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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VOLUME 4
Page 469 through 649

PROCEEDINGS:	HEARING
BEFORE:	COMMISSIONER RUDOLPH "RUDY" BRADLEY COMMISSIONER CHARLES M. DAVIDSON COMMISSIONER LISA POLAK EDGAR
DATE:	Wednesday, April 27, 2005
TIME:	Commenced at 10:00 a.m.
PLACE:	Betty Easley Conference Center 4075 Esplanade Way, Room 148 Tallahassee, Florida
REPORTED BY:	LINDA BOLES, RPR Official FPSC Hearings Reporter (850) 576-9597
APPEARANCES:	(As heretofore noted.)

I N D E X

WITNESSES

EXHIBITS

NUMBER:		ID.	ADMTD.
9	JCF-1	648	648
21	Xspedius 2005 Bills	625	648
22	Attachment 6 to 2005 Agreement	629	648
23	Xspedius Florida Tariff Florida Price List	637	648

P R O C E E D I N G S

COMMISSIONER BRADLEY: Call this hearing to order. Your next witness is Mr. Falvey?

MR. HORTON: That's correct, sir.

COMMISSIONER BRADLEY: You may proceed.

JAMES C. FALVEY

was called as a witness on behalf of Joint Petitioners and, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HORTON:

Q Good morning, Mr. Falvey. Could you state your name and address for the record, please, sir.

A Good morning. James C. Falvey, and my -- I'm Senior Vice President, Regulatory Affairs, of Xspedius Communications, LLC. And my address is 14404 (sic.) Laurel Place, Suite 200, Laurel, Maryland 20707. 14405 is the address. I just moved to the new location.

Q And you were present yesterday when all the witnesses were sworn and you were sworn in yesterday, were you not?

A Correct.

Q Okay. Have you prepared and prefiled direct and rebuttal testimony in this proceeding?

A Yes, I have.

Q And other than the corrections noted in the errata sheet, do you have any changes or corrections to make to either

he direct or rebuttal?

A No, I don't.

Q If I were to ask you the questions contained in that irect and rebuttal testimony today, would your answers be the ame?

A Yes.

MR. HORTON: Mr. Chairman, may we ask that his direct nd rebuttal testimony be inserted into the record as though ead?

COMMISSIONER BRADLEY: Yes. Without objection, the refiled testimony of Mr. Falvey is admitted into the record as hough read.

MR. HORTON: Thank you, sir.

BY MR. HORTON:

Q Mr. Falvey, attached to your testimony was an exhibit which has been identified as Exhibit 9, and that is the Exhibit A language, contract language; is that correct?

A That's correct.

PRELIMINARY STATEMENTS

WITNESS INTRODUCTION AND BACKGROUND

Xspedius: James Falvey

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

A. My name is James C. Falvey. I am the Senior Vice President of Regulatory Affairs for Xspedius Communications, LLC. My business address is 7125 Columbia Gateway Drive, Suite 200, Columbia, Maryland 21046.

Q. PLEASE DESCRIBE YOUR POSITION AT XSPEDIUS.

A. I manage all matters that affect Xspedius before federal, state, and local regulatory agencies. I am responsible for federal regulatory and legislative matters, state regulatory proceedings and complaints, interconnection and local rights-of-way issues. I participated actively in the negotiation of the Agreement that is the subject of this arbitration.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND.

A. I am a cum laude graduate of Cornell University, and received my law degree from the University of Virginia School of Law. I am admitted to practice law in the District of Columbia and Virginia.

After graduating from law school, I worked as a legislative assistant for Senator Harry M. Reid of Nevada, and then practiced antitrust litigation in the Washington D.C. office of Johnson & Gibbs. Thereafter, I practiced law with the Washington, D.C. law firm of Swidler & Berlin, where I represented competitive local exchange

providers and other competitive providers in state and federal proceedings. In May 1996, I joined e.spire Communications, Inc. as Vice President of Regulatory Affairs, where I was promoted to Senior Vice President of Regulatory Affairs in March 2000. I have continued to served in that same position for Xspedius, after Xspedius acquired the bulk of e.spire's assets in August 2002.

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

A. In total, I have testified before 13 public service commissions, including those of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, New Mexico, Texas, Pennsylvania, Arkansas, and Kansas.

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

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

General Terms and Conditions	2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 8/G-8, 9/G-9, 12/G-12
Attachment 2: Unbundled Network Elements	23/2-5, 26/2-8, 27/2-9, 36/2-18, 37/2-19, 38/2-20, 43/2-25, 46/2-28, 50/2-32, 51/2-33(B) & (C)
Attachment 3: Interconnection	63/3-4, 65/3-6

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

Attachment 6: Ordering	86/6-3(B), 88/6-5, 94/6-11
Attachment 7: Billing	95/7-1, 96/7-2, 97/7-3, 99/7-5, 100/7-6, 101/7-7, 102/7-8, 103/7-9, 104/7-10
Supplemental Issues	108/S-1 thru 114/S-7

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

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

GENERAL TERMS AND CONDITIONS[2]

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

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

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

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

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

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

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

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

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

***Item No. 5, Issue No. G-5** [Section 10.4.2]: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks?*

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

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

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

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

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

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

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

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

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 9/ISSUE G-9.

A. Either Party should be able to petition the Commission, the FCC, or a court of law for resolution of a dispute. No legitimate dispute resolution venue should be foreclosed

to the Parties. The industry has experienced difficulties in achieving efficient regional dispute resolution. Moreover, there is an ongoing debate as to whether state commissions have jurisdiction to enforce agreements (CLECs do not dispute that authority) and as to whether the FCC will engage in such enforcement. There is no question that courts of law have jurisdiction to entertain such disputes (see GTC, Sec. 11.5); indeed, in certain instances, they may be better situated to adjudicate a dispute and may provide a more efficient alternative to litigating before up to 9 different state commissions or to waiting for the FCC to decide whether it will or won't accept an enforcement role given the particular facts.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners submit that it is unreasonable to exclude courts of law from the available list of venues available to address disputes under this Agreement. There is no question that courts of law have proper jurisdiction over disputes arising out of this Agreement, and in fact, BellSouth and the Petitioners have agreed to language providing as much elsewhere in the Agreement, including in Sec. 11.5 of the General Terms and Conditions (and in prior agreements (*see, e.g.*, NuVox's and Xspedius's current agreements at section 15)). Therefore, at a minimum, internal consistency militates in favor of including courts of law as available venues. Furthermore, in a number of instances, such as the resolution of intellectual property issues, tax issues, the determination of negligence, willful misconduct or gross negligence issues, petitions for injunctive relief and claims for damages, courts of law may be better equipped to adjudicate such disputes. 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 in connection with this Agreement (and a court can if appropriate defer to the expertise of the state or federal commission under the doctrine of primary jurisdiction, if these types of complaints are brought directly to courts), however the foregoing types of disputes would tax heavily the Commission's expertise and resources.

In addition, administrative efficiency favors inclusion of the courts as venues for dispute resolution. Given that this Agreement, or an Agreement very similar to it, will likely be adopted across BellSouth's nine-state region, the courts may for certain disputes and in certain contexts provide a more efficient alternative to litigating in up to 9 different jurisdictions or to waiting for the FCC, to decide whether or not it will accept an enforcement role given the particular facts.

Petitioners' experience has been that achieving efficient regional dispute resolution is already too difficult and it need not be made more difficult by the elimination of the courts as a possible venue for dispute resolution. As a result of the difficulties inherent in enforcing a multi-state agreement (technically, separate agreements for each state), BellSouth often is able to force carriers into heavily discounted, non-litigated settlements. Such settlements often are heavily discounted to reflect the exorbitant costs associated with litigating an issue that exists region-wide, but that gives rise to a disputed amount that may be too low for a single carrier to justify litigating in each state jurisdiction separately. Foreclosing the courts as a venue for dispute resolution may prevent CLECs from litigating legitimate disputes that cannot

efficiently be litigated across 9 different states or at the FCC, where dispute resolution is expensive and uncertain.

At bottom, elimination of the court of law as a venue option for dispute resolution unnecessarily forecloses a viable means for efficient dispute resolution. The Parties must decide on a case-by-case basis the appropriate venue for a particular dispute, and a court of law with competent jurisdiction should not be excluded from those choices.

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

A. BellSouth recently has revised its proposed language to allow for recourse to a court of law under certain conditions. Petitioners, however, remain concerned that disputes could evolve over "matters which lie outside the jurisdiction or expertise of the Commission or FCC". **Such disputes could hamper efficient dispute resolution.** Petitioners fear that the Parties could get mired in such disputes.

BellSouth's new proposal is also inadequate in that it could be used to effectively force CLECs to re-litigate the same issue in 9 different states, or, if claimed damages spread across all the states are too small, not to pursue their rights to enforce compliance with the Agreement at all. While the FCC theoretically may be available as an enforcement venue for disputes arising out of the Agreement, the FCC is often slow to decide as a threshold matter, whether in fact, it will even accept an enforcement role under particular facts. Assuming that the FCC is willing to exercise its jurisdiction (if it decides it has jurisdiction), the FCC often takes many months and

in some cases years to render decisions, which, in the context of business contracts that have daily and on-going impact, is unacceptable.

Finally, BellSouth's proposed language could force the needless bifurcation of claims based on breach from related claims based on other legal and equitable theories. Claims brought before a court may be referred to the Commission or FCC, for their expert opinion, if necessary. Forced bifurcation is needlessly burdensome and it may hamper Petitioners' ability to effectively pursue related claims, such as antitrust claims, before a court of competent jurisdiction.

Q. WHAT IS YOUR POSITION ON BELLSOUTH'S PROPOSED RESTATEMENT OF ITEM 9/ISSUE G-9?

A. Petitioners disagree with BellSouth's proposed restatement of the issue, as it attempts to improperly skew the issue by incorporating the false implication that there are exclusive, efficient and adequate administrative remedies available to address all claims and disputes that may arise under the Agreement and that there is an applicable mandate that such remedies be exhausted before a Party may resort to a court. BellSouth's own insistence that intellectual property related claims and disputes must go directly to a court of law (a provision to which the Petitioners agreed) underscores that BellSouth's premise and position are false.

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

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

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

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

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

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

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

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

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

RESALE (ATTACHMENT 1)

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

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

NETWORK ELEMENTS (ATTACHMENT 2)

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 27/ISSUE 2-9.

A. When multiplexing equipment (equipment that allows multiple voice and data streams and signals to be carried over the same channel or circuit) is attached to a commingled circuit, the multiplexing equipment should be billed from the same jurisdictional authorization (Agreement or tariff) as the lower bandwidth service (which in most cases will be a UNE loop).

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. If a CLEC requests a commingled circuit in which multiplexing equipment is attached, then the multiplexing equipment should be billed at the lower bandwidth of service – *i.e.,* per the jurisdiction of the loop if a loop is attached or per the lower

bandwidth transport, if the circuit involves commingled transport links. It is our understanding that the FCC held, in the TRO, that the definition of local loop includes multiplexing equipment (other than DSLAMs). Therefore, the multiplexing should be at UNE rates when a UNE loop is part of the circuit. At the very least, the CLEC – as the Party ordering and paying for the service – should be able to choose whether it wants to purchase multiplexing out of the Agreement (connected to a UNE) or out of a BellSouth tariff.

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

A. BellSouth's proposed language provides that when multiplexing equipment is attached to a commingled circuit, the multiplexing equipment will be billed from the same jurisdictional authorization (agreement or tariff) as the higher bandwidth service. The problem with this language is that, in a commingled circuit incorporating a DS1 UNE loop and DS3 special access transport (the most common kind of commingled circuit we expect to see), the multiplexing element would get billed at special access rates even though it is by definition part of the loop UNE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 46/ISSUE 2-28.

A. The answer to the question posed in the issue statement is "YES". The CLEC should be permitted to incorporate the Fast Access language from the FDN and/or Supra interconnection agreements, respectively docket numbers 010098-TP and 001305-TP, for the term of this Agreement.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. These matters have been litigated already before the Commission, and Joint Petitioners should be placed in the same position as other carriers like FDN and Supra.

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

A. BellSouth has refused to provide language that does anything more than indicate that it will some day provide Petitioners with another non-section 252 agreement to consider. This is unacceptable. Petitioners are not willing to wait until someday and

they are not willing to accede to BellSouth's request to address the issue outside the scope of the Commission's jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERCONNECTION (ATTACHMENT 3)

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

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

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

***Item No. 63, Issue No. 3-4** [Section 10.8.6, 10.10.6 and, 10.13.5]: 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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 63/ISSUE 3-4.

A. In the event that a terminating third party carrier imposes on BellSouth any charges or costs for the delivery of Transit Traffic originated by CLEC, the CLEC should reimburse BellSouth for all charges paid by BellSouth, which BellSouth is obligated to pay pursuant to contract or Commission order. Moreover, CLECs should not be required to reimburse BellSouth for any charges or costs related to Transit Traffic for which BellSouth has assumed responsibility through a settlement agreement with a third party. BellSouth should diligently review, dispute and pay such third party invoices (or equivalent) in a manner that is at parity with its own practices for reviewing, disputing and paying such invoices (or equivalent) when no similar reimbursement provision applies.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Petitioners have agreed to reimburse BellSouth for termination charges that BellSouth must pay third party carriers that terminate CLEC-originated traffic transited by BellSouth. The Agreement, however, must be clear that such reimbursement is limited to those charges BellSouth is contractually-obligated to pay to third party carriers or obligated to pay pursuant to Commission order. Moreover, Petitioners should not be made unwilling parties to any settlement agreement between BellSouth and a third party. Meaning, if BellSouth agrees to pay a third party for the

termination of Transit Traffic as part of some arrangement or settlement, Petitioners should not be responsible for reimbursing BellSouth's for its business decision to pay such third party. Without such limitations, there is the potential that BellSouth will pay third parties without carefully scrutinizing their bills and the legal bases therefore, and expect reimbursement from Petitioners for unjustified termination charges. In order to further ensure that BellSouth does not overpay and Petitioners are not over-reimbursing for third-party termination of Petitioner-originated/BellSouth transited traffic, BellSouth should be required to diligently review, dispute and pay such third party invoices (or equivalent) in a manner that is at parity with its own practices. Petitioners feel that such language is needed because, without it, there is the incentive for BellSouth to become lax, as it can relay on the reimbursement provision. Accordingly, we simply ask BellSouth to treat bills for termination of Transit Traffic no differently from other bills the company gets from independent telcos and the like. Petitioners' proposal will eliminate any potential discrimination and promote business certainty with regard to BellSouth's transiting function.

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

A. BellSouth's language is inadequate in that it does not limit the reimbursement obligation to those charges BellSouth is contractually obligated to pay, or obligated to pay pursuant to Commission order, third parties terminating Petitioner-originated/BellSouth-transited traffic. Instead, it gives BellSouth the latitude to choose to pay such third parties even when it has no contractual or other legal

obligation to do so. The result would leave Petitioners vulnerable to whatever political or business arrangements BellSouth struck with such third parties regardless of whether the rate imposed or payment scheme agreed to is unjust and unreasonable.

Q. WHAT IS YOUR VIEW ON BELLSOUTH'S PROPOSED RESTATEMENT OF THE ISSUE?

A. Our view is that it is unacceptable in that it appears that BellSouth is trying to disguise the fact that this is an issue that relates to BellSouth's Transit Traffic service. It is not simply an issue about Petitioner-originated traffic.

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

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

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

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

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

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

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

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

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

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

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

Item No. 73, Issue No. 3-14 [Sections 10.10.4, 10.10.5, 10.10.6.10.10.7]: ***This issue has been resolved.***

COLLOCATION (ATTACHMENT 4)

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

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

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

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

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

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

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

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

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

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

ORDERING (ATTACHMENT 6)

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 86(B)/ISSUE 6-3(B).

A. If one Party disputes the other Party's assertion of non-compliance, that Party should notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the Parties should cooperatively seek expedited resolution of the dispute. "Self help", in the form of suspension of access to ordering systems and discontinuance of service, is inappropriate and coercive. Moreover, it effectively denies one Party the due process

contemplated by Dispute Resolution provisions incorporated in the General Terms and Conditions of the Agreement.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Self help is nearly always an inappropriate means of handling a contract dispute. If there is a dispute, it should be handled in accordance with the Dispute Resolution provisions of the contract and not under the threat of suspension of access to OSS or termination of all services. If BellSouth is truly concerned about quickly resolving such issues, it should not continue to oppose including a court of law as an appropriate venue for dispute resolution.

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

A. BellSouth's language provides little more than the threat of suspension of access to OSS and the termination of all services (regardless of its potential impact on its competition or customers who have been disloyal to BellSouth). BellSouth offers as window dressing that if a Petitioner disagrees with BellSouth's allegations of unauthorized use, the *Petitioner* must proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions. However, that turns on its head the notion that the Party seeking redress must seek Dispute Resolution and puts Petitioners in the position of having to bear the burden of running to up to 9 state commissions every time they cannot convince BellSouth to cease engaging in baseless bullying. Moreover, it is not at all clear whether BellSouth would get to pull the plug while the dispute is pending or whether the coercive pressure created by

BellSouth's ambiguous language is all that it is seeking. In the end, neither Petitioners nor their customers should be forced into such a precarious situation. At bottom, the Party seeking certain relief (in this case BellSouth), should be the Party that has to file actions under the Dispute Resolution provisions. Petitioners should not be forced to seek Dispute Resolution as a means of curtailing ongoing or potential damage from BellSouth bullying and self-help.

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 88/ISSUE 6-5.

A. Rates for Service Date Advancement (a/k/a service expedites) related to UNEs, interconnection or collocation should be set consistent with TELRIC pricing principles.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. All aspects of UNE ordering and provisioning must be priced at TELRIC. This same rule should apply to Service Date Advancements. Petitioners are entitled to access the local network and obtain elements at forward-looking, cost-based rates. Where they require such access on an expedited basis, which is sometimes necessary in order to meet a customer's needs, Petitioners should not be subject to inflated, excessive fees that were not set by the Commission and that do not comport with the TELRIC pricing standard.

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

A. BellSouth's position is that it is not required to provide expedited service pursuant to the Act. Therefore, BellSouth's language states that BellSouth's tariffed rates for service date advancement will apply. BellSouth's tariffed rate, however, is $200.00 per element, per day. Thus, for example, a request to speed up an order for a 10-line customer by 2 days would cost $4,000.00. This fee is unreasonable, excessive and harmful to competition and consumers.

Q. IS ITEM 88/ISSUE 6-5 AN APPROPRIATE ISSUE FOR ARBITRATION?

A. Obviously, the answer to this question is "yes". The manner in which BellSouth provisions UNEs is absolutely within the parameters of section 251. Where Petitioners require expedited provisioning, that request remains part of the overall UNE provisioning scheme. And, as we have explained, that request should result in TELRIC rates as for any other UNE order. BellSouth's position that "this issue is not appropriate in this proceeding" is therefore incorrect. Setting prices and arbitrating the terms and provisions associated with section 251 unbundling are squarely within the Commission's jurisdiction and are appropriately resolved in this arbitration proceeding. Moreover, as previously stated, this Commission has clearly found that an interconnection agreement may encompass rates terms and conditions that extend beyond an ILEC's section 251 obligations. So, even if BellSouth's position that expedite charges are outside the scope of section 251 is correct (which it is not), it is irrelevant, as that would not render the issue outside the scope of the Agreement.

Item No. 89, Issue No. 6-6 [Section 2.6.25]: ***This issue has been resolved.***
Item No. 90, Issue No. 6-7 [Section 2.6.26]: ***This issue has been resolved.***
Item No. 91, Issue No. 6-8 [Section 2.7.10.4]: ***This issue has been resolved.***
Item No. 92, Issue No. 6-9 [Section 2.9.1]: ***This issue has been resolved.***
Item No. 93, Issue No. 6-10 [Section 3.1.1]: ***This issue has been resolved.***
Item No. 94, Issue No. 6-11 *[Sections 3.1.2, 3.1.2.1]: (A) Should the mass migration of customer service arrangements resulting from mergers, acquisitions and asset transfers be accomplished by the submission of an electronic LSR or spreadsheet?* *(B) If so, what rates should apply?* *(C) What should be the interval for such mass migrations of services?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 94(A)/ISSUE 6-11(A).

A. The answer to this question is "YES". Mass migration of customer service arrangements (*e.g.*, UNEs, Combinations, resale) should be accomplished pursuant to submission of electronic LSR or, if mutually agreed to by the Parties, by submission of a spreadsheet in a mutually agreed-upon format. Until such time as an electronic LSR process is available, a spreadsheet containing all relevant information should be used.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Consolidation in the CLEC industry has recently brought to the forefront issues surrounding mass migration and the need to ensure that there is an efficient, predictable and lawfully priced process in place for accomplishing the mass transfer of customers and associated serving arrangements from one carrier to another. It is in consumers' best interests that such transitions happen seamlessly, quickly and at a reasonable price. Mass migration scenarios that result from CLEC mergers or asset acquisitions should not translate into an opportunity for BellSouth to make things difficult, create delay or to extract a ransom to get the work done.

Because mass migrations essentially amount to bulk porting/bulk change situations, they are not extraordinarily complex and they do not require BellSouth to do new and unique things. Accordingly, they should be made possible by submission of an electronic LSR (or spreadsheet prior to that becoming available) and accomplished within a definite timeframe such as the 10-calendar day interval that Petitioners propose.

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

A. The problem with BellSouth's language is that it leaves the determination of what is expeditious and reasonable entirely up to BellSouth. Moreover, BellSouth controls the means, pace and price for how these things get accomplished. It is no consolation that it promises to do that the same way for everybody. Too many carriers already have faced too many obstacles to getting mass migrations accomplished by BellSouth in a reasonable manner and at a reasonable price. Yet, facing a task that must be done

and the reality that there is nowhere else to go to get it done CLECs ultimately must endure, litigate or pay the price demanded by BellSouth. BellSouth simply should not be permitted to leverage its control over UNEs and other service arrangements in such a way. Because this control necessitates the involvement of BellSouth, mass migrations of customers should be accomplished in predictable time periods and at fair and predictable rates that comport with the TELRIC pricing standard.

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 94(B)/ISSUE 6-11(B).

A. An electronic OSS charge should be assessed per service arrangement migrated. In addition, BellSouth should only charge Petitioners a TELRIC-based records change charge, as set forth in Exhibit A of Attachment 2, for migrations of customers for which no physical re-termination of circuits must be performed. Similarly, BellSouth should establish and only charge Petitioners a TELRIC-based charge, as set forth in Exhibit A of Attachment 2, for migrations of customers for which physical re-termination of circuits is required.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As Petitioners have maintained, TELRIC is the appropriate methodology for setting rates that are related to the provisioning of UNEs. Performing mass migrations of customers must be subject to this same standard. This work should not be relegated to precarious ICB pricing terms, as it involves no different work than customer porting generally, which is priced at TELRIC. Pricing on an ICB basis render carriers unable to predict their cost of service and, as suggested by BellSouth, includes no commitment to adhere to TELRIC pricing principles.

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

A. Tellingly, BellSouth proposes no language regarding rates. BellSouth's position, however, is that the rates by necessity must be negotiated between the Parties based upon the particular services to be transferred and the work involved. As we have explained, such "negotiated" rates — ICB prices — are inappropriate for mass migrations. Such rates are easily inflated, due to the advantage in bargaining power enjoyed by BellSouth (there is nobody else a Petitioner could turn to in this instance). For all these reasons, the Agreement should state that mass migrations will be priced in accordance with TELRIC.

Q. DO YOU HAVE ANY EXPERIENCE WITH BELLSOUTH "NEGOTIATED" ICB-PRICING THAT SUGGESTS THAT AFFIRMATIVE LANGUAGE REQUIRING TELRIC-BASED PRICING IS NEEDED?

A. Yes. Xspedius once attempted to accomplish the mass migration of several special access circuits to UNE loops. Although this event would require nothing more than a simple records change for each circuit, BellSouth quoted a minimum price of several hundred dollars. In addition, BellSouth proposed several hundred dollars in charges associated with "project management". These proposals obviously outweigh the approximately $25.00 rate approved by the Commission for converting special access to UNE Combinations. Yet, because only a single UNE was involved, BellSouth insisted that it was justified in imposing what amounts to a king's ransom. In the end, the effect of this "negotiated ICB rate" was that Xspedius chose not to order the

conversions and BellSouth, in certain instances, still reaps the rewards of selling Xspedius over-priced special access.

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 94(C)/ISSUE 6-11(C).

A. Migrations should be completed within ten (10) calendar days of an LSR or spreadsheet submission.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. BellSouth must be held to an objective and definite timeframe for porting customers to Petitioners or for effectuating records changes, whether on a small scale or via mass migrations. A 10-day interval is a reasonable requirement, and should be ample time for BellSouth to complete the necessary work.

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

A. BellSouth proposes no language here and appears inclined to leave it all up to negotiations. In its position statement, BellSouth maintains that no finite interval can be set to cover all potential situations, and that while shorter intervals can be committed to and met for small, simple projects, larger and more complex projects require much longer intervals and prioritization and cooperation between the Parties. This position is unreasonable. As we have explained, BellSouth's purported need for special "project management" is unsupported, and should not be used as an excuse to delay the conversion of customers. Mass migrations should not be delayed on the ground that they are somehow different from generic requests to port a customer or update BellSouth's records. Since they simply involve bulk submission of such

requests, petitioners' 10-day interval should therefore be stated explicitly in the Agreement.

Q. IS ITEM 94/ISSUE 6-11 AN APPROPRIATE ISSUE FOR ARBITRATION?

A. Yes. The manner in which BellSouth provisions UNEs is absolutely within the parameters of section 251. The mass migrations of customers served via UNEs, resale and Other Services is inextricably linked to BellSouth's section 251 obligations. It seems implausible that the migration of customers to service configurations covered by the Agreement should not be covered by the Agreement and resolved in this arbitration. Moreover, as previously stated, this Commission has clearly found that an interconnection agreement may encompass rates terms and conditions that extend beyond an ILEC's section 251 obligations. BellSouth's position that "this issue is not appropriate in this proceeding" is therefore incorrect. Prescribing the terms by which BellSouth switches customers and updates records associated with UNE and other serving configurations is squarely within the Commission's jurisdiction.

BILLING (ATTACHMENT 7)

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 96(A)/ISSUE 7-2(A).

A. Petitioners submit that a Party should be entitled to make one corporate name, OCN, CC, CIC or ACNA change ("LEC Change") in the other Party's databases, systems and records within any 12 month period without charge. For any additional "LEC Changes", TELRIC-compliant charges should be assessed.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Due to the current status of the telecommunications industry, it is likely a company will go through a corporate reorganization, merger, acquisition, etc. that will require some type of system, database, or records change(s) to reflect the change ("LEC Change"). It is our understanding that generally "LEC Changes" are simple administrative changes that are not unduly time or labor intensive. Therefore, CLECs should be afforded one "LEC Change" in any twelve (12) month period without charge.

In the commercial setting, businesses have to deal every day with corporate reorganizations, mergers, acquisitions, etc. Most businesses, however, do not get to impose a charge for making a system modification to recognize a change in a customer's corporate status or identity. Rather, it is treated as a cost of doing business. Nonetheless, BellSouth seeks to impose charges, via the cumbersome and uncertain BFR/NBR processes, to recover costs for implementing "LEC Changes". To the extent the Commission concludes that BellSouth may recover such costs, BellSouth should only be able to do so if a CLEC requests a "LEC Change" more than once in a twelve-month period and any such charge for additional "LEC Changes" should be TELRIC-compliant rates, as they are a necessary part of the business of gaining access to and using cost-based interconnection, UNEs and collocation.

Q. ARE YOU AWARE OF THIS PROVISION BEING INCLUDED IN ANY OTHER INTERCONNECTION AGREEMENTS?

A. Yes, it is my understanding that SBC had included, in its 13-State Agreement, a provision that provides for a one-time OCN/AECN change, without charge, as part of a corporate name change. For example, this provision is included in the Stonebridge Communications, Inc.'s 13-State Agreement. [Section 4.9, GT&Cs] It is also included in the Digital Telecommunications, Inc.'s 13-State Agreement [Section 4.9, GT&Cs] Further, the Time Warner/SBC Wisconsin Agreement, which is a modified 13-State Agreement, also provides for a one-time OCN/AECN change without charge [Section 4.8, GT&Cs]

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

A. BellSouth's proposed language would require a CLEC to go through the BFR/NBR process in order to conduct a "LEC Change". Specifically, BellSouth's language states, "...[CLEC] shall bear all costs incurred by BellSouth to convert [CLEC] to the new ACNA(s)/BAN(s)/CC(s)/CIC(s)/OCN(s)... and will be handled by the BFR/NBR process." It is BellSouth's position that CLECs should be responsible for all "reasonable records change charges" via the BFR/NBR process. It is our understanding that the BFR/NBR process is a lengthy, expensive and typically unsatisfactory process. The BFR process is used to develop a new or modified UNE or related services pursuant to the Act, and the NBR process is used to develop an entirely new network element or service not required by the Act. By requesting a "LEC Change", CLECs are hardly requesting anything that rises to the level of a new UNE or new service. Rather, CLECs are asking for BellSouth to make an administrative change in its systems and databases to reflect a corporate identity change. Petitioners have specifically negotiated this provisions to incorporate language addressing "LEC Changes" in the Agreement because they do not want to be subject to BellSouth's murky BFR/NBR process for this type of request. Further, Petitioners want certainty as to the cost BellSouth will charge for a "LEC Change". Ultimately, these types of records changes must be done and Petitioners do not want to be put in the position of having to pay whatever price BellSouth demands, no matter how excessive.

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 96(B)/ISSUE 7-2(B).

A. Petitioners submit that "LEC Changes" should be accomplished in thirty (30) calendar days. Furthermore, "LEC Changes" should not result in any delay or suspension of ordering or provisioning of any element or service provided pursuant to this Agreement, or access to any pre-order, order, provisioning, maintenance or repair interfaces. Finally, with regard to a Billing Account Number ("BAN"), Petitioners' proposed language provides that, at the request of a Party, the other Party will establish a new BAN within ten (10) calendar days.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As discussed above, a "LEC Change" is simply an administrative records change in BellSouth's systems and databases and, accordingly, 30 days is ample time to complete such a change. Furthermore, the Agreement should be clear that "LEC Changes" will not disturb or delay the provisioning of any service orders or the operational interfaces between Petitioners and BellSouth, including access to BellSouth's OSS. The Agreement must be clear on this point so that there is no opportunity to use a "LEC Change" as an excuse for provisioning delays or denial of the ability to access BellSouth's OSS (and the attendant ability to order UNEs and other services). Finally, due to the importance of accurate billing between BellSouth and a CLEC, the Parties should establish BANs for the other party within ten (10) calendar days. A billing account change should be a simple records change and should be done on an expedited basis to avoid any billing discrepancies and the disputes that might result.

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

A. BellSouth does not include any intervals for completing "LEC Changes" in its proposed language. It is also our understanding that there are no intervals for "LEC Changes" or equivalents in any of the BellSouth intervals guidelines or operational guides. BellSouth's proposed language provides that "LEC Changes" be handled by the BFR/NBR process. The intervals for "LEC Changes" should not be left to BellSouth's discretion through the amorphous BFR/NBR processes. The Agreement should include precise intervals that the Parties can rely on in their course of dealings under the Agreement.

Q. WHY IS ITEM 96/ISSUE 7-2 APPROPRIATE FOR ARBITRATION?

A. In its position statement, BellSouth asserts that Issue 7-2 should not be included in this Arbitration because "it involves a request by the CLECs that is not encompassed" in section 251 of the 1996 Act. BellSouth is mistaken. Regardless of whether LEC Changes are expressly mandated under section 251 or state law, this issue plainly involves BellSouth's OSS and billing for UNEs, collocation and interconnection which is clearly encompassed by section 251. This issue goes directly to ensuring that BellSouth's practices are just and reasonable, which are always within the jurisdiction of the Commission. Moreover, as previously stated, this Commission has clearly found that an interconnection agreement may encompass rates terms and conditions that extend beyond an ILEC's section 251 obligations. So, even if the issue of "LEC Changes" is outside the scope of section 251 (which it is not), it is not

outside the scope of the Agreement. For these reasons, Issue 7-2 is properly before the Commission.

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

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 99/ISSUE 7-5.

A. Petitioners as well as BellSouth should have the right to suspend access to ordering systems and to terminate particular services or access to facilities that are being used in an unlawful, improper or abusive manner. However, such remedial action should be limited to the services or facilities in question and such suspension or termination should not be imposed unilaterally by one Party over the other's written objections to

or denial of such accusations. In the event of such a dispute, "self help" should not supplant the Dispute Resolution process set forth in the Agreement.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. Termination of services or denial of access to ordering systems is a potentially life-threatening event for CLECs. Petitioners will be unable to conduct business without access to BellSouth ordering systems and customers will lose service if BellSouth terminates their access to services and facilities. Such drastic measures must not be taken, therefore, without following standard procedures set forth in the Agreement. While we understand the need for BellSouth to ensure the integrity of its network, BellSouth should not be able to unilaterally terminate facilities or deny access to ordering systems if there is any dispute as to the unlawfulness or improper use of its network or facilities. The Dispute Resolution provisions of the Agreement must trump any self-help BellSouth may seek to undertake against a Petitioner in such circumstances.

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

A. BellSouth proposes that either Party should have the right to suspend or terminate service to **all** existing services in the event a Party believes the other Party is using **any** of its services or facilities in an unlawful, improper or abusive manner, and such use is not corrected within thirty (30) calendar days. BellSouth's proposed language, however, fails to acknowledge that a CLEC may question or even deny its allegation of unlawful, improper or abusive use and that the Parties may in fact disagree over whether or not such violation has occurred or continues to occur. Instead,

BellSouth's proposed language simply provides that it may engage in self-help by terminating services or denying access to ordering systems after providing notice if such alleged improper use is not corrected. Because this outcome is an "end game" for CLECs, BellSouth must be prohibited from engaging in self-help if there is a dispute. Accordingly, the Agreement should require that the Parties adhere to the Dispute Resolution provisions in the event of a dispute regarding use of the other Party's network or facilities. Otherwise, BellSouth will be able to leverage its monopoly power over CLECs by engaging in self-help whereby the remedy imposed by BellSouth significantly would outweigh any infraction (*i.e.,* "lights-out" regardless of how insignificant the infraction – or perceived infraction – and irrespective of whether the CLEC disputes BellSouth's allegations). The Commission should prevent this result as competitors and Florida consumers could be irreparably harmed by BellSouth's attempt to secure and exercise "self-help" in a manner that capitalizes on its monopoly legacy and overwhelming market dominance.

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

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

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

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 102/ISSUE 7-8.

A. The answer to the question posed in the issue statement is "YES". The amount of security due from an existing CLEC should be reduced by amounts due to CLEC by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in the deposit provisions of Attachment 7 of the Agreement. This provision is appropriate given that the Agreement's deposit provisions are not reciprocal and that BellSouth's payment history with CLECs is often poor.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As mentioned above, Petitioners have compromised significantly throughout the negotiations of these deposit provisions in order to reach a reasonable and balanced solution that can work throughout the BellSouth territory. As such, the CLECs conceded to give up the right to reciprocal deposits in an effort to settle one potential arbitration issue. But, if Petitioners do not collect deposits they should at least have the ability to reduce the amount of security due to BellSouth by the amounts BellSouth owes CLEC that have aged thirty (30) days or more.

Q. DOES BELLSOUTH TYPICALLY HAVE SIGNIFICANT BALANCES OWED TO CLECs AGED OVER THIRTY DAYS?

A. Yes, BellSouth does not have a pristine or even good payment record when it comes to paying CLECs the amounts BellSouth owes under its interconnection agreements. Thus, reducing deposit amounts the Petitioners would owe BellSouth is a reasonable means to protect the CLECs' financial interest, as the remainder of the deposit provisions protect BellSouth's financial interests.

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

A. BellSouth has not proposed any language on this issue. BellSouth fails to address is the fact that CLECs have no remedy in the security deposit context if BellSouth is late in paying invoices to the CLECs. Since the CLECs suffer financially when payment of invoices are late or not paid in full, but are unable to request security deposits from BellSouth, they should at least be able to reduce the security amount when BellSouth has failed to make timely payments to CLECs. Furthermore, the

CLECs' offset proposal is proper in that once the amount of deposit the CLECs owes BellSouth is decreased by amounts BellSouth has failed to pay the CLECs, the resulting amount will more accurately reflect BellSouth's actual exposure to potential nonpayment.

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

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

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

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

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

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

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

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

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

(ATTACHMENT 11)

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

SUPPLEMENTAL ISSUES

(ATTACHMENT 2)

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

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

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

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

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

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

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 111/ISSUE S-4.

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

Joint Petitioners' answer to this question is "NO." The Agreement should not automatically incorporate the "Transition Period." The "Transition Period," or plan proposed by the FCC for the six months following the Interim Period, has not been adopted by the FCC, but was merely proposed in FCC 04-179. The FCC sought comment on the proposal and on transition plans in general. Upon release of the Final FCC Unbundling Rules, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the transition plan adopted therein or to other standards, if they mutually agree to do so. Any issues which the Parties are

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

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

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The rationale is quite simple. The Transition Period is and was merely a proposal by the FCC. In paragraph 29, of FCC 04-179, the FCC used the words "we propose" with respect to the plan. It did not say "we adopt." Indeed, the ordering paragraphs (paragraphs 47-49) in FCC 04-179 do not identify the Transition Period as something ordered. Moreover, concurrent with release of the Order, the FCC's Chairman attached a statement wherein he noted that "[c]ontrary to the inaccurate assertions being thrown around, there are no automatic price increase after 6 months for facilities providers," and that "[t]oday's Order only seeks comment on a transition that will not be necessary if the Commission gets its work done." The Chairman's statements make it eminently clear that the transition plan set forth in 04-179 was merely a proposal set forth for comment.

We also find it ironic that BellSouth takes a position here contrary to that of its trade association, the United States Telecom Association (USTA), in a recent mandamus petition filed before the U.S. Court of Appeals (D.C. Circuit). Here, BellSouth takes the position that the Transition Period will take effect at the end of the Interim Period and therefore should be automatically incorporated into the Agreement. Yet, on page 13 of USTA's mandamus petition, USTA argued that the Transition Period was and is a mere proposal with "no legal force whatsoever." Given USTA's role in

representing ILEC interests, including those of BellSouth, and the fact that USTA appears to agree with our position, we do not understand why BellSouth wishes to arbitrate this particular issue before the Commission.

At this time, there are no FCC rules in place as to what will happen when and if the Interim Period expires. However, the FCC's Chairman has stated that it is his intention to release the Final FCC Unbundling Rules by December 2004. This indicates that it is not the FCC's intention to allow the Interim Period to lapse without issuing an order containing the so-called Final FCC Unbundling Rules. That order is almost certain to incorporate a transition plan that may or may not be similar to the one proposed in FCC 04-179. After that order is released, the Parties should exchange language, negotiate and arbitrate, if necessary, any provisions on which they cannot agree.

Thus, the rest of the rationale here is the same as that found in the testimony related to Issue Nos. S-1, S-2(A), S-2(B) and S-3. Automatic incorporation of a proposed or even ordered transition plan would undermine and circumvent the negotiation process established by the Act. The Act requires the Parties to engage in good faith negotiations with respect to applicable legal requirements first and then allows for Commission arbitration of issues the Parties are unable to resolve through good faith negotiations. In either case, interconnection agreements (existing ones – or new ones such as the ones pending in this arbitration) are not automatically revised to incorporate a transition plan that has been merely proposed or, for that matter a

transition plan that has been ordered. Instead, language must be negotiated or arbitrated (to the extent the court order effectuates a change in law with practical consequences), depending on the nature of the issues and the Parties' positions with respect thereto.

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

Our position also is practical. We do not know what an FCC order establishing a transition plan will say or how it would impact provisions of the Agreement already agreed to or those at issue in this arbitration. If and when such an order is released, a process will need to be adopted to allow the Parties time to assess the order, propose and negotiate contract language relating thereto (again, only to the extent the court order effectuates a change in law with practical consequences), and to identify specific issues which cannot be resolved timely through voluntary negotiations and

that will need to be resolved through arbitration. The language that results from those negotiations and that aspect of the arbitration is how any FCC-ordered transition plan should be incorporated into the Agreement. That language should be effective when all other terms and conditions of the Agreement are effective – which is the date of the last signature executing the Agreement -- neither the Agreement nor any of its terms can be effective prior to that date.

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

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

As we understand BellSouth's proposal, BellSouth inappropriately seeks to upend the process established by the Act which requires good faith negotiations with respect to existing applicable legal requirements first and then allows for Commission arbitration of issues the Parties are unable to resolve through good faith negotiations. The Agreement should not be "deemed amended" to "automatically incorporate" a

transition plan that has not yet been adopted by the FCC and that may change dramatically prior to adoption. We do not, as of the date of this filing, what such an order would say or what impact it could have. Even if we did, we do not know whether the Parties will agree on the order's meaning and on what language, if any, should be incorporated into the Agreement with respect thereto. In this regard, it is important to note that the Parties to this arbitration generated many issues for arbitration despite having had the opportunity to review relevant rules and orders and to negotiate with regard to contract language related thereto. We do not anticipate that any new FCC order adopting a transition plan would prove much different. While the Parties may be able to agree on some contract language with respect thereto, it also is possible that they will not be able to agree on all contract language proposals and that arbitration by the Commission will be needed in that regard. How the timing of all this will work out remains to be seen.

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

BellSouth's proposal to "automatically incorporate" a proposed FCC transition plan also runs counter to the principle that negotiations should take into account the law as it exists at the time – not as it might exist in the future. The Parties agreed to do this with respect to the FCC's TRO. Although parts of the TRO were vacated in March 2004, the vacatur did not become effective until June 2004. Until that point, the Parties negotiated as though all of the TRO was valid law – simply because it was. In the case of the proposed FCC transition plan, the same principle applies. Since it has not been adopted by the FCC and it is not law, it makes little sense to expend resources on it. Those resources will be better spent when a transition plan actually is adopted by the FCC.

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 113(A)/ISSUE S-6(A).

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

BellSouth is obligated to provide DS1, DS3 and dark fiber loop UNEs. *USTA II* did not vacate the FCC's rules which require BellSouth to make available DS1, DS3 and dark fiber loop UNEs. *USTA II* also did not eliminate section 251, CLEC impairment, section 271 or the Commission's jurisdiction under federal or state law to require BellSouth to provide unbundled access to DS1, DS3 and dark fiber loop UNEs.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. The D.C. Circuit in *USTA II* did not vacate the FCC rules with regard to the provision of unbundled access to DS1, DS3 and dark fiber loops. Although BellSouth asserts in its position statement that the *USTA II* decision vacated the FCC's rules involving DS1 and other high-capacity UNE loops, this is not so. The D.C. Circuit merely vacated the FCC's referral of additional impairment conclusions to state regulators. BellSouth now seeks to extrapolate from this ruling the vacatur of the FCC's DS1, DS3 and dark fiber loop unbundling rules. However, such extrapolation is ill-advised

and not proper. If the Court intended to vacate the FCC's enterprise market loop rules, it certainly would have said so explicitly, as it did with respect to other FCC rules. Indeed, the FCC recognized that the *USTA II* opinion contains no language announcing BellSouth's claimed vacatur of the FCC's unbundling rules for DS1, DS3 and dark fiber loop UNEs. In FCC 04-179, footnote four, the FCC states that the D.C. Circuit "did not make a formal pronouncement regarding the status of the [FCC's] findings regarding enterprise market loops." Thus, the FCC has thus far refused to accept BellSouth's contention that *USTA II* vacated its enterprise market loop unbundling rules. It would be improper for the Commission to render vacated FCC rules which the Court did not say were vacated and which the FCC itself has properly not accepted are vacated.

In paragraph 202 of the TRO, the FCC stated that "[w]ith respect to dark fiber loops, DS3 loops and DS1 loops, we conclude that requesting carriers are impaired on a location-by-location basis without unbundled access to incumbent LEC loops nationwide." The FCC reiterated its **nationwide impairment** findings with respect to DS1, DS3 and dark fiber loops in paragraphs, 325, 320 and 311 of the TRO, respectively. In paragraph 328, the FCC again refers to its **affirmative findings of impairment** with respect to DS1, DS3 and dark fiber loops. The *USTA II* decision did not vacate these findings. In fact, the *USTA II* decision's vacatur of the FCC's referral to the states regarding the establishment of **exceptions** to the FCC's nationwide impairment findings effectively means that these findings by the FCC are final and uncontested, as the vehicle for establishing exceptions to the FCC's

nationwide findings of impairment for DS1, DS3 and dark fiber loops has been eliminated. FCC rule 319(a)(4) provides that ILECs must provide access to DS1 UNE loops, *except* where a state commission has found through application of the competitive wholesale trigger, a lack of impairment. The FCC's DS3 and dark fiber loop rules share a similar construct requiring unbundling *except* where a state commission finds a lack of impairment through application of, in the case of DS3 and dark fiber loops, two triggers. Per *USTA II,* state commissions, including the Commission, cannot make such findings (a decision which BellSouth fiercely supported and which CLECs fiercely opposed). Accordingly, no exceptions to the rule apply. The *USTA II* decision therefore perpetuates the nationwide unbundling requirement for DS1, DS3 and dark fiber loop UNEs, until such time as the FCC's existing rules are modified in a manner that requires something different.

Furthermore, the Commission must acknowledge that *USTA II* did not eliminate section 251 of the Act. Section 251 is a statute and the D.C. Circuit did not strike it down. Accordingly, under section 251, BellSouth has the "duty" to provide network elements pursuant to section 251(c). BellSouth also has a "duty to negotiate in good faith" regarding fulfillment of its duty to provide network elements under section 251(c)(1). These duties did not go away when the *USTA II* mandate was issued. Section 251(c)(3) is still "Applicable Law" under this Agreement and it plainly mandates access to UNEs where impairment exists. As explained above, the FCC made nationwide findings of impairment with respect to DS1, DS3 and dark fiber loop UNEs. These findings have not been overturned. Indeed, BellSouth's assertion

of impairment with respect to certain route-specific facilities were squarely rebutted in proceedings before the Commission. Moreover, the FCC's definition of impairment was neither vacated nor remanded by the D.C. Circuit in *USTA II*. Indeed, the Court specifically observed that the FCC's interpretation of "impairment" in the TRO represented an improvement over past efforts because the FCC "explicitly and plausibly" connected the factors to be considered in the analysis to natural monopoly characteristics and/or to other structural impediments to competitive supply, such as sunk costs, ILEC absolute cost advantages, first-mover advantages, and operational barriers to entry within the control of the ILEC. The Court offered several "general observations" for the FCC's consideration in making impairment determinations on remand. However, the FCC's definition of impairment was neither vacated nor remanded by the Court. Thus, impairment exists and unbundling is still required, even if the Commission were to erroneously accept BellSouth's invitation to write into the *USTA II* opinion a vacatur of the FCC's enterprise loop unbundling rules.

In addition to BellSouth's obligations under section 251 of the Act, BellSouth has an obligation under section 271 of the Act to provide access to DS1, DS3 and dark fiber loops at rates, terms and conditions that are just, reasonable and nondiscriminatory, consistent with the standards articulated under sections 201 and 202 of the Act. As the FCC has found, section 271 imposes unbundling obligations independent of those in section 251(c)(3). These unbundling obligations that are *not* conditioned on the presence of impairment. The FCC's interpretation of BellSouth's and other BOCs'

section 271 unbundling obligations was upheld by the *USTA II* court, which described the FCC's decision with respect to section 271 to mean that "even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases in order to enter the interLATA market."

Specifically, section 271 Competitive Checklist Item No. 4 requires ILECs to provide local loop transmission from the central office to the customer's premises, unbundled from the local switching or other services. In the TRO, the FCC held that BOCs are under an independent statutory obligation under section 271 of the Act to provide competitors with unbundled access to network elements, which would include the local loop under Competitive Checklist Item No. 4. BellSouth has not been relieved from its section 271 obligations in Florida. BellSouth is required to meet Competitive Checklist Item No. 4 during the section 271 application process ***and remain in compliance*** with these requirements after approval has been granted. In particular, section 271(d)(6) requires BellSouth to continue to satisfy the conditions required for approval of its section 271 application. The FCC has held that that in order to provide local loops in compliance with Competitive Checklist Item No. 4, a BOC must demonstrate that it furnishes loops (1) in quantities demanded by competitors, (2) at an acceptable level of quality and (3) in a non-discriminatory manner. In granting BellSouth's section 271 Application for Florida, the FCC concluded that BellSouth satisfied Competitive Checklist Item No. 4 as it provided all loop types, including high capacity loops, such as DS1, DS3 and dark fiber loops. Moreover, this Commission held in a Covad/BellSouth arbitration award that "the FCC reasonably

concluded that checklist item 4 imposed unbundling requirements for elements independent of the unbundling requirements imposed by Section 251 . . . . This Commission finds that, pursuant to Section 271(c)(2)(B)(iv), BellSouth has an obligation to unbundled local loop transmission from the central office to the customer's premises."

The Commission has ample authority to enforce section 271 Competitive Checklist obligations, with regard to CLEC access to DS1, DS3 and dark fiber loops. The FCC has recognized the ongoing role of state commissions in its section 271 approval orders. In approving BellSouth's section 271 application for Florida, the FCC held that the Commission has a vital role in conducting section 271 proceedings and that state and federal enforcement can address any backsliding that may arise in Florida. Moreover, the fact that BellSouth sought and obtained section 271 approval, based on the existence of interconnection agreements that specify the terms and conditions under which BellSouth is providing the Competitive Checklist items, (known as section 271 "Track A") means that the Commission has jurisdiction over the provision of Competitive Checklist elements by virtue of its jurisdiction over interconnection agreements. Furthermore, since state commissions have jurisdiction over all issues included in interconnection agreements, and the Applicable Law definition in the General Terms and Conditions includes all "applicable federal, state, and local statutes, laws, rules regulations, codes, effective orders, injunctions, judgments and binding decisions, awards and decrees that relate to the obligations

under this Agreement" within its scope, the Commission has, *ipso facto*, jurisdiction over section 271 and BellSouth's compliance therewith.

Aside from any federal statutes, this Commission arguably has independent state law authority to order BellSouth to continue to provide access to DS1, DS3 and dark fiber loop UNEs. Specifically, § 364.161(1) of the Florida Code provides that local carriers such as BellSouth "unbundle all of its network features, functionalities and capabilities." In particular, this provision contemplates the unbundling of "local loops." We believe that this Florida statute, in addition to § 364.01 of the Florida Code, gives the Commission the authority, in an effort to promote competition and the availability of good telecommunications services to Florida consumers, to require BellSouth to unbundle DS1, DS3, and dark fiber loops.

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 113(B)/ISSUE S-6(B).

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

BellSouth is obligated to provide access to DS1, DS3 and dark fiber loop UNEs at TELRIC-compliant rates approved by the Commission. DS1, DS3 and dark fiber loops unbundled on other than a section 251 statutory basis should be made available at TELRIC-compliant rates approved by the Commission until such time as it is determined that another pricing standard applies and the Commission establishes rates pursuant to that standard.

Q. WHAT IS THE RATIONALE FOR YOUR POSITION?

A. As stated above, *USTA II* not vacate the FCC's rules which require BellSouth to make DS1, DS3 and dark fiber loop UNEs available to CLECs. Furthermore, BellSouth is obligated to provision unbundled access to these UNEs pursuant to section 251 (regardless of whether the FCC's enterprise loop unbundling rules were vacated – which they were not) and section 271. In addition, the Commission may order BellSouth to continue such unbundling pursuant to Florida state law. The Commission may also enforce unbundling requirements under section 271. Joint Petitioners maintain that their currently negotiated Attachment 2 adequately incorporates the rates, terms and conditions for DS1, DS3 and dark fiber loops that should remain in the Agreement. Notably, the rates incorporated are intended to be

the TELRIC-compliant rates approved by the Commission. These rates should apply to DS1, DS3 and dark fiber UNE loops, in all instances where unbundling is required pursuant to section 251. In cases where section 271 is the source of the continuing unbundling mandate, the FCC articulated that the just, reasonable and nondiscriminatory pricing standard under sections 201 and 202 would apply. Accordingly, the Commission should require BellSouth to continue providing section 271 checklist items at TELRIC-complaint rates, at least until such time as it is determined that another pricing methodology comports with the just, reasonable and nondiscriminatory pricing standard and the Commission establishes rates pursuant thereto.

In FCC 04-179, the FCC recognized that the ILEC obligation to provide section 251 switching, loops and transport UNEs has been in place for several years and the precipitous elimination of these UNEs could destabilize the market. BellSouth's proposed alternative to TELRIC – phantom-market-based rates or tariffed special access rates – would not only harm competitive carriers, but also the consumers who rely on them to provide competitively-priced services. BellSouth's phantom-market-based rates and special access rates are generally exorbitant, bear no discernable relationship to costs (or to a cost-based pricing standard found to comport with the just and reasonable pricing standard), and are largely unconstrained by market forces. Consequently, neither BellSouth's proposed phantom market-based rates nor special access rates are "just and reasonable" for section 271 elements and they should not be allowed by the Commission. By maintaining TELRIC-complaint rates, the

Commission will shield consumers from sharp and sudden rate increases as a result of carriers' increased costs for network elements and decreases the likelihood that consumers will be forced to incur steep price hikes from Joint Petitioners (to the extent that Joint Petitioners were able to impose such price hikes and remain competitive with BellSouth) or to return to BellSouth (which, in the absence of competition would surely seek to impose its own steep price hikes on consumers).

Finally, with respect to UNEs for which state law, independent of section 251, is the basis of unbundling, Joint Petitioners submit that the Commission should continue to require unbundling at its TELRIC-compliant UNE rates, at least until such time as it determines another pricing methodology is appropriate and establishes rates pursuant thereto.

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

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

Q. WHAT IS YOUR POSITION WITH BELLSOUTH'S PROPOSED RESTATEMENT OF ITEM 113/ISSUE S-6.

A. BellSouth attempts to narrow the issue so that the *USTA II* decision is the only binding authority on BellSouth's obligations to provide Joint Petitioners with unbundled access to DS1, DS3 and dark fiber loops. BellSouth's proposed issue statement unreasonably eliminates other sources of law that impacts its obligations to provide such UNEs, including sections 251 and 271 of the Act, as well as the Commission's authority under Florida state law.

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

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

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

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

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

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

PRELIMINARY STATEMENTS

WITNESS INTRODUCTION AND BACKGROUND

Xspedius: James Falvey

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

A. My name is James C. Falvey. I am the Senior Vice President of Regulatory Affairs for Xspedius Communications, LLC. My business address is 7125 Columbia Gateway Drive, Suite 200, Columbia, Maryland 21046.

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

A. Yes, the answers would be the same.

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

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

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[1] The following issues have been settled: 1/G-1, 3/G-3, 8/G-8, 10/G-10, 11/G-11, 13/G-13, 14/G-14, 15/G-15, 16/G-16, 17/1-1, 18/1-2, 19/2-1, 20/2-2, 21/2-3, 22/2-4, 24/2-6, 25/2-7, 27/2-9, 28/2-10, 29/2-11, 30/2-12, 31/2-13, 32/2-14, 33/2-15, 34/2-16, 35/2-17, 39/2-21, 40/2-22, 41/2-23, 42/2-24, 43/2-25, 44/2-26, 45/2-27, 47/2-29, 48/2-30, 49/2-31, 50/2-32, 51/2-33(A), 52/2-34, 53/2-35, 54/2-36, 55/2-37, 56/2-38, 57/2-39, 58/2-40, 59/2-41, 60/3-1, 61/3-2, 62/3-3, 64/3-5, 66/3-7, 67/3-8, 68/3-9, 69/3-10, 70/3-11, 71/3-12, 72/3-13, 73/3-14, 74/4-1, 75/4-2, 76/4-3, 77/4-4, 78/4-5, 79/ 4-6, 80/4-7, 81/4-8, 82/4-9, 83/4-10, 84/6-1, 85/6-2, 86/6-3(A), 87/6-4, 89/6-6,

General Terms and Conditions	2/G-2, 4/G-4, 5/G-5, 6/G-6, 7/G-7, 9/G-9, 12/G-12
Attachment 2: Unbundled Network Elements	23/2-5, 26/2-8, 36/2-18, 37/2-19, 38/2-20, 46/2-28, 51/2-33(B) & (C)
Attachment 3: Interconnection	63/3-4, 65/3-6
Attachment 6: Ordering	86/6-3(B), 88/6-5, 94/6-11
Attachment 7: Billing	96/7-2, 97/7-3, 100/7-6, 101/7-7, 102/7-8, 103/7-9, 104/7-10
Supplemental Issues	108/S-1 thru 114/S-7

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

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

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

GENERAL TERMS AND CONDITIONS[2]

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

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

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

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

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

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

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

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

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

Item No. 5, Issue No. G-5 *[Section 10.4.2]: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks?*

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

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

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

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

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

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

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

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

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 9/ISSUE G-9.

A. Either Party should be able to petition the Commission, the FCC, or a court of law for resolution of a dispute. No legitimate dispute resolution venue should be foreclosed

to the Parties. The industry has experienced difficulties in achieving efficient regional dispute resolution. Moreover, there is an ongoing debate as to whether State Commissions have jurisdiction to enforce agreements (CLECs do not dispute that authority) and as to whether the FCC will engage in such enforcement. There is no question that courts of law have jurisdiction to entertain such disputes (*see* GTC, Sec. 11.5); indeed, in certain instances, they may be better equipped to adjudicate a dispute and may provide a more efficient alternative to litigating before up to 9 different State Commissions or to waiting for the FCC to decide whether it will or won't accept an enforcement role given the particular facts.

Q. BELLSOUTH HAS PROPOSED REVISED LANGUAGE THAT WOULD ALLOW DISPUTES TO GO TO A COURT OF LAW IN CERTAIN INSTANCES. WHY IS THAT LANGUAGE NOT ACCEPTABLE? [BLAKE AT 17:1-7, 18:6-13]

A. As explained in our direct testimony, BellSouth's proposal unnecessarily builds in opportunities for dispute over when the conditions for taking a case to court have been met and imposes inefficiencies by requiring that certain claims be separated. We would prefer not to close or partially restrict the option of going to a court of competent jurisdiction for dispute resolution. When faced with the decision to file a complaint at the Commission, the FCC or a court, we will have to weigh the pros and cons of each venue (expertise and scope of jurisdiction would be among the factors) and assess them based on the totality of the dispute between the Parties – which could easily extend beyond the Florida Agreement. We find ourselves in need of efficient and effective enforcement regionally – not just in Florida. Accordingly, we will not

voluntarily give up the option of going to a court of competent jurisdiction, as such a court may provide a means by which we can avoid having to litigate nine times over (or more) or to discount settlement positions as a result of regional dispute resolution difficulties which BellSouth has used to its advantage and seeks to preserve.

Q. MS. BLAKE REFERENCES AN ARBITRATION PROCEEDING BETWEEN BELLSOUTH AND AT&T WHEREIN THIS COMMISSION FOUND THAT IT WILL RESOLVE DISPUTES UNDER THE SUBJECT INTERCONNECTION AGREEMENT. WHAT IS YOUR POSITION WITH REGARD TO MS. BLAKE'S STATEMENT?

A. The decision cited by Ms. Blake is not on point. The Commission's BellSouth/AT&T decision dealt with whether a third party commercial arbitrator could be used to resolve disputes under the subject interconnection agreement. This is quite distinct from what the Joint Petitioners seek here. Joint Petitioners do not seek to have a third party arbitrator settle disputes; Joint Petitioners simply want not to give up their rights – or any aspect of them – to bring disputes before courts of competent jurisdiction. It goes without saying that a third party arbitrator is not a court of law.

Certain state and federal courts have original jurisdiction over interconnection agreement related matters. On the other hand, a third party arbitrator has no jurisdiction unless otherwise agreed to by the parties or unless jurisdiction is conferred upon the arbitrator by the Commission. The Joint Petitioners are not asking the Commission to confer jurisdiction upon various state and federal courts, as it

would have to do with an arbitrator. These courts already have jurisdiction. Indeed, Joint Petitioners are simply requesting that this Commission deny BellSouth's request to strip courts of jurisdiction they already possess. Achieving efficient dispute resolution has been difficult in the past. With BellSouth advancing a regional legislative agenda designed to strip state commissions of various aspects of their jurisdiction, Joint Petitioners believe it is essential that courts of law remain an unencumbered option in their agreements for dispute resolution.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No, not at this time.

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

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

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

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

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

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

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

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

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

RESALE (ATTACHMENT 1)

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

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

NETWORK ELEMENTS (ATTACHMENT 2)

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

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

Item No. 21, Issue No. 2-3 [Section 1.4.1]: ***This issue has been resolved***

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

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

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

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

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

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

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

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

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

Item No. 27, Issue No. 2-9 [Section 1.8.3]: ***This issue has been resolved.***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Item No. 41, Issue No. 2-23 [Sections 2.16.2.2, 2.16.2.3.1-5, 2.16.2.3.7-12]: ***This issue has been resolved.***

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

Item No. 43, Issue No. 2-25 [Section 2.18.1.4]: ***This issue has been resolved.***

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 46 ISSUE 2-28.

A. The answer to the question posed in the issue statement is "YES". Joint Petitioners should be permitted to incorporate the Fast Access language from the FDN and/or Supra interconnection agreements, respectively docket numbers 010098-TP and 001305-TP, for the term of this Agreement.

Q. DO YOU AGREE THAT THE COMMISSION SHOULD DEFER RESOLUTION OF THIS ISSUE UNTIL THE FCC REACHES A DECISION ON BELLSOUTH'S EMERGENCY PETITION?

A. No. the Commission has decided this matter already, and Joint Petitioners must be given the same access that FDN and Supra were given. Joint Petitioners should not have to wait for access; to do otherwise would be discriminatory.

Item No. 47, Issue No. 2-29 [Section 4.2.2]: ***This issue has been resolved as to both subparts.***

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

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

Item No. 50, Issue No. 2-32 [Sections 5.2.5.2.1, 5.2.5.2.3, 5.2.5.2.4, 5.2.5.2.5, 5.2.5.2.7]: ***This issue has been resolved.***

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERCONNECTION (ATTACHMENT 3)

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

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

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

Item No. 63, Issue No. 3-4 *[Section 10.8.6, 10.10.6 and, 10.13.5]: 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?*

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 63/ISSUE 3-4.

A. In the event that a terminating third party carrier imposes on BellSouth any charges or costs for the delivery of Transit Traffic originated by CLEC, the CLEC should reimburse BellSouth for all charges paid by BellSouth, which BellSouth is obligated to pay pursuant to contract or Commission order. Moreover, CLECs should not be required to reimburse BellSouth for any charges or costs related to Transit Traffic for which BellSouth has assumed responsibility through a settlement agreement with a third party. BellSouth should diligently review, dispute and pay such third party invoices (or equivalent) in a manner that is at parity with its own practices for reviewing, disputing and paying such invoices (or equivalent) when no similar reimbursement provision applies.

Q. DOES BELLSOUTH PROVIDE ANY JUSTIFICATION AS TO WHY IT CANNOT AGREE TO JOINT PETITIONERS' PROPOSED LANGUAGE?

A. No, we could not detect any. But is important to remember that the issue here is not about Joint Petitioners paying third party charges; it is about when Joint Petitioners must reimburse BellSouth for the payment of such charges. Joint Petitioners are willing to reimburse BellSouth only in those cases where BellSouth has a legal obligation to pay such charges, excluding, of course, settlements in which BellSouth voluntarily takes on such obligations. In such situations, we simply cannot afford to give BellSouth a "blank check."

Q. MS. BLAKE SPENDS A GOOD DEAL OF TIME OPINING AS TO WHETHER OR NOT BELLSOUTH HAS AN OBLIGATION TO PROVIDE TRANSIT SERVICES TO JOINT PETITIONERS. IS THAT DISCUSSION RELEVANT TO THIS ISSUE? [BLAKE AT 38:2-40:22]

A. No. Ms. Blake's discussion about whether or not BellSouth is obligated to provide transit services to Joint Petitioners is not relevant to this issue. (In any event, we think that BellSouth is obligated to provide transit services to Joint Petitioners under Section 251 and under the Agreement). Indeed, irrespective of the Parties' differing views of what the law requires, they have agreed that transit services will be part of the Agreement. Thus, this is not an issue of whether BellSouth will provide transit services to Joint Petitioners. BellSouth already has agreed to do so.

Q. BELLSOUTH STATES THAT IT DOES REVIEW, DISPUTE AND PAY ICO BILLS FOR CLECS IN THE SAME MANNER IT DOES FOR ITS OWN INVOICES. PLEASE RESPOND. [BLAKE AT 40:10-16]

A. If BellSouth does, in fact, review and dispute ICO bills in a manner that is at parity with its own practices, then BellSouth should not be disputing the Petitioners' proposed language. BellSouth should not pay an ICO for charges it was not obligated to pay under its agreement with the ICO or pursuant to a Commission order and, therefore, BellSouth should not agree to pay any extraneous or unauthorized charges to an ICO for the delivery of transit traffic originated by a CLEC.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No.

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

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

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

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

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

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

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

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

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

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

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

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

COLLOCATION (ATTACHMENT 4)

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

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

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

been resolved.

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

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

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

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

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

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

ORDERING (ATTACHMENT 6)

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

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

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

Q.

A. If one Party disputes the other Party's assertion of non-compliance, that Party should notify the other Party in writing of the basis for its assertion of compliance. If the receiving Party fails to provide the other Party with notice that appropriate corrective measures have been taken within a reasonable time or provide the other Party with proof sufficient to persuade the other Party that it erred in asserting the non-compliance, the requesting Party should proceed pursuant to the Dispute Resolution provisions set forth in the General Terms and Conditions and the Parties should

cooperatively seek expedited resolution of the dispute. "Self help", in the form of suspension of access to ordering systems and discontinuance of service, is inappropriate and coercive. Moreover, it effectively denies one Party the due process contemplated by Dispute Resolution provisions incorporated in the General Terms and Conditions of the Agreement.

Q. WHY ARE THE JOINT PETITIONERS OPPOSED TO BELLSOUTH'S PROPOSED LANGUAGE FOR SECTIONS 2.5.6.3?

A. BellSouth's proposed language allows it to terminate Joint Petitioners' access to BellSouth OSS for an allegedly unauthorized use of a CSR. This form of "self help" is inappropriate. Joint Petitioners have therefore proposed that, if there is a dispute over an assertion of alleged noncompliance with CSR procedures, and notice of alleged non-compliance is not answered with a certification that corrective measures have been taken, the dispute should proceed according to the Dispute Resolution procedures in Section 13 of the General Terms and Conditions. This procedure is more reasonable than the disproportionate and unilaterally imposed pull-the-plug remedies BellSouth seeks to reserve for itself.

Q. DID ANYTHING MR. FERGUSON HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Although the Petitioners recognize that abuse of CSRs by any carrier is serious and that such abuse could involve the access of Customer Proprietary Network Information of Florida consumers without their knowledge, *see* Ferguson at 14:4-10, Mr. Ferguson does not provide adequate justification for why *disputes* over alleged unauthorized access to CSRs cannot be handled through the dispute resolution

procedures. Moreover, Mr. Ferguson's statement that "BellSouth does not suspend or terminate access to OSS interfaces on a whim", *see* Ferguson at 13:22-23, or that to his knowledge, BellSouth has only terminated a CLEC's access to CSRs once, *see* Ferguson as 14:21, provides no reasonable or reliable measure of assurance to Joint Petitioners. BellSouth's proposal still allows BellSouth to unilaterally impose disproportionate and customer-impacting pull-the-plug remedies. BellSouth's insistence on having the ability to unilaterally resolve disputes by engaging in self-help is inappropriate and coercive.

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 88/ISSUE 6-5.

A. Rates for Service Date Advancement (a/k/a service expedites) related to UNEs, interconnection or collocation should be set consistent with TELRIC pricing principles.

Q. PLEASE EXPLAIN WHY SERVICE DATE ADVANCEMENTS SHOULD BE PRICED AT TELRIC-COMPLIANT RATES.

A. Unbundled Network Elements must be provisioned at TELRIC-compliant rates. BellSouth does not dispute this fact. *See* Morillo at 4:3-11. An expedite order for a UNE should not be treated any differently.

Q. IN HIS PRELIMINARY STATEMENT, MR. MORILLO STATES THAT THE JOINT PETITIONERS WANT MORE FAVORABLE TERMS THAN BELLSOUTH PROVIDES TO ITS OWN RETAIL CUSTOMERS. [MORILLO AT 3:17-18]. PLEASE RESPOND?

A. Joint Petitioners are not similarly situated with BellSouth's retail customers. We pay TELRIC rates – not retail rates for loop and transport facilities. BellSouth is obligated to treat us at parity with how it treats its own retail service operation. Joint Petitioners cannot effectively compete with BellSouth if they are forced to accept BellSouth's retail provisioning prices. Moreover, it appears that BellSouth is attempting to treat JPs worse than its retail customers, as it has offered no provisions to account for its waiving of such charges for its retail customers.

Q. PLEASE ADDRESS BELLSOUTH'S ASSERTION THAT BECAUSE OFFERING EXPEDITES IS NOT A 251 OBLIGATION, TELRIC RATES SHOULD NOT APPLY. [MORILLO AT 4:10-11]

A. First, Mr. Morillo has no basis for asserting that making expedites available on UNE orders is not a Section 251 obligation. Second, it is important to make clear that this issue is not about whether BellSouth will offer expedites in this Agreement. It already has agreed to do so. There is no dispute over the language – it is merely a dispute over the appropriate rate. Third, TELRIC-based rates, by definition, include a reasonable profit. As explained in our direct testimony, the rates proposed by BellSouth are unreasonable, excessive and harmful to competition and consumers.

Q. WHY IS THIS ISSUE APPROPRIATE FOR A SECTION 251 ARBITRATION?

A. As explained in our direct testimony, the manner in which BellSouth provisions UNEs is absolutely within the parameters of section 251. Moreover, the Parties already have negotiated and agreed to language providing for expedites. BellSouth cannot now argue that rates for that service cannot be arbitrated.

Q. DID ANYTHING MR. MORILLO HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, the Joint Petitioners remain optimistic that BellSouth will take them up on their offer to negotiate a reasonable rate for service expedites.

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

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

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

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

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

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

(B) If so, what rates should apply?

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 94(A)/ISSUE 6-11(A).

A. Mass migration of customer service arrangements (*e.g.*, UNEs, Combinations, resale) is an OSS functionality that should be accomplished pursuant to submission of electronic LSR or, if mutually agreed to by the Parties, by submission of a spreadsheet in a mutually agreed-upon format. Until such time as an electronic LSR process is available, a spreadsheet containing all relevant information should be used.

Q. SHOULD EVERY MASS MIGRATION BE HANDLED ON A CASE-BY-CASE BASIS, AS BELLSOUTH INSISTS? [OWENS AT 4:3-8]

A. No. Mass migrations should not be subject to a formless, uncertain ICB standard as BellSouth proposes. Though it may be true that "every merger, acquisition, or asset transfer is unique", *see* Owens at 4:3-8, an order is still an order and therefore, there is no reason why BellSouth cannot process OSS record changes required by mass migrations in an efficient, standardized and predictable manner via the submission of an electronic LSR or spreadsheet.

Q. DOES BELLSOUTH'S PROPOSED PROCESS FOR MERGERS AND ACQUISITIONS DISTINGUISH BETWEEN ASSET TRANSFERS AND TRANSFERS OF OWNERSHIP?

A. Yes. BellSouth's recently developed mergers and acquisitions process distinguishes between transfer of assets and transfer of ownership. Additionally, during negotiations on this issue, BellSouth has repeatedly stated that it is easier for BellSouth to process a mass migration when one company is purchasing all of the assets of another company as opposed to a partial asset purchase. While this may be true for BellSouth, its process, in effect, seems to discriminate against asset purchasers who are unwilling to assume all of the sellers assets. A CLEC has the right not to assume all of the prior liabilities of the seller for each circuit and such CLEC should not be discriminated against or forced to pay higher charges for making such a business decision.

Q. DID ANYTHING MR. OWENS HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. The Joint Petitioners appreciate that BellSouth has developed a mergers and acquisitions process. *See* Owens at 4:10-19. Nevertheless, BellSouth has not provided any reason why mass migration related OSS record changes cannot be performed pursuant to submission of standardized electronic LSR(s) or, until an electronic LSR process is available. The Joint Petitioners are willing to work upon a mutually agreeable format for the submission of service arrangements to be migrated to accommodate BellSouth's processes. However, it is time to take some of the guess work and uncertainty out of the process.

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 94(B)/ISSUE 6-11(B).

A. An electronic OSS charge should be assessed per service arrangement migrated. In addition, BellSouth should only charge Petitioners a TELRIC-based records change charge, such as the one set forth in Exhibit A of Attachment 2, for migrations of customers for which no physical re-termination of circuits must be performed. Similarly, BellSouth should establish and only charge Petitioners a TELRIC-based charge, which would be set forth in Exhibit A of Attachment 2, for migrations of customers for which physical re-termination of circuits is required.

Q. PLEASE EXPLAIN WHY TELRIC-COMPLIANT RATES SHOULD APPLY TO MASS MIGRATIONS.

A. All aspects of provisioning UNEs, interconnection, traffic exchange and collocation should be priced at TELRIC-compliant rates, as Joint Petitioners have consistently maintained. This obligation should include mass migrations, which are simply bulk OSS record change orders. The Joint Petitioners have also sought rates from BellSouth for services regularly involved in a migrations process, including but not limited to, OSS charges, order and project coordination, billing/records change, disconnect and re-termination orders, retagging of circuits, collocation charges and completion notifications. We also have asked BellSouth to identify and price any other activities that might need to be undertaken as a result of a mass migration. At this point, BellSouth has not provided any rates for these services or identified and priced any additional activities. As discussed above, however, any rates that BellSouth does propose for these services should be at TELRIC-compliant rates as

these services are related to the provisioning of UNEs interconnection, traffic exchange and collocation under section 251.

Q. DID ANYTHING MR. OWENS HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, we have refined our position statement to account for the fact that the proper rates may not yet be, or are not yet, in Exhibit A to Attachment 2. Joint Petitioners should pay an electronic OSS charge per service arrangement migrated, and a TELRIC-based records change charge for migrations of customers for which no physical re-termination of circuits must be performed. BellSouth should only charge Petitioners a TELRIC-based rate for migrations of customers for which physical re-termination of circuits is required. The Joint Petitioners are, however, optimistic that BellSouth is working on providing a list of applicable rates that will be included as part if its mergers and acquisitions process. A list of applicable rates, and transparency as to their composition, will assist in negotiations. *See* Owens at 6:23-7:3.

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 94(C)/ISSUE 6-11(C).

A. Migrations should be completed within 10 calendar days of an LSR or spreadsheet submission.

Q. PLEASE EXPLAIN WHY BELLSOUTH SHOULD COMMIT TO A 10 CALENDAR-DAY INTERVAL FOR COMPLETING A MASS MIGRATION.

A. Mass migrations of customers should be treated in a manner similar to typical CLEC orders and not relegated to ICB status. Joint Petitioners should not be forced to submit to unspecified deadlines derived on a case-by-case basis in order to acquire customers. More importantly, Joint Petitioners' customers' service should not be vulnerable to or affected by any such delay.

Q. PLEASE EXPLAIN WHY ITEM 94/ISSUE 6-11 IS AN APPROPRIATE ISSUE FOR ARBITRATION. [OWENS AT 3:15-18]

A. Section 251 is devoted to ensuring that CLECs obtain interconnection, collocation, and UNEs in a just and reasonable manner. Provisioning intervals are absolutely included in this requirement. Apart from that, it seems nonsensical that the migration of customers to service configurations covered by the Agreement should not be covered by the Agreement and resolved in this arbitration. Accordingly, the terms by which BellSouth switches customers and updates records associated with UNE and other serving configurations is squarely within the Commission's jurisdiction.

BILLING (ATTACHMENT 7)

Item No. 95, Issue No. 7-1 [Section 1.1.3]: ***This issue has been resolved.***

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 96(A)/ISSUE 7-2(A).

A. Charges for updating OSS to reflect such changes as corporate name, OCN, CC, CIC, ACNA and similar changes ("LEC Changes") should be TELRIC-compliant.

Q. PLEASE EXPLAIN WHY THE PETITIONERS' LANGUAGE IS APPROPRIATE?

A. The Petitioners' revised language is appropriate because it affords BellSouth TELRIC-based cost recovery (and profit) for one OSS record change functionalities provided. Requests for OSS record LEC Changes should not be forced into BellSouth's amorphous BFR/NBR process where BellSouth is not bound to any pricing scheme and Joint Petitioners have virtually no negotiating leverage, but rather should be assessed TELRIC-based rates.

Q. DID ANYTHING MR. OWENS HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. Mr. Owens did not explain why adding standardization, predictability and pre-set pricing for certain tasks could not replace the current regime wherein BellSouth essentially gets to pick a number out of a hat. However, as with Mr. Owens' testimony on Item 94/Issue 6-11, above, we are hopeful that the process will become more transparent and predictable with BellSouth's inclusion of applicable rates as part of its mergers and acquisitions process. *See* Owens at 10:2-4. Moreover, at this point, we also note that Joint Petitioners have abandoned their contention that

BellSouth should absorb up to one LEC identifier change per year, in exchange for predictable and reasonable processes and rates.

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 96(B)/ISSUE 7-2(B).

A. Petitioners submit that "LEC Changes" should be accomplished in thirty (30) calendar days. Furthermore, "LEC Changes" should not result in any delay or suspension of ordering or provisioning of any element or service provided pursuant to this Agreement, or access to any pre-order, order, provisioning, maintenance or repair interfaces. Finally, with regard to a Billing Account Number ("BAN"), the CLECs proposed language provides that, at the request of a Party, the other Party will establish a new BAN within ten (10) calendar days.

Q. BELLSOUTH CLAIMS THAT IT IS "EXTREMELY DIFFICULT, IF NOT IMPOSSIBLE, TO ESTABLISH AN INTERVAL [FOR A LEC CHANGE] BEFORE THE SCOPE OF THE PROJECT AND REQUIRED WORK HAS BEEN DETERMINED". [OWENS AT 10:25-11:2] PLEASE COMMENT.

A. The Commission should not accept BellSouth's vague and hollow attempt to avoid reasonable intervals for completing LEC Changes. Joint Petitioners are rightfully concerned that a simple name change could result in substantial delay and disruption of service. Mr. Owens does not even attempt to address the reasonableness of intervals proposed by the CLECs or provide counter proposals, but rather attempts to preserve the cloak of ICB rates and intervals. The Petitioners maintain that, due to the prevalence of LEC Changes, the Commission must adopt intervals to ensure that the process is speedy, fair and predictable.

Q. DID ANYTHING MR. OWENS HAD TO SAY ON THIS SUB-ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No.

Q. IS BELLSOUTH CORRECT IN ITS ASSERTION THAT THIS ISSUE (BOTH PARTS) IS NOT APPROPRIATE FOR ARBITRATION? [OWENS TESTIMONY AT 8:8-11]

A. No, BellSouth's assertion is not correct. Pursuant to section 251, BellSouth must provide nondiscriminatory access to network elements, interconnection and collocation. Regardless of whether LEC Changes are expressly mandated under section 251 or state law, this issue plainly involves BellSouth's OSS and billing for UNEs, collocation and interconnection which is clearly encompassed by section 251. Furthermore, this issue directly impacts BellSouth's billing practices and ensures that they are just and reasonable. There is no question that BellSouth's billing practices are within the Commission's purview.

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

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

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

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

Item No. 99, Issue No. 7-5 [Section 1.7.1]: ***This issue has been resolved.***

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

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

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

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 102/ISSUE 7-8.

A. The amount of security due from an existing CLEC should be reduced by amounts due to CLEC by BellSouth aged over thirty (30) calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in the deposit provisions of Attachment 7 of the Agreement. This provision is appropriate given that the Agreement's deposit provisions are not reciprocal and that BellSouth's payment history with CLECs is often poor.

Q. PLEASE EXPLAIN WHY THE PETITIONERS' LANGUAGE IS APPROPRIATE.

A. Joint Petitioners language is appropriate because it is fair and reasonable. Joint Petitioners have had to endure a legacy of untimely payments from BellSouth, and there are no deposit provisions in this Agreement to protect Joint Petitioners from the credit risks created by BellSouth's chronically poor payment history. Any credit risk exposure that BellSouth seeks to protect itself from Joint Petitioners is certainly offset by amounts that BellSouth does not pay timely to Joint Petitioners.

Q. DOES MR. MORILLO PROVIDE ANY JUSTIFICATION FOR BELLSOUTH'S REFUSAL TO AGREE TO JOINT PETITIONERS' PROPOSAL? [MORILLO 10:21-11:1]

A. No. Mr. Morillo provides no justification for BellSouth's refusal to offset deposit requests with amounts past due from BellSouth to Joint Petitioners. Instead, Mr.

Morillo suggests that suspension/termination of service and assessment of late payment charges are sufficient to protect Joint Petitioners' credit risk created by BellSouth's poor payment track record. Mr. Morillo does not explain why these same mechanisms are not sufficient to protect BellSouth. If BellSouth was willing to rely exclusively on those mechanisms, we would as well. However, BellSouth insists upon collecting deposits. Accordingly, we have every right to insist that the deposit requirements incorporated into the Agreement reflect the fact that BellSouth's risk exposure is reduced by amounts that it withholds from Joint Petitioners.

Q. DID ANYTHING MR. MORILLO HAVE TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. However, the Petitioners recognize BellSouth's proposal that it is willing to reduce a deposit amount by amounts BellSouth owes Petitioners for reciprocal compensation payments pursuant to Attachment 3. *See* Morillo at 11:13-18. Nevertheless, the Petitioners do not want to limit their right to reduce security deposits to only BellSouth's past-due reciprocal compensation payments. There is no rational basis for such a limitation. The Petitioners, however, are willing to continue to negotiate this issue with BellSouth.

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

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

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

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

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

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

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

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

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

(ATTACHMENT 11)

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

SUPPLEMENTAL ISSUES

(ATTACHMENT 2)

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

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

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

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

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

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

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 111/ISSUE S-4.

A. The Agreement should not automatically incorporate the "Transition Period." The "Transition Period" or plan proposed by the FCC for the six months following the Interim Period has not been adopted by the FCC, but was merely proposed in FCC 04-179. The FCC sought comment on the proposal and on transition plans in general. After release of the Final FCC Unbundling Rules, the Parties should endeavor to negotiate contract language that reflects an agreement to abide by the transition plan adopted therein or to other standards, if they mutually agree to do so. Any issues which the Parties are unable to resolve should be resolved through Commission arbitration. The effective date of the resulting rates, terms and conditions should be the same as all others – ten (10) calendar days after the last signature executing the Agreement.

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

Q. WILL THE CERTAINTY AND STEADINESS OF THE TELECOMMUNICATIONS MARKET BE FRUSTRATED BY NOT AUTOMATICALLY INCORPORATING INTO THE AGREEMENT THE TRANSITION PERIOD? [BLAKE AT 54:1-13].

A. No, the "certainty" and "steadiness" of the telecommunications market will not be frustrated. In fact, stability of the market demands that the status quo be maintained. In other words, the rates frozen during the Interim Period should continue until release of the Final FCC Unbundling Rules or the Transition Plan is adopted and finalized. Increased rates and the inability to provide certain elements to new customers is a dramatic change for which the ultimate effects on the market are anything but certain and steady.

Q. IS THE TRANSITION PERIOD DESCRIBED IN FCC 04-179 MERELY A PROPOSAL FOR WHAT SHOULD TAKE PLACE IN THE EVENT THE INTERIM PERIOD EXPIRES?

A. Yes, the Transition Period is a proposal and nothing more. As discussed in our direct testimony, the FCC specifically used "we propose" when it discussed the Transition Plan. Moreover, the Chairman, in a concurrent statement released with FCC 04-179, stated that the order "only seeks comment on a transition that will not be necessary if the Commission gets its work done." The foregoing considered, Joint Petitioners do not understand how BellSouth can believe the Transition Period is presently binding on the industry.

Q. BELLSOUTH TAKES THE CONTRARY POSITION AND ARGUES THAT THE TRANSITION PERIOD WAS ORDERED. [BLAKE AT 54:18-55:2] DO YOU DISAGREE?

A. Yes, we disagree. As we discussed above, as well as in our direct testimony, the Transition Period was and is a mere proposal the FCC put out for comment. To be ordered, there must be evidence of finality. In FCC 04-179, there is no such evidence of finality – at least not with regard to the Transition Plan. In fact, the ordering clauses found in FCC 04-179 make no mention of the Transition Period. Indeed, the Transition Period therefore cannot be deemed ordered.

Q. WHAT SHOULD OCCUR IN THE EVENT THE INTERIM PERIOD EXPIRES WITHOUT THE FINAL FCC UNBUNDLING RULES BECOMING EFFECTIVE?

A. Provided that the Transition Plan is not finalized, if the Interim Period lapses without the FCC's Final Unbundling Rules becoming effective, then the status quo should be maintained. Maintaining the status quo is the only measure to ensure market stabilization.

Q. WHAT SHOULD OCCUR IN THE EVENT THAT THE FCC ADOPTS THE TRANSITION PERIOD PLAN?

A. Should the Transition Plan be formally adopted or any other transition plan, the resulting plan and associated contract language should be negotiated, and if needed, arbitrated just like the FCC's Final Unbundling Rules and any intervening FCC or State Commission order or court decision.

Q. IN THE ABSENCE OF FINAL FCC UNBUNDLING RULES, BELLSOUTH CLAIMS THAT WITHOUT THE TRANSITION PLAN, JOINT PETITIONERS WILL HAVE NO LEGAL RIGHT TO OBTAIN VACATED ELEMENTS AFTER MARCH 12, 2005. [BLAKE AT 55:6-7] DO YOU AGREE WITH THIS STATEMENT?

A. No. Should there be a gap whereby there is no adopted Transition Plan and no FCC Final Unbundling Rules, the Parties should continue as they would anyway – which is to operate under the rates, terms and conditions in their existing Agreements. Further, in the absence of any controlling federal law, the Commission may order the status quo without conflicting with federal law or any FCC rule or order (FCC rules still require nationwide unbundling of DS1, DS3 and dark fiber loops – *USTA II* did not vacate those requirements). The Commission has the power to order BellSouth to continue to provision the UNEs at issue in this arbitrations (DS1, DS3 and dark fiber loops and transport) pursuant to federal as well as state law.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No.

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

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

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

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

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 113(A)/ISSUE S-6(A).

A. BellSouth is obligated to provide DS1, DS3 and dark fiber loop UNEs. *USTA II* did not vacate the FCC's rules which require BellSouth to make available DS1, DS3 and dark fiber loop UNEs. *USTA II* also did not eliminate section 251, CLEC impairment, section 271 or the Commission's jurisdiction under federal or state law to require BellSouth to provide unbundled access to DS1, DS3 and dark fiber loop UNEs.

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT THE JOINT PETITIONERS' POSITION ON THIS ISSUE "REQUIRES THE COMMISSION TO DISREGARD BINDING FEDERAL AND FCC AUTHORITY." [BLAKE AT 58:12-14]

A. BellSouth's assertion is incorrect. On the contrary, it is BellSouth's position on this issue that would require the Commission to disregard FCC rules with regard to the provision of DS1, DS3 and dark fiber loops, BellSouth's 271 obligation to make such loops available and Florida state law which also provides the Commission independent authority to order BellSouth to continue to provide access to these loops. BellSouth claims that "*USTA II* vacated any requirement for BellSouth to unbundle and provide these high capacity transmission facilities at TELRIC prices...." *See* Blake at 58:15-16. As stated in the Joint Petitioners direct testimony, the D.C. Circuit in *USTA II* did not vacate the FCC's rules regarding DS1 and other high-capacity UNE loops, but merely vacated the FCC's referral of additional impairment conclusions to state regulators. Additionally, *USTA II* did not vacate the FCC's nationwide finding of impairment with respect to DS1, DS3 and dark fiber loops made in the TRO. Moreover, the Commission also has not made any finding that Florida CLECs are not impaired without access to these loops. Accordingly, there is no FCC or Commission finding of non-impairment with respect to DS1, DS3 and dark fiber loops and, therefore, BellSouth has no justification for its position that it is not legally obligated to provide the Joint Petitioners will unbundled access to these loops.

Since neither the FCC or the Commission has made a finding of non-impairment with respect to DS1, DS3 and dark fiber loops, the Joint Petitioners are in no way asking the Commission to "disregard binding federal and FCC authority" as BellSouth argues. The bottom line is that there are FCC rules in place that require unbundling of these loops; these rules have not been vacated and BellSouth must comply with these rules. BellSouth is trying to "imply vacatur" of these rules and intimidate the Commission into believing that by maintaining the "status quo" with respect to these loops, the Commission will be acting contrary to federal law. This is not the case, and the Commission should not be swayed by BellSouth's sweeping and baseless claims that there are no statutory obligations, FCC rules, or state laws that require BellSouth to continue to unbundle DS1, DS3 and dark fiber loops.

Q. PLEASE STATE YOUR POSITION WITH RESPECT TO ITEM 113(b)/ISSUE S-6(B).

A. BellSouth is obligated to provide access to DS1, DS3 and dark fiber loop UNEs at TELRIC-compliant rates approved by the Commission. DS1, DS3 and dark fiber loops unbundled on other than a section 251 statutory basis should be made available at TELRIC-compliant rates approved by the Commission until such time as it is determined that another pricing standard applies and the Commission establishes rates pursuant to that standard.

Q. PLEASE RESPOND TO BELLSOUTH'S STATEMENT THAT "THE COMMISSION IS PROHIBITED FROM ESTABLISHING A 'NEW' PRICING REGIME FOR THESE [DS1, DS3 AND DARK FIBER LOOPS] ELEMENTS THAT CONTRADICTS [FCC 04-179]". [BLAKE TESTIMONY AT 58:23-25]

A. The Joint Petitioners are in no way asking the Commission to establish any "new" pricing regime that contradicts FCC 04-179. Nor are the Joint Petitioners attempting 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." *See* Blake at 59:1-3. It is the Petitioners understanding that the Commission has already established TELRIC-complaint rates for these elements and the Joint Petitioners are not challenging these rates. Indeed, the Petitioners do not see why there would be a need to change the rates for these elements. The bottom line is that BellSouth remains obligated to provide unbundled access to DS1, DS3 and dark fiber loops at TELRIC-compliant rates set by the Commission.

Q. MS. BLAKE NOTES THAT BELLSOUTH RECOGNIZES ITS OBLIGATION TO OFFER ITS HIGH-CAPACITY LOOPS AND TRANSPORT PURSUANT TO ITS 271 OBLIGATIONS; HOWEVER, SHE CLAIMS THAT BELLSOUTH IS NOT OBLIGATED TO PROVIDE SUCH ELEMENTS AT TELRIC RATES. DO YOU AGREE?

A. No. Section 271 pricing must be just and reasonable. TELRIC-compliant rates are just and reasonable and should be employed until such time as the Commission decides to adopt and apply another pricing methodology. Section 271 elements are

not simply special access. If special access elements satisfied the Section 271 checklist (and they don't), there would have been no need for Congress to enact the Section 271 checklist in the first place. Obviously, Congress decided that something other than special access was needed.

Q. DID ANYTHING MS. BLAKE HAD TO SAY ON THIS ISSUE (BOTH PARTS) CAUSE YOU TO CHANGE YOUR POSITION OR PROPOSED LANGUAGE?

A. No. But given that we have not had sufficient time to make our own counter-proposals, we reserve or request the right to provide additional direct and rebuttal testimony with respect to BellSouth's proposed language, as well as our own.

The D.C. Circuit in *USTA II* did not relieve BellSouth of its obligation to provide unbundled access to DS1, DS3 and dark fiber loops, as BellSouth purports. BellSouth provides no legal justification for its claim that it is no longer obligated to provide unbundled access to these elements. BellSouth's "we-say-so-therefore-it-is" approach is not persuasive. On the other hand, the Joint Petitioners have set forth the following justification for why BellSouth remains obligated to provide access to high-capacity and dark fiber loops: (1) *USTA II* did not vacate the FCC's unbundling rules for these elements; (2) *USTA II* did not vacate ILEC's section 251 obligations nor the FCC's impairment standard; (3) BellSouth is obligated under Competitive Checklist Item No. 4 of section 271 to provided unbundled access to local loop transmission facilities, that includes high-capacity and dark fiber loops; and (4) there is independent Florida state law that obligates BellSouth to makes these facilities available to promote competition for Florida consumers. Moreover, the rates, terms

and conditions for these loops should not be altered from the rates, terms and conditions already agreed to by the Parties in the Agreement. The Commission has already established rates for these loop facilities that are TELRIC-compliant and these rates should continue to apply.

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

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

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

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

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

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

BY MR. HORTON:

Q Do you have a summary of your testimony at this time?

A I do.

Good morning. I'm here on behalf of the Joint Petitioners, including Xspedius Communications. Xspedius is a facilities-based CLEC with facilities -- service to customers in Jacksonville, Fort Lauderdale, Miami and Tampa, Florida.

Issue 2 is a dispute over the appropriate definition of the term "end user." The parties recently have made progress in resolving this issue and have agreed to waive cross-examination at this hearing. Should settlement elude the parties, however, they have agreed that they will brief this issue.

Issue 9 is about whether a court of law should be included in the list of venues available for dispute resolution. BellSouth seeks to place a Byzantine set of conditions on when a party could resort to a court of law. We simply don't need to create opportunities for disputes over dispute resolution venues. Joint Petitioners seek to preserve all available dispute resolution venues, including the Commission, the FCC and courts of competent jurisdiction. The Commission should decline BellSouth's request to strip in any way jurisdiction from state and federal courts to hear disputes arising from the agreement.

Issue 26 is about BellSouth's unlawful attempt to

make Section 271 UNEs useless by imposing the same commingling restriction that was lifted by the FCC in the TRO. The FCC's rules allow the commingling of Section 251 UNEs and UNE combinations with facilities or services that we have obtained at wholesale by any method other than Section 251(c)(3) unbundling. Section 271 is obviously one of those wholesale methods. The FCC's correction of Footnote 1990 in the TRO eliminates any possible debate on this issue. The Commission should reject BellSouth's attempt to render meaningless its obligation to unbundle Section 271 loops, transport and switching.

Issue 36 is the first of three consecutively numbered line conditioning issues. Issues 36, 37 and 38 essentially turn on one question: Do petitioners have the right to insist upon full and unqualified compliance with the FCC's line conditioning rule or is BellSouth permitted to rewrite the rule so that it has reduced obligations? Of course, BellSouth should fully comply with the FCC's line conditioning rule and the TELRIC pricing that applies to all line conditioning. The Commission should reject BellSouth's attempt to impose non-TELRIC, non-Commission approved rates for certain types of line conditioning.

Issue 36 is a two-part issue centered on the scope of the FCC's line conditioning requirements. First, line conditioning should be defined exactly as it is defined in the

FCC's line conditioning rule. Secondly, BellSouth must perform its line conditioning obligations in full accordance with the FCC's rule. Neither the line conditioning definition nor BellSouth's obligations should be limited by BellSouth's attempt to conflate the line conditioning rule with the FCC's separate rule governing routine network modifications. Contrary to BellSouth's position, line conditioning is not limited to those functions that qualify as routine network modifications. Unless the Commission rejects BellSouth's position, BellSouth will be in the position to curtail or eliminate its line conditioning obligations and artificially limit the pace of CLEC innovation and the types of services Florida consumers can receive over UNE loops.

Issue 86 is one of several self-help issues. This one involves unauthorized access to customer service record or CSR information. Here BellSouth seeks to claim the role of prosecutor, **judge and jury by preserving for itself the right** to pull the plug on a Joint Petitioner and its Florida customers for alleged unauthorized access to CSRs. The remedies which BellSouth seeks the unilateral authority to impose on exceedingly short time frames based merely on allegations which may properly be contested include suspension of access to ordering and provisioning OSS interfaces and termination of services. Imposition of such remedies could have a catastrophic impact on us and our Florida consumers. We

have proposed a more rational and evenhanded procedure under which disputes in this context are handled just as all others: Pursuant to the agreement's dispute resolution provisions. Self-help in the form of suspension of access to ordering systems and discontinuance of service is inappropriate and coercive. If a dispute arises under the agreement, it should be decided by the Commission, the FCC or a court of competent jurisdiction without the threat of suspension or termination being imposed by BellSouth.

Issue 88 is about whether or not TELRIC-based rates should apply to service date advancement or expedite orders. Consistent with FCC pricing rules, rates for all UNE orders must be TELRIC compliant. These requirements are not limited to provisioning UNEs in standard intervals. If there are additional costs associated with expedites, Joint Petitioners are willing to pay a TELRIC-based charge that allows BellSouth to recover such costs as well as a reasonable profit. However, there is no reasonable basis on which service expedites should be priced at federal access tariff rates. The Commission should reject BellSouth's position as being contrary to the FCC's TELRIC pricing mandate, anticompetitive and anti-consumer.

Finally, Issue 102 is about whether the amount of a security deposit due BellSouth should be reduced by amounts due Joint Petitioners from BellSouth that are past due. The amount

of security due from an existing CLEC should be reduced by amounts due to the CLEC from BellSouth aged over 30 calendar days. BellSouth may request additional security in an amount equal to such reduction once BellSouth demonstrates a good payment history, as defined in the deposit provisions of Attachment 7 of the agreement. This provision is appropriate given that the agreement's deposit provisions are not reciprocal and that BellSouth's payment history with CLECs is often poor. The Commission should approve Joint Petitioners' deposit offset proposal, as it properly recognizes that any risk exposure is effectively reduced by amounts due that it fails to pay us in a timely manner. That concludes my summary.

MR. HORTON: Thank you. Mr. Falvey is available.

MR. MEZA: Thank you, Mr. Chairman.

CROSS EXAMINATION

BY MR. MEZA:

Q Good morning, Mr. Falvey.

A Good morning.

Q I'd like to start with Issue 9, sir. And isn't it true, sir, that in Issue 9 the Joint Petitioners want to have the option of going to a court of law as an initial forum for dispute resolution?

A That's correct.

Q And isn't it also true that one of the reasons that the Joint Petitioners are seeking such an option is to avoid

litigating the same dispute before nine different state commissions?

A That's one of the reasons. The principle reason is that we have the right to go to a state or federal court today, as, as, like anybody does in America. And what we're trying to avoid is, is some kind of a contractual provision which we're not willing to agree to. If we agreed to it, that would be one thing. But we're trying to avoid a contractual provision that would restrict our right as the plaintiff to choose the forum to take a complaint to.

So, yes, what you mentioned, avoiding multiple fora, is one reason, but fundamentally we don't want to restrict our rights.

Q Isn't it also true that in your direct testimony, sir, you give a second reason as to why this Commission should adopt your language in that BellSouth's language results in the bifurcation of claims?

A That is one of the many reasons. And bifurcation is not the right word. It would be splitting out nine times over; if we had the same issue in nine states, if we have to go in every event to the state commissions, then we'd have to file nine complaints to recover on what could be the exact same issue of contract interpretation in each of the nine states. We've had something like this happen to us. It was -- it exhausted our resources. And so it's much more than a

bifurcation of claims. It's a requirement to go to nine state commissions.

Q Now, sir, you use the phrase "bifurcation of claims" in your direct testimony, do you not?

A Oh, let's look at the testimony and maybe that would help.

Q Yeah. Please look at --

A I don't deny that I did, by the way, but I'd just like to look at it.

Q Sure. Page 10 of your direct, Line 3.

A Okay. Let's look at all of the testimony. I'm going to start -- let me, let me start first by answering your question directly. Yes, I did use the word "bifurcation" on Page 10. But on Page 9, Line 15 and 16, I said, "BellSouth's new proposal is also inadequate in that it could be used to effectively force CLECs to relitigate the same issue in nine different states." So that's, that's the nine-state piece that I was referring to before.

And with respect to bifurcation, I think what we're referring to is if, for example, we had a federal question, for example, an antitrust claim, and then we wanted to file an antitrust claim but also with some breach of contract claims, we would have to file the antitrust claim in federal court, the breach of contract claims over at the state commission, and that would be a bifurcation. So I'm sorry about the confusion.

I did use the word "bifurcation," but I wanted to, I just wanted to sort of refute the fact that we also talk about nine states also on the page before that. You were suggesting that, that I was being inconsistent.

MR. MEZA: Mr. Chairman, if I may ask for an instruction for the witness to answer the question being asked. I appreciate his ability to provide additional answers to a direct question, but that three-minute dissertation was essentially the repeating of a previous question I asked and avoidance of a very discrete question that I asked. And I'm not suggesting that the witness cannot expound upon his answer, but I am asking that the witness respond to the question being asked.

MR. HEITMANN: Mr. Chairman, the witness did respond to the question asked, and the witness is entitled to explain his answer and that is precisely what he did. Mr. Meza asked the question twice, it was answered twice.

COMMISSIONER BRADLEY: Yes. Where possible, start with a yes or a no and then give your explanation.

THE WITNESS: Will do.

COMMISSIONER BRADLEY: That may eliminate any future problems.

THE WITNESS: Thank you, sir. Certainly.

BY MR. MEZA:

Q Just so I'm clear, Mr. Falvey, you don't dispute the

fact that in your testimony you provide essentially two reasons why BellSouth's language is unacceptable: One, it results in the litigation of the same claim in nine different state commissions, and, two, it could result in the needless bifurcation of claims; is that correct?

A No, that's not correct. Those are two of the reasons that I give, but I would not reduce my testimony to those two reasons.

Q Are you refuting the fact that you make those two reasons in your testimony?

A If you listen to my answer, I'm not refuting that. My answer was those are two of the reasons that I give.

Q Now would you agree with me, sir, that BellSouth's language would require the parties to bring disputes relating to the enforcement or interpretation of the interconnection agreement to this Commission or the FCC?

A Yes. Under certain circumstances that's correct.

Q And would you also agree with me that BellSouth's language states that when a dispute is outside the jurisdiction or expertise of this Commission or the FCC, that the parties can avail itself of a court of law as an initial forum?

A That's correct.

Q You would agree with me that this Commission has the authority to interpret and enforce interconnection agreements that they approve pursuant to the Act, wouldn't you?

A I would, yes, agree that the Commission has such authority, but not exclusive authority. And that such authority could also be vested in the state or federal courts, and that I would certainly, as the plaintiff, want to preserve my right to bring a claim in the state or federal courts if I thought that was the appropriate place to bring the claim.

Q Would you also agree with the statement, sir, that this Commission is actually the expert agency with respect to a number of issues that might arise in connection with the enforcement or interpretation of this agreement?

A Yes. And, in fact, we have brought complaints to this Commission in the past, and so we certainly recognize further the Commission's expertise. But there may be certain circumstances where we'd want to go to, for example, a federal court. The federal court has the doctrine of primary jurisdiction which, which it can act under. If it feels that an issue is beyond its expertise, it can then defer the issue back to the state commission if it's not comfortable, if it's not comfortable hearing the issue.

Q And would you agree with Ms. Johnson's deposition testimony that state commissions are the experts in enforcing 251 obligations?

A I'm not familiar with that testimony as I sit here. But if you want to show me a portion of the testimony, I would be glad to review it.

Q Do you dispute that statement?

A I'd like to see the testimony. I neither dispute nor agree with it until I see the testimony, which, as you know, I have a right to do. Once I've asked for something like that, I'd appreciate it if you'd give it to me.

Q Do you disagree with the general statement that state commissions are experts in the enforcement of 251 obligations?

A I think I've answered that question. I don't disagree, but they're not the sole experts. There are other fora such as the FCC and the state or federal courts who have ample expertise, and particularly with respect to certain provisions of an interconnection agreement.

Q Do you have Ms. Johnson's deposition testimony?

A Do I have it up here? I'm looking for it.

Q Thank you, sir. And, sir, I'd like to refer you to Page 76 of Ms. Johnson's North Carolina deposition, Lines 13 through 19, and let me know when you get there.

A 13 through 19.

Q Okay.

A Let me take a look. Should I read it?

Q I'll read it to you.

A Okay.

Q See if you agree if I read it correctly.

Question, "But the meat and bones of the agreement, the Attachment 2s, the Attachment 6s, the Attachment 4s,

Attachment 7s, do you believe that state commissions are the experts in those areas?"

Answer, "I believe that state commissions are the experts in enforcing the 251 obligations."

Do you agree with that statement?

A Yes, I agree with the statement as read in the context of this deposition. If you read a few questions around that, and this is not uncommon that BellSouth will pull out one piece of a deposition, there's a question on Page 75, Line 16.

"Are you aware of any items that they, meaning the state commissions, would not have expertise?"

And the answer is, "That is between a court of law and a public service commission. As an example, a court of law may have better expertise in interpreting and applying indemnification or limitation of liability provisions than the public service commission might have."

"And why is that?"

"Because the court of law -- in the court of law they deal generally with contract matters that arise and frequently bring claims under limitation of liability or indemnification provisions."

"Any other instances or types of issues that you think a court of law would have a better expertise relating to implementation or interpretation of the agreement?"

Answer, "Assignment provisions perhaps. Without

looking at the GT&Cs," that's general terms and conditions, "table of contents, it's hard to specify."

And then finally we get to your question about the meat and bones, which, again, I agree with that answer, but only in the context of the two or three preceding questions in the whole area of the deposition which you neglected to point to.

Q Mr. Falvey, I asked you a specific question.

Do you agree with the statement that Ms. Johnson provided that you don't refute she said that state commissions are experts in enforcing 251 obligations? That was my question, wasn't it, sir?

MR. HEITMANN: Mr. Chairman, Mr. Chairman, I'm going to object. Counsel has asked a question several times now and the witness has repeatedly said he agrees. And I do not understand why he is getting so excited, and he is beginning to badger my witness.

COMMISSIONER BRADLEY: Well, I'm going to overrule your objection and ask the witness to, to, to answer the specific question that he is asked. He's given an explanation, but I think he needs to answer the specific question with a yes or no and then expound upon his, his rationale.

THE WITNESS: Can you repeat the question?

MR. MEZA: You've already answered it, Mr. Falvey.

BY MR. MEZA:

Q Now under the Joint Petitioners' proposal you would require this Commission to intervene in a state court proceeding in an alien state; correct?

A What's your definition of an alien state? Does that include -- you're talking about --

COMMISSIONER BRADLEY: Mr. Falvey, would you be so kind as to start with, with a yes or no.

THE WITNESS: Okay.

COMMISSIONER BRADLEY: And then give your explanation.

THE WITNESS: Okay. If I can -- I don't understand the question. If he could explain it a little bit better, I'm sure I can provide you a yes or no.

BY MR. MEZA:

Q Yes, sir. Presume for me, sir, that you win on this issue in all nine states and you file a complaint against BellSouth in federal court in Tennessee for actions of BellSouth in the state of Florida, along with other actions in other states.

Isn't it true, sir, that in order for this Commission to be involved in that Tennessee federal court proceeding regarding an agreement that this Commission arbitrated and approved, the Commission would have to intervene in that case?

A Yes. I mean, that's the way it is today under our current agreement. And you've agreed to this before; somehow

you're not agreeable to it now. But, yes, they would have to intervene

Q And isn't it also true, sir, that under your proposal that if, in fact, a court, through the doctrine of primary jurisdiction, refers certain claims to the state commission as the expert, that under your proposal there could be a bifurcation of claims?

A Yes. That would be our choice though to go to the federal court first. The way you've set it up, it's BellSouth's choice as to where I go first, and that's just not the way it works in America. The plaintiff chooses the forum.

Q Now I'd like to talk to you about Issue 26. Excuse me. 36. We'll get there first.

Issue 36 is tied to Issue 37 and 38; is that right?

A That's correct.

Q And Mr. Willis testified about Issues 37 and 38.

A Correct.

Q And you're here testifying about Issue 36.

A Correct.

Q Okay. Would it be fair to say, sir, that this issue revolves around what rates the Joint Petitioners should pay for line conditioning that BellSouth doesn't perform for its own customers?

A No.

Q You don't agree with that?

A No. This is line conditioning. You do perform line conditioning for your own customers.

Q Would you agree with the statement that the parties are in dispute as to whether or not TELRIC rates should apply for line conditioning that BellSouth does not provide for its own customers?

A No. You do provide line conditioning for your own customers.

Q Would you agree with me that this issue revolves around the rates that the Joint Petitioners should pay for the type of line conditioning and the scope of line conditioning that exceeds what BellSouth provides its customers?

MR. HEITMANN: Mr. Chairman, I'm going to object to this line of questioning. Joint Petitioners' witness Mr. Willis was the witness for Issues 37 and 38, which are the rate issues surrounding the line conditioning obligations. This Issue 36 is a definitional issue. The rate issues are 37 and 38.

MR. MEZA: Mr. Chairman, that, that's inaccurate. The impact of Issue 36 effectively determines your ruling on 37 and 38. 36 is a rate issue, that's all it is, because whether and how you interpret the definition of line conditioning will dictate the rates that they pay for.

COMMISSIONER BRADLEY: Can you reword your question?

MR. MEZA: Sure. I'll go back to my board and it'll

be easier to do it that way.

(Discussion held off the record.)

COMMISSIONER BRADLEY: Why don't we take a five-minute recess.

(Recess taken.)

COMMISSIONER BRADLEY: Let me back up and restate for the record what just transpired. I made a request of Mr. Falvey to answer all questions with a yes or no answer, and then to expound upon his, his rationale or his answer, with the thought in mind that there is going to be redirect questioning, and anything that Mr. Falvey's attorney feels needs to be clarified then be asked during the redirect so that hopefully we will not get bogged down with any contentious exchanges so that we can move on.

THE WITNESS: Understood.

COMMISSIONER BRADLEY: Okay. Thank you.

MR. MEZA: Yes, sir, Mr. Chairman. My apologies.

BY MR. MEZA:

Q Mr. Falvey, I drew this same, this picture with Mr. Willis yesterday. Were you here for that?

A I was. I was behind the board, but I've seen it before.

Q And I've crossed Ms. Johnson in other states on this exact diagram, wouldn't you agree?

A I believe so.

Q Okay. Now if I understand the Joint Petitioners' position on Issue 36 is that they believe that the FCC rule regarding line conditioning is not limited by what BellSouth performs for its own customers; is that right?

A That's right, but only to a point. The FCC has recognized, might, might recognize some distinctions that, for example, if you didn't perform line conditioning at all, then you would not have to perform line conditioning for a CLEC. However, what it's really about is the distinction about line conditioning on longer loops, and that is a distinction which the FCC has not recognized. They don't -- if you perform line conditioning, then you have to perform it on loops of any length. That's, that's what the issue is about.

Q Okay. You reject BellSouth's definition of line conditioning that restricts its obligation to that type of line conditioning and the scope of line conditioning that it routinely provides for its retail customers; is that right?

A That's correct.

Q Okay. So assume for me that BellSouth does not remove load coils beyond 18,000 feet for its own customers. Okay?

A Yes.

Q Under BellSouth's interpretation of its definition of line conditioning, would you agree with me that BellSouth believes it only has an obligation to remove load coils at

TELRIC up to 18,000 feet because that's what it does for its own customers?

A That -- I would agree that that is BellSouth's position. That's not the CLECs' position and it's directly inconsistent with the FCC's position. But that is BellSouth's position.

Q And would you also agree with me that under the Joint Petitioners' position that BellSouth has an obligation to remove load coils that exceed 18,000 feet at TELRIC, even if BellSouth doesn't remove those same load coils for its own customers?

A That's the FCC's position. That's correct. The FCC in the TRO said the Commission -- and this is Footnote 1947 from the TRO.

"The Commission subsequently refined the conditioning obligation to cover loops of any length." They were referring back to in a previous order, the UNE remand order. And then in the TRO they said, "We readopt the Commission's previous line and loop conditioning rules for the reasons set forth in the UNE remand order." So, you know, the FCC agrees with the CLECs on this one.

Q According to you.

A According to the written order and the --

Q Mr. Falvey, would you agree -- I'm sorry.

Would you agree with me that as a result of the

adoption of your language that BellSouth would be required to perform line conditioning at TELRIC prices in instances where it doesn't perform line conditioning for its own customers?

A Yes. I mean, to the extent that you would be required to perform line conditioning over 18,000 feet. But mind you, the Florida Commission has already set a rate for this. They've already set a rate for line conditioning over 18,000 feet when the UNE remand order came out. So -- and there's nothing in the TRO that -- in fact, the TRO explicitly readopted its previous finding. So, frankly, the CLECs are a little bit baffled as to why we're here on this issue.

MR. MEZA: Mr. Chairman, I'd like to provide the witness and to the staff and to you a copy of the TRO so we can go over this real quickly. I don't think we need to mark it.

BY MR. MEZA:

Q Now, Mr. Falvey, I'd like to focus your attention on Paragraph 643 of the TRO. Paragraph 643.

Now isn't it true that in the second sentence of Paragraph 643 the FCC states that, "Instead, line conditioning is properly seen as a routine network modification that incumbent LECs regularly perform in order to provide xDSL services to their own customers"?

A That's what that sentence reads, yes.

Q And would you also agree with me that the next sentence reads, "As noted above, incumbent LECs must make the

routine adjustments to unbundled loops to deliver services at parity with how incumbent LECs provision such facilities for themselves"?

A Again, that's correct. That's what that sentence says.

Q And then skipping a sentence, would you agree that the FCC then states, "Thus, line conditioning is a term or condition that incumbent LECs apply to their provision of loops for their own customers and must offer to requesting carriers pursuant to their Section 251(c)(3) nondiscrimination obligations"?

A Again, yes, that's what that sentence says.

Q And, sir, would you agree with me that under 251(c)(3) BellSouth must treat the CLECs in the same manner that it treats its own customers?

A That's correct. So if you perform line conditioning for yourselves, you must perform line conditioning for the CLECs pursuant to the FCC's rules.

Q And BellSouth is willing to perform line conditioning to the same degree that it provides to its own customers, isn't it?

A No. I mean, you've created an artificial distinction. You've said that, you know, that you will provide it under 18,000 feet and you won't provide it over 18,000 feet, but that's not a distinction that's recognized in the FCC's

rules. It's a distinction that is explicitly countered by the Footnote 1947 where it says you do have an obligation for longer loops. We have a price for longer loops here in Florida.

So, I mean, technically, yes, if you don't, and nobody really knows what you do for your own loops because it's out there in your own network, but if you say you don't condition over 18,000 feet and you are now required to condition over 18,000 feet for us, yes, technically you're, you're providing a service at a point on a line that you don't provide for yourself. But as the custodian of, of your monopoly network, you're required to do that by federal and state law.

Q Mr. Falvey, I believe you gave me a no and a yes to that question, so let me make sure I understand.

Isn't it true, sir, that BellSouth is willing and is agreeable to providing to the Joint Petitioners at TELRIC rates the same type of line conditioning that it performs for its own customers?

A I would say no because you're not willing to do it over 18,000 feet.

Q And if BellSouth doesn't perform line conditioning over 18,000 feet because it doesn't perform it for its own customers, does that change your answer?

A No. I mean, the FCC has said you have to do it. and

you're just defying the FCC. They've said you have to provide line conditioning on long loops, and there's nothing in this order -- the FCC did change some of the rules in the TRO. They came back and they added some language on subloops and so on. But the line conditioning rule remains unchanged in its obligation to, to provide line conditioning at any point on the loop, including longer loops. The Florida Commission has already set a rate, we've been through this here in Florida up and down, and I'm not sure why we're here on this issue.

Q Mr. Falvey, do you dispute the fact that the FCC in Paragraph 643 finds that BellSouth's obligation to perform line conditioning is based upon its 251(c)(3) nondiscrimination obligation?

A That's the basis they give in Paragraph 643. But if you look in Paragraph 644, they're relying also on Section 706, which is a provision in the Telecom Act that encourages the development and the distribution of advanced services, and that's what this is really all about. They want to limit us to being able to provide DSL three miles away from an end office. We want to go five miles out, if the technology allows us to do that. So we're trying to reach out to a band of two miles more of customers. You probably get complaints here at the Commission, how come I can't get DSL? Maybe you've had that experience yourself as a Commissioner where you called up and tried to get DSL and you couldn't get it. We're trying to get

it out two miles further. And the FCC also relied on Section 706 of the Telecom Act in setting out rules that would expand the availability of advanced services. So it's not just 251(c)(3).

Q Mr. Falvey, would you also agree with me, and I think you have, that 251(c)(3) requires BellSouth not to discriminate between CLECs and its own customers; correct?

A That's correct.

Q And BellSouth is offering to you in this arbitration line conditioning at TELRIC on the same terms and conditions that it provides to its own customers; correct?

A That's correct. I mean, nondiscrimination is also about providing it in the same way to Xspedius as you provide it to KMC as you provide it to NuVox. It's not -- you're really talking about a parity obligation more, more than nondiscrimination. But, but --

Q Do you believe there's a difference between the two?

A Yeah, I think there is. There is some distinction between the two. Parity is just BellSouth and Xspedius; you provide the same to Xspedius as you provide to BellSouth. Nondiscrimination is BellSouth vis-a-vis NuVox, KMC, Xspedius.

Q And it has no relationship --

A It could, it could include parity, but they're not, they're not, they're not the exact same thing.

Q And, in fact, the FCC uses parity in the third

sentence of Paragraph 643 in describing line conditioning, doesn't it?

A Yes.

Q And it also uses 251(c)(3) in nondiscrimination, doesn't it?

A Yes. No question. But if you read the full paragraph, what they're actually saying is they're disagreeing with Verizon. Verizon took BellSouth's position that somehow line conditioning creates a superior network. But repeatedly in this paragraph they say line conditioning does not constitute the creation of a superior network, and they take a very broad reading of what is required for, for the line conditioning obligation.

Q Okay. Let's move to Issue 26.

Now Issue 26 deals with the definition of commingling in the TRO; is that right?

A That's correct.

Q And would you disagree with the general concept that the FCC defined commingling as the combining of certain elements?

A Yes.

Q You would disagree or --

A No. I'm sorry. I thought it was, "Would you agree?" So, no. Repeat your question. I would agree -- I thought you said --

Q Okay. You agree with the statement that --

A -- "Would you agree with the statement that it defines it as combining?" And I said, "Yes."

Q Okay. And where the parties' dispute lies is in whether or not 271 services are considered wholesale services within the definition of commingling; correct?

A That's correct.

Q Joint Petitioners believe that when the FCC uses the word "wholesale services," it includes 271 services, and BellSouth disagrees with that; correct?

A Generally I'd say that's correct.

Q Okay. Now you would agree with me that the USTA II decision found that BellSouth has no obligation to combine 271 services?

A I believe that's correct.

Q And I'd like to focus your attention on Paragraph 584.

A That's combined and not -- they didn't talk about commingling; right? That was about combinations.

Q Combining.

A Fine.

Q Now would you agree with me that in Paragraph 584 the FCC references 271 services in discussing a commingling obligation?

A Yes.

Q Would you also agree with me that in the errata subsequently issued by the FCC the FCC deleted the reference to 271 services in Paragraph 584?

A That's correct. They did some other things in that errata also that, that made it very clear that commingling with 271 was, was permitted. But they did in this paragraph take out the words "Section 271."

Q Now would you also agree with me that in the entire discussion of commingling between Paragraphs 579 and Paragraph 584 there is no other reference to 271 services?

A I would agree, yes, with that statement. I mean, as a technical matter you won't find the words "271." But these paragraphs are very clear that commingling with 271 elements is permitted. It's stated three times in Paragraph 579 that 251(c)(3) UNEs can be commingled with anything purchased at wholesale from an ILEC pursuant to any method other than unbundling under 251(c)(3). So if you really want to get to the nub of the issue, the nub of the issue is is 271 a, a method other than unbundling under 251(c)(3)? And I think that we can all agree that it is. They say that three times in, in Paragraph 579.

Q Isn't it also true, sir, that in the entire discussion of commingling, when the FCC gives an example of what commingling means, they refer to switched and special access tariffs only?

A There are several times when they say "for example," and they use examples. And that is correct, yes. When they use examples, they usually refer to the tariffs. But the order in the rules are very clear that commingling with anything other than 251(c)(3) UNEs, as long as it's purchased at wholesale from an ILEC, is permitted.

Q Isn't it true, sir, that the FCC actually expressly requires ILECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs in UNE combinations?

A That's correct.

Q Isn't it also true, sir, that the FCC expressly finds and defines commingling in Paragraph 583 that commingling allows a competitive LEC to connect or attach a UNE or UNE combination with an interstate access service such as high capacity multiplexing or transport services?

A If we could look to that paragraph. I can't answer that without -- you made reference to Paragraph 583, I believe.

Q Yes, sir. It is the, about two-thirds of the way down of the paragraph on the left-hand side of my version beginning with the word "Instead."

A Yes, that's correct, it says that. And, again, that is by way of example, because there is no such limitation in the rule. If you look back to the commingling rule, there's no limitation whatsoever that would limit us to commingling with

some kind of just tariffed services. And, in fact, we went so far, just to make this issue go away as we've done several times in this negotiation, we went back and we tried to just cite to the federal rule and say, you know, BellSouth shall permit a CLEC to commingle a UNE or a combination of UNEs with any wholesale service consistent with 47 CFR 51.309(3) cite, and BellSouth wouldn't agree to it.

The limitation that you're trying to impose, which is a series of examples throughout this section, is not a valid limitation.

Q Let me see if I understand your recent testimony. You believe that the sentence in Paragraph 583 beginning with "Instead" is an example?

A Absolutely. Yes.

Q So when the FCC says in the preceding sentence, "Third, we find that commingling does not constitute the creation of a new UNE for which an impairment analysis is required. Instead, commingling allows a competitive LEC to connect or attach a UNE or UNE combinations with an interstate access service," you believe that that statement is an example?

A Well, clearly because -- yes. That statement must be read in the context of the broader order. And in Paragraph 579, which, you know, is kind of -- it's the first key paragraph where they say -- in this order, by the way, they eliminate the commingling restriction. The FCC has decided

that, that this commingling restriction has a very anticompetitive effect on the marketplace. And so when they eliminated it, right off the bat in the first paragraph they said three times, anything other than 251(c)(3) UNEs you can, you can commingle.

Q And except for the reference to 271 services in Paragraph 584, which was deleted in the errata, wouldn't you agree with me that nowhere in the discussion of commingling does the FCC reference 271?

A Well, there is an indirect reference to 271 in Footnote 1990, and so I think it's worth taking a look at that. The last -- there was -- the last sentence of Footnote 1990 says, "We also decline to apply our commingling rule set forth in Part 7A above to services that must be offered pursuant to these checklist items." Actually this is in a different section of the order. This is in the Section 271 section.

And in the same errata that you referred to, the FCC went back and deleted that sentence. That was the sentence that said what you wanted to, to have in the order. And the FCC went back and deleted that because it was completely inconsistent with what it, what it had said earlier, so.

Q Do you agree that --

A You can't just look at one section of the order; right? You've got to look at the whole TRO.

Q I apologize for interrupting you, sir.

A That's all right.

Q Do you agree that the errata is in force and effect today?

A Yes.

Q Do you also agree that when the FCC deleted the reference to 271 services in 584, that they did that to clean up stray language?

A Yes.

Q Do you also agree that, with Ms. Johnson's previous testimony that the reason they did that, and that being the deletion of 271 services in Paragraph 584, was to make it clear that resale services are wholesale services?

A No, I wouldn't put it exactly that way. I would say that, that they wanted to make it clear that -- in 584 they're talking quite a bit about resale, and so they were just trying to stay focused on resale in Paragraph 584. That's the way I would put it.

Q Do you have Ms. Johnson's deposition, North Carolina deposition?

A Yes. It would take me a minute to get, to get it out.

I have it.

Q You do? Look on Page 130, sir, of that deposition, starting on Line 5.

A Okay.

Q And the question reads, "In your supplemental rebuttal testimony you state that the errata was nothing more than an attempt to clean up stray language. What did you mean by that?"

Answer, "The term that's used in Paragraph 584 initially is other wholesale facilities and services. Other wholesale facilities and services are all encompassing. The purpose of Paragraph 584 was to clarify with regard to Section 251(c)(4) that wholesale services and facilities included resale."

Do you disagree with that statement, sir?

A No, I don't disagree. That's what I just said, that -- without having looked at this, I said, look, the main purpose of 584 was to focus on resale, and that's what she said. The purpose of 584 was to clarify with regard to Section 251(c)(4) that wholesale services and facilities included resale.

Q And would you also agree with her testimony, sir, that the reason why the FCC did this was because they believed people were confused as to whether resale constituted a wholesale service?

A When you say would I also agree with her testimony, is there a particular part of her testimony that you're referring to? I want to make sure I understand the question.

Q Look on Page 131, Line 25, following on the next

page.

Question, "Do you think the FCC is confused as to whether or not resale is a wholesale service?"

Answer, "I think that the FCC believes that other people were confused, which is why in Paragraph 584 the FCC took effort to note that as a final matter."

Do you see that?

A Yes.

Q So do you agree with her testimony that the rationale behind the deletion of 271 services in Paragraph 584 was because the FCC believed that people were confused that resale services were wholesale services?

A Yes.

Q Do you believe an errata can be used to affect substantive rights?

A No. I don't think that -- I think that if an errata is trying to, for example, change the rules in a substantive way that's inconsistent with the order, then, no, I don't think that should be done through an errata. I think that should be done through a motion for reconsideration.

Q And so based upon that analysis, sir, wouldn't you agree with me that the FCC's deletion of a last sentence of Footnote 1990 cannot be effectuated?

A No. Because what I said was that if you're changing substantive, making a substantive change to the, to the thrust

of the order, okay, and the thrust of this order, repeated three times in the first paragraph where they talk about commingling, is that you definitely can commingle, you definitely can commingle. These are in, in the, the first lead paragraph on commingling, you can commingle 271 with 251(c)(3).

And so what they were doing was deleting a stray sentence that was inconsistent with paragraph upon paragraph upon paragraph in this order.

Q Now, sir, you said that the lead paragraph on commingling says that CLECs can commingle 271 with 251. It doesn't say that, does it?

A It does. It says it very plainly.

Q It says you can commingle 271 with 251 in the first paragraph of commingling.

A Plainly it says you can commingle 251(c)(3) with any wholesale service that is not a 251(c)(3).

Q But it doesn't say 271, does it?

A It doesn't say the word "271." I'll grant you that.

MR. MEZA: All right. I have no further questions for this witness, sir. Mr. Culpepper has a few.

CROSS EXAMINATION

BY MR. CULPEPPER:

Q Good morning, Mr. Falvey.

A Good morning, Mr. Culpepper.

COMMISSIONER BRADLEY: Why don't we take a

five-minute break.

(Recess taken.)

COMMISSIONER BRADLEY: We need to reconvene.

MR. CULPEPPER: Yes, Mr. Chairman.

COMMISSIONER BRADLEY: You're recognized.

BY MR. CULPEPPER:

Q Good morning again, Mr. Falvey.

A Good morning, Mr. Culpepper.

Q Let's talk about Issue 102, deposit offset provision.

A Okay.

Q Now the parties have agreed that the security deposit amount should be subject to an offset for the amount owed by BellSouth to the Joint Petitioners; correct?

A That's correct.

Q The disagreement is over how you determine the appropriate offset amount; correct?

A That's correct.

Q Let's start with the Joint Petitioners' version. Do you have it in front of you, or would you agree with me that the Joint Petitioners are proposing that the security deposit should be reduced by amounts due to customer by BellSouth aged over 30 calendar days?

A That's correct.

Q So that would include both disputed and undisputed amounts.

And for services billed on a monthly basis, would you agree with me that amounts aged over 30 calendar days are amounts past due?

A That's correct.

Q And you do have the Joint Petitioners' responses to staff discovery requests nearby, don't you?

A Yes, I do.

Q Would you agree with me that the party seeking to reduce the deposit bears responsibility of computing the aged amount over 30 days, and such amounts are typically tracked on a routine basis?

A Could you repeat that question? Because I thought we were going to look at one of the interrogatory responses, and so I got thrown off.

Q Do you have Joint Petitioners' response to Interrogatory Number 40?

A Yes, I do. Hang on a second.

Q Actually to move on, if you can just pull out Joint Petitioners' supplemental response to Number 72, that probably would be more efficient.

MR. CULPEPPER: Mr. Chairman, we'll pass out Joint Petitioners' supplemental response to Staff Interrogatory Number 72. That is, is already in the record. It's in the composite exhibit.

BY MR. CULPEPPER:

Q Mr. Falvey, I believe it's your testimony that the Joint Petitioners' offset proposal doesn't exclude amounts that are subject to a billing dispute; correct?

A That's correct.

Q And to support your assertion that BellSouth has a poor payment history, your company provided a supplemental response to Interrogatory Number 72 last week; correct?

A That's correct.

Q Let's take a look at it. Do you have the attachments to the supplemental response to Interrogatory 72?

A Yes.

Q Would you agree with me that the first attachment is a, some billing information related to a reciprocal compensation payment made in March of 2004?

A Correct.

Q Would you agree with me that that payment shown there shows up in the reciprocal compensation billing invoice that's also attached, the Xspedius reciprocal compensation invoice for reciprocal comp that's dated April 15th, 2004?

A Yes.

Q Let's --

A That's -- you flip through a couple, two more pages, and there's an April 15th, 2004, invoice showing a total amount due of $2 million.

Q Right. And that $2 million is subject, was subject

to a dispute between Xspedius and BellSouth; correct?

A Yes. There's always lots and lots of disputes. A little bit less now. It used to be up to $25 million. They had $25 million of ours. On this invoice it's only $2 million. But that's a lot of money to our company.

Q And that $2 million -- BellSouth and Xspedius settled the reciprocal compensation matter; right?

A Yes, we did. The problem is that in the same time frame BellSouth was coming to us and saying, we need a $4 million deposit from you, $4 million. And we said -- my CFO said, well, they already have -- it wasn't just this $2 million. There was $600,000 more that's on the back of this page. They had overbilled us by $2 million on some interconnection facilities. So this was a company that owed us close to $5 million coming to us asking us for a deposit. And so that's kind of the nub of this issue for our company is we, we want to make sure that disputed amounts are taken into account as an offset to deposit requests.

Q Mr. Falvey, the April 2004 reciprocal compensation bill does not back out the $2 million that was in dispute, does it?

A No. That's what this is all about. It's all about disputed amounts. You have over $100,000 disputed with us today.

Q And let's go to the next invoice that you attached

with the supplemental discovery response. I believe, and correct me if I'm wrong, but you state this is an interconnection transport bill from April 2004.

A That's correct.

Q And, again, the $648,000 or thereabouts was subject to a dispute between BellSouth and Xspedius?

A That's largely correct, except that it's actually $679,000. 648 is the top -- that was the last bill. The current bill is $679,000.

Q And, again, this particular invoice doesn't back out or itemize the disputed amount between the parties, does it?

A No, definitely not. I mean, mind you -- you know, let's be clear. When we settled, you paid us millions of dollars. We were, you know -- you owed us a lot of money at the time. It has been settled. You've run up another $100,000 tab since then. And, you know, a Kansas arbitrator looked at this issue and they said it would be extremely unfair not to take into account these large amounts of dollars that are withheld by BellSouth fairly routinely that they then eventually settle up. When, when -- in the case of e.spire, the company that we bought, they were in the tab up to $25 million. And those receivables were a big part of what sent e.spire into bankruptcy.

Q But you would agree with me that under the interconnection agreement BellSouth will not disconnect based

on nonpayment of disputed amounts; correct?

A When you say under the interconnection agreement, the current one or under your proposed language?

Q Both.

A Well, I'd have to look at your proposed language to see whether you would have a right to disconnect based upon disputed amounts.

Q Well, Mr. Falvey, is it your testimony that BellSouth should be allowed to disconnect for nonpayment of disputed amounts?

A No. You should certainly not be entitled to disconnect for nonpayment of disputed amounts.

Q Mr. Falvey --

A There's a lot of pull-the-plug provisions in your language though, so I don't -- you've, you've set it up so that you would have a right to disconnect us in many circumstances, and so I don't want to misstate what your proposals say.

Q Mr. Falvey, Xspedius attached an April 2004 bill for reciprocal compensation and interconnection transport to the supplemental interrogatory response it provided last week; correct?

A That's correct. They were requested about, I don't know, maybe a month or two ago. And at the time -- it took us a while to pull the information together, and we supplemented it last week.

Q Are you familiar with the April 2005 bill for reciprocal compensation and interconnection transport?

A Not specifically familiar with that bill. I do know that our current receivable from BellSouth is over $100,000.

MR. CULPEPPER: Mr. Chairman, I would like to pass out the April 2005 Xspedius bill to BellSouth for reciprocal compensation and interconnection transport, and ask that it be marked as the next hearing exhibit.

COMMISSIONER BRADLEY: Give me the title again, please.

MR. CULPEPPER: I would just say Xspedius bills, 2005 bills.

COMMISSIONER BRADLEY: Okay. We'll mark it as Exhibit 21.

(Exhibit 21 marked for identification.)

BY MR. CULPEPPER:

Q Do you have the bills, Mr. Falvey?

A Yes, I do.

Q Would you agree with me that the April 2005 bill for interconnection transport indicates total charges of $24,909 comprises almost 100 percent of current charges?

A If you could just repeat the question, I'm sure I'll agree. But I just -- I was looking at something else.

Q Sure. The first bill is the interconnection transport bill for, for April 2005.

A That's correct.

Q Okay. And would you agree with me that it shows a total amount due of $24,909?

A Correct.

Q And would you agree with me that that's about 99 percent comprised of current charges?

A That's correct.

Q Let's look at the reciprocal comp invoice for April 2005. Would you agree with me there that the total amount due is $111,000?

A Correct.

Q And it is comprised -- $82,000 of which is current charges?

A That's correct. I mean, it's -- according to this, it's, that's, that's correct. I mean, you still owe us a total of $135,000. And all we're saying is that if that, if there's that much that's disputed and it stays disputed over a period of time, then we should have an offset. In the past that amount has gone as high as $25 million. And the other exhibit that we put in, last year alone it was $2 million. They ran up the tab to $2 million. So there's no question you've gotten better. But based on your past track record, under this contract, which the new one is going to be in place until 2009, we, we want to make sure we have that offset right.

Q And you would agree with me that the reciprocal comp

bill for April 2005 is not due until May 15th?

A That's correct. And, you know, there's no question that you've cleaned up your act when you've been under the bright lights of the arbitration procedure. I'm hopeful that your cleanup will continue throughout the 2009 contract. If it does, then you have nothing to worry about with this offset provision, right, because there won't be, there won't be anything to offset.

COMMISSIONER BRADLEY: Mr. Falvey.

THE WITNESS: Yes.

COMMISSIONER BRADLEY: Would you be so kind as to just answer a yes -- with a yes or a no, and to try as much as you possibly can to stick to the answer and not get into an exchange that might lead to putting us out of order.

THE WITNESS: I will, Commissioner. I want to make sure that, that the Commission is not misled as to BellSouth's payment track record. I will, however, endeavor to keep my answers as short as possible. This is -- I've lived through this for --

COMMISSIONER BRADLEY: Right. And we are going to have redirect.

THE WITNESS: -- for ten years and it's taken a toll on me personally and on my companies, and that's why I want to make sure that we fill out the record fully.

COMMISSIONER BRADLEY: And I, and I can understand

that. But as I said earlier, your attorneys are listening to everything and they are going to have the opportunity to, to redirect.

THE WITNESS: Fair enough.

BY MR. CULPEPPER:

Q Mr. Falvey, just to be clear, the supplemental interrogatory response to Staff Interrogatory Number 72 was filed on April 19th; correct?

A That's correct.

Q And just to be clear, instead of including the April 2005 bills for reciprocal compensation and interconnection transport, your company included the April 2004 bills for such services; correct?

A That's correct. We were trying to demonstrate the problem we've had as recently as April of last year.

Q Mr. Falvey, let's move on to Issue 86B, disputes over unauthorized access to CSR information.

MR. CULPEPPER: And, Mr. Chairman, at this time we're going to pass out Attachment 6 to the interconnection agreement dated February 16th, 2005, and would ask that it be marked as the next hearing exhibit.

COMMISSIONER BRADLEY: Attachment to the --

MR. CULPEPPER: It's Attachment 6.

COMMISSIONER BRADLEY: Oh, Attachment 6. Okay. To the 2005 agreement? And we'll mark it as Exhibit 21 -- 22

I'm sorry.

(Exhibit Number 22 marked for identification.)

BY MR. CULPEPPER:

Q Mr. Falvey, would you agree with me that Issue 86B involves what rights and remedies either party has if it has reason to believe the other party has access to customer service record information without first obtaining the customer's permission?

A That's correct.

Q And CSR information contains customer proprietary network information; correct?

A That's correct.

Q And BellSouth and the Joint Petitioners have an obligation to protect CPNI; correct?

A That's correct.

Q And both parties have agreed not to view, copy or otherwise obtain CSR information without the customer's permission; correct?

A That's correct.

Q And both parties have agreed to access CSR information only in strict compliance with applicable law; correct?

A That's correct. And we've never had a problem; neither company has ever breached those obligations to my knowledge.

Q And if there's a question about whether either party failed to obtain the other party's, failed to obtain a customer's permission prior to accessing CSR information, either party may request that the other party provide an appropriate letter of authorization or LOA within seven business days; correct?

A That's correct.

Q And the party accused has agreed to use best efforts to produce an LOA within seven business days; correct?

A That's correct.

Q So you would agree with me that means that the accused party has at least nine calendar days to exercise best efforts to produce an appropriate LOA.

A That's correct.

Q Let's focus on BellSouth's version of 2.5.5.3. Do you have that in front of you?

A Yes.

Q Would you agree with me that in BellSouth's version, if no LOA is produced within the seven business days, then the requesting party will notify via e-mail a person designated by the other party to receive such notice of noncompliance that the other party has five additional days to take corrective action?

A That's correct. And that's -- that would be the first notice that I would get in the regulatory department.

And it would be five calendar days, which could be as little as three business days.

Q Correct. But your company has already agreed to use best efforts to obtain that LOA; right?

A Yes. And we do and we've never had a problem. This issue is all about when we disagree about whether, whether we've provided an appropriate LOA and what recourse you should have in those circumstances.

Q Will you agree with me that under BellSouth's version that the party accused of unauthorized access to CSR information has at least 14 days to produce the LOA before any action can be taken?

A Yes. The company -- I want to clarify though that the company has 14 days, and then -- but I would only have as little as three business days. And at that point under your proposal the real problem that we have is you could pull the plug on our customers, on Florida customers with very little notice.

Q Mr. Falvey, is it your testimony that Xspedius doesn't employ adequate personnel to abide by its contractual and legal obligations?

A No.

Q Let's continue with BellSouth's proposed language. Would you --

A Let me just say that given our staffing, we are very

careful about what types of contractual language we enter into. We're not a, you know, $20, $25 billion company.

Q Would you agree with me that under BellSouth's proposed language, if the accused party disagrees with the allegations regarding unauthorized use, then the alleging party or requesting party shall proceed under the dispute resolution provisions set forth in the agreement's general terms and conditions?

A Well, actually, first, it says you're going to issue a notice; right? It says, in addition, alleging party, that you may at the same time provide written notice by E-mail to the person designated by the other party to receive notices of noncompliance, that the alleging party may terminate the provision of access to ordering systems to the other party and may discontinue the provisioning of existing services if such use is not corrected or ceased by the tenth calendar day. And then it says if we disagree, we go, we go to dispute resolution.

We don't like this language because it's not at all clear that you would not exercise your right to terminate services to our company and to Florida consumers while we're working through the dispute resolution process.

Q That was kind of a long answer. Let me ask my question one more time, Mr. Falvey. Would you agree with me that in the last sentence of BellSouth's version of 2.5.5.3,

that the, that the burden is on the alleging party if the other party disagrees to take the matter to, take the matter to the dispute resolution provisions set forth in the agreement's general terms and conditions section?

A Yes. After you've issued this notice, the flag is up, then the burden would be on you, the alleging party, to proceed to dispute resolution.

Q Mr. Falvey, would you agree with me that in your direct testimony on Page 25 that you, that you state that the Joint Petitioners' rationale for its position on this very issue is, quote, if there is a dispute, it should be handled in accordance with the dispute resolution provisions of the contract?

A That's correct. But we don't want to be negotiating under the dispute resolution provisions with a gun to our head. And you've watered this language down several times over the course of this, of this proceeding. There are at least three provisions here where they say, we're going to pull the plug. We'll negotiate with you, but we're reserving the right to pull the plug and shut down your whole customer base. It's a bullying tactic and we've objected to it.

It's possible we can work this issue out if you will confirm that you're not going to hold a gun to our head while we're proceeding to dispute resolution, and that you do not reserve the right to shut down our ordering systems. which

means our customers can't add services, can't get services that are currently in the pipeline to be provided, and you won't take any action while we're going through dispute resolution.

In fact, Mr. Culpepper, with all due respect, you've come to our position. Don't make it sound the other way around. Our position was let's go through dispute resolution, and you have now changed your language over time to come to our position. And if you have, in fact, come to our position, I think we can settle this issue.

Q Mr. Falvey, would you agree with me that BellSouth has, has modified its position on this issue to give the Joint Petitioners everything they want? That is, if there's a disagreement over CSR access, that the party, the accusing party will proceed to the dispute resolution provisions in the general terms and conditions; correct?

A No. If you give us everything we want, you'd give us the CLEC version.

What I said was that your version is much longer and more complicated, but we might be willing to compromise now that you've changed it substantially and taken, taken out many of our major objections. I'm not saying you've given us everything. But now that you've taken out the major objections, we might be able to agree to some language.

Q Mr. Falvey, you would agree with me that termination of service because of fraudulent or prohibited use of service

is not a new concept, is it?

A No.

Q And you would agree with me that your company, Kspedius, has that right in its Florida tariff; correct?

A That's correct. We're not -- there's been no allegation of fraudulent behavior. We're talking about a case where there's a good faith dispute as, you know, as to whether a CSR has, has been unfairly accessed.

Q Let's move on to Issue 88, service expedite charge. Now Issue 88 involves what is the appropriate rate for a service expedite request; correct?

A That's correct.

Q And it is the Joint Petitioners' position that a service expedite request should be priced at TELRIC, and it's BellSouth's position that a service expedite request should be priced out of BellSouth's federal access tariff; correct?

A That's correct.

Q And BellSouth's federal access tariff rate is a $200 per circuit per day charge; correct?

A That's correct.

Q And you would agree with me that a one circuit or DS1 circuit contains 24 voice grade lines, would you not?

A That's correct.

Q You would agree with me that a $200 per day per circuit service expedite charge means that a CLEC requesting to

expedite the installation of a T1 circuit by two days would be charged $400; correct?

A That's correct.

Q Do you know what the standard interval is for installing a DS1 loop?

A Not off the top of my head.

Q Have you reviewed the BellSouth service interval guides that are available in BellSouth's interconnection services Internet site?

A No. At least not recently.

Q Service expedite is a special arrangement governed by special pricing, isn't it, Mr. Falvey?

A Special arrangement. No, I wouldn't say it's a special arrangement. It's fairly routine. We've asked for 46 service expedites in the last year in Florida. We paid $33,000 to do that, $147,000 region-wide. So the kind of routine loop expedite that you're talking about, I wouldn't say it's all that special.

Q Mr. Falvey, service expedite charges are addressed in your Florida tariff, aren't they?

A In which Florida tariff?

Q Florida Price List 1, which I would ask, Mr. Chairman, to be marked as the next hearing exhibit.

A Is this the Xspedius Florida tariff?

Q Correct.

A Yes. There is some language relating to expedites in our Florida tariff.

COMMISSIONER BRADLEY: Mark it as Exhibit 23.

MR. CULPEPPER: Yes, Mr. Chairman. Xspedius Florida tariff.

(Exhibit 23 marked for identification.)

BY MR. CULPEPPER:

Q Mr. Falvey, let's turn to original sheet 128.1 of the Xspedius tariff.

A This is the end user tariff; right?

Q Correct.

A And what was the sheet number?

Q Original sheet 120 -- 128.1. Are you there?

A Not yet. Okay.

Q Would you agree with me that this tariff sheet is entitled "Special Arrangements Expedite Order"?

A Yes.

Q Would you agree with me that Xspedius is charging its end user customers in Florida an $800 per order per occurrence service expedite charge?

A Yes. But let's talk about that because I think this is misleading. If you'll note, there's a footnote that says, 'In the event the ILEC rates charged to the company are higher than the listed rate, the rate charged to the customer will be equal to the ILEC's rates imposed on the company." So what's

going on here -- you gave an odd example of one T1, but --

COMMISSIONER BRADLEY: Excuse me, Mr. Falvey.

THE WITNESS: Yes.

COMMISSIONER BRADLEY: Again, would you be so kind as just to answer the question and leave some of your explanations up to your attorney when he does redirect so that he -- so that we can move along. And I know that you have a desire to explain, but it sounds like you're going past explaining what was asked to me.

THE WITNESS: Well, he suggested that the rate was extremely high, and I want to explain that in many cases this wouldn't begin to, $800 wouldn't begin to recover for what was imposed on us.

We'll have a $5,000 charge imposed on us, and this is $800. This is also -- this is an end user tariff. And we're -- any company, any customer that doesn't like the $800 charge can go somewhere else. But for a BellSouth wholesale service, I can't go anywhere else. It's the only rate in town, and it's required, therefore, to be priced at TELRIC.

So there are some very important things that I would like to, to, to say that I think are responsive to the implications in his, in his question.

COMMISSIONER BRADLEY: Okay. I'll accept that.

THE WITNESS: But I will endeavor to keep my answers short and to leave some of that for redirect, Commissioner.

MR. CULPEPPER: No further questions.

COMMISSIONER BRADLEY: Staff.

MS. SCOTT: Chairman, staff has no questions for this witness.

COMMISSIONER BRADLEY: Commissioner Edgar?

Redirect?

MR. HEITMANN: Yes.

REDIRECT EXAMINATION

BY MR. HEITMANN:

Q Good afternoon Mr. Falvey. Good morning, actually.

A Good morning.

Q Mr. Falvey, with regard to Issue 88, as long as we have that tariff page in front of us, can you explain further why -- explain further your comments about the $800 charge in the footnote that's attached to that charge.

A Well, let's assume that we have a five-line customer and they want to expedite their service by five days. At $200 per circuit per day that would cost us $5,000. So what we've done is we've tried to put some rate into our tariff that will recover a smaller order, and then we have to reserve our right to pass through the $5,000 charge if it goes as high as $5,000. These charges are very high; they're extremely high. And the reason is because BellSouth is making a lot of money off of expedites. They're -- you know, they own the market, and so they can charge whatever they want. **And the whole purpose of**

the Telecom Act is to get those rates down to cost-based rates, and then the charge that they bill me will be much lower and, more importantly, the charges that all, all consumers will pay are also going to be much lower. We believe it's mandated by the Act to have the TELRIC, a TELRIC rate.

Q Mr. Falvey, in responding to Mr. Culpepper's questions about that tariff, you pointed out it's a retail service tariff and that your retail service customers can choose another retail service provider.

Can you explain whether or not the same is true for you in the wholesale context buying unbundled network elements under Section 251(c)(3) from BellSouth?

A No, the same is not true. There's only one provider that you can go to, and that's BellSouth. And because of that unique circumstance, we have to have TELRIC rates. The worst problem is that, let's say BellSouth's costs -- they're charging $200 per circuit per day. Let's say their cost is $50 per circuit per day. They can waive three quarters of that charge because they can waive it down to cost. We can't waive anything because we're paying the full freight. That's why you have cost-based pricing in the first place so that my costs begin to look like BellSouth's costs.

Q Mr. Falvey, working our way backward, do you recall Mr. Culpepper's questioning on Issue Number 86?

A Yes.

Q And do you recall Mr. Culpepper's assertion that BellSouth had given the Joint Petitioners everything they want?

A Yes.

Q Mr. Falvey, do you have a copy of the Joint Petitioners' revised Exhibit A?

A Yes.

Q And can you point us -- do you have before you the revised language proposal for Issue Number 86 which appears on Page 14?

A Yes.

Q And it also -- would you agree -- could you explain for us why BellSouth's revised proposal still includes the self-help remedies that the Joint Petitioners have found so objectionable?

A Well, our concern is that they want to exercise the self-help remedies. They're going to send us a notice that says that the alleging party may terminate the provision of access to ordering systems and may discontinue existing services. That means take down people's phone service. And that's what we've been trying to get out throughout this whole process. Ours just says if you have a disagreement, you go to dispute resolution like you always do. And even now you have to somehow read out this middle portion of their proposal in order to get to dispute resolution. And even now we have some, we have some concerns about these pull-the-plug provisions, and

we won't agree to this language unless we get some firm assurance that they won't exercise these pull-the-plug provisions and take our customers down.

Q With respect to Issue Number 102, Mr. Falvey, do you recall Mr. Culpepper's questioning referring you to your direct testimony on Page 25?

A Yes.

Q Could you explain whether or not BellSouth changed its contract language proposal for Issue Number 102 after your direct testimony was filed?

A What page was that, the testimony? On Page 25, did you say?

Q I believe Mr. Culpepper's reference was to Page 25 of your direct testimony.

A And, I'm sorry, did you say this was relating to Issue 102, the offset?

Q Yes.

A They have changed their testimony, I mean, their position throughout this proceeding, and there's no question that, you know, in many cases it started to look a lot, a little more favorable to us. For example, on Issue 102, they at one point -- you have to understand that initially they weren't going to allow for any offset and then at one point they said, okay, well, we will allow for offsets of undisputed amounts, and they added that into their language.

Q Could you explain for us whether or not the Joint Petitioners -- excuse me. Could you explain for us whether or not BellSouth's revised proposal for Issue 102 is acceptable to the Joint Petitioners?

A No, it's not acceptable. The language doesn't take into account very large disputed amounts. And we've, we've taken this issue to an Oklahoma arbitrator, a Kansas arbitrator, and they both agreed that an offset is appropriate. And if a company is withholding -- I think in Oklahoma the arbitrator said, look, if you're holding more than $500,000, then no deposit at all is appropriate at that time. You've got to work out your disputes.

So, so the way this is set up where there's no recognition of what happens when you have a $500,000 or a $1 million or $2 million dispute, that language is not acceptable.

Q With respect to Issue Number 26, Mr. Falvey, do you recall Mr. Meza's questioning wherein he pointed you to a predefined set of paragraphs in the TRO and asked you whether you saw any references to Section 271?

A Yes.

Q Can you explain for us whether the TRO, including all of its paragraphs and the rules attached to it, ever include a reference that carves out 271 out of the commingling requirements?

A No. There was a carve out in Footnote 1990 and it was deleted by the errata. That carve out was completely inconsistent with the entire order on commingling, which eliminated the commingling restriction and, and included, and allowed commingling of 271 wholesale with 251(c)(3) UNEs.

Q Moving to Issue Number 36, Mr. Falvey, can you explain for me whether or not BellSouth's line conditioning obligations under Section 251(c)(3) are limited to what BellSouth decides to do for itself?

A I mean, the bottom line is they're not limited by what they do for themselves. The rule is the rule and then BellSouth has to comply with the rule. And the rule says line conditioning, and there's been many attempts by BellSouth and other ILECs to limit the scope of that rule. But it's very plain and simple, and the Commission has said that it doesn't matter what you do for yourself. You're the custodian of the loop. If you're not going to be a fair custodian of the loop and offer it to other providers, you know -- you know, this is not the Commission, but Xspedius would say, hey, maybe we need to have someone else controlling these loops. Maybe we need to have structural separations. The ILECs don't like structural separations. So as long as they're the custodian of the loop, they have to provide line conditioning pursuant to the FCC rules, and at the end of the day it doesn't matter exactly what form or whether they provide it for themselves.

Q Mr. Falvey, can you explain whether or not the FCC has ever said that its TELRIC-based line conditioning obligations are limited by the separate routine modification rules?

A Well, it's clear from the rules and from the orders that the line conditioning rules are not in any way limited by the routine network modification rules. That's, that's the position of BellSouth that they're trying to impose such a limitation, but there is no such limitation in the rules. And, in fact, the limitations that they're trying to apply to the line conditioning rule through the back door of routine network modifications is explicitly refuted by the express language of the, of the FCC's order, which says that there is a requirement to condition lines for longer loops over 18,000 feet.

Q Mr. Falvey, do you recall Mr. Meza's questioning with respect to Section 251(c)(3)'s obligations requiring nondiscriminatory access to network elements which BellSouth must unbundle at TELRIC rates?

A Yes.

Q Can you explain for us whether or not Section 251(c)(3) carries the TELRIC pricing obligation?

A It does. 251(c)(3) is just the basic requirement to unbundle the monopoly network, and so the -- I have a copy of the Act here. Hang on a second. Well, 251(c)(3) is in terms of -- is sort of the obligation to unbundle. The pricing for

unbundled network elements is contained in Section 252, and that's stated in 251(c)(3) where it says that it must be unbundled consistent with the requirements of this section and Section 252. And what they're referring to there is the 252(d) TELRIC pricing requirements, 252(d)(1) TELRIC pricing requirements.

Q Mr. Falvey, can you explain for us whether the loops that you seek to have the right to have conditioned pursuant to FCC rules are those that BellSouth would be unbundling pursuant to Section 251(c)(3)?

A They are. They are the same loops. This line conditioning obligation has been found by the Commission and the courts to be a necessary and integral part of the loop unbundling requirement of 251(c)(3).

Q Do you recall Mr. Meza's questioning with respect to parity and BellSouth's supposed obligation to treat the Joint Petitioners just as it treats its retail customers?

A Yes.

Q Mr. Falvey, can you explain whether BellSouth's retail customers can buy unbundled network elements under Section 251(c)(3) from BellSouth at TELRIC pricing?

A No, they cannot. An end user cannot purchase a TELRIC loop. And so this isn't a matter of going out and saying, okay, what does the end user get? That if we only get what the end user gets, we're never going to be able to compete

with BellSouth. This is about making the network available at TELRIC pricing so that we can have competition.

Q Mr. Falvey, finally, do you recall Mr. Meza's questioning with regard to Paragraph 643 of the Triennial Review Order?

A Yes.

Q I think you have that order in front of you.

A Yes.

Q Do you recall Mr. Meza either read or had you read certain sections of that paragraph?

A Yes.

Q Mr. Falvey, could you read the last sentence of that paragraph including the appended footnote?

A Yes. "We, therefore, view loop conditioning as intrinsically linked to the local loop and included within the definition of the loop network element." The footnote says, "As the Commission noted in the UNE Remand Order, the Eighth Circuit expressly affirmed the Commission's determination that Section 251(c)(3) requires incumbent LECs to provide modifications to their facilities in order to accommodate access to network elements."

MR. HEITMANN: Thank you. I have nothing further for this witness.

COMMISSIONER BRADLEY: Thank you. The witness is excused.

THE WITNESS: Thank you, Commissioners. Thank you for your patience.

MR. HORTON: Commissioner, Mr. Chairman, we would move Exhibit 9, Joint Petitioners' Exhibit 9, please.

COMMISSIONER BRADLEY: Okay. Without objection, Exhibit 9 is admitted into the record.

MR. HORTON: Thank you.

(Exhibit 9 marked for identification and admitted into the record.)

MR. CULPEPPER: And we would move Exhibits 21, 22 and 23 into the record.

COMMISSIONER BRADLEY: Without objections, Exhibits 21, 22 and 23 are admitted into the record.

MR. CULPEPPER: Thank you, Mr. Chairman.

(Exhibits 21, 22 and 23 admitted into the record.)

COMMISSIONER BRADLEY: And I think we're ready to go to the BellSouth witnesses.

MR. HORTON: That's correct. That concludes all the witnesses for the Joint Petitioners. Thank you.

COMMISSIONER BRADLEY: Thank you, Mr. Horton.

STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, LINDA BOLES, RPR, Official Commission Reporter, 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' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS _____ DAY OF MAY, 2005.

LINDA BOLES, RPR
FPSC Official Commission Reporter
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