BEFORE THE
TENNESSEE REGULATORY AUTHORITY

In the Matter of 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

JOINT RESPONSE OF PETITIONERS TO
BELLSOUTH'S MOTION TO SEVER OR
TO IMPOSE PROCEDURAL RESTRICTIONS

NewSouth Communications Corp ("NewSouth"), NuVox Communications, Inc ("NuVox"), KMC Telecom V, Inc ("KMC V") and KMC Telecom III LLC ("KMC III") (collectively, "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co Switched Services, LLC ("Xspedius Switched") and Xspedius Management Co of Jacksonville, LLC ("Xspedius Management") (collectively, "Xspedius") (collectively, the "Joint Petitioners" or "CLECs"), by their attorneys and pursuant to Tennessee Regulatory Authority Rule 1220-1-1 06(2), hereby file with the Tennessee Regulatory Authority ("TRA") their opposition to BellSouth's Motion to Sever or to Impose Procedural Restrictions In support of this Joint Response, the Joint Petitioners state as follows

1 BellSouth's Motion is without merit and should be dismissed or denied There is nothing improper about the Joint Petition Nor is there anything vague about the basis of a joint petition Joint Petitioners acknowledge the merit to having an efficient process and offer suggestions

below to facilitate an orderly disposition To grant BellSouth's Motion to Sever would serve no legal, procedural, or other rational purpose

2. As explained in their Joint Petition for Arbitration, the Joint Petitioners have filed a joint petition for arbitration as opposed to several individual petitions for arbitration because, in order to maximize limited resources, efficiency, and bargaining power, they have been negotiating with BellSouth as a group Joint Petition, ¶ 12. Notably, the efficiency and economy that will result from a this multi-party arbitration will be shared by the TRA, its staff and all parties, including BellSouth Many of the efficiencies and economies that will result from having a single arbitration in lieu of four are obvious. There would be one set (not four sets) of procedural orders, one hearing, and one arbitration decision There would be one Issues Matrix to track – not four. In most, if not all cases, there would be one response to BellSouth motions. Joint Petitioners also anticipate propounding discovery requests and filing briefs jointly (handling issues raised by fewer than all four CLECs in a manner similar to that in which they were handled in the Joint Petition and Joint Issues Matrix) In short, because there are over 100 common issues to be decided in this arbitration proceeding,[1] separate filings and hearings would result in unwarranted expense to the parties and the TRA, as well as unnecessary delay.

3. Although it is common for arbitrations under Section 252 of the Communications Act of 1934, as amended ("Communications Act" or "Act") to be between two parties, it also is not uncommon to have Section 252 arbitrations that involve multiple CLECs, such as is the case in this proceeding. 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 Indeed, Section 252(a)(1) refers to "a requesting telecommunications carrier or carriers," indicating that Congress contemplated that these endeavors may involve more than a single CLEC Section 252(b)(1) states that "the carrier or any other party to the negotiation

[1] There are only 6 issues that are raised by just one of the CLECs. The other three CLECs simply chose not to arbitrate those issues

may petition a State commission to arbitrate any open issues " In this case, the four CLECs (and their affiliated entities listed in the caption above) that were a party to the joint negotiations have petitioned the TRA for arbitration jointly. Section 252(b)(2)(A) refers to "a party" and "each of the parties" and contains no directive that the number of parties be limited to two. Section 252(b)(2)(B) also clearly contemplates that multiple parties may be involved in the same arbitration. Thus, Section 252 does not express a preference as to whether petitioners should file jointly or file separately with the intent to seek consolidation. Moreover, it is clear that a joint arbitration petition is neither expressly nor implicitly prohibited by the Act (or the TRA rules) In fact, TRA Rule 1220-1-2- 01(2)(c) expressly allows joint petitions and joint petitioners.

4 BellSouth's quarrel with the Joint Petitioners is one that elevates form above substance without a sufficient basis to do so BellSouth alleges that Joint Petitioners would have done better to consolidate "properly filed" separate arbitrations into a single proceeding. Motion, ¶ 1. Indeed, BellSouth alleges that the "proper procedure" would have involved four separate petitions, then, following the "proper course", a "proper Motion for Consideration" (presumably) requesting consolidation. *Id.*, ¶ 2 BellSouth, however, cites no rules or cases mandating this process and provides no other rational foundation for imposing upon its adversaries its self-determined view of what is "proper " Thus, no real "procedural infirmities" have been alleged or suffered

5 Indeed, Joint Petitioners respectfully submit that BellSouth's view of what is proper would be wasteful For example, if BellSouth took on the burden of filing for arbitration (something it refused to do), the TRA would now likely have four motions (to consolidate) and four oppositions (by BellSouth opposing consolidation) before it instead of the single motion and single opposition it has before it now Moreover, Joint Petitioners respectfully submit that it would be wasteful to sever and then seek to re-consolidate what already was consolidated The Joint Petitioners had participated in consolidated joint negotiations all along Although BellSouth had refused to bless the notion that

a Joint Petition for Arbitration likely would (and did) arise from those negotiations, such blessing was never needed.[2]

6. BellSouth also complains that "little in the way of real facts" has been provided in support of the TRA having one arbitration proceeding, as opposed to four separate ones Here, too, it seems inappropriate for respondent to be the creator, imposer, and arbiter of a standard that in any event appears to be illusory. The plain and simple fact is that a proceeding with one petition, one response, one set of procedural orders, one hearing and one decision will result in economies and efficiencies that will be realized by the TRA and all parties Despite BellSouth's attempt to obfuscate and bind the hands of the Joint Petitioners, the Joint Petition contains 97 issues common to all parties With respect to these 97 issues, CLECs have jointly submitted a position statement (see Joint Petition and Joint Matrix) Obviously, it will be more efficient to decide these issues once, as opposed to four times Of the remaining 10 issues, there are 4 that are common to multiple parties and 6 that are common only to single CLEC and BellSouth [3] What distinguishes these 10 issues from the other 97 is that one or more of the Joint Petitioners opted not to arbitrate these 10 issues. Nevertheless, where more than one CLEC is arbitrating the issue (whether it be two or three CLECs), those CLECs have jointly adopted a position statement

7. BellSouth's primary concern appears to be that Joint Petitioners have not promised that all of the efficiencies of one proceeding (instead of four) will be delivered with respect to the filing of testimony by Joint Petitioners[4] and the cross-examination of BellSouth's witnesses by Joint Petitioners. BellSouth's concern is misplaced. First, Joint Petitioners easily can agree that they will

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2 In their Joint Petition, Joint Petitioners did not imply that BellSouth had either agreed to a Joint Petition of waived its right to object. Thus, BellSouth's assertion in this regard, *see* Motion, ¶ 4, appears to be a case of BellSouth creating a concern where none exists

3 Although there can be no guaranty, Joint Petitioners believe that, given the current course of ongoing discussions with BellSouth, it is likely that as many as 8 of these 10 issues will settle before hearing

4 While, by its very nature, a proceeding involving four petitioners almost certainly will be more efficient than four separate ones, by virtue of its inclusion of multiple independent entities, a proceeding involving four petitioners almost certainly will be more complex than a proceeding involving only one. However, because this proceeding is likely to be modestly more complicated than a proceeding involving a single petitioner and a single respondent does not suggest that it would be prudent to replace it with four separate proceedings that will require duplication of efforts in all respects

have only one attorney representing Joint Petitioners cross-examine a BellSouth witness on any given issue, or sub-issue, as the case may be. *See* Motion, ¶¶ 11-12

8 With respect to testimony filed on behalf of each of the Joint Petitioners, BellSouth appears to presume that the Joint Petitioners should become one company and should file as a single entity. Motion, ¶ 13. Although two of the four CLECs – NewSouth and NuVox – recently announced an agreement to merge, it is remains likely that there will be at least three independent CLECs as petitioners at the time this proceeding reaches hearing. BellSouth's suggestion that one CLEC party should have filed and the others should simply wait to adopt the agreement that results from this arbitration is again based solely on what BellSouth views is proper without any legal foundation or other support. Motion, ¶ 13 Moreover, it is disingenuous. Unless each of the Joint Petitioners filed for arbitration, each faced the prospect of being ejected from its current interconnection agreements into the standard BellSouth interconnection agreement As BellSouth is well aware, each of the Joint Petitioners have roughly 100 points of disagreement with that document, not to mention the dozens (if not hundreds) of issues raised with respect to the BellSouth standard document that were resolved through active negotiations In addition, BellSouth has been and remains well aware that each of the Joint Petitioners will have separate and different (there are four versions of Attachment 3) interconnection agreement at the far end of this proceeding Thus, the TRA must rebuff BellSouth's attempt to forge a single entity where there are four, each with its own legal rights and obligations

9. All this is not to say that the Joint Petitioners are not amenable to procedures that will streamline this proceeding As stated in the Joint Petition, "[n]o CLEC party takes a position adverse to the position taken by the other CLEC." As indicated on the Joint Issues Matrix, Joint Petitioners have offered a single "CLEC Position" for each and every issue Joint Petitioners also stated in the Joint Petition that they intended to use, to the fullest extent possible, a "team" witness approach In subsequent discussions with BellSouth on this issue (largely between local representatives of the parties in North Carolina, with indirect participation by regional representatives for the Joint

Petitioners and BellSouth), Joint Petitioners fleshed out their "team" proposal which would entail the use of panels containing witnesses from each CLEC that joined in raising an issue being open to cross-examination by BellSouth (BellSouth could choose whether to address the panel or individual witnesses) on an issue-by-issue basis.

10. BellSouth, however, expressed a preference against multi-party panels and in favor of crossing CLEC witnesses, one CLEC at a time That alternative approach would be acceptable to CLECs. In that approach, the use of panels would be limited to instances where a CLEC had multiple witnesses to cover the various subparts or technical and policy related concerns raised with respect to an issue That approach, however, did not win the approval of BellSouth and so Joint Petitioners continue their efforts to arrive at an agreed-upon process with BellSouth

11. To address BellSouth's concerns regarding having to read four separate sets of substantially similar, harmonious, complementary and often redundant testimony, Joint Petitioners are willing to file consolidated and integrated Joint Testimony encompassing all testimony on all issues Such Joint Testimony would list all CLEC witnesses on the cover (likely 2-3 per CLEC) and inside would set out by company which witnesses were sponsoring what Some answers would be sponsored by a witness from all companies, some by fewer than all. The Joint Testimony at its beginning would include a section introducing by company each witness, with appropriate biographical information and qualifications, and a paragraph listing the answers he or she sponsors. To facilitate such identification, answers to questions would be numbered To make it easy for the TRA, staff and all parties to follow, CLECs would include at the end of each numbered answer an indication of which company witnesses are sponsoring the answer (e.g., [Sponsored by M Johnson (KMC), J. Jennings (NewSouth), H Russell (NuVox), J Falvey (Xspedius)]) This proposal will alleviate the need for paper shuffling and comparison of four sets of entirely separate testimony

13 Finally, Joint Petitioners note that BellSouth now appears to be amenable, or at least expresses no opposition, to a waiver of the 9 month statutory deadline for deciding this proceeding. In prior discussions between the parties, BellSouth refused to agree to a proposed regional schedule

that would have required such a waiver Joint Petitioners support a waiver of the 9 month statutory deadline in this case, as neither the TRA nor the parties have much to benefit from deciding the numerous and complex issues raised in a rushed manner.

WHEREFORE, the Joint Petitioners respectfully request that the TRA dismiss or deny BellSouth's Motion to Sever or to Impose Procedural Restrictions, and grant any other relief as the TRA may deem just and proper.

Respectfully submitted,

H LaDon Baltimore
FARRAR & BATES, L L.P
211 Seventh Avenue North
Suite 420
Nashville, TN 37219
Tel. 615-254-3060
Fax 615-254-9835
E-mail: don baltimore@farrar-bates com

John J Heitmann
Stephanie A Joyce
Heather T Hendrickson
KELLEY DRYE & WARREN LLP
1200 19th, N.W., Suite 500
Washington, D C. 20036
Tel (202) 955-9600
Fax (202) 955-9792
E-mail. jheitmann@kelleydrye com

Counsel for the Joint Petitioners

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via U S Mail, first class postage prepaid, to the following, this 2nd day of March, 2004.

Guy Hicks, Esq
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201

H LaDon Baltimore