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July 9, 2004

BY HAND DELIVERY

Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 031047-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of KMC are an original and fifteen copies of KMC's Rebuttal Testimony of Robert E. Collins, Jr. and Rebuttal Testimony of Timothy J. Gates in the above referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,

Floyd R. Self

FRS/amb
Enclosures
cc: Parties of Record

CMP
COM 5
CTR
ECR
GCL 1
OPC
MMS
RCA
SCR
SEC 1
OTH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by Hand Delivery (*) and/or U.S. Mail this 9th day of July, 2004.

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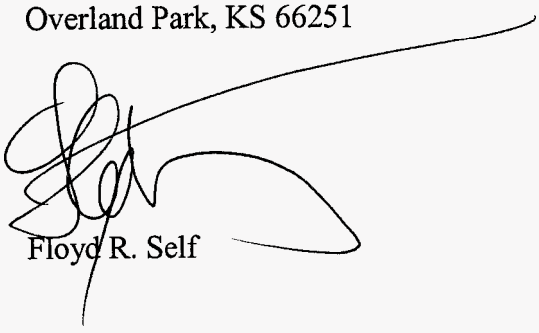

Floyd R. Self

BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of the Petition by KMC Telecom III, LLC, KMC Telecom V, Inc., and KMC Data, LLC, for Arbitration of an Interconnection Agreement with Sprint-Florida, Incorporated, Pursuant to Section 252(b) of the Communications Act of 1934, as Amended	)))))	Docket No. 031047-TP

REBUTTAL TESTIMONY OF ROBERT E. COLLINS, JR.

ON BEHALF OF

KMC TELECOM III LLC, KMC TELECOM V, INC., AND KMC DATA, LLC

July 9, 2004

Q: PLEASE STATE YOUR NAME AND BUSINESS ADDRESS FOR THE RECORD.

A: My name is Robert E. Collins, Jr. My business address is 1755 North Brown Road, Lawrenceville, Georgia 30043.

Q: BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A: I am employed by KMC Telecom Holdings, Inc. as Director of Operations, Southern Region.

Q: BRIEFLY DESCRIBE YOUR RESPONSIBILITIES AT KMC.

A: My primary responsibilities as Director of Operations at KMC include directing KMC's network engineering center, overseeing technical evaluation of new equipment, engineering, and network design of KMC's basic and enhanced telecommunications networks. Moreover, I oversee the company's construction, installation, provisioning, and maintenance of KMC's end-user and wholesale products and services, as well as technical support for KMC's network.

Q: ON WHOSE BEHALF ARE YOU TESTIFYING HERE TODAY?

A: I am testifying on behalf of KMC Telecom V, Inc., KMC Telecom III LLC, and KMC Data LLC. For simplicity, I will refer to these three KMC companies collectively as "KMC."

Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A: The purpose of my testimony is to rebut the direct testimony of several Sprint witnesses, including the testimony of Brian K. Staihr regarding the issue of security deposits, the testimony of Pete Sywenki concerning

interconnection, the testimony of Don Meyer regarding performance assurance, and the testimony of Edward Fox concerning collocation.

Q: DID YOU FILE DIRECT TESTIMONY IN THIS PROCEEDING?

A: Yes, on June 11, 2004, I filed direct testimony on behalf of KMC in this proceeding.

RECIPROCITY OF SECURITY DEPOSITS

Q: SPRINT WITNESS STAIHR ARGUES THAT THERE IS AN ECONOMIC RATIONALE FOR REQUIRING A SECURITY DEPOSIT. DO YOU DISAGREE WITH HIS ASSERTION?

A: No, I do not. KMC is not arguing that Sprint should not be allowed to require a security deposit under the right conditions. Indeed, I agree with Mr. Staihr's statement that, under certain circumstances, security deposits are needed to "mitigate the risk that accompanies uncertainty." (Staihr Direct at 4.) This matter is not the issue in dispute between the parties. I would note, however, that financial uncertainty caused by the inability of the other party to pay is not the only basis for requiring a security deposit. It may simply be that the other carrier is not paying its bills in a timely fashion for reasons having nothing to do with financial instability. In such cases, a security deposit would be equally justified.

Q: WHERE DO YOU DISAGREE WITH SPRINT REGARDING SECURITY DEPOSITS?

A: The focus of much of Mr. Staihr's testimony notwithstanding, our disagreement with Sprint centers on whether KMC should also be allowed

to require a security deposit as a matter of fairness and sound business practice. We believe that KMC should have a reciprocal right to require a security deposit should conditions arise in the future such that there is doubt that Sprint can pay its bills or, in the alternative, if Sprint simply, for whatever reason, does not pay its bills.

Q: MR. STAIHR APPEARS TO SUGGEST THAT A RECIPROCAL SECURITY DEPOSIT REQUIREMENT IS NOT APPROPRIATE IN THIS CASE BECAUSE SPRINT DOES NOT PRESENT THE SAME DEGREE OF UNCERTAINTY TO KMC THAT KMC PRESENTS TO SPRINT. DO YOU AGREE?

Q: Mr. Staihr misstates the crux of the issue. The focus cannot be just on the present, and KMC is not arguing that a security deposit is required from Sprint at this time. I doubt that there is any company today—public or private—that could predict its financial future with 100% certainty. In the last several years, we have seen publicly traded corporate behemoths, such as Enron, suffer financial disasters. On the other hand, we also have witnessed small start-up companies attain unprecedented financial success. Financial uncertainty is by no means unique to smaller and/or privately held corporations, as Mr. Staihr would seem to suggest. None of us has a financial "crystal ball"—if we had, we wouldn't be arbitrating this issue before this Commission. KMC simply wants the same level of protection accorded to Sprint in the event Sprint were to suffer a financial difficulty, improbable as that may sound to Mr. Staihr. In addition, as noted above,

if it turns out that Sprint, whatever the reason, does not pay its bills in a timely fashion, then KMC would be entitled to require a security deposit.

Q: DOES SPRINT'S STATUS AS A CARRIER-OF-LAST-RESORT IN FLORIDA MAKE IT LESS LIKELY THAT SPRINT WOULD SUFFER A FINANCIAL PROBLEM IN THE FUTURE?

A: No. Sprint's status as an incumbent local exchange carrier and/or a carrier-of-last-resort does not make its financial status more or less predictable than KMC's. The fact that it has an obligation to provide service to all customers requesting service in Florida, or that it has a statutory obligation to interconnect with competitive local exchange carriers ("CLECs") (*see* Staihr Direct at 5), has absolutely no bearing on KMC's right to protect itself by requiring a security deposit under appropriate circumstances.

Q: AT PAGE 7 OF HIS TESTIMONY, MR. STAIHR CITES TO A DIRECT TESTIMONY OF DR. YASUJI OTSUKA OF THE NEVADA PUBLIC UTILITIES COMMISSION TO SUPPORT HIS POSITION THAT DEPOSITS NEED NOT BE RECIPROCAL. DO YOU HAVE ANY COMMENT ON THIS?

A: Yes, I do. Although I am sure that Dr. Otsuka is a learned man, his position is not generally shared by state regulatory commissions. Indeed, to our knowledge, the Nevada Public Utilities Commission has not issued an order adopting Dr. Otsuka's position. On the other hand, for example, the North Carolina Utilities Commission has unequivocally held that the

deposit language in the interconnection agreement between BellSouth Telecommunications, Inc. (an ILEC) and ITC DeltaCom Communications, Inc. (a CLEC) should be made reciprocal. I refer the Commission to *Petition for Arbitration of ITC DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. P-500, Sub 18, Recommended Arbitration Order (issued Mar. 2, 2004), at 75-78 (attached as Exhibit REC-1).

Q: AT PAGE 7 OF HIS DIRECT TESTIMONY, MR. STAIHR CITES TWO "PRACTICAL REASONS" WHY SPRINT SHOULD BE ALLOWED TO REQUIRE A SECURITY DEPOSIT. DO YOU AGREE WITH HIS PROPOSITION?

A: No. Mr. Staihr's first argument—that it should be allowed to require a security deposit because, without it, Sprint would forfeit the ability to require a security deposit from any CLEC—is irrelevant because, as I have explained, KMC is not challenging Sprint's right to require a security deposit in the appropriate circumstances. His second argument—that a reciprocal deposit provision in the KMC agreement would allow other CLECs to demand a similar requirement—does not even come close to justifying the forfeiture of KMC's right to protect itself. In essence, Mr. Staihr wants to protect Sprint at the expense of KMC (and other CLECs). Further, if KMC is justified in having the right to require a security deposit under certain conditions, as we think we should, other CLECs would be similarly entitled.

Q: WHAT RELIEF DO YOU SEEK REGARDING THIS ISSUE?

A: KMC respectfully requests that the Commission adopt KMC's position and require that the provisions regarding security deposits in the parties' interconnection agreement be reciprocal and that KMC, in the appropriate circumstance, has the right to require a security deposit.

PERFORMANCE ASSURANCE

Q: SPRINT WITNESS MEYER ARGUES AGAINST EFFECTIVE, SELF-EXECUTING PERFORMANCE ASSURANCE MECHANISMS. DO YOU AGREE WITH HIS ASSERTIONS?

A: No. KMC is attempting to compete against Sprint in Florida, while at the same time relying on Sprint for adequate interconnection, UNEs, and related services. Given Sprint's role as both a competitor and wholesaler, there must be effective, self-executing performance mechanisms in place in order to assure satisfactory performance.

Q: WHY AREN'T THE CURRENT MECHANISMS, SUCH AS THE PERFORMANCE MEASUREMENT PLAN (PMP), SUFFICIENT?

A: Let me address the PMP issue at the outset. What KMC has said is that the Commission should utilize the BellSouth metrics – and all of the effort that went into reviewing and refining them – for the Sprint territories in Florida as well. If, however, the Commission is ultimately of the opinion that the Sprint metrics are better suited to Sprint's operations and territories, then KMC may have no issue with that. KMC does strongly believe that, regardless of which metrics are utilized, the Commission

must institute self-executing performance measures. The real issue is performance assurance.

Q: PLEASE DESCRIBE WHAT YOU MEAN BY "PERFORMANCE ASSURANCE."

A: While Sprint witness Meyer spends a lot of time on the background of the metrics used in Florida, he gives short shrift to the question of whether Sprint's performance is indeed satisfactory. The metrics are only valuable if they capture the correct categories of performance and the performance measured is satisfactory. In KMC's experience, Sprint's performance is less than satisfactory in critical areas such as installation intervals for interconnection facilities, reject notice intervals, repeat troubles for both DS0 and DS1 loops, failure to meet 24-hour repair objectives, and E911 database update intervals. If Sprint's performance were not a problem, KMC would not be pursuing this issue. Thus, performance assurance will encourage satisfactory performance by Sprint.

Q: DO YOU AGREE WITH MR. MEYER'S COMMENTS THAT SPRINT IS NOT AN RBOC?

A: Yes. KMC recognizes that Sprint is not an RBOC, and stresses the acceptability of a separate, tailored performance assurance plan for that very reason. However, both Sprint and BellSouth have very large, significant service territories in the state, and both are subject to the same section 251 and 252 obligations. They should both, therefore, have self-

executing remedy plans. Further, there is no self-evident reason why their performance plans must be different.

Q: SPRINT WITNESS MEYER CITES SEVERAL METHODS BY WHICH KMC CAN ENFORCE ITS RIGHTS. WHY ARE THESE NOT SUFFICIENT?

A: For the same reasons that BellSouth is subject to a self-executing performance assurance plan. KMC should not be forced to bring a complaint each and every time Sprint's performance is unsatisfactory as Mr. Meyer implies. From an operational perspective, it is very difficult for KMC to enforce its rights since this involves a great deal of resources – both personnel and monetary. KMC does participate in the CLEC Forum, as Mr. Meyer states, but has been unable to obtain adequate performance by virtue of that involvement. If Sprint is so confident that its performance meets the standards established, then it should not oppose financial incentives to back that up – since Sprint would pay no penalties as long as its performance remained satisfactory.

INTERCONNECTION

Q: SPRINT WITNESS SYWENKI FOCUSES ON THE TYPE OF TRAFFIC BEING EXCHANGED BETWEEN KMC AND SPRINT. IS THIS RELEVANT?

A: No. As Mr. Sywenki himself points out, the FCC did not, in the ISP Remand Order, change the obligations of the originating carrier to pay for

the cost to transport originating traffic. The traffic percentages referenced by witness Sywenki are a red herring, in that they are not relevant to the proper application of the law to the matters at hand. While Mr. Gates will more fully respond to Mr. Sywenki's testimony, I will briefly address these issues from an operational perspective.

Q: HAVE KMC AND SPRINT BEEN IN DISCUSSIONS REGARDING THE NUMBER AND LOCATION OF POINTS OF INTERCONNECTION IN FLORIDA?

A: Yes. KMC recognizes that, although it is entitled to interconnect at just one point per LATA, it may be able to agree to additional points in very limited circumstances which should be left to the parties' as a business matter. KMC may be agreeable, for example, to have a second point of interconnection where it already has available transport facilities in place. During their multi-year relationship, KMC and Sprint have both reasonably addressed other interconnection-related concerns, and KMC will continue to entertain reasonable Sprint proposals in the interest of compromise while administering the agreement.

Q: COULD KMC SUPPORT MULTIPLE POINTS IN ALL INSTANCES?

A: No. Sprint's proposals to shift transport costs to KMC or drop off Sprint-originating traffic at various points on the KMC network are improper. As Mr. Gates points out, Sprint's positions are not supported by law or regulation. Operationally, Sprint's proposals would overwhelm KMC's

network and severely hamper KMC's ability to compete in Florida. Sprint's suggestion that it drop off its traffic on KMC's network wherever it chooses is simply a transparent attempt to avoid the requirement that bring its originating traffic to the KMC-designated POI.

SHARED CAGELESS COLLOCATION SPACE

Q: MR. FOX ARGUES THAT SPRINT SHOULD NOT BE REQUIRED TO PROVIDE SHARED CAGELESS COLLOCATION SPACE. DO YOU AGREE?

A: No, I do not. As I explained in my direct testimony, this is simply a matter of permitting KMC to make the most efficient and cost-effective use of its available cageless collocation space. There is no valid justification for denying KMC the ability to share its cageless collocation space in the event KMC has spare space. As I have previously stated, unless it is technically infeasible, KMC should be allowed to sublease the portion of its cageless collocation space that is not in use.

Q: HAS MR. FOX PROVIDED ANY EVIDENCE THAT SHARED CAGELESS COLLOCATION IS TECHNICALLY INFEASIBLE?

A: No. Nowhere in Mr. Fox's testimony does he claim that shared cageless collocation is technically infeasible.

Q: MR. FOX APPEARS TO SUGGEST THAT, UNLESS KMC IS "WAREHOUSING" CAGELESS COLLOCATION SPACE, THERE

IS NO OPERATIONAL BASIS FOR SHARED CAGELESS COLLOCATION. DO YOU HAVE ANY COMMENT ON THIS?

A: Yes. As Mr. Fox points out, KMC must order a minimum of one rack space for a cageless collocation. This is the case regardless of whether KMC needs the entire rack or, say, just the first five rack elevations. Due to the advances in technology, equipment footprints have reduced in size dramatically. For example, not that long ago, equipment to support one end of an OC-48 took up an entire rack itself. Today, an OC-192 (four times the capacity of an OC-48) can be supported by electronics that are about one-fifth of that size. KMC's position is that resulting unused space on the rack, if any, should be available for sharing. Shared cageless collocation, rather than being a symptom of warehousing, as Mr. Fox contends, is really, to quote the same language that Mr. Fox does, a means to "'reduce the cost of collocation for competitive LECs and . . . reduce the likelihood of premature space exhaustion." (*Advanced Services First Report and Order*; ¶43.).'" (page 6, lines 1-3) Mr. Fox also notes (page 6, line 7) that

> [t]he benefit [of cageless collocation] to the ILEC is greater efficiency in overall floor space use. This translates to greater benefits received by the subscribers in Florida. The FCC Order has the consumers' benefit in mind as it discusses this topic in the *Advanced Services Order*. "...the record reflects, that more cost-effective collocation solutions may encourage the deployment of advanced services to less densely populated areas by reducing the cost of collocation for competitive LECs." (Advanced Services First Report and Order ¶39)"

Therefore, taking advantage of developments in technology in the past few years, shared cageless collocation advances the same pro-consumer and pro-competitive goals as cageless collocation without any additional burden, even less so, to the ILECs operations. I also fully agree with Mr. Fox that "[b]ecause collocation space on incumbent LEC premises may be limited, inefficient use of space by one competitive entrant could deprive another entrant of the opportunity to collocate facilities or expand existing space." (page 7, line 8) Where we differ is that shared cageless collocation actually creates opportunities for another carrier to collocate facilities efficiently and expand existing space when that carrier's existing space might become exhausted.

Q. IS KMC IN THE PRACTICE OF HOARDING CAGELESS COLLOCATION SPACE?

Absolutely not. As a matter of sound business practices, KMC leases collocation space from other carriers in quantities that are adequate to meet its operational needs. It is not KMC's policy or practice to hoard collocation space for financial gain or other purposes. However, whether because of the minimum one-rack cageless collocation requirements and the ever diminishing footprints of central office equipment, or because business requirements change, it only makes sense to allows collocators to sublease available space to optimize the overall use of central office space. KMC is not in the business of trading collocation space, as Mr. Fox appears to suggest.

If the incentive for warehousing or hoarding were as great as Mr. Fox suggests, in an effort to make money on subleasing, one would have expected to see hoarding of caged collocation space. Such space, generally speaking, historically and currently has been at a premium in many areas, but there has not been a rush by collocators to hoard such space. Rather, the problem was simple space exhaustion in certain central offices, a circumstance which cageless collocation was designed to alleviate, and the sharing of cageless space – made possible in large part by the increasingly diminutive size of equipment – will advance that goal even further.

Q: DOES THE ABILITY OF COLLOCATED CARRIERS TO CROSS-CONNECT WITH EACH OTHER SOMEHOW RENDER SHARED CAGELESS COLLOCATION UNNECESSARY, AS MR. FOX CONTENDS?

A: No, it does not. While Mr. Fox is correct that federal rules allow collocated carriers to cross-connect with each other, this right to cross-connect does not alleviate the problem of excess cageless collocation space. Furthermore, shared cageless collocation has certain pro-competitive advantages over cross-connects that Mr. Fox fails to mention. Shared cageless collocation, like shared caged collocation, makes competitive carriers more self-reliant because, cross-connects can be provisioned themselves and the carriers avoid any cross-connect charges that would apply if the co-carrier with whom a CLEC wishes to cross-

connect is not in an adjacent space. Shared cageless collocation also allow a carrier that has exhausted its existing collocation space to lease efficiently something less than a rack from another collocator if that is all that is required to meet its needs. Further, shared cageless collocation reduces the overall power requirements of the parties sharing the cageless collocation. Finally, as a result of recent regulatory developments, it appears that regulators may require competitive carriers to rely more and more on each other, and less on incumbent local exchange carriers, for their transport and other facilities requirements. Shared cageless collocation will facilitate the ability of carriers to more efficiently access and utilize components of each others' networks as an alternative to incumbent carriers network and network elements.

Q: WHAT RELIEF DO YOU SEEK REGARDING THIS ISSUE?

A: KMC respectfully requests that the Commission adopt KMC's position and require Sprint to permit KMC to sublease the unused portion of its cageless collocation space.

USE OF SPARE CAPACITY ON EXISTING ENTRANCE FACILITY

Q: AT PAGES 12 AND 13 OF HIS TESTIMONY, MR. FOX APPEARS TO SUGGEST THAT CROSS-CONNECTS CAN ACHIEVE THE SAME RESULT THAT TERMINATING AN ENTRANCE FACILITY IN MULTIPLE COLLOCATIONS PROVIDES. DO YOU AGREE?

A: No, I do not agree. While KMC appreciates the benefits of co-carrier cross-connects, Mr. Fox's comments, in this particular situation, oversimplify the matter. He fails to take into account the prospect of exhausted entrance facilities of one collocator. By utilizing available capacity of another collocator's entrance facilities, such a carrier eliminates the need for an additional entrance facility into the central office, which could deprive another entrant of the opportunity to collocate facilities or expand existing facilities at the same central office. A requirement for such a carrier to provision an entirely separate entrance facility when sharing is a viable option would serve to reduce valuable entrance ducting into the ILEC facility. Over and above the added costs a bar on sharing entrance facilities would impose on competitors, this problem could become critical if the central office is close to, or at, maximum capacity. Mr. Fox also does not take into account the added points of failure that would be created if co-carrier cross-connects are the only option, due to multiple terminations of fiber and LGX cross connects. Each fiber jumper in a co-carrier cross-connect introduces a small amount of loss into the fiber, and there will be more with a series of co-carrier cross-connects than the sharing of entrance facilities. Additionally, by terminating fiber into intermediary LGX panels, as using co-carrier cross connects requires, the potential for accidental disconnect is increased when a technician inadvertently removes an incorrect jumper on a disconnect or move order.

Q: AT PAGE 15 OF HIS TESTIMONY, MR. FOX STATES THAT TERMINATION OF ENTRANCE FACILITIES AT MULTIPLE COLLOCATIONS WITHIN THE SAME CENTRAL OFFICE IS PROBLEMATIC. DO YOU AGREE WITH HIS POSITION?

A: No. Mr. Fox seriously overstates the issue. Indeed, the installation concerns he raises, which competent technicians and engineers infrequently encounter in any event, are equally present when co-carrier cross connects are used. Either way, there will have to be splicing within the common area of the cable vault. Mr. Fox's concern about "damage to other facilities and the possibility of network outages" are red herrings. Finally, Mr. Fox has not testified that the sharing of entrance facilities is technically infeasible.

Q: WHAT RELIEF DO YOU SEEK REGARDING THIS ISSUE?

A: KMC respectfully requests that the Commission adopt KMC's position and require Sprint to permit KMC to utilize spare capacity on an existing collocated carrier's entrance facility.

LINE SPLITTING

Q. MR. DAVIS, ON PAGES 3-7 OF HIS TESTIMONY, ADDRESSES THE ISSUE OF RATES FOR LINE SPLITTING-RELATED SERVICES (Issue 12). IS THERE AN OPEN ISSUE BETWEEN THE PARTIES?

A. No. This issue is now resolved between the parties.

ROUTINE NETWORK MODIFICATIONS

Q. MR. DAVIS, ON PAGES 8-13 OF HIS TESTIMONY, ADDRESSES THE ISSUE OF RATES FOR CERTAIN ROUTINE NETWORK MODIFICATIONS (Issue 13). IS THERE AN OPEN ISSUE BETWEEN THE PARTIES?

A. No. This issue is now resolved between the parties.

Q. MR. DAVIS, ON PAGES 10-12 OF HIS TESTIMONY, AND MR. FOX, ON PAGES 10-12 OF HIS TESTIMONY, ADDRESS THE ISSUES (Issues 21(a) and 21(b)) OF CROSS CONNECTS IN KMC's COLLOCATION SPACE AND CO-CARRIER CROSS CONNECTS. IS THERE AN OPEN ISSUE BETWEEN THE PARTIES?

A. No. The only open issue had been rates for co-carrier cross connects. This issue is now resolved between the parties.

Q: DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A: Yes, it does.

approximate amount of time ITC has to review bills when BellSouth's billing systems are performing to reasonable standards. The Public Staff asserted that its proposal would allow adequate time for ITC to review its bills and would provide an incentive for BellSouth to render timely bills.

Based upon the foregoing, the Commission believes that the Public Staff's recommendation for the payment due date to be 26 days from the date of receipt is a reasonable interval of time in which ITC can review and pay its bills. In consideration that after the bill date, BellSouth then has to accumulate the traffic sensitive-type charges which according to BellSouth results in another three to five days before bills are electronically transmitted to ITC, which results in ITC typically having a payment due date that is 27 to 25 days after the date of receipt, or sometimes 23 days as ITC noted that it has even been seven days after the bill date before the bill is received, the Commission believes that establishing a specific payment due date of 26 days after receipt of the bill would be reasonable and fair to both ITC and BellSouth. The Commission infers from BellSouth's representation of its present process of a three- to five-day lag, that BellSouth is already rending its bills electronically to ITC, on average, within four days after the bill date, thus, the Commission does not believe that a 26-day requirement would result in any material system-wide change in BellSouth's billing systems. Furthermore, the Commission recognizes that when special circumstances warrant, ITC may request an extension of the payment due date; the Commission believes BellSouth should continue to grant such request, when reasonable.

CONCLUSIONS

The Commission concludes that the payment due date should be 26 days from the date of receipt of the bill. Accordingly, the Commission requires ITC and BellSouth to properly amend the proposed language in the Agreement in Attachment 7, Sections 1.4 and 1.4.1, in accordance with this decision.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 21

ISSUE NO. 60: (a) Should the deposit language be reciprocal?

(b) Must a party return a deposit after generating a good payment history?

POSITIONS OF PARTIES

ITC: (a) Yes. ITC supports language that is consistent with FCC policy on deposits including the basic principles of reciprocity, non-discrimination, transparency, payment history for timely billed undisputed charges, and third party review.

(b) Yes. ITC supports language that is consistent with FCC policy on deposits including the basic principles of reciprocity, non-discrimination, transparency, payment history for timely billed undisputed charges, and third party review.

BELLSOUTH: (a) No. The deposit language should not be reciprocal. BellSouth is not similarly situated as a CLP provider and, therefore should not be subject to the same creditworthiness and deposit requirements. When BellSouth buys services from a CLP's tariff, the terms and conditions of such tariff will govern whether a deposit is required of BellSouth. Thus, the interconnection agreement should not include deposit requirements that would be placed upon BellSouth.

(b) No. BellSouth should not be required to return a deposit merely because a CLP has generated a good payment history. Payment history alone is not a measure of credit risk.

PUBLIC STAFF: (a) Yes. The deposit language in the interconnection agreement should be reciprocal between the Parties.

(b) Deposits should be refunded in accordance with Commission Rule R12-5.

DISCUSSION

ISSUE 60(a): Regarding language in the interconnection agreement on the payment of deposits, ITC witness Watts testified that ITC should not be required to provide a deposit to BellSouth since ITC has maintained a good payment history with BellSouth. Witness Watts stated that ITC has neither missed an undisputed payment to BellSouth in 20 years nor defaulted on payment of an undisputed bill. Despite filing for and emerging from bankruptcy, ITC has managed to pay its bills to BellSouth in a timely manner. Further, witness Watts argued that BellSouth's insistence that ITC should provide greater payment assurance is unreasonable in light of the FCC's policy statement that narrower protections such as accelerated and advanced billing would strike a better balance between the interests of incumbent LECs and their customers in accordance with statutory standards than imposing additional deposit requirements on customers.[12] However, witness Watts testified that ITC does not believe that accelerated or advanced billing requirements should be imposed on it given its good payment history. ITC also cited BellSouth's confidential answer to an interrogatory propounded in ITC's First Set of Interrogatories as evidence that BellSouth administers its deposit policy discriminatorily, requiring most of its wholesale customers to pay a deposit while not requiring the same from the majority of its retail customers. ITC noted that BellSouth pays ITC for certain services and maintained that any language in the agreement regarding deposits should, consistent with FCC policy, be reciprocal and non-discriminatory.

BellSouth witness Ruscilli testified that payment history alone is not an adequate measure of one's creditworthiness and that BellSouth should be entitled to perform a full credit analysis that goes beyond mere payment history. Despite having a good payment history, several BellSouth customers, including ITC, remained current on their payments up through filing for bankruptcy. In response to ITC's testimony that

[12] *In the Matter of Verizon Petition for Emergency Declaratory and Other Relief,* WC Docket No. 02-202, December 23, 2002, at ¶30.

BellSouth's deposit policy is administered in a discriminatory fashion, witness Ruscilli testified that BellSouth treats its retail and wholesale customers the same with respect to credit scoring when making deposit requirement and refund decisions. Regarding reciprocity, witness Ruscilli testifed that deposit requirements should not be reciprocal since BellSouth is not similarly situated with CLP providers such as ITC. Unlike ITC, BellSouth, under the mandate of the 1996 Act, cannot decline to do business with a CLP customer it finds to be credit-risky. Further, when BellSouth purchases from a CLP's tariff, the terms of the tariff contain provisions applicable to whether BellSouth is required to pay a deposit.

The Public Staff agreed that BellSouth should be permitted to make determinations regarding the requirement of a deposit based upon an analysis of creditworthiness. While Commission Rule R12-2 does not contemplate applicability where the customer is another utility as opposed to a retail consumer, the Public Staff suggested the rule should apply and provide guidance in the instant matter. Rule 12-2(a)(2) provides that an applicant may establish creditworthiness "by appropriate means including, but not limited to, references . . . ." The Public Staff maintained that the process proposed by BellSouth seeks to establish creditworthiness, in the same manner as contemplated by Rule 12-2(a)(2), i.e., by appropriate means. However, regarding reciprocity of deposit language, the Public Staff agreed that the language in the agreement should apply to both Parties inasmuch as the agreement does specify terms and conditions for both Parties. The Public Staff was careful to note that reciprocity in this instance should not mean that one party must pay a deposit if the other one does. Instead, it is the process by which creditworthiness is determined that must be reciprocal and the requirement of a deposit will be determined by the outcome of the creditworthiness analysis or determination. The Public Staff urged the Commission to find that Commission Rule R12-4(a) and R12-4(c) should provide guidance for the amount of any required deposit and for the payment of interest on cash deposits respectively. According to the Public Staff, BellSouth's proposed language on the amount of any required deposit is consistent with R12-4(a) but needs to be revised to ensure reciprocal application to both Parties. BellSouth's proposed language should be revised further to include payment of interest on cash deposits that is consistent with R12-4(c) and the interest provisions should also apply to both Parties.

Having reviewed the evidence of record and the language proposed by the Parties, the Commission concludes that BellSouth is entitled to determine the creditworthiness of ITC by performing an analysis that goes beyond looking at ITC's payment history. Ability to make payments is not the only indicator of creditworthiness and BellSouth should not be limited to making deposit decisions solely on the basis of payment history. Except with regard to reciprocity, the language proposed by BellSouth for Attachment 7, Section 1.11 is reasonable and seeks to establish a process for determining creditworthiness that is similar to the principle established by Commission Rule R12-2. Therefore, BellSouth and ITC shall make creditworthiness determinations about each other in accord with the principle set forth in Commission Rule R12-2(a)(2) for retail consumers; the language proposed by BellSouth complies with said principle. However, the Commission is also persuaded that the language in the Agreement

regarding payment of deposit should be reciprocal. Accordingly, the language proposed by BellSouth should be included in the Agreement but revised to apply to both ITC and BellSouth. The Commission further concludes that although Rule R12-4 applies in the context of retail customers, its provisions should be used as the basis for terms in the interconnection agreement regarding the amount of deposits, collection of deposits, and the accrual of interest on deposits, except that interest should accrue at a rate of eight percent per annum to be credited quarterly (without request) to the payor's next bill for service. BellSouth's proposed language should be modified accordingly and should be written to apply reciprocally to both Parties.

ISSUE 60(b): ITC, through its witness Watts, testified that ITC's proposed language provided that a deposit shall be refunded with accrued interest following a period of six months prompt payment. In the case of a cash deposit, for the period the deposit is held, ITC proposed that the customer shall receive simple interest at the rate of one percent per month or 12 percent annually. BellSouth's witness Ruscilli again argued that payment history is not the only mark of creditworthiness and should not be the sole determinant of when or whether a deposit is refunded. Witnes Ruscilli testified that six months of timely payment is not enough to protect BellSouth should ITC cease making timely payments.

The Public Staff pointed out that neither BellSouth nor ITC should be permitted to hold deposits in perpetuity. Commission Rule R12-5 addresses refunding of deposits, and, according to the Public Staff, should be applied to deposits required of either party under the Agreement.

Having reviewed the record and the language proposed by the Parties, the Commission concludes that both BellSouth and ITC are entitled to consider more than mere payment history before refunding a deposit. As discussed above, both Parties should be able to consider creditworthiness if they choose. Accordingly, relying on Commission Rule R12-5 for guidance, the Commission concludes that the Agreement should provide for return of deposits using the following language or language which substantially achieves the same result:

> The party holding the deposit of the other party shall, on the date twelve months after receipt of the deposit and annually thereafter for as long as the deposit is held, review the deposit account and shall automatically refund the deposit if the other party (1) has paid its bills for service for the preceding twelve consecutive months without having had more than one late payment of an undisputed bill, and (2) is creditworthy at the time of review according to the standards initially applied to determine that a deposit was required; provided that only one late payment in the 12 months preceding review shall not be the sole reason not to refund the deposit. A disputed bill used to justify or excuse late payment must be disputed in good faith.