or the FCC arbitrate disputes or involve disputes relative to the implementation or interpretation of

the agreement.

Q Ms. Blake, you didn't answer my question.

A Sorry. I think I did. Go ahead. Sorry.

Q My question was, yet BellSouth forced Joint Petitioners to arbitrate in order to preserve any aspect of their right to go to a court of law in the first instance, correct?

A I wouldn't say we forced you to arbitrate.

Q If the Joint Petitioners did not file an arbitration petition in February of 2004, would they have had any right to go to a court of law in the first instance in the interconnection agreement?

A I believe you are referring back at the time the arbitration was filed, BellSouth did not have its latest proposed language in there that would allow in those cases where there is not expertise or jurisdiction in the Commission or the FCC, and then the parties could take the dispute to a court of law. I believe our initial position was that the dispute should come to the Commission and the FCC first, or the FCC first.

Q Now, under your latest proposal, Ms. Blake, which is included in Joint Petitioners' Exhibit A on Pages 5 and 6, would you agree with me that it says that the parties should go to the, quote, appropriate regulatory body -- I'm going to skip some words -- unless it is obvious.

A Can you point me where you're reading, what section? Sorry.

Q I believe it is 13.3. Hold on one second. In order to save time, I will rephrase.

Would you agree with me that BellSouth's position is that the parties should go to the appropriate regulatory body unless it is obvious that neither the FCC nor the Florida Public Service Commission has expertise, is that right?

A I'm not sure our language says obvious. Our language says for such matters that lie outside the jurisdiction or expertise, if a dispute arises then a party can go to a court of law.

Q Now, under your proposal the parties would have to agree whether the Florida PSC or the FCC had sufficient level of expertise or jurisdiction before the Joint Petitioners could go to a court of law, correct?

A Not necessarily. I mean, the parties could agree before anybody takes action to going to a court. However, if the disputing party thought it was outside the jurisdiction and the nondisputing party or the other party did not, they could take such action to either change the jurisdiction back to the Commission or try and argue against the jurisdiction of the court in that case.

Q Now, if there was a disagreement as to whether this Commission had jurisdiction or expertise, under your proposal,

the parties would first have to come to this Commission and litigate that issue before they ever got to litigate the dispute that they started with, correct?

A Not necessarily. That is what I attempted to explain a second ago. If there was a dispute and a party that was raising the dispute thought it was outside the jurisdiction or expertise of the Commission; and, therefore, invoked this provision that took it to a court, and the other party felt it was within the jurisdiction or expertise of the Commission, they could petition -- again, I'm not an attorney, but I believe there would be some proceeding or process to petition the court to say this is better served or better heard by the Commission, the PSC, or the FCC.

Q Would you agree with me that at least in some instances your proposal could end up with dispute proceedings and complaint proceedings before this Commission about where to resolve disputes?

A Whether it is a full-blown proceeding or not, I'm not familiar with the procedural matter of how that would transpire. If it is just a matter of a simple filing that says, we don't think you have the jurisdiction, and, therefore, we want to take it to a court versus going to the court and saying we think the PSC has better jurisdiction and expertise to resolve this dispute. Whether those are simple filings or full-blown evidentiary hearings and stuff, I don't -- I don't

know the details of that.

Q So is the answer to my question, yes, Ms. Blake?

A It's possible.

Q It's possible. It's possible that if the Joint Petitioners and BellSouth have a dispute over whether this Commission or the FCC has expertise over a particular matter, that we could be engaged in complaint proceedings here in Florida and perhaps in up to eight other state commissions simply over whether or not the Joint Petitioners can avail themselves of their fundamental right to take a dispute to a court of law?

A No, I don't believe I said that. I said it could be a simple filing that the attorneys would file that says we don't think the appropriate jurisdiction is before the Commission; therefore, it should go to a court. Or vice versa, a filing before a court that would say this is better heard by the Commission that approved this agreement. It has the expertise and has the jurisdiction to hear complaints and disputes relative to an agreement that was negotiated and approved by the Commission, or arbitrated.

Q Do you know whether the Florida Commission or any other of the state commissions in your region has developed a simple filing procedure to ensure that your proposal is not unduly burdensome on the state commission and the Joint Petitioners?

A Unduly -- I'm sorry, I'm not sure I follow what you are inferring would be unduly burdensome on the Commission. Hearing the complaint, the dispute in general?

Q The dispute about where to go, yes.

A Again, as I said, I'm not familiar with all the procedural process of what would be filed, but I have seen quite a few filings in my job as far as motions and all sorts of documents that get filed all the time asking for things to be done differently.

Q Now, Ms. Blake, if one of the Joint Petitioners alleged or asserted that a particular claim was outside the scope of this Commission's jurisdiction, and BellSouth disagreed, the Joint Petitioners would have no recourse other than go to this Commission first, correct?

A No, that is what I said. If the Joint Petitioners thought they could dispute -- take the dispute to the court, they would file the dispute with the court. If BellSouth felt that it was within the expertise or jurisdiction of this Commission, we would make a filing to the court that says, in accordance with the interconnection agreement, we feel the expertise and jurisdiction is with the Commission, and that is where the dispute should be heard. I would say the Joint Petitioners would file something countering that or rebutting that position BellSouth took, and let the court decide is it appropriate for jurisdiction to go, or this dispute to go back

to the Commission for an agreement that they approved.

Q And, Ms. Blake, do you recall that in North Carolina in response to cross-examination questioning from the public staff attorney you agreed that even BellSouth's latest proposal seeks to limit Joint Petitioners' rights; that is, their right to avail them themselves of the court system, both state and federal?

A Do you have my transcripts, I'm not --

Q You can't recall?

A Not exactly those words, no.

Q Okay. Would you agree with me that to some extent BellSouth seeks to limit Joint Petitioners' rights to go to court?

A To the extent -- yes, to the extent that the jurisdiction or expertise of the dispute is in the possession of the Commission or the FCC.

Q And in seeking to limit or encumber Joint Petitioners' rights in such a manner, you also are asking the Public Service Commission in this arbitration to, in effect, strip the federal and state courts of some of their jurisdiction, correct?

A Again, I don't think I can speak to what ability the Commission has to strip jurisdiction of a court. I think our intent of our language is to get disputes and issues relative to the implementation or interpretation of this interconnection

agreement to be heard by the Commission if they have the expertise and jurisdiction.

Q Now, I believe your testimony just was that you do not know whether the Florida Public Service Commission has the ability or the jurisdiction to strip a state or federal court of its jurisdiction to any extent, is that fair?

A I'm not an attorney. I don't know all the ins and outs of the Commission's jurisdiction or ability to assert jurisdiction.

Q Okay. Now, in your direct testimony, at Pages 18 and 19, you cite to a case this Commission decided, an arbitration case between BellSouth and AT&T. And at issue in that arbitration, I believe, was whether the interconnection agreement should include a commercial arbitrator as an option for dispute resolution, correct?

A Yes, I cited to that. That was the AT&T/BellSouth arbitration.

Q Now, isn't it true that the Joint Petitioners had proposed commercial arbitration as an option for dispute resolution during the course of negotiations?

A That you have or have not?

Q We had.

A I'm not familiar with that discussion or during negotiations if that was presented. I'm not familiar with it.

Q Can you agree with me that in the course -- in the

context of this particular arbitration whether or not the Joint Petitioners have a right to go to a commercial arbitrator is not at issue?

A Right, and that's fine.

Q And you agree with me?

A I agree that going to a commercial arbitrator is not an issue, is not my understanding of the issue.

Q It is not an issue nor will it be a right under this contract, correct?

A That's correct. Again, my reference for citing to the AT&T arbitration was the Commission, you know, based on the evidence presented, we find that third-party arbitration is neither speedy nor inexpensive. And I think that can be extended in the next sentence, nothing in the law gives us explicit authority to require a third party, and that the Commission should -- shall resolve disputes under the interconnection agreement. We are just saying the same ruling should be here, the Commission shall resolve disputes under the interconnection agreement.

Q Now, you reference that the Florida Public Service Commission stated that nothing in the law gives us the explicit authority to require a third-party arbitration. In this context, isn't it true that nothing in the law allows the Florida Public Service Commission to take jurisdiction away from Florida courts and federal courts?

A Well, I previously answered I'm not in a position to answer that question. I'm not an attorney.

Q I am going to move to Issue Number 12. Now, Ms. Blake, would you agree with me that this provision is a dispute over the extent to which applicable law is included in the interconnection agreement?

A I think it is more in -- should the agreement explicitly state that all existing federal and state rules, regulations, and decisions apply unless otherwise specifically agreed to by the parties.

Q Now, you would agree with me that the parties already have defined what they mean by applicable law?

A Yes. There is a paragraph in the general terms that discusses --

Q Do you have a copy of that with you?

A Yes, I do.

Q And are you referring to Section 32.1?

A Yes, I am.

Q Could you read for us the manner in which the parties have defined applicable law for purposes of this interconnection agreement?

A Yes. Section 32.1, each party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, injunctions, judgments and binding decisions, awards and

decrees that relate to its obligations under this agreement. Open parens, quote, applicable law, close quote, close parens.

Q So you would agree with me that applicable law could include state laws, for example?

A Yes. It says state, local statutes, laws, that's part of the definition of applicable law in this paragraph.

Q Right. And you would agree with me that applicable law could include the rules and orders of this Florida Public Service Commission, correct?

A Yes, as that relates to its obligation under this agreement, the last part of the sentence. And our obligations under this agreement are pursuant to 251 and 252 of the Act.

Q Now, Ms. Blake, would you agree with me that access to CSR information and compliance with the FCC's CPNI rules is governed by Section 222 of the Act?

A I believe that is true.

Q And would you agree with me that in certain respects that this agreement, in fact, goes beyond Section 251 obligations?

A Yes. As the parties have expressly entered into our obligations relative to CSR information protecting CPNI.

Q Now, this provision, 32.1, states that the parties are going to comply with applicable law, and the provision under dispute talks about when they are going to comply with applicable law and an exception. The exception that Joint

Petitioners make is that when the parties have agreed to do something else in the contract or created an explicit exception. Is that a fair characterization of the Joint Petitioners' position?

A Yes, that's my understanding.

Q Now, BellSouth takes a different position with respect to compliance with applicable law. It is BellSouth's position that BellSouth is going to have an implied blanket exception to all applicable law that is not expressly referenced in this interconnection agreement, correct?

A I wouldn't characterize it as a blanket exemption. I believe the intent of our language is to know what we are obligated to do at the time the parties execute the agreement.

Q Well, Ms. Blake, if you have already agreed to comply with applicable law in Section 32.1, where does BellSouth's confusion lie?

A I think there was a discussion yesterday relative to state unbundling requirements. If there is a conflict with what the FCC has required and what our obligations are pursuant to 251 and 252 of the Act, that is what we should be obligated to comply with.

Q Hypothetically speaking, Ms. Blake, let's say that the Florida Public Service Commission had unbundling obligations that BellSouth contended were inconsistent with federal unbundling law. Would BellSouth's recourse be to

simply ignore the Florida Public Service Commission's rules and orders, or seek preemption at the FCC?

A I'm not sure I can speak to the legal avenues we would exhaust. The intent of this agreement is to lay out our obligations under 251 and 252 of the Act. If there are other obligations of the Commission, they would not necessarily be obligations under 251 and 252 of the Act. If there is something the Commission has required us to do that is in specific conflict with the federal requirements, then my understanding is, again, not being an attorney, I don't believe that is permissible, if you will, as far as being in conflict.

Q Now, Ms. Blake, you talk about your obligations under Section 251 and 252 of the Act. Can you turn to BellSouth's proposed language, which is at Page 6 of Exhibit A?

A Yes.

Q BellSouth's proposed language references substantive telecommunications law?

A Only.

Q Do you see that in the first provision about one, two, seven lines down?

A Yes. It's in -- with respect is a virtue of a reference to an FCC or Commission rule or order or with respect to substantive telecommunication law only.

Q Now, would you agree with me that substantive telecommunications law is, in fact, much broader than Sections

251 and 252 of the federal act?

A It could be, yes.

Q Okay. Now, you criticized the Joint Petitioners' proposal by calling it a catch-all for inclusion of applicable law that they did not specifically set forth in the contract, correct?

A Yes.

Q Is it your position that if Joint Petitioners didn't negotiate specifically with respect to a specific requirement contained in applicable law, such requirement is excluded from the interconnection agreement?

A BellSouth's position -- I'm not sure that I can answer that yes or no. BellSouth's position is that we should know what our obligations are entering into this contract. We have been negotiating for two years now, at least, and I feel like it is BellSouth's position that the parties would know what the law is. And if there was some provision that needed to be memorialized in there individually, then the parties would enter into it in the agreement at the time it was negotiated.

If there was a law that one party thought the other party wasn't complying with, then that would be what would result in the provisions we have got in our language to raise a dispute and bring that before the Commission to resolve and figure out is there an obligation under the contract for the

other party.

Q Now, Ms. Blake, you are aware that BellSouth selected and, in fact, insisted upon Georgia law as the governing law of this interconnection agreement and its variations in every single state across the BellSouth region, correct?

A Yes. I believe we do have Georgia law as the governing law. There is a section on governing law, Section 22, that has some other information in it, as well.

Q Does referring to Section 22 --

A 22.1, governing law.

Q -- confirm your recollection that the parties, indeed, have selected Georgia law as governing law for this contract?

A Well, the first sentence says where applicable this agreement shall be governed by and construed in accordance with federal and state substantive telecommunication law, including rules and regulations of the FCC and appropriate commission. In all other respects, this agreement shall be governed and construed and enforced in accordance with the laws of the state of Georgia.

Q Now, isn't it true that under Georgia law, laws of general applicability are incorporated into contracts as though expressly set forth therein, unless the parties include an exception to that law in the contract or agree upon other terms which would displace the applicable law?

A You are way far afield from my layman's -- I'm not an attorney. I can't speak to any of what you just asked me. I'm sorry.

Q Okay. I am going to ask another question, and if it is again beyond your scope, just say so, and I will try to move on. But, Ms. Blake, do you realize that your position, BellSouth's position is fundamentally at odds with the Georgia law you insisted on applying to the agreement?

A I don't believe it is.

Q And the basis for that opinion is?

A Is I can't -- BellSouth will not enter into a contract or propose language that is in conflict with the law. I mean, again, I will defer to my attorneys to brief that and speak to that. But, I mean, I don't think I agree with your characterization that we would do something inappropriate.

Q Now, in your rebuttal testimony you have accused NuVox of exploiting a similar applicable law provision, is that correct, Page 31 of your rebuttal testimony?

A Just give me one second, please. Yes, that is the gist of my language -- my testimony, excuse me.

Q And is what you are referring to litigation between NuVox and BellSouth concerning EEL audits in the state of Georgia?

A I believe Georgia is one of the states, yes.

Q And isn't it true that the Georgia Commission, in

fact, rejected BellSouth's position and found in favor of NuVox on the issue of applicable law, correct?

A I believe that was the case. I don't know all the ins and outs of that whole decision without looking at it.

Q Would you agree with me that the Kentucky Public Service Commission also ruled in a manner which suggests that NuVox was correct on its interpretation of Georgia law and that BellSouth's position was, again wrong?

A I am not familiar at all with the Kentucky decision.

Q Okay. Ms. Blake, can you provide for us a list of the provisions of substantive telecommunications law not expressly replicated or included in the contract with which BellSouth thinks it does not have to comply?

A No, I cannot.

Q Could you provide us with some examples of the law to which BellSouth is unclear about applying to the parties vis-a-vis this interconnection agreement?

A No. I think the intent of the language that is being arbitrated here is to memorialize the obligations each party feels they have. If down the road one party feels the other party is not fulfilling its obligations and feels it has an obligation under the contract, then our language we proposed sets forth the process for resolving that.

Q Ms. Blake, why don't we move to Issue Number 26.

A Okay.

Q Would you agree with me that this is an issue about whether Section 251 elements can be commingled with Section 271 elements?

A Yes. It's whether BellSouth has an obligation to commingle 271 elements.

Q And would you agree with me that FCC Rules 309(e) and (f) require BellSouth to perform functions to enable commingling as well as to permit commingling?

A Yes, they do.

Q And you would agree with me that commingling essentially means connecting Section 251 UNEs with wholesale services offered pursuant to any method other than Section 251?

A I think the definition of commingling in the FCC rules mentions more wholesale services, UNEs and UNE combinations with wholesale services. I think you are probably referring to Paragraph 579 where it carves out things other than 251.

Q Is it your testimony the FCC rules set forth the particular types of wholesale services with which BellSouth has an obligation to commingle with Section 251 elements?

A No. The rule does not explicitly define all the wholesale services. I believe read in concert with the rule, Paragraphs 579 through 584, 85 clearly is the -- what appears that the FCC has defined wholesale services to be, tariffed access services.

Q You say the FCC has defined wholesale services to be tariffed access services?

A Throughout those paragraphs I just referenced, 579 through 584 and 85, the reference to wholesale services is inclusive or reflective of special and switched access services provided pursuant to tariff.

Q Now, let's continue first with the definition of commingling. Would you agree with me that the definition of commingling appears in FCC Rule 51.5?

A Yes, I believe it does. I don't have that in front of me. If you have a copy.

Q Do you have a copy of the triennial review order with you?

A There is probably one up here.

Q It probably has a rule section appended to it.

A Yes, 51.5.

Q Okay. If you could leave that open, we will continue with that in a second. BellSouth's position is that CLECs cannot commingle Section 251 UNEs with 271 elements, correct?

A Services provided pursuant only to 271, yes.

Q And BellSouth's position is based on the fact that it does not believe that Section 271 services, as you call them, are wholesale services?

A Correct.

Q Does BellSouth offer Section 271 services on a retail

basis?

A BellSouth offers transport and high capacity loops pursuant to its tariffs to its wholesale/retail -- retail customers that can buy out of our access tariff, whether you call them a wholesale customer or a retail customer.

Q So if my colleague, Mr. Horton, wanted to buy some BellSouth Section 271 switching, there is a tariff he could buy it out of?

A No, I said transport and high capacity loops are what we offer. Our 271 obligations for those elements are offered pursuant to our access tariffs.

Q So you don't offer a Section 271 retail switching product?

A Not via tariff. We do offer it through a commercial agreement.

Q So is a Section 271 switching product you offer a wholesale service offered through commercial agreement?

A It would be offered pursuant to that commercial agreement, yes.

Q Ms. Blake, is Section 271 transport -- excuse me. Ms. Blake, is the Section 271 switching offering you have a wholesale service?

A It's a wholesale service, but it is not an obligation governed by 251 commingling requirements.

Q And your position is that -- the import of that

position, Ms. Blake, is that Section 271 switching cannot be connected to any Section 251 elements, correct?

A Well, the effect of connecting, of BellSouth being obligated to connect a 271 switching element to a 251 loop element, unbundled network element, in essence, effectuates UNE-P. **BellSouth does not have an obligation to combine 271** elements.

Q Now, Ms. Blake, let's talk in terms of Section 271 transport. Presume for me, if you will, that there is a Section 271 obligation that results in a transport offering that is, in fact, different than your current special access offerings, okay?

A That's a hypothetical because they are not.

Q And that is BellSouth's position again?

A That our transport offering that satisfies our 271 obligation, we offer that pursuant to our access tariff.

Q So it is BellSouth's position that Section 271 transport, which is a checklist item, agreed?

A Yes.

Q Is actually special access, correct?

A That is the means we provide that service. Our obligation under 271 is provided pursuant to the rates, terms, and conditions under access tariff, yes.

Q Ms. Blake, did BellSouth offer special access transport services and special access loops services in 1995?

A I believe we did, yes.

Q And in 1996, did the President enact legislation or sign legislation into law that included the Section 271 checklist?

A Yes, that would be the Telecom Act.

Q Would you agree with me that transport and loops are items on the Section 271 checklist?

A Yes, I said that earlier.

Q Ms. Blake, would you agree with me that there would have been no reason to include loops and transport on the checklist if things like special access, which already were available, were out there?

A No, because I believe those elements were also considered unbundled network elements for which the FCC at the time found there was impairment without BellSouth unbundling its network to make those elements available at TELRIC rates versus special access rates which are higher.

Q Now, let's focus in on that definition again, 51.5, Ms. Blake. Do you see any exception in that definition that says except for Section 271 elements?

A No, I do not.

Q Could you turn to FCC Rule 309(e) and (f)?

A Okay.

Q Would you agree with me these are the rules that we refer to as the commingling rules?

A The section of the rule is the use of unbundled network elements; (e) and (f) discusses the obligation to permit commingling.

Q And (f), in fact, describes the obligation of the incumbent LECs shall perform the functions necessary to commingle, correct?

A Yes.

Q Do you see in either Subsections (e) or (f) any exclusion that says wholesale services, except Section 271 services?

A Not specifically in those rules, but I think when read and coupled with the paragraphs of the TRO, Paragraphs 579 through 585, I think it is very clear by their use of the terms and the examples they give, that the intent was that wholesale service would be the services provided pursuant to BellSouth's tariff.

Q Why don't we start with Paragraph 579, Ms. Blake?

A Okay. I'm there.

Q Would you agree with me that in the TRO the FCC eliminated commingling restrictions it had imposed in prior orders?

A Yes.

Q And would you agree with me in Paragraph 579 the FCC describes what they mean by commingling? Do you see that sentence that -- I believe it is the third one in. It starts

with by commingling we mean.

A Yes, I see that.

Q Could you read that sentence for us?

A "By commingling, we mean the connecting, attaching, or otherwise linking of a UNE or a UNE combination to one or more facilities or services that a requesting carrier has obtained at wholesale from the 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."

Q Would you agree with me that Section 271 services constitute a service that a requesting carrier can obtain at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act?

A It could be -- yes, I would agree that it is a method. However, there are other provisions throughout the next several paragraphs whereby BellSouth's position is that the Commission specifically referenced commingling in the **context of tariff services with UNEs.** And when you go forward on to some other paragraphs there, it's very -- it seems to be very clear that there is not an obligation to commingle or combine 271 UNEs, or the effect of that would create a new UNE for which we are not obligated to provide.

Q Ms. Blake, let's stick with the triennial review order and go to Footnote 1990. Actually, if you don't mind, I

think we'll stop at 584 first. We'll keep it in order.

A Okay.

Q 584 is a paragraph that BellSouth relies on, correct, in support of its position?

A Yes, that coupled with the errata that impacted this paragraph.

Q Yes. And would you agree with me that the errata struck from the first sentence of that paragraph the words, "any network elements unbundled pursuant to Section 251 and"?

A Yes, I believe that was the effect of the errata.

Q And BellSouth's position is that based on the striking of that language, BellSouth implies an intent on behalf of the FCC to apply a commingling restriction to Section 271 elements, correct?

A I don't know that we are implying a restriction. It is the intent of our understanding of the FCC's order that commingling is limited to wholesale services other than 271 services provided pursuant to 271.

Q Ms. Blake, in anywhere between Paragraph 579 and Paragraph 584 does the FCC expressly state that Section 271 elements may not be commingled with Section 251 elements?

A No, but the effect of their definition and discussions surrounding the wholesale services that can be commingled with UNEs or UNE combinations references access services provided pursuant to tariff.

Q Now, Ms. Blake, those references you refer to, for example, would be in Paragraph 579, correct, where in the second sentence in the parenthetical they include e.g., switched and special access services offered pursuant to tariff?

A Yes, that is one.

Q That is what you are referring to?

A Yes.

Q Would you agree with me that e.g. does not mean the same thing as i.e.?

A Yes, I believe those have different meanings.

Q E.g. means an example?

A Yes.

Q And an example could be one of many?

A Could be.

Q Okay. Let's turn to Footnote 1990. Ms. Blake, this is yet another provision impacted by the FCC's errata you referred to, correct?

A Yes.

Q Now, would you agree with me that the FCC's errata struck from Footnote 1990 the last sentence, correct?

A Yes.

Q What did the last sentence say originally?

A "We decline to apply our commingling rule set forth in Part 7.A above to services that must be offered pursuant to

these checklist items."

Q Would you agree with me that the commingling rule the FCC is referring to is the rule that is codified in 309(e) and (f)?

A I believe it is referenced in the commingling section where we were before with 579, those paragraphs is what the -- Part 7.A above.

Q Do you disagree with me that the commingling rules are included in FCC Rule 309(e) and (f)?

A No, they are, and they are also as set forth above in the Part 7.A.

Q Would you agree with me that the checklist items referred to in that last sentence, the former last sentence in 1990 are Section 271 checklist items?

A Yes.

Q Would you agree with me that loops, transport, and switching, are all Section 271 checklist items?

A Yes, they are.

Q And so the FCC via its errata, the very same errata you rely on, struck the sentence that would have imposed commingling restrictions on 271 elements, isn't that right?

A Well, yes, they did strike that sentence. And my thinking of why it would have been appropriate to strike that sentence is because they eliminated this sentence in Paragraph 584, so there is no need to reference 271.

Q Now, Ms. Blake, finally, on Issue 26 you referred to the D.C. Circuit's opinion in USTA II, correct?

A Yes.

Q Isn't it true that the USTA II court did not address the FCC's commingling rules?

A I believe they addressed the issue of combining -- obligation to combine 271 elements which, in essence, from a practical standpoint, commingling and combining are, for all practical purposes, the same thing. You end up with a service made up of different elements.

Q Ms. Blake, when you put together a Section 271 loop with a Section 271 transport, is that combining?

A We don't put together 271 loops and 271 transport, that would be a special access service that would be provided pursuant to that.

Q Ms. Blake, if you happened to put together a Section 271 loop with a Section 271 transport element, would you call that combining?

A It could be facilitated as combining or combined. However, it would be provided pursuant to the tariff.

Q Would you agree with me that if you put together or connected a Section 271 loop to a Section 271 transport, it is by definition not commingling?

A I think when you read the definition of commingling it is connecting, combining. The term combining is in the

definition of commingling.

Q Now, the commingling rules, correct, in 309 and in the very TRO paragraphs you point to require that one of the things being connected is a 251 element, correct?

A Yes.

Q So if we are connecting two 271 elements, it is by definition not commingling, correct?

A Well, commingling is a 251 obligation. So in that regard it would not be commingling, nor do we have an obligation to combine 271 elements.

Q I want to move to Issue Number 51.

A Okay.

Q Ms. Blake, would you agree with me that this issue has two components, the first being whether the for cause auditing standard adopted by the FCC and agreed to by the parties can result in audits limited to those circuits for which BellSouth demonstrates cause; and the second being whether the agreement should require a mutual agreement regarding the independent auditor selected to conduct the audit?

A Yes, that is the basis of the dispute, yes, and what the notice should include and how the auditor should be selected.

Q Now, with respect to the first component of this issue concerning the for cause auditing standard and scope,

would you agree with me that BellSouth has agreed that it will initiate EEL audits only based upon the establishment of costs?

A Yes, that is agreed upon language in Attachment 2.

Q And it was agreed upon because it is a requirement of the FCC, correct?

A Yes, and that's what has been memorialized in the agreement in Section 5.2.6.

Q Yet, BellSouth forced the Joint Petitioners to arbitrate to get that requirement into this interconnection agreement, isn't that true?

A I believe at the initial stage of the arbitration back over a year ago there was a discussion about the for cause. However, the parties have since agreed to this language.

Q Yes. But, Ms. Blake, isn't it true that prior to the Joint Petitioners actually filing for arbitration, BellSouth refused to incorporate the for cause auditing standard into the interconnection agreement?

A I can't speak to all the discussions between the parties during the negotiations. I wasn't involved in the early stages, as far as refusing and that characterization of the negotiations. I know we are where we are now. The parties have agreed to this language that is in 5.2.6, that we will on an annual basis, and only based upon cause, conduct an audit.

Q Now, Ms. Blake, with respect to the for cause

auditing standard, BellSouth refuses to include in its notice requesting the EEL audit their circuits with respect to which it actually has cause, correct?

A BellSouth -- yes, that is correct. We are not obligated pursuant to the TRO to identify specific circuits and limit the audit to specific circuits. We will have cause or a have a concern that warrants the -- that we have some allegations that they are not in compliance, the CLECs certify that they are in compliance. If we have information that indicates they are not in compliance, we have the right to audit. And that is how we prove compliance or noncompliance.

Q And, Ms. Blake, it is your position, BellSouth's position, that the cause that it has it need not demonstrate and can, in fact, keep secret?

A I think the audit will reveal compliance or noncompliance. We have agreed we will only conduct an audit for cause, and we will identify the cause upon which we rest our allegations in the notice.

Q And yet you refuse to provide any supporting documentation upon which you have established that cause?

A It is not a requirement of the TRO, nor is it appropriate in that -- what is considered supporting documentation. The Joint Petitioners or any CLEC could say that is not good enough documentation so you can't audit. If you limit the number of circuits to just the list you provide

in the notice, and that is all you can audit, give them 30 days' notice, they could fix those 30 -- or those circuits identified in the notice, and we would be restricted from auditing for a whole another year. **It is not going to certify** or validate their certification that they are in compliance with the EEL eligibility criteria, and that's the intent of the audit.

Q Now, Ms. Blake, you said that one of your worries about having to identify the circuits with respect to which you have cause is because you will have to wait another year in order to audit any others, is that right?

A That could be the case. We have a limited right to audit on an annual basis. And if we identified specific circuits, and at the time we identified those, the Joint Petitioners or the CLEC -- I'm not going to accuse the Joint Petitioners of doing this, but the possibility would be they could switch those to special access real quick. By the time the auditor gets out there, they would not have seen any out of compliance.

Q And if, let's say, there were, in fact, circuits that were ineligible to be EELs that were switched to special access, isn't that your goal?

A Our goal is for the Joint Petitioners to be in compliance with the eligibility criteria, and only obtain EELs consistent with the law. And I don't believe any amount of

documentation or information that we could provide or identify circuits is going to lead to the Joint Petitioners or any CLEC saying that is sufficient enough or cause enough to justify the audit.

Q Now, with respect to the for cause auditing standard, Ms. Blake, I believe you have testified repeatedly, and in North Carolina in particular, that if BellSouth has cause with respect to one circuit in the state, it may audit every single EEL circuit in the state, is that correct?

A That could be a possible outcome. Again, I think the parties have agreed to language relative to how the conduct of an audit will be performed by the certified public accountant in accordance with the AICPA standards and how they conduct the audit. Maybe they sample. If we have cause for one circuit, the auditor may sample a selection of all the circuits of that CLEC. And if they're out of compliance; they are out of compliance, and there is reason to audit all the circuits to make sure all of them are in compliance.

Q Now, Ms. Blake, if you are going to audit all circuits every year, how is that limited? The FCC, in fact, did state that you only had a limited right to audit in Paragraph 626 of the TRO, correct?

A Yes, and I don't believe I said we would audit every circuit every year. If we have cause to believe that the CLEC is in violation of the eligibility criteria, we would have the

right to audit -- conduct an audit in accordance with the TRO.

Q Ms. Blake, you also mentioned the word "sampling." Let's say that a CLEC had 100 EEL circuits in the state of Florida, and you demonstrated cause with respect to 40 of them. Would you agree with me that an auditor could, if it wanted to choose, sample within the 40?

A Yes. I don't think -- we don't dictate the sampling or the criteria. There is language in our agreed-upon language that talks about consistent with standard auditing practices, compliance testing designed by an independent auditor which typically includes an examination of a sample selected in accordance with independent auditor's judgment. But, again, I think if the findings of the audit reveal there is out of compliance of that -- either that sample or that defined number that was identified or that will be audited, I think that justifies an additional audit.

Q Would you agree with me, Ms. Blake, that the for cause auditing standard determines the scope of the audit?

A No.

Q Would you agree with me that the auditor determines whether or not to sample within the scope of the audit?

A Yes, I believe that would be consistent with AICPA standards and how audits are conducted and the judgment of the auditor, consistent with the language in 5.2.6.1.1 that the parties have agreed to.

Q Ms. Blake, let's turn to the independent auditor itself. Is it BellSouth's position that an independent auditor need not be a member of AICPA?

A I don't believe that is an obligation or requirement under the TRO. The TRO specifically says that the auditor must perform the audit in compliance with the standards of the AICPA.

Q Now, in this particular aspect of the dispute, the language BellSouth disagrees with is on Page 12 of the Joint Petitioners Exhibit A, Section 5.2.6.1, and it is a requirement that the parties mutually agree upon the third-party independent auditor, correct?

A Yes.

Q And would you agree with me that this mutual agreement on an independent third-party auditor requirement is, in fact, based upon BellSouth's own language that it has used for years, and has proposed with respect to PIU and PLU audits?

A Yes. There is some provisions in the contract relative to jurisdictional reporting PIU/PLU that has a whole different set of auditing requirements that is not contained in the TRO or pursuant to the TRO obligations.

Q So you would agree with me that BellSouth has for years required mutual consent in the PIU context on the independent auditor used for those audits?

A I am not familiar with the exact language in the

PIU/PLU audit section. Again, there are some other aspects of that that I think resolve the need for an audit relative to jurisdictional reporting, some new systems that are in place that I'm not that familiar with. But, again, that is a whole different animal in regards to verifying compliance with the law that the CLECs have an obligation to only obtain EELs consistent with the requirements of the law. And they are self-certifying that they are obtaining those EELs based on that eligibility criteria. And if we have cause to believe they are not, our right to audit should be -- we have the right to invoke our audit rights under the TRO.

Q Ms. Blake, you characterize in your direct testimony at Page 34 the mutual consent requirement as a pointless step designed only as a delaying tactic. Were those your words?

A Yes. Could be delaying tactics.

Q It could be your words?

A No, it could be a delaying tactic. I'm sorry.

Q I think you were far more definitive in your testimony on Page 34 at Line 10, Ms. Blake, were you not?

A Are you looking at my direct? I'm sorry.

Q I believe so. Line 10.

A Yes.

Q And it is BellSouth's testimony that in the context of EEL audits mutual consent is pointless, but in the context of PIU audits, you, in fact, insist upon it, correct?

A I can't speak to whether we insisted upon mutually agreeing on the auditors. I wasn't familiar with that provision of our contract. Again, I think that the EEL audit provision is different from a PIU/PLU audit. There is a requirement, according to the law, that the Joint Petitioners CLECS have to self-certify that they are using the EELS consistent with the law. The ability to audit and select the auditor should not delay getting to whether they are in compliance.

Q Ms. Blake, do you have any personal knowledge to support your statement that it was designed only as a delaying tactic?

A Well, I don't -- no, I do not have any personal knowledge. However, based my practical understanding of it, 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.

Q Why don't we move to Issue Number 65, Ms. Blake. Ms. Blake, would you agree with me that Issue 65 is not a dispute over whether or not transit traffic will be -- transit services will be provided by BellSouth as part of this interconnection agreement?

A That's true. The dispute is over the ability to charge for that function being provided.

Q So would you agree with me that BellSouth's

obligation to provide transit service is, in fact, a Section 251 obligation?

A I believe all -- sorry. All carriers have an obligation to directly or indirectly interconnect with each other, so it is part of 251(a).

Q The answer is yes?

A Yes. There is an obligation to directly and indirectly interconnect.

Q Now, Ms. Blake, the parties already have agreed, at least to a certain extent, on the rates for which BellSouth will be compensated for providing transit service, correct?

A Yes, correct.

Q And consistent with the parties' experience over the past seven or so years, perhaps longer, the Joint Petitioners will be paying BellSouth TELRIC rates for the tandem switching functionality performed and, if necessary, TELRIC rates for any common transport provided, correct?

A That has been the rates that have been charged. However, the functions BellSouth is providing pursuant to providing the transit function is providing a service above and beyond our obligations at TELRIC.

Q Now, the TIC, would you agree we call this rate the TIC, T-I-C?

A Yes.

Q The TIC that BellSouth proposed is .0015 per minute

of use, correct?

A Yes, that is the last proposed rate, I believe. We have had other discussions about other rates, but I think that is where we are.

Q And this is an additive rate that gets applied in addition to the two TELRIC rates BellSouth already charges for transit service, correct?

A Yes. And that is for the function of providing the transit service to the CLEC and whereby they can interconnect directly with the terminating carrier and not use BellSouth's service. So in the case where they do choose to use BellSouth's transit service or function, we should be entitled to charge them for that service.

Q And the .0015 TIC you propose in this arbitration case is not a composite rate, such as the rate ordered by the Georgia Public Service Commission, correct?

A No, it is not. It would be, as you discussed a minute ago, on top of the tandem TELRIC rate and transport, if applicable, TELRIC rate.

Q And, the .0015 TIC you proposed in this proceeding is not a TELRIC rate, correct?

A Correct.

Q And I believe you have testified in the past that BellSouth has not done any cost studies to support that rate, correct?

A Correct.

Q And that it is not based upon any established pricing methodology, correct?

A Well, I imagine there is some process we went through to come up with the .0015 rate, but as far as a TELRIC-like study, no, it was not conducted in that manner.

Q Now, I believe it is your testimony that this issue is, in fact, an issue that is beyond the jurisdictional scope of the Florida Public Service Commission, is that right?

A Yes.

Q So it is BellSouth's position that this Commission does not have the jurisdiction to review, set, or even approve the rate BellSouth proposes, correct?

A Yes. BellSouth does not believe it is an obligation to be provided pursuant to TELRIC pricing.

Q But yet you have already agreed to provide this service in this contract, correct?

A Yes. It has been there for ease of administration. I guess one of the alternatives could be to pull it out of this contract and put it in a commercial agreement.

Q Now, Ms. Blake, you have suggested that this proposed rate is intended to recover certain costs incurred by BellSouth. And, in fact, I think in a discovery response to Staff Interrogatory Number 137, which was provided on day one of the hearing, BellSouth submitted charts that it, in fact,

had late-filed in the Tennessee arbitration case, correct?

A Yes.

Q Do you have a copy of those with you?

A Yes, I do. Yes, I've got it.

MR. HEITMANN: Mr. Chairman, for convenience we will pass a few copies of this out. It is already part of the record.

BY MR. HEITMANN:

Q Ms. Blake, when you can, if you could turn to the third slide.

A I'm there.

Q Now, would you agree with me that this depiction that you have, this picture that you have, or diagram, depicts but one scenario where it is actually a CLEC transiting through BellSouth to another CLEC?

A Yes.

Q It can and often is another incumbent LEC that is the receiving party of the call, correct?

A Yes. The chart there says or ICO.

Q Okay.

A The end point.

Q And ICO is a term meaning independent company?

A Yes.

Q And that is an ILEC, correct?

A It could be an ILEC, yes.

Q Okay. Now, with respect to the description underneath that, in the second sentence you state when a FB-CLEC purchases BellSouth's transit service, the FB-CLEC receives the following. By FB you mean facilities-based, correct?

A Yes.

Q Would you agree me that each of the Joint Petitioners are, in fact, facilities-based CLECs?

A Yes, I have heard you say that.

Q Okay. And so for purposes of clarity, the TIC would actually be imposed upon CLEC A in your diagram, correct?

A Yes.

Q On the left-hand side. And so it is CLEC A that actually purchases BellSouth's transit service when it originates a call, correct?

A Correct.

Q And so let's modify your sentence to see if we can't make it clearer, because it is actually CLEC A, FB-CLEC A, rather than an FB-CLEC, correct, that is purchasing in this diagram?

A Yes, because the originating CLEC is the one purchasing the transit, so that was the intent of that second sentence to reflect that diagram.

Q Right. So would you agree with me that your intent was -- well, confirm for me that your intent is the following:

That it should state when facilities-based CLEC A purchases BellSouth's transit service, facilities-based CLEC A receives the following?

A Actually, the second part could be facility-based CLEC A or B.

Q Okay. Well, let's leave it at A, because I want to know what facilities-based CLEC A is getting in exchange for purchasing this transit service and for which you want to impose a TIC, okay?

A Okay.

Q We can agree that, if necessary, it is going to get common transport, correct?

A Correct.

Q And we can agree that BellSouth already is going to be imposing a TELRIC rate for the common transport, correct?

A Correct.

Q We can agree that facilities-based CLEC A will be getting tandem switching, correct?

A Correct, at TELRIC, yes.

Q And at TELRIC, correct. Facilities-based CLEC A will not, however, be getting any records from BellSouth, correct?

A The service provides records identifying the originating facility-based CLEC, so that was why my modification to that sentence to be facility-based CLEC A and B receive the following -- and/or B receive the following.

Q Would you agree with me that facilities-based CLEC A needs no records identifying itself, and that it, in fact, knows who it is?

A Well, they may need records to provide to the terminating carrier so the terminating carrier can bill reciprocal compensation to the originating carrier. By BellSouth, as part of its service, providing the terminating carrier the records that shows who the originating carrier was, that basically saves the originating carrier from having to provide the records to the terminating carrier, so they can get billed recip comp.

Q Ms. Blake, the records you refer to here, in fact, are not provided to facilities-based CLEC A, correct?

A No. I said that as part of the service we provide the records to the terminating carrier. You are paying for the records. We are giving them to the terminating carrier because that is part of their cost of terminating your call. If we billed the terminating carrier for those records, all they would do is turn around and bill you as the originating carrier, because that is part of the cost of terminating that call.

Q Isn't it true, Ms. Blake, that you seek to charge CLEC A for records you, in fact, send to CLEC B?

A As part of your cost of terminating the call to CLEC B.

Q Isn't it true, Ms. Blake, that the Joint Petitioners have told BellSouth that they do not need records when they purchase transit service from you?

A Well, the transit service BellSouth offers comes with the records we provide to the terminating carrier. The Joint Petitioners are free to directly interconnect with the terminating CLEC and not pay BellSouth for its transit service.

Q Ms. Blake, if the terminating carrier, in fact, needs those records, why don't you just bill the terminating carrier?

A Because as I said, if we billed the terminating carrier for those records, by virtue of the fact that the terminating carrier would recover its cost of terminating your call from you as the originating carrier, they would basically turn around and bill you that same record cost. **It's basically** eliminating a billing step.

Q Ms. Blake, isn't it true that when one of the Joint Petitioners is, in fact, the terminating carrier on a transit traffic call, that they don't need such records because they have sophisticated switches and signaling equipment and can actually tell who is sending the call, correct?

A I don't know that as a fact. I don't know what switching equipment the terminating carrier may or may not have. It depends on the facility-based CLEC's capabilities.

Q Well, you would agree with me that you have heard the Joint Petitioners testify that they don't need the records,

regardless of whether they are at the originating end or the terminating end of a transit call, correct?

A I may have heard that during the course of these proceedings. However, that is a service BellSouth offers as part of its transit function, and the offering contains providing the records to the terminating carrier.

Q Ms. Blake, you mentioned that there were -- I believe in your opening, a few state commissions that have determined that this TIC or transit service need not be provided at TELRIC rates, correct?

A Yes.

Q Would you agree with me that there are also a few state commissions that have, in fact, found that it does, indeed, need to be provided at the TELRIC rate?

A Yes, I believe I have heard of a few.

MR. HEITMANN: Mr. Chairman, I think this is good point to break.

COMMISSIONER BRADLEY: Do you all agree?

Yes. I think this is a natural breaking point. Do we all agree?

MR. MEZA: Yes, sir. That's fine with BellSouth. Thank you.

COMMISSIONER BRADLEY: Okay. And with that, we will recess until -- in fact, let me ask this question. How much more do you anticipate?

MR. HEITMANN: My prediction, Mr. Chairman, is two hours.

COMMISSIONER BRADLEY: Okay. Well, we will -- why don't we recess until 9:30 in the morning.

MR. HEITMANN: Yes, sir. Thank you.

COMMISSIONER BRADLEY: Have a good evening.

MR. HEITMANN: You, too.

(The hearing adjourned at 4:50 p.m.)

STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 10th day of May, 2005.

JANE FAUROT, RPR
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