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February 25, 2004

VIA HAND DELIVERY

Hon Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Joint Petition for Arbitration of NewSouth Communications Corp., et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*
Docket No. 04-00046

Dear Chairman Tate:

Enclosed are the original and fourteen copies of BellSouth's *Motion to Sever or to Impose Procedural Restrictions* Copies of the enclosed are being provided to counsel of record

Very truly yours,

Guy M Hicks

GMH ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Joint Petition for Arbitration of NewSouth Communications, Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*

Docket No. 04-00046

BELLSOUTH'S MOTION TO SEVER OR TO IMPOSE PROCEDURAL RESTRICTIONS

BellSouth Telecommunications, Inc. ("BellSouth") hereby files its Motion to Sever Or To Impose Procedural Restrictions, and states the following:

1. Arbitrations such as the instant proceeding are filed pursuant to Section 252 of the Telecommunications Act. The Act contemplates that arbitrations will be between a single CLEC and a single incumbent. For example, Section 252(b)(4)(B) provides that "the State Commission may require the petitioning party and the responding party to provide such information as may be necessary for the State Commission to reach a decision on unresolved issues." Nevertheless, the above-captioned arbitration has been filed jointly by four CLECs (NewSouth, KMC, NuVox and Xspedius). The four CLECs seek arbitration of 107 issues. Clearly, the Act does not contemplate this type of joint filing. At the same time, such a joint filing is not expressly prohibited by the Act. Given this, there may well be circumstances in which it would be appropriate for the Authority to

consolidate properly filed, separate arbitrations into a single proceeding. On its face, however, the Joint Petition does not present such a case.

2. The Joint Petition suffers from two significant procedural infirmities. One, the proper procedure for seeking a joint proceeding would be for each of the four CLECs to file a separate petition and then move for consolidation. The Petitioning CLECs have failed to take this proper course. Instead, they have taken the liberty of inappropriately filing a petition on behalf of all four. Two, a proper Motion for Consideration should contain sufficient facts to allow the Authority to determine whether the requested consolidation would be in the interest of judicial economy, and would otherwise result in a more efficient resolution of the issues than would separate proceedings. The Petitioners have not only failed to file such a Motion, they have failed to make a sufficient showing to support consolidation.

3. Specifically, the Petitioners have set forth in the Petition a single paragraph that deals in a very cursory way with their decision to proceed jointly. This paragraph does not contain sufficient information to establish that proceeding on a joint basis is appropriate. Instead, this paragraph states a number of very vague assertions as to why this joint approach is appropriate, but little in the way of real facts. Moreover, the facts that are stated do not support consolidation.

4. First, the Petitioners state that they are filing the Petition jointly because they have negotiated jointly with BellSouth. It is true that these CLECs requested joint negotiations with BellSouth, and for the most part, BellSouth has been able to accede to this request. BellSouth, however, has never agreed to the filing of a Joint Petition, in substantial part, because of the procedural problems

with such a filing that are discussed below. To the extent the Petition implies that BellSouth has either agreed to a Joint Petition or waived its right to object, this implication is simply wrong.

5. Second, the Petition attempts to justify the Joint filing by reference to "the statutory deadline within which the Authority is charged with concluding this arbitration proceeding." (¶ 12). The CLECs, however, also request a waiver of this deadline if they are not allowed to proceed jointly. Also, the CLECs and BellSouth have discussed the prospect of jointly requesting such a waiver regardless of whether the cases proceed jointly or separately. Thus, the CLECs cannot legitimately contend that the statutory deadline is always treated as being inflexible, or that a joint proceeding is the only way to meet this deadline.

6. Beyond this, the CLECs' attempt to support their joint filing with a number of vague assertions that are ultimately insufficient to allow the Authority to determine whether such a filing will result in increased efficiency and economy or in inefficiency and an unduly complicated proceeding. For example, the CLECs state that "to the fullest extent possible, CLECs anticipate the use of a 'team' witness approach." (¶ 12). Obviously, this extremely vague statement does not constitute a commitment by the CLECs to do anything. Despite what they anticipate at the present, the Petition apparently reserves to the CLECs the option of filing the testimony of four completely independent sets of witnesses to address each of the 107 issues that they raise in their Joint Petition if they later decide that they would prefer to do so. Further, even if things turn out as the CLECs anticipate and they do follow a "team approach," there is still no indication in the

Petition as to what this means. For example, the CLECs could decide that their team would best be served by having multiple witnesses provide essentially cumulative testimony on each issue.

7. Also, the single paragraph of the Petition that addresses the joint approach contains insufficient information to allow the Authority to determine if there is a true unity of interests among the CLECs. The Petition states that the CLECs' interests are not adverse to one another, but does not state that the CLECs' respective positions are the same. Thus, one could assume that the CLECs' team approach would entail multiple witnesses that address the same issue (each on behalf of a different company) in a way that would be "complimentary" to one another, but not adverse.

8. The point is this: the Authority should not allow the Petitioners to proceed jointly unless they do considerably more than make a vague allusion to an "anticipated" team approach. If the team approach ultimately entails, for example, the testimony of six witnesses for each of the four CLECs, then having a single proceeding in which 24 CLEC witnesses give extended, repetitive testimony would accomplish nothing more than having an extremely unwieldy proceeding. On the other hand, if it is the intention of the CLECs to effectively conduct the arbitration as if they were a single party (and they are willing to commit to this approach), then there may well be some economy in proceeding under the current joint structure. The difficulty is that the CLECs have provided nothing more than extremely vague representations on this point, and certainly what they have

presented is an insufficient basis to support the motion to consolidate that they should have made, but did not.

9. Accordingly, BellSouth submits that it is appropriate for the Authority to deal with the Petitioners' procedurally inappropriate approach by taking one of two actions: One, the Authority could immediately sever the proceeding into four separate arbitrations. Two, the Authority could allow the Petitioners to continue jointly, but only if the proceeding is conducted with certain restrictions that are appropriate to ensure that efficiency and administrative economy is served rather than hindered by this approach.

10. Specifically, the Authority should require that, if the Petitioners continue to proceed jointly, then their positions must be the same on each issue. In the Petition, the four CLECs appear to state that they are in concert on 97 of the 107 issues, but that there is some variation in their positions on the other issues. (¶ 12). The Petition would also appear to suggest that there is no direct conflict on these remaining ten issues, but rather that there are particular issues that some, but not all, of the CLECs are advancing. However, the Petition simply contains insufficient evidence to ensure that this is the case. Thus, again, the Authority should order that the CLECs may only continue with this proceeding if their positions on each issue are not only "not adverse," but are, in fact, identical. In other words, although not every CLEC needs to join in raising every issue, those CLECs that do jointly raise a given issue should be required to take the identical position.

11. Second, the Authority should restrict the CLECs to cross examining each BellSouth witness only once. Since the Petition does not address this issue in any way, the CLECs may well take the position that since there are four of them, that they are entitled to cross each BellSouth witness four times. If this is their intention, then this is unfair and there is little to be gained in the way of administrative economy by having a single proceeding. Thus, the Authority should also order that if the CLECs proceed jointly, then they should be strictly limited to one cross examination of each BellSouth witness. Otherwise, BellSouth objects to any consolidation.

12. Third, the Authority should order that if the CLECs continue jointly, then they should be limited to one witness per issue or sub-issue. BellSouth uses the term "sub-issue" advisedly, because there may be instances in which a single issue may require testimony from two or more witnesses with different areas of expertise. For example, there are issues raised by the Petition that involve both policy considerations and technical questions (e.g., feasibility). Even if an arbitration appropriately involved only a single party on each side, multiple witnesses might still be necessary to address this type of issue. The CLECs, however, should not be allowed, for example, to address the policy aspect of a particular issue through the testimony of multiple witnesses. As stated above, in this instance, these witnesses would necessarily either be giving cumulative testimony or expressing differing positions on behalf of their respective employers. In either event, this approach would not be appropriate in an arbitration proceeding. Therefore, BellSouth requests that the Authority also order that the

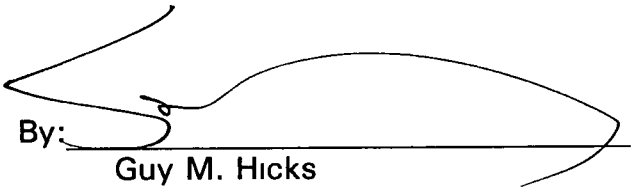
CLECs "team" be composed of only a single witness to address each substantive aspect of each issue.

13. Again, BellSouth would not object to the Joint Petition if it were clear that the CLECs intended to proceed as if they were a single entity. At the same time, BellSouth raised many of the issues addressed above with counsel for the CLECs prior to the Petition being filed, but received no assurances regarding the CLECs' intentions. Likewise, the Petition is, as explained above, extremely vague on certain salient points that the Authority must consider to determine whether a joint proceeding would be appropriate. All of this begs the question of why the CLECs have decided to file a Joint Petition. One would normally assume that if four CLECs have precisely the same position, then one of them would file for arbitration, and the other three would adopt the agreement that results from the arbitration. The fact that the CLECs have opted not to take this approach, combined with the fact that they have been extremely vague in the Petition as to their intentions, certainly raises the prospect of procedural improprieties or gamesmanship, or at least difficulties, as this case progresses. BellSouth believes that it is imperative that the Authority act now to avoid a situation in which agency resources would be wasted rather than conserved, and in which this arbitration would devolve into a complicated, multi-part proceeding having unnecessary, numerous witnesses and a multiplicity of CLEC positions.

WHEREFORE, BellSouth respectfully requests the entry of an Order either severing this proceeding into four separate arbitration proceedings or, alternatively, imposing the procedural restrictions described above.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2004, a copy of the foregoing document was served on the following, via the method indicated

[ ] Hand
[ ] Mail
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[ ] Overnight
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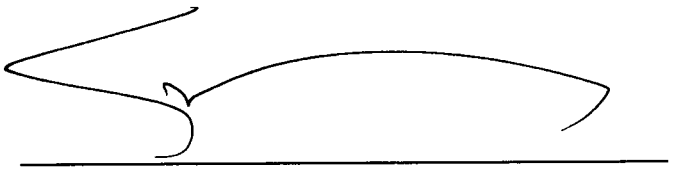

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