

J Russell Farrar
William N Bates
Kristin Ellis Berexa
Teresa Reall Ricks
Molly R Cripps
Mary Byrd Ferrara*
Robyn Beale Williams
Jennifer Orr Locklin
Keith F Blue
Christopher J Larkin**

*Also licensed in KY
**Also licensed in AL

LAW OFFICES
FARRAR & BATES, L.L.P.

211 Seventh Avenue North
Suite 420
Nashville, Tennessee 37219

Telephone 615-254-3060
Facsimile 615-254-9835
E-Mail fblaw@farrar-bates.com

Of Counsel

H LaDon Baltimore

May 20, 2005

Honorable Pat Miller, Chairman
Tennessee Regulatory Authority
ATTN: Sharla Dillon, Dockets
460 James Robertson Parkway
Nashville, TN 37243-5015

RE. Joint Petition for Arbitration of an Interconnection Agreement with BellSouth
Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act
of 1934, as Amended; Tennessee Regulatory Authority Docket No 04-00046

Dear Chairman Miller:

Enclosed for filing in the above-referenced matter please find the original and thirteen (13) copies of Joint Petitioners' Opposition to BellSouth's Request to Remove Certain Issues from the Joint Petitioners' Section 252 Arbitration Proceeding.

Please date stamp the enclosed file copy of this letter and this filing and return via the courier making this filing.

Thank you for your assistance. If you have questions, please do not hesitate to contact me.

Sincerely,



H. LaDon Baltimore

LDB/dcg
Enclosures
cc. Guy Hicks, Esq.

**BEFORE THE
TENNESSEE REGULATORY AUTHORITY**

| | | |
|--------------------------------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| Joint Petition for Arbitration of NewSouth |) | Docket No. 04-00046 |
| Communications Corp., <i>et al.</i> with |) | |
| BellSouth Telecommunications, Inc. |) | |

**JOINT PETITIONERS' OPPOSITION TO BELL SOUTH'S REQUEST TO REMOVE
CERTAIN ISSUES FROM THE JOINT PETITIONERS'
SECTION 252 ARBITRATION PROCEEDING**

NewSouth Communications Corp. ("NewSouth"), NuVox Communications, Inc ("NuVox"), KMC Telecom V, Inc. and KMC Telecom III, LLC (together, "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiaries named in this proceeding ("Xspedius") (collectively, the "Joint Petitioners"), by and through their undersigned counsel, hereby oppose BellSouth's post-hearing request to move certain issues from this arbitration proceeding. At its May 11, 2005 Panel Conference, the Panel in this Docket, consisting of Chairman Miller and Directors Jones and Tate, voted to have the Joint Petitioners respond to BellSouth's request by May 20, 2005.¹ Specifically, BellSouth seeks to move Issues 26, 36, 37,

¹ Since Joint Petitioners have been provided with the opportunity to respond to portions of BellSouth's post-hearing brief in this regard, Joint Petitioners note that this response should not be considered a comprehensive response to BellSouth's brief. If afforded such an opportunity, Joint Petitioners would catalogue a series of contentions that they believe accurately reflect the facts, the law, their position and, at times, even BellSouth's language or position (*e.g.*, the non-existent "FCC standard" BellSouth refers to at p 14 and elsewhere; the "financial windfall to the Joint Petitioners that greatly exceeds any harm actually experienced" (at p 15) -- nowhere do Joint Petitioners propose to collect for more than the amount of damages caused by *BellSouth's negligence* -- and the cap proposed on that could easily result in a financial windfall to BellSouth if its negligence causes damages in amounts greater than the cap, the false accusation of inaccurate and untruthful discovery responses in note 17 that was then compounded by an intentional omission (Joint Petitioners refused to name with specificity particular customer contracts and BellSouth never pursued a motion to compel (likely because it would not have prevailed), Joint Petitioners response clearly indicates that the Joint Petitioners were aware of cases in which they indeed conceded in customer contracts limitation of liability language less restrictive than their tariffed language and that they expected

38 and 51 ("Original Arbitration Issues") to the Generic Proceeding² or, in the alternative, defer resolution of these issues until completion of the Generic Proceeding.³ As the Tennessee Regulatory Authority ("Authority") is aware, the Joint Petitioners joined BellSouth in a Motion to move Issue 23 to the Generic Proceeding, as this particular issue is impacted by the FCC's post-hearing release of the *Triennial Review Remand Order* and thus, should be addressed in the Authority's Generic Proceeding after the Parties have determined the *Triennial Review Remand Order's* impact on their positions (if any) and have attempted to negotiate resolution of the issue.⁴ The Joint Petitioners, however, object to BellSouth's attempt to move the Original Arbitration Issues into the Generic Proceeding, as they are based on the *Triennial Review Order*, which has been the law of the land **since October 2003**. In support of this objection, Joint Petitioners provide the following:

As a general matter, under section 252, Joint Petitioners have the right to have the Original Arbitration Issues resolved in their section 252 arbitration being conducted before the Authority. Section 252(b)(1) provides Joint Petitioners the right to "petition a State commission to arbitrate *any* open issues." 47 U.S.C. § 252(b)(1) (emphasis added). The Generic Proceeding is not a section 252 arbitration and, even if it were, it is certainly not the one filed by Joint

(that they may continue to do so in the future), the incorrect characterization of the North Carolina and Mississippi decisions at p. 26 (neither made the finding BellSouth credits them with having made), the inaccurate characterization of BellSouth's own indemnification provision as being narrow on p. 27 (far from being "quite narrow", BellSouth seeks indemnification to the extent that Joint Petitioners *use or rely on* services provided by BellSouth under the Agreement -- it couldn't be any broader), the inaccurate representation of what NuVox argued on p. 45 (BellSouth's claim is the one that is unsupported), the attempt at p. 49 to confuse and conflate the TRO's remarks about "sampling" with the scope of an audit (which is dictated necessarily by the extent to which "cause" is shown)

² Petition to Establish Generic Docket, Docket No. 04-00381

³ BellSouth has not filed a motion requesting removal of the Original Arbitration Issues to the Generic Proceeding, but rather has set forth its position in its April 15, 2005 Post-Hearing Brief, pgs. 35-36, 40, 48

⁴ See *Joint Motion to Move Issues to Generic Proceeding*, Docket No. 04-00046 (filed Apr. 14, 2005). The Panel granted this motion at its May 11, 2005 conference.

Petitioners. Accordingly, the Joint Petitioners are unwilling to waive this right or any other established in section 252.

Moreover, each of the Original Arbitration Issues is part of the original set of issues on which arbitration was sought in February 2004. There is no agreement between the parties to move these issues into the Generic Proceeding, as was the case with Issue 23. The law has been long settled on these particular issues. Although BellSouth argues in its Post-Hearing Brief that that it would be a waste of time and resources to address these issues in our section 252 arbitration,⁵ the time and resources have already been spent in drafting written testimony, engaging in discovery, participating in the Authority's hearing and filing post-hearing briefs. These issues are ready for resolution and we respectfully request that the Authority resolve them without delay.

This is not the first time BellSouth has attempted to remove issues from a section 252 arbitration proceeding that it did not want to address, and the Authority has properly rejected such requests. In the recent ITC^DeltaCom/BellSouth arbitration, BellSouth attempted to remove arbitration issues it claimed were better addressed in other forums (*i.e.*, its 271 proceeding and its Change Control Process).⁶ The Authority denied BellSouth's motion finding that these issues were properly included in section 252 arbitrations.⁷ Additionally, BellSouth has

⁵ BellSouth Post-Hearing Brief at 36

⁶ See Petition for Arbitration of ITC^DeltaCom Communications, Inc. With BellSouth Telecommunications, Inc., Initial Order Regarding BellSouth's Motion to Remove Issues and Other Pre-Hearing Procedural Issues, Docket No. 03-00119 (Aug. 20, 2003)

⁷ *Id.* The Authority similarly rebuffed efforts by BellSouth to remove issues from an earlier section 252 arbitration involving ICG. See Petition by ICG Telecom Group, Inc., Docket 99-00377, Final Arbitration Order at 9 (Aug. 4, 2000)

tried to remove these same issues from the Parties' current arbitration in Florida and such effort has been similarly rejected by the Florida Public Service Commission.⁸

BellSouth argues that the Original Arbitration Issues should be removed from this proceeding because they are identical to issues identified in the Generic Proceeding for resolution. While such a claim is irrelevant, as the Joint Petitioners have a right to have these issues decided by the Authority in our 252 arbitration whether they are identified in the Generic Proceeding or not, BellSouth's claim is, for the majority of issues identified, simply not true. There are no corresponding issues identified to date for the Line Conditioning issues raised by Joint Petitioners in issues 36, 37 and 38. While broad issues that correspond to Issues 26 (commingling) and 51 (EEL audits) have been identified in the preliminary issues list developed for the Generic Proceeding, it is not at all clear that the language that will be reviewed for these issues will mirror that proposed by the Joint Petitioners. As the Authority is aware, Joint Petitioners are facilities-based carriers. Thus, commingling and EEL-related issues are critical to their ability to compete effectively through the use of UNEs, combinations and section 271 loop and transport offerings, in association with their own fiber, switches and collocated facilities in Tennessee.

BellSouth requests a transfer or, alternatively, to hold the Original Arbitration Issues in abeyance, so that the Authority can avoid the risk of conflicting results.⁹ This argument, which is relevant to only Issues 26 and 51, as discussed above, is a red herring. There is little risk and no reason to assume that the two panels (on which both Directors Tate and Jones

⁸ See Order Granting in Part and Denying in Part BellSouth Telecommunications, Inc.'s Motion to Move Issues Into Docket No. 041269-TP, Docket No. 04013-TP (Apr. 26, 2005). As indicated in Joint Petitioners' Opposition to BellSouth's request in Florida, the Florida Public Service Commission, like the Authority, has established precedent wherein it has refused requests to remove issues involuntarily from section 252 arbitrations.

⁹ BellSouth Post-Hearing Brief at 36.

are members) would reach conflicting results. In addition, BellSouth's desire to have the Authority avoid speculative risks cannot trump the Joint Petitioners' rights under section 252. If, however, the Authority were to reach a different result in the Generic Proceeding, the Authority would merely have to set forth sufficient legal and/or factual basis for doing so.

BellSouth's argument to transfer or hold these issues in abeyance because of the impact the Authority's decision may have on other Tennessee carriers is also a red herring. It is inevitable that section 252 arbitrations include issues that may indirectly impact other carriers.¹⁰ This has been the case since the passage of the Act. For example, BellSouth argued that the Joint Petitioners should lose Issue 46 (BellSouth's DSL-tying) because it essentially had been decided in BellSouth's favor in the ITC/DeltaCom/BellSouth arbitration (for that reason and others, the Joint Petitioners settled it). Furthermore, the Joint Petitioners argued that Issue 97 (payment due date) should be decided in Joint Petitioner's favor, because BellSouth's position had been rejected by the Authority in the ITC/DeltaCom/BellSouth arbitration. These examples demonstrate that BellSouth's concerns are without merit and are simply part of the current telecommunications regulatory environment.

Finally, BellSouth is wrong that the Joint Petitioners would not be prejudiced by transferring these issues or delaying their resolution. The Joint Petitioners want this arbitration concluded as fast as possible and their agreement to waive the statutory decision timeframe is not intended to be construed as indication that they did not want the arbitration decided in a reasonably timely manner. Issues 26 and 51 encompass commingling and EELs, which as noted above, are critical tools for carriers such as Joint Petitioners. This would be especially true, in

¹⁰ Section 252 arbitrations do not typically result in decisions of general applicability (a fact that BellSouth repeatedly has used to its advantage, by forcing competitive carriers to arbitrate the same issues over and over again). However, they do establish precedent and can form the basis for subsequent orders of general applicability by a state commission.

the event that the Authority fails in any respect to enforce the voluntarily negotiated and Authority-approved Abeyance Agreement.¹¹ Even in light of the Authority's May 16, 2005 decision regarding "new adds" as a result of the *Triennial Review Remand Order* (until an order is released, it will not be clear precisely what will be impacted by that order other than UNE-P (and it is unclear as to how UNE-P will be impacted)), Joint Petitioners expect that, like the Alabama Public Service Commission, the Authority will enforce the commercially and voluntarily negotiated Abeyance Agreement and find that the *Triennial Review Remand Order* will have no impact as between Joint Petitioners and BellSouth until they move into their new Agreement.¹² To the extent that the Authority is to give the *Triennial Review Remand Order*'s transition plan (including the "no new adds" aspect of it) retroactive effect, the Authority should even-handedly find that commingling, conversions, EEL eligibility and audit language in the new Agreement should be effective as of October 2, 2003 -- the date upon which commingling restrictions became prohibited by federal law, conversions rights were clarified, and EEL eligibility criteria were replaced and audit criteria clarified. The law impacting the Original

¹¹ See Joint Motion to Hold Proceeding in Abeyance, Docket No. 04-00046 (July 15, 2004), Order Granting Joint Motion to Hold Proceeding in Abeyance and Establishing Revised Procedural Schedule, Docket No. 04-00046 (July 16, 2004), *see also* Motion for Emergency Relief, Docket No. 04-00381 (Feb. 25, 2004)

¹² On May 3, 2005, the Alabama PSC, by a 3-0 vote, adopted the following recommendation


Based on numerous state commission decisions and three federal district court decisions in the BellSouth region (Mississippi, Kentucky and Georgia), it is recommended that the Commission find as follows (1) that BellSouth is not, and was not, required to process any new orders for UNEs delisted by the TRRO and, in particular, UNE-P switching, as of March 11, 2005 except as to the Joint Petitioners NuVox, Xspedius and KMC. The Joint Petitioners have an Abeyance Agreement with BellSouth which is not superseded by the FCC's TRRO. The Joint Petitioners and BellSouth should accordingly be ordered to implement the provisions of the TRRO as part of their ongoing arbitration in Docket 29242 unless a mutual agreement to the contrary is reached.

(emphasis added)(final APSC order not yet issued).

Arbitration Issues has been clear since October 2003 and thus, the Original Arbitration Issues should be decided by the Authority in light of the full record developed in this proceeding. Indeed, in light of the importance of these issues, Joint Petitioners respectfully request that the Authority decide these issues in Joint Petitioners' favor at its next Directors' Conference in June.

WHEREFORE, for the foregoing reasons, Joint Petitioners request that the Authority reject BellSouth's effort to move the Original Arbitration Issues into the Generic Proceeding and find that these issues should be decided in the Joint Petitioners' favor without abeyance or delay based on the full record developed in this proceeding.

Respectfully submitted this 20th day of May, 2005.


H. LaDon Baltimore FARRAR & BATES, LLP
211 Seventh Avenue North
Suite 420
Nashville, TN 37219
(615) 254-3060 (phone)
(615) 254-9835 (facsimile)

John J. Heitmann
Heather T. Hendrickson
KELLEY DRYE & WARREN LLP
1200 19TH Street, N.W.
Suite 500
Washington, D C 20036
(202) 955-9600 (phone)
(202) 955-9792 (facsimile)

Counsel to Joint Petitioners

May 20, 2005

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, facsimile transmission, or electronic transmission to the following, this the 20th day of May, 2005

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

H. LaDon Baltimore (Gymbarna Permedon)
H. LaDon Baltimore