BELLSOUTH

BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy hicks@bellsouth com

Guy M Hicks
General Counsel

615 214 6301
Fax 615 214 7406

March 12, 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 for Permission to File A Reply* to Petitioners' *Response to BellSouth's Motion to Sever* and BellSouth's proposed *Reply*. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In 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

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR LEAVE TO FILE REPLY

BellSouth Telecommunications, Inc. ("BellSouth") respectfully moves the Tennessee Regulatory Authority ("Authority" or "TRA") for leave, pursuant to TRA Rule 1220-1-2-.06(3), to file a *Reply* to Petitioner's *Response to BellSouth's Motion to Sever* ("Response"). A copy of BellSouth's proposed *Reply* is attached hereto.

BellSouth has attempted to provide a targeted response that will be helpful to the Authority in resolving these issues. BellSouth's *Reply* points out matters the Authority should be aware of prior to ruling on the *Motion to Sever*. The Authority should have the benefit all relevant information that bears on the issues presented in the Petition.

For the foregoing reasons, BellSouth respectfully requests that the Authority grant BellSouth leave to file the proposed *Reply*.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Guy M. Hicks
Joelle J Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

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 Communications, LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co. of Chattanooga, LLC, 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 TELECOMMUNICATIONS, INC.'S REPLY TO PETITIONERS' RESPONSE TO BELLSOUTH'S MOTION TO SEVER

BellSouth Telecommunications, Inc ("BellSouth") hereby files its Reply to the Response of NewSouth, NuVox, KMC and Xspedius ("Petitioners" or "CLECs") to BellSouth's Motion to Sever, and states the following:

Whether this case should be severed into separate proceedings or remain a single proceeding with multiple petitioners is a matter within the sound discretion of the Authority This discretion is to be exercised based on the specific facts of the case. In the CLECs' Petition, they provided an insufficient factual basis for the Authority to determine that the joinder that the CLECs seek (without the benefit of a Motion to Consolidate) is proper. Although the CLECs spend a great deal of time in their Response leveling accusations at BellSouth and offering unlikely interpretations of Federal law, they still provide no additional meaningful facts to bolster their contention that this matter should move forward as a joint proceeding. Moreover, the few clues that the CLECs give in their response of their true intentions for the conduct of this case

only serve to reinforce the fact that they should not be allowed to proceeding jointly without the imposition of the procedural restrictions requested by BellSouth.

The central premise of the CLECs' Response appears to be that the Telecommunications Act of 1996 gives them free reign to do whatever they want. Specifically, the Petitioners state that the Act contemplates the filing of joint arbitration petitions by CLECs (Response, p. 2). The CLECs state that, "contrary to BellSouth's suggestion, the Act appears to contemplate multiple party negotiations and arbitrations and contains no express preference for arbitrations between a single CLEC and a single ILEC" (Response, p. 2). Although the CLECs stop short of expressly claiming that the Act gives them an absolute right to join their claims in any way they wish, this is the clear implication of the Response The CLECs support this proposition primarily with the observation that the Act does not prohibit joint filings. Thus, the CLECs appear to contend that they are allowed to take any procedural course that the Act does not explicitly prohibit.

If the CLECs were right on this point (and they are not), this would lead to an extraordinary result for two reasons One, if the CLECs' position were correct, then they would have discovered a procedural right that has escaped the notice of every State Commission, every ILEC and every CLEC in the hundreds (or thousands) of arbitrations that have taken place in the last eight years. Although the CLECs claim that "it is not uncommon to have Section 252 arbitrations that involve multiple CLECs," they cite no support for this contention, a contention that BellSouth believes to be flatly wrong (Response, p. 2). There have been situations in BellSouth's region in which two CLECs independently file petitions for arbitration, and a Commission subsequently makes the

decision to consolidate the two cases because the Commission considers it administratively efficient to do so. BellSouth has never been a party, however, to an arbitration in which multiple CLECs have simply presumed to file a joint petition and to take the position that it is their right to do so Further, to BellSouth's knowledge, there has never been a case filed in this manner anywhere in its region. Thus, if the CLECs are correct in their assertion that the Act is absolutely neutral as to whether parties file their petitions individually or jointly, then they have discovered something that has escaped the notice of every Commission and every party over the course of eight years and hundreds of arbitrations.

More to the point, if the CLECs were correct, then this would necessarily mean that the Telecommunications Act functions in a manner that is distinctly different from any statutory law in the country, either State or Federal. Generally speaking, Federal Statutes (much like State Statutes) can be used as the basis for substantive claims. However, absent some explicit indication in the statute itself, they generally do not dictate the procedural rights of the party. Thus, when a Federal Statute states the basis under which a party may file a claim (or file an arbitration), it establishes the right to make the claim, but not the manner in which the claim is to be made. Instead, that is a matter that is dictated by the applicable Rules of Civil Procedure. This Authority, of course, does not a specific rule that addresses general joinder (or misjoinder) of parties in arbitration proceedings under the Federal Act.. Tennessee, however, does have a procedural rule, Rule 42.02 (Tennessee Rules of Civil Procedure), that tracks closely Rule 42(b) of the Federal Rules of Civil Procedure. Federal Rule 42(b) states explicitly

that separate trials can be ordered (i.e., the equivalent to the severance requested by BellSouth in this case) under the following circumstances:

> The Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues ..

This Rule has been used both to bifurcate a single party's claims into separate proceedings, and to separate the claims of individual parties into separate proceedings For example, in Stoddard v. Ling-Temco-Vought, Inc., 513 F.Supp. 314, 327 (1980), remanded on unrelated grounds, 711 F2d 1431, the Court stated the following:

> In the instant case the court must weigh whether one trial or separate trials will best serve the convenience of the parties and the court, avoid prejudice, and minimize expense and delay. Also taken into consideration is whether the procedure is more likely to result in a just final disposition of the litigation Here, the court has concluded after due consideration of these factors that a separate trial would be appropriate for plaintiffs in intervention.

Further, whether a Motion to Sever is granted or denied is within the discretion of the tribunal, and is based upon the factors set forth in Rule 42, and the particular facts of the case. "The language of Rule 42(b) places the decision to bifurcate within the discretion of the district court." Saxion v. Tite-C Manufacturing, Inc., 86 F3d 553, 556 (6th Cir. 1996). "A decision ordering bifurcation is dependent on the facts and circumstances of each case." (Id).

BellSouth submits that this Authority should employ the same analysis to determine whether the instant case should be severed into separate proceedings, or whether the procedural restrictions urged by BellSouth should be adopted. In other

words, the Authority should determine the effect that going forward jointly will have on "the expedition and economy" of the proceeding, and whether the conduct of a single joint proceeding will prejudice any party Although the Plaintiffs have filed their Petition jointly, under the apparent theory that is their right to do so, they have failed completely to set forth facts, either in the original Petition or in their Response, that would allow the Authority to make a determination that the joinder they seek is justified.

Instead, the CLECs largely devote their efforts to an attack on BellSouth's Motion that relies largely on mischaracterizing certain aspects of the Motion. For example, the CLECs claim that BellSouth wishes for the Authority to engage in a wasteful process whereby these proceedings would be automatically severed into four proceedings, merely for the purpose of forcing the CLECs to file a Motion to Consolidate, at which time the cases would be re-consolidated into a single proceeding. (Response, p. 3). This simply is not true. The entire point of BellSouth's Motion is that--regardless of whether the issue comes before the Authority through a proper Motion to Consolidate filed by individual CLECs or through a Motion to Sever--the Authority needs to review the specifics of the case to determine whether joinder or non-joinder is more appropriate. The flaw in the Petitioners' position is not just that they have gone about seeking joinder in a manner that is procedurally inappropriate, but that they have failed to set forth in any manner a basis for the joinder they seek.

Likewise, the CLECs devote a portion of their Response to attacking BellSouth for what they contend is an attempt to abridge their rights. (Response, p. 5) This too is a false claim. The Petitioners have the absolute ability to pursue their respective rights to arbitrate, just as would any other parties They do not, however, have the right to

pursue their individual substantive claims in a joint proceeding if doing so would cause administrative inefficiency, hamper the economy of the proceeding, or generally result in a single complex, unwieldy proceeding, as compared to four simple straightforward proceedings. Again, the CLECs have failed to provide adequate information to address the determinative question of whether joinder (or non-joinder) is appropriate in the specific context of this case.

The Petitioners state, in perhaps their only true attempt to demonstrate any economy to be gained by a joint proceeding, that having one proceeding rather than four will result in one hearing, one brief, one order, etc. (Response, p. 2).[1] This, of course, skirts the dispositive issue of whether the single hearing, brief, etc. will be so unwieldy or duplicative that it is more efficient to have four markedly smaller, simpler and less complex hearings, briefs, etc. Moreover, the CLECs' response, if anything, undercuts the vague representations of CLEC unity in the Petition, and strongly suggests that if the CLECs are allowed to proceed jointly and without restriction, then they will turn this proceeding into something so unwieldy as to be unmanageable.

Again, the CLECs complain that BellSouth is attempting to abridge their rights by requesting that the Authority restrict the proceedings so that the CLECs will effectively act as a single party At the same time, the CLECs decline to acknowledge that there should be <u>any</u> limitation on the way that the proceeding will be conducted if it goes forward in its present structure [2] The CLECs have provided no clue as to whether they intend to file cumulative and duplicative testimony on the issues on which they claim to

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[1] Still, the CLECs represent only that "<u>in most</u>, <u>if not all cases</u>, there would be one response to BellSouth motions" (*Id*) (emphasis added) Thus, the CLECs have not even committed to taking the same position on <u>procedural</u> issues that may arise

[2] The CLECs <u>have</u> agreed to only cross BellSouth's witnesses once They have not agreed, however, to similar (or, for that matter, any) restrictions on the presentation of their witnesses

take a common position. Moreover, although the Petition states that the CLECs take the same position on approximately one hundred of the issues in the proceeding, the CLECs also reserve the right to file differing testimony by each CLEC on each issue. This reservation by the CLECs, of course, undercuts entirely their original representation that they share a single position on most of the issues.

An arbitration pursuant to the Act is, of course, not the type of proceeding in which the CLEC states one position in its initial pleading, the ILEC states another, and the Authority is left to do nothing but choose between the two. Instead, parties file evidence to support their initial positions, and in many instances, expand upon the positions considerably. Ultimately, the Authority rules, not on the basis of the respective initial issue statements of the parties, but rather on the basis of the evidence. Thus, when the CLECs say that they take the same positions on about one hundred issues, but they reserve the right to file differing testimony on these issues, what they really mean is that they potentially reserve the right to take different positions. Again, the case will be decided on the evidence, and by preserving the right to submit evidence that differs from one party to the next, the CLECs are preserving the right to take different positions

Moreover, much of what has occurred during negotiations suggests to BellSouth that the parties do not even really share the same interests in any given "single" position. In negotiations, some CLECs expressed more interest in some issues, while others expressed more interest in other issues. In other words, the negotiation process appeared to reveal that each of the four CLECs may actually be interested in some smaller subset of the issues in their joint filing, but they decided to put together all of the

issues that are important to any of the CLECs. Thus, if the issues were tried separately, the number of issues in each proceeding would likely be considerably fewer than the hundred or so before the Authority now.

Finally, one of the crucial considerations under the Federal Rule (which BellSouth believes this Authority should apply) is whether the conduct of a joint proceeding will prejudice any party There remains the considerably potential that the CLECs' joint testimony will be structured specifically for the purpose of strategic gamesmanship that will prejudice BellSouth Specifically, in a one-on-one arbitration, a party would simply take the position on an issue that it believes the Authority should approve, and it would support this position in its testimony. By reserving the right to file four different sets of testimony on each issue, the CLECs would have the ability, for example, to have one CLEC witness file testimony taking an extreme position (the best possible result the CLECs could hope for), to have another CLEC take a middle-ground, compromise position, and for the other CLEC witnesses to take positions somewhere in between Allowing the CLECs to structure their case in this way (and by attempting to preserve the right to do virtually anything, the CLECs have certainly not ruled out this possibility) would not only be unfair to BellSouth, it would result in a single proceeding with more positions, more testimony, and considerably more complication than would four separate, discrete, smaller proceedings.

Even worse, under the CLECs' "compromise," they would file all their testimony in the form of a single document that would constitute a sort of CLEC position paper. There would not necessarily be a commonality of testimony among CLECs from one issue to the next, but instead the document would be a hodgepodge of everything that

the CLECs might possibly have to say. Thus, on a given issue, there might be a few paragraphs of testimony that one CLEC witness would sponsor, followed by a few paragraphs of testimony that would be sponsored by another CLEC witness, and on and on. From paragraph to paragraph and section to section, the substance of the position paper would not necessarily be consistent Instead, the paper could contradict itself as it posited the differing views of first one CLEC, then another.

Further, under the CLECs' proposal, there would be some portions of the document to which all CLECs would agree. In this case, these portions of the position paper would have an indication that they were sponsored by witnesses that represent all the CLECs . In the expressed view of the CLECs, this would avoid the problem of cumulative testimony (Response, p. 6). In reality, this approach would simply make cross examination difficult, if not impossible. It would be one thing if all four CLECs took the same position, and that position was advanced by a single witness who, although employed by only one CLEC, testified on behalf of all. Instead, the CLECs proposed to BellSouth that they would have a single piece of pre-filed testimony, portions of which would be "sponsored" by witnesses for all four CLECs, regardless of who is the actual author of the position. In other words, this document would not really be testimony at all, but would rather constitute a written set of comments that would presumably be prepared by either the CLECs' counsel or by only one of the witnesses who support it. The other witnesses would simply append their name to the portion of the "testimony" with which they agree.

Among the many problems that would be caused by this approach is the practical consideration that cross examination would be almost impossible If one witness (or the

CLECs' attorney) writes the testimony on one issue, but four witnesses attach their names to the testimony, then it will be necessary for BellSouth to cross examine all witnesses on the issue to determine which one actually has knowledge of the issue and actually developed the CLECs' position. Thus, rather than streamlining the hearing, the CLECs' approach on any issue on which they truly take a common position would have the effect of ensuring that all witnesses must be cross examined on every single issue. In other words, it would complicate the hearing substantially beyond what would be necessary if proper testimony were submitted.

Finally, in an arbitration in which the CLECs have raised over 100 issues, one can anticipate that there would be hundreds of pages of testimony even under the best of circumstances. If the CLECs file a single position paper that has as many as four separate positions on each of the 100 or so issues, then one can anticipate that this document will run to many hundreds of pages, which will make cross examination, and the conduct of the proceeding in general, even that much more difficult.

The above scenarios describe some of the difficulties that could arise from allowing the CLECs to continue jointly, without procedural restrictions Further, the CLECs have offered the Authority nothing in the way of reassurance that these problems would not occur by committing to any restrictions on witness testimony. Instead, the CLECs have merely related to the Authority their discussions with BellSouth of their proposal not to file the testimony of individual witnesses in the typical manner, but instead to file a crazy quilt of differing, sometimes complementary, perhaps conflicting, and, in some cases, cumulative "testimony" in the form of a single document. Clearly, this is not a solution to the problems created by improper joinder. Instead, it is

a proposal to file a set of written comments rather than testimony, which creates an entirely new set of problems in addition to those created by the original misjoinder.

Again, the question of whether the separate claims of separate parties should be permissively joined or severed into separate proceedings is one that, in a federal proceeding, is within the discretion of the Court, and is based on factors such as efficiency, economy, and avoiding prejudice. In conducting an arbitration pursuant to a federal statute, this Authority should apply the same standards The CLECs have failed utterly to demonstrate that their "self-help" version of a Motion to Consolidate meets this standard. For this reason, the Authority should either sever the preceding into four separate proceedings, or alternatively, adopt all the procedural restrictions proposed by BellSouth in its Motion.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

GUY M. HICKS
JOELLE PHILLIPS
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201
(615) 214-6301

R. DOUGLAS LACKEY
J. PHILLIP CARVER
675 West Peachtree Street, N.E., Suite 4300
Atlanta, Georgia 30375

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2004, a copy of the foregoing document was served on the following, via the method indicated:

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[X] Electronic

H LaDon Baltimore, Esquire
Farrar & Bates
211 Seventh Ave. N, # 320
Nashville, TN 37219-1823
don.baltimore@farrar-bates.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

John J. Heitmann
Kelley Drye & Warren
1900 19th St., NW, #500
Washington, DC 20036
jheitmann@kelleydrye.com