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Of Counsel
H. LaDon Baltimore

December 13, 2005

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

Via Hand Delivery

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 Jones:

On behalf of my clients, NuVox Communications, Inc. and Xspedius Communications, Inc,. ("Joint Petitioners") in the above-referenced docket, enclosed for filing are the original and 13 copies each of a Petition to Enforce Abeyance Agreement and a Motion to Set Procedural Schedule.

The Joint Petitioners are requesting the Authority grant respondents 30 days to respond. Therefore, the pleading entitled Petition to Enforce Abeyance Agreement is presented as a petition to allow for such 30 days to respond. However, if the Authority decides to consider this filing a motion, Joint Petitioners request that respondents be allowed 30 days to respond, instead of 7.

These filings are in response to and in compliance with the Joint Petitioners' motion to dismiss filed in the U. S. District Court, Middle District of Tennessee, Nuvox Communications, Inc., et al. v. Tennessee Regulatory Authority, case number 3:05-cv-742.

Thank you for your attention to this matter.

Sincerely,

H. LaDon Baltimore
Counsel to NuVox Communications, Inc. and Xspedius Communications, Inc.

LDB/dcg
Enclosures

cc: Guy Hicks, Esq.
Stephanie Joyce, Esq.
Susan Berlin, Esq.
Jim Falvey, Esq.
Dale Grimes, Esq.

BEFORE THE TENNESSEE REGULATORY AUTHORITY

In re: Joint Petition for Arbitration of NewSouth Communications Corp., *et al.* with BellSouth Telecommunications, Inc.	Docket No. 04-00046

MOTION TO ESTABLISH PROCEDURAL SCHEDULE

NuVox Communications, Inc. ("NuVox") and Xspedius Communications, LLC for itself and on behalf of its operating subsidiaries ("Xspedius"), collectively the "Petitioners," hereby move the Tennessee Regulatory Authority ("TRA") to establish a procedural schedule for the briefing and consideration of their Petition to Enforce Abeyance Agreement filed herewith. This schedule, which Plaintiffs have presented to the federal district court for the Middle District of Tennessee in *NuVox Communications, Inc. v. TRA*, Case No. 3:05-cv-0742, will allow the TRA to review of the Petitioners' Abeyance Agreement with BellSouth as it has stated it wishes to do.

As the TRA is aware, Petitioners have appealed its twin decisions regarding BellSouth's No New Adds policy, which were released July 13 and July 25, 2005, in the Generic Docket No. 04-00381. The TRA moved to dismiss that case chiefly on the ground that it had not issued a final decision as to the effect of the Abeyance Agreement. It argued that "[t]he [Petitioners] have not asked for review by the Authority in Docket No. 04-00046 [the arbitration] or in Docket No. 04-00381 [the generic proceeding] seeking the Authority's position regarding the effect of the Orders regarding the Plaintiffs' alleged 'abeyance agreement.'" Memorandum of Law in Support of Defendants' Motion to Dismiss Complaint at 11 (Oct. 17, 2005).

Petitioners therefore moved, jointly with the TRA, to stay the federal case in order that the TRA could conduct its requested review. When that joint motion was denied, Petitioners moved, without any objection from BellSouth or the TRA, to dismiss the federal case without prejudice in order to afford Petitioners the opportunity to present the Abeyance Agreement again within the NuVox-Xspedius arbitration with BellSouth.

Petitioners' motion included a specific timeframe for the further proceeding: Petitioners will file a Petition to Enforce Abeyance Agreement on **December 13, 2005**; BellSouth had the right to oppose by **January 13, 2006**; and Petitioners could reply to any opposition by **January 27, 2006**. On the basis of that representation to the Court, Petitioners now respectfully request that the TRA adopt this schedule and commence its review of the Abeyance Agreement as presented by the Petition to Enforce filed herewith.

WHEREFORE, Petitioners move that the TRA adopt the procedural schedule described herein.

Respectfully submitted,

By: 

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Dated: December 13, 2005

Certificate of Service

The undersigned hereby certifies that on this the 13th day of December, 2005, a true and correct copy of the foregoing has been forwarded via U. S. Mail, overnight delivery, facsimile transmission, or electronic transmission to the following.

Guy Hicks
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guy.hicks@bellsouth.com

H. LaDon Baltimore

BEFORE THE TENNESSEE REGULATORY AUTHORITY

In re: Joint Petition for Arbitration of NewSouth Communications Corp., *et al.* with BellSouth Telecommunications, Inc.	Docket No. 04-00046

PETITION FOR ENFORCEMENT OF ABEYANCE AGREEMENT

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SUMMARY

BellSouth agreed with NuVox and Xspedius ("Petitioners") in June 2004 that post-*USTA II* changes in unbundling law would not be implemented in the existing Interconnection Agreements that these CLECs hold with BellSouth but instead would only be implemented in the parties' new Interconnection Agreements being arbitrated by the TRA in this docket. BellSouth now seeks to avoid fulfilling that agreement. The TRA has the authority and the duty to require BellSouth adhere to that agreement, and Petitioners respectfully request that the TRA do so.

The TRA is aware of the parties' Agreement, which Petitioners term the "Abeyance Agreement," because it was filed with the TRA on July 15, 2004, in the Petitioners' ongoing interconnection arbitration with BellSouth. The Abeyance Agreement, a written document countersigned by BellSouth and Petitioners, states an agreement that the arbitration should be stayed in order to allow the parties to negotiate as to how the FCC's new rules, which Chairman Powell had publicly stated would be released on an expedited basis, would be incorporated within the Interconnection Agreement being arbitrated. As part of that arrangement, the parties agreed that the existing Interconnection Agreements would not be amended to incorporate the FCC's rules issued on remand from the *USTA II* court. Those changes would only be incorporated in the new arbitrated Interconnection Agreements. The TRA granted the parties' motion for abeyance.

Yet days after the FCC released the *Triennial Review Remand Order*, BellSouth issued region-wide Carrier Notification Letters stating that that order would be effectuated immediately and unilaterally by BellSouth. This pronouncement by its terms applied to all

CLECs, including Petitioners who had already entered into the Abeyance Agreement with BellSouth. When several CLECs, including Petitioners, protested BellSouth's new policy, now termed "No New Adds," the TRA granted a 30-day negotiation period during which BellSouth was precluded from taking the action it had announced. The TRA terminated that relief weeks later, thus permitting BellSouth to put "No New Adds" into immediate effect and implementing the rule changes of the *TRRO*. The TRA did not opine as to the impact of that decision on the parties' Abeyance Agreement.

Petitioners have made clear their position that BellSouth may not lawfully implement the *TRRO* without negotiating with CLECs appropriate interconnection agreement language to implement those changes of law. The *TRRO* states in several places that such negotiations are required. But more particularly to Petitioners, the Abeyance Agreement is an added factor precluding unilateral implementation. The Abeyance Agreement constitutes a valid commercial agreement – a contract – that is enforceable under Tennessee law. Moreover, it is precisely the type of "commercial arrangement" that the FCC expressly stated is immune to the new "default" unbundling rules in the *TRRO*.

At bottom, the Abeyance Agreement is a waiver of both parties' right to implement the *TRRO* for the existing Interconnection Agreements. BellSouth should be required to comply with that agreement.

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PETITION FOR ENFORCEMENT OF ABEYANCE AGREEMENT

NuVox Communications, Inc. ("NuVox") and Xspedius Communications, LLC ("Xspedius"), itself and on behalf of its operating subsidiaries, collectively the "Petitioners," submit this Petition to Enforce Abeyance Agreement to the Tennessee Regulatory Authority ("TRA") to ensure that BellSouth adheres to the voluntary commercial agreement it forged with Petitioners whereby their existing Interconnection Agreements ("Agreements" or "ICAs") will remain unaffected by the recent changes in unbundling law. This Abeyance Agreement is a valid contract under Tennessee law and represents a valid waiver by BellSouth of its rights to amend Petitioners' existing ICAs. The TRA accordingly should require BellSouth, as it is authorized to do, to adhere fully to the terms of the Abeyance Agreement and continue to provide all unbundling secured by these ICAs at the rates, terms, and conditions specified therein.

BACKGROUND

The BellSouth Arbitration and Abeyance Agreement

NuVox and Xspedius are competitive local exchange carriers ("CLECs") certificated to provide local and long-distance service in Tennessee. They each have TRA-approved Agreements; the NuVox-BellSouth Agreement was effective June 30, 2000, and the Xspedius-BellSouth ICA was effective December 30, 2002. They each expired by their terms in June 2003. Both Agreements entitle Petitioners to several items and services, including the right to obtain unbundled network elements ("UNEs") at TRA-approved, cost-based Total Element Long Run Incremental Cost ("TELRIC") rates.

Negotiations to craft new Agreements began in January 2003, with NuVox and Xspedius participating jointly.[1] Because the parties were unable to resolve several items

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[1] KMC Telecom, Inc. had been a party to the negotiations and arbitrations but withdrew in July of this year.

necessary to the Agreements, they sought arbitration before every State Commission in the BellSouth region, including the TRA, in accordance Section 252 of the Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. § 252, on February 11, 2004. During the pendency of that arbitration, on March 10, 2004, the federal Court of Appeals for the D.C. Circuit issued its opinion in *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313 (2004), also known as "*USTA II*." That decision vacated many of the FCC's existing unbundling rules that had been promulgated in the *Triennial Review Order*[2] and that had formed the basis of the parties' interconnection negotiations and arbitration. Most importantly, the D.C. Circuit had vacated the FCC's decision to maintain uniformly high-capacity loops (DS1-level and higher) and dedicated transport as UNEs. 359 F.3d at 594.

Then-Chairman Michael Powell of the FCC responded to *USTA II* by issuing a statement that the FCC would "consider interim, transitional protections to bridge the gap that exists in the period preceding adoption of our final rules." Press Release, *FCC Chairman Michael K. Powell Announces Plans for Local Telephone Competition Rules* (June 14, 2004). The Chairman also stated that it would "promptly turn to writing a set of sound rules that ... comply with the court's mandate[.]" *Id.* It was thus clear as of June 14, 2004, that both interim and permanent unbundling rules would be forthcoming from the FCC.

The *vacatur* of the *TRO*, as well as Chairman Powell's statement, created great uncertainty in the legal regime underlying the parties' arbitration, prompting them to form an agreement at the end of June, 2004, to hold all arbitrations in abeyance for 90 days in order that the parties could attempt to conform certain parts of the ICAs being arbitrated to the new

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[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, Report and Order, Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003) ("*Triennial Review Order*" or "*TRO*").

unbundling rules. This agreement was filed through a Joint Motion to Hold Proceeding in Abeyance, signed by counsel for both Petitioners and BellSouth, on July 15, 2004 (**Attachment 1**). It states that "the Parties have agreed to [a] proposed 90-day abatement so that they can consider how the post-*USTA II* regulatory framework should be incorporated into the new agreements[.]" Abeyance Agreement at 2. With regard to the existing Agreements, the Abeyance Agreement explained that

> The Joint Petitioners and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements to address *USTA II* and its progeny. Accordingly, the Parties have agreed that **they will continue to operate under their current Interconnection Agreements** until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding.

Abeyance Agreement at 3 (emphasis added). In other words, the existing NuVox-BellSouth Agreement and Xspedius-BellSouth Agreement would not be amended, renegotiated, or nullified as a result of *USTA II* or any legal or regulatory change that followed in its wake.

Post-USTA II Regulatory Changes

The FCC released the *Interim Rules Order*[3] on August 20, 2004, with the stated purpose "to avoid disruption in the telecommunications industry" while the FCC crafted final unbundling rules. The *Interim Rules Order* set forth a tentative plan, for which the FCC sought comment, to transition of high-capacity loops and dedicated transport from UNEs to some other form of tariffed access service. In the meantime, the FCC ordered all ILECs to continue operating under their current ICAs with CLECs.

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[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket 04-313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd. 16783 (2004).

As the FCC had promised, "final rules" were issued later in the *Triennial Review Remand Order* on February 4, 2005.[4] These final rules adopted a variant of the UNE transition plan that the *Interim Rules Order* had proposed. The FCC made clear, however, that this final plan, particularly as it applied to high-capacity loops and dedicated transport, was not intended to supercede any change-of-law procedure already codified in an ICA, and that ILECs were required to negotiate the implementation of the *TRRO* with CLECs holding effective ICAs. It stated several times that

> [W]e find that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, including decisions concerning where to deploy, purchase, or lease facilities. Consequently, carriers have twelve months from the effective date of this Order **to modify their interconnection agreements, including completing any change of law processes.**

TRRO ¶ 143 (emphasis added) (regarding dedicated transport); *see also id.* ¶ 196 (regarding high-capacity loops). The FCC also made clear that the UNE transition plan "does not replace or supercede any commercial arrangement carriers have reached for the continued provision of" both transport and high-capacity loops. *Id.* ¶¶ 145, 196.

In addition, the FCC stated that "[w]e expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act." *Id.* ¶ 233. As the TRA is doubtless aware, Section 252 prescribes the process for negotiating and arbitrating Agreements. The FCC went on to caution that "the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action." *Id.*

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[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, CC Docket No. 01-338, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) ("*Triennial Review Order*" or "*TRRO*").

The *TRRO* was released February 4, 2005, and was effective by its terms on March 11, 2005.

BellSouth's No New Adds Policy

On February 11, 2005, only one week after the *TRRO* was released, BellSouth posted a Carrier Notification Letter announcing to all CLECs in its region, including those in Tennessee, that it would no longer provide several UNEs as of March 11, 2005, among them dedicated transport and high-capacity loops in certain areas. **Attachment 2.** Other Carrier Notification Letters followed on February 25 and March 10, 2005, that clarified and expanded the list of elements that would no longer be provided as UNEs. **Attachment 3.** The letters established a BellSouth policy now termed "No New Adds." As CLECs, NuVox and Xspedius are among the entities that will be detrimentally affected by this policy.

NuVox and Xspedius accordingly filed a Motion for Emergency Relief on February 25, 2005, in the docket established by the TRA for implementing the *TRRO*.[5] MCI and Cinergy separately filed similar motions on March 2, 2005, although neither contained an alternative claim for relief based on an abeyance agreement or other similar agreement with BellSouth. BellSouth opposed Petitioners' motion on March 7, and opposed the MCI and Cinergy motions on March 8, 2005. Oral argument was held on March 14, and the TRA voted the matters on a consolidated basis on April 11, 2005. By a 3 to 0 vote, the TRA panel of Directors Tate, Kyle and Jones denied all of the motions, and instead established the "alternative relief" of requiring BellSouth to negotiate with all requesting CLECs for a period of 30 days in order to implement the changes of law in the *TRRO*. Docket 04-00381, Transcript of

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[5] Docket No. 04-00381, Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law. KMC Telecom also joined the petition but later withdrew from this docket and the separate arbitration with BellSouth.

Proceedings at 22:4 – 23:2 (Apr. 11, 2005) ("Transcript"). The resulting order issued July 13, 2005.

Counsel for Petitioners asked the panel if they intended that the "alternative relief" apply even to NuVox and Xspedius, or whether the Abeyance Agreement rendered them differently situated from other CLECs in Tennessee. Transcript at 21:13-22. After a brief recess, the panel stated that they had considered the Abeyance Agreement and nonetheless determined that the "alternative relief" of 30-day negotiations applied to all CLECs. *Id.* at 22:22 – 23:2. On May 16, 2005, the same TRA panel terminated the relief and held that BellSouth no longer had any obligation to negotiate with CLECs in order to effectuate the *TRRO*. In other words, the TRA upheld BellSouth's No New Adds policy. The order reflecting this subsequent decision was released July 25, 2005.

Petitioners' Appeal of the TRA Decisions

On September 23, 2005, NuVox and Xspedius filed timely appeals of the TRA's two decisions to the Court of Appeals for the Middle Section of Tennessee and the federal district court for the Middle District of Tennessee. The action at the Court of Appeals was stayed without objection from the TRA. In the federal court, BellSouth successfully intervened and filed an answer. The TRA moved to dismiss, principally on the ground that the TRA's decisions were not final as to the Abeyance Agreement. It argued that "[t]he [Petitioners] have not asked for review by the Authority in Docket No. 04-00046 [the arbitration] or in Docket No. 04-00381 [the generic proceeding] seeking the Authority's position regarding the effect of the Orders regarding the Plaintiffs' alleged 'abeyance agreement.'" Memorandum of Law in Support of Defendants' Motion to Dismiss Complaint at 11 (Oct. 17, 2005).

Petitioners and the TRA jointly filed on October 20, 2005, to stay the federal case in order to afford the TRA the requested opportunity to review the Abeyance Agreement. That motion was denied on October 25, 2005. Petitioners then filed a Motion to Dismiss Without Prejudice, which neither the TRA nor BellSouth opposed. In that motion, Petitioners proposed a schedule for returning to the TRA: that Petitioners would file a Petition to Enforce the Abeyance Agreement on December 13, 2005; BellSouth would have the right to oppose the Petition on or before January 13, 2006; and Petitioners could reply to any opposition on or before January 27, 2005.

Petitioners accordingly file this Petition to Enforce Abeyance Agreement, and the companion Motion to Establish Procedural Schedule, for the TRA's review.

ARGUMENT

I. THE ABEYANCE AGREEMENT IS AN ENFORCEABLE COMMERCIAL CONTRACT

The Abeyance Agreement is an enforceable contract. It is a memorialized, countersigned indication the Petitioners and BellSouth agreed on a course of dealing that will last until the TRA approves the ICAs presently being arbitrated. By any standard, the Abeyance Agreement is a lawful contract. Moreover, it is a "commercial agreement" that the FCC expressly preserved in the *TRRO*, stating that the transition plan adopted in the *TRRO* was not intended to "supercede" commercial arrangements that carriers had already or would later establish for the provision of UNEs and services. Having all the earmarks of a contract under Tennessee law, and typifying exactly the agreements that the FCC recognized and encouraged in the *TRRO*, the Abeyance Agreement should be enforced.

A. The Abeyance Agreement Is A Valid Contract Under Tennessee Law

Section 47-2-106 of the Tennessee Code defines "contract" as instruments related to "the present or future sale of goods." Tenn. Code § 42-7-106(1). "Goods" refers to "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities ... and things in action." *Id.* § 47-2-105(1). Any such instrument regarding the sale of goods totaling $500 or more must be in writing under the Statute of Frauds. 47-2-201(1). The Abeyance Agreement satisfies each of these statutory requirements.

Plainly the Abeyance Agreement involves the sale of goods, because it states expressly that the parties "will continue operating under their current Interconnection Agreements" governing the terms and conditions whereby NuVox and Xspedius obtain network elements from BellSouth. Attachment 1 at 2. Not only is that agreement expressly stated, but in fact is also evidenced in BellSouth's conduct, whereby from the date the Abeyance Agreement was filed, July 20, 2004, until the date of the first Carrier Notification on February 11, 2005, BellSouth continued to perform Petitioners' existing ICAs by their terms. BellSouth has consistently acted in a manner consistent with the words of the Abeyance Agreement, evidencing its belief that the Abeyance Agreement is a binding contract. Finally, the Abeyance Agreement was reduced to writing and thus comports with Section 47-2-201 of the Tennessee code.

The Abeyance Agreement is not, contrary to what BellSouth is likely to argue, simply a pleading filed with the TRA. Though couched in terms of a request to stay the parties' ongoing interconnection arbitration, that document includes plain expressions of a meeting of the minds regarding subject matter outside the scope of a simple procedural request. The "Parties agreed" to perform the existing ICAs and they "agreed" that new issues of law arising in the "post-*USTA II*" environment may be brought to the TRA. These agreements demonstrate the

parties' intent that the existing ICA UNE provisions will remain intact, even in the face of more FCC "post-*USTA II*" rule changes. That intent, reduced to writing in satisfaction of applicable Tennessee commercial law, must be honored by BellSouth.

B. The Abeyance Agreement Evidences Valid Waivers by Both BellSouth and Petitioners of the Right to Implement the *TRRO* Within the Existing ICAs

It is plain from the face of the Abeyance Agreement that the parties were aware of additional rule changes to come – which became the *Interim Rules Order* and the *TRRO* – after the agreement was filed. It is also plain from the Abeyance Agreement that BellSouth waived its rights to implement or otherwise enforce those FCC orders while the parties continue to operate under the current ICAs. This waiver was knowing, lawful, and should be applied in this case.

Parties are able legally to waive rights otherwise afforded to them, even prospectively, including rights secured by federal statute. For example, the Fifth Circuit Court of Appeals has held that an employee may by contract waive his rights to relief under the Age Discrimination Employment Act. *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015 (5th Cir. 1990).

Other examples of valid prospective waivers include a waiver, by virtue of an arbitration clause, of the right to take a dispute to state or federal court. *American Heritage Life Ins. Co. v. Orr*, 2002 WL 1306188 (5th Cir. June 14, 2000); *McKenzie Check Advance of Miss. v. Hardy*, 866 So.2d 446, 455 (Miss. 2004); *Feld v. Horch-Oppenheimer*, 80 N.Y.S. 2d 389, 327 (N.Y. 1948); *Pyburn v. Bill Heard Chevrolet*, 63 S.W. 3d 351, 361 (Tenn. Ct. App. 2001). Parties may also waive their right to additional forms of remuneration that become available after formation of a contract, for example, the right to collect royalties. *Bass Development Corp. v. Miss. State Tax Comm'n*, 271 So.2d 432, 433 (Miss. 1973).

The United States Supreme Court has held that such waivers are valid only if made knowingly and voluntarily. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). Further, the Court has held that parties must be of equal bargaining power in order that neither party may claim duress. *Id.*; *see also Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972). In this matter, BellSouth made clear its awareness that future FCC decisions implementing *USTA II* – that would likely reduce BellSouth's UNE obligation – were forthcoming.

The Abeyance Agreement states that "Joint Petitioners and BellSouth **have agreed to avoid** a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements **to address *USTA II* and its progeny**." Attachment 1 at 2 (emphasis added). This statement demonstrates that BellSouth was aware that *USTA II* would spawn "progeny."[6] The *TRRO*, which came after *USTA II* and was devoted entirely to the implementation of *USTA II* is, under any reasonable understanding, included in the "progeny" that the parties agreed would be implemented only in the new Agreements.

The Abeyance Agreement also states that "no new issues may be raised in this arbitration proceeding other than those that result from the Parties' negotiations regarding the post-*USTA II* regulatory framework." *Id.* This statement shows that BellSouth agreed to adjudicate the result of *USTA II* only in the arbitration of the new Agreements, but not as to the existing Agreements. In addition, the reference to the "post-*USTA II* regulatory framework" indicates that all new law and regulation, whether from a court or the FCC, implementing that decision would be waived for the existing decisions. These statements, appearing in a

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[6] "Progeny" is defined as "a line of opinions succeeding a leading case." Black's Law Dictionary at 1227 (7th ed. 1999). In addition, Webster's defines "progeny" as "descendants, children; offspring of animals or plants; outcome, product." Merriam Webster's Collegiate Dictionary at 931 (10th ed. 1996).

countersigned documents, plainly evidence BellSouth's knowledge of the agreement it was making.

It is also irrefutable that BellSouth was aware that the FCC would release new rules to implement *USTA II*. On June 14, 2004, then-Chairman Powell released a statement that the FCC would "consider interim, transitional protections to bridge the gap that exists in the period preceding adoption of our final rules." June 14 Press Release. The Chairman also stated that the FCC would "promptly turn to writing a set of sound rules that ... comply with the court's mandate[.]" *Id.* This release came out two weeks before the parties agreed to put all nine arbitrations on hold, and a full month before the Abeyance Agreement was filed. BellSouth was actually aware of the Chairman's statements, and thus had full knowledge that it would be waiving its right to implement the forthcoming interim rules and final rules in the existing ICAs.

It also cannot be said that BellSouth held inadequate bargaining power in forming the Abeyance Agreement. Petitioners and BellSouth were similarly situated at that time as litigators and negotiators, and both found mutual advantage in agreeing to stay the arbitration proceeding and focus all energy on negotiating and, if necessary, arbitrating the forthcoming (not the existing) Interconnection Agreements. There can be no reasonable claim of duress on BellSouth's part, as it was an equal party to the creation of the agreement.

Not only is the Abeyance Agreement a valid waiver by BellSouth, but it also includes waivers by NuVox and Xspedius. For example, these Petitioners cannot yet avail themselves of the new eligibility criteria for Enhanced Extended Links ("EELs") established in the *TRO*. Petitioners must continue to operate under the FCC's previous, less advantageous criteria that are memorialized in the existing ICAs. Thus, it is not only BellSouth that waived its

right to take advantage of certain FCC rule changes. The plainly bilateral operation of the Abeyance Agreement is even further evidence that it is valid and enforceable.

The Abeyance Agreement is the product of a fully informed and unforced decision by BellSouth not to enforce the *TRRO*, or any other FCC order following from *USTA II*, on the existing ICAs. BellSouth therefore should have been required to perform that Agreement; it should have been precluded from issuing an industry-wide Carrier Notification Letter announcing its intent to implement the *TRRO* without the input of any CLEC, including NuVox and Xspedius. *Overmyer*, 405 U.S. at 185-86. BellSouth is legally precluded by the Abeyance Agreement from attempting that action as to NuVox and Xspedius, and the TRA should hold that BellSouth must adhere to that agreement.

C. The FCC Acknowledged and Encouraged the Formation of "Commercial Arrangements" That Predated and Post-Dated the *TRRO*

In the *TRRO*, the FCC instructed ILECs to adhere to the terms of commercial contracts with CLECs. Indeed, the FCC has long been encouraging carriers to execute voluntary agreements, to be performed either in concert with or apart from ICAs, as a means of implementing the competitive goals of the 1996 Act. *E.g.*, *Interim Rules Order*, 19 FCC Rcd. at 16786 ¶ 7 (quoting March 31, 2004, press statement encouraging "good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements"). In fact, the FCC requested permission from the D.C. Circuit to delay its implementation of *USTA II* in order better to facilitate voluntary, commercial arrangements. *Id.* These arrangements, according to the FCC, would move unbundling transactions to a more arm's-length process.

In keeping with this advice, the FCC stated that the 12-month transition mechanism for de-listed UNEs "is simply a default process," and "does not replace or supercede

any commercial arrangements carriers have reached for the continued provision" of those UNEs. *TRRO* ¶ 145 (regarding dedicated transport); *see also id.* ¶ 198 (regarding high-capacity loops). The TRA in fact reiterated these statements, concluding that "the FCC supported negotiations between ILECs and CLECs." *July 13 Order* at 11. These caveats make clear that existing commercial arrangements regarding the continued provisioning of UNEs must persist even while other players in the industry, who do not have such arrangements, move to implement the *TRRO*'s rule changes. The FCC held apart those voluntary agreements, even those that ILECs signed ***prior to release of the TRRO***. The Abeyance Agreement is just such an agreement, and, according to the FCC, it must be honored.

As explained above, the Abeyance Agreement is a "commercial arrangement," a contract. Yet despite the plain and legally binding arrangement memorialized in the Abeyance Agreement, BellSouth quickly made an about-face and sought immediate implementation of the modified unbundling rules upon release of the *TRRO*. The TRA should order BellSouth to cease that action as regards NuVox and Xspedius. It should give effect to the parties' intentions as outlined in the Abeyance Agreement contract. *Pennzoil Company, et al. v. Federal Energy Regulatory Commission*, 645 F.2d 360, 388 (5th Cir. 1981). To do less would grossly infringe on Petitioners' right to expect the performance of a valid contract.

II. THE TRA HAS THE AUTHORITY TO ENFORCE THE ABEYANCE AGREEMENT

The TRA is endowed by both state and federal statutes with the power to require BellSouth to adhere to the bargain it struck in the Abeyance Agreement. The Abeyance Agreement, like the existing ICAs, describes BellSouth's duty to provide UNEs and other services in accordance with all unbundling law. Its subject matter is patently within the province of the TRA's jurisdiction, because it regards the provision of telecommunications in this State

and the local competition mandates that Congress entrusted both the FCC and State Commissions with enforcing. The Abeyance Agreement, a valid commercial contract having clear regulatory implications, falls within those provisions. Thus, just as the TRA has the authority to enforce Petitioners' existing ICAs with BellSouth, so does it have the authority to enforce the Abeyance Agreement.

A. The TRA Has the Authority to Require Telecommunications Carriers to Adhere to Tennessee Legal Requirements, Including Contracts

The TRA's statutory authority over BellSouth is expansive under both state and federal law. Section 65-4-104 of the Tennessee code states that "[t]he authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter [65]." Tenn. Code § 65-4-104. The code also states that "[i]t is the **duty** of the Tennessee regulatory authority to ensure that the provisions of [Chapter 65] and all laws of this state over which they have jurisdiction are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the state are collected." *Id.* § 65-1-113 (emphasis added).

In addition, the TRA has original jurisdiction to "investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of [Chapter 65]." *Id.* § 65-5-110. Indeed, the TRA enjoys a presumption of authority over those it regulates: Chapter 65 "shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority ... shall be resolved in favor of the existence of the power[.]" *Id.* § 65-4-106.

Further, the TRA is authorized by Section 252 of the 1996 Act to review ILECs' agreements. 47 U.S.C. § 252(e). BellSouth has argued, in the context of the parties' arbitration,

the TRA is authorized to review disputes occurring under ICAs and is in the "best position" to do so. Docket 04-00046, BellSouth Post-Hearing Brief at 29 (Apr. 15, 2005). BellSouth has in fact argued that "state commissions are in the best position to resolve disputes relating to the interpretation or enforcement of agreements that it approves pursuant to the Act." *Id.* It cannot reasonably argue the opposite now.

B. BellSouth's No New Adds Policy Impairs the Abeyance Agreement, As Well As Petitioners' Interconnection Agreements, and Cannot Invoke the Protections of *Sierra-Mobile* Under FCC Precedent

BellSouth seeks immediately to cease provisioning several network elements as UNEs, strips Petitioners of the rights secured to them in their existing ICAs. These ICAs are, however, immune to such agency actions as a result of the Abeyance Agreement. In addition, according to the FCC, which is chiefly responsible for setting the parameters of local competition under the 1996 Act, it does not have the authority under the *Sierra-Mobile* Doctrine[7] to abrogate ICAs, which would be the inevitable result of ignoring the Abeyance Agreement.

BellSouth's position remains that the *TRRO* is "self-effectuating" – it nullifies BellSouth's contractual and legal obligations to provide unbundled access to certain loops and transport and switching as of March 11, 2005. *See* Attachment 3. As such, BellSouth reasons, the Interconnection Agreement terms allowing Petitioners to order the loop, transport and switching UNEs are automatically supplanted as of March 11, 2005.

As the FCC has made clear, however, the legal doctrine that would empower the FCC (and subsequently the Florida Commission) to "self-effectuate" the findings of the *TRRO* into binding contracts ***cannot apply to Section 252 interconnection agreements***. This doctrine,

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[7] *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*"); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*"). These cases collectively are known as the "*Sierra-Mobile* Doctrine."

known as the *Sierra-Mobile* Doctrine, was established in a line of cases from the United States Supreme Court, and gives the FCC the authority to automatically amend the terms of a private contract between two carriers concerning communications services.[8] At first blush, it would appear as if the *Sierra-Mobile* Doctrine would support BellSouth's position with respect to the "self-effectuating" nature of the *TRRO*. Yet, as detailed below, the FCC has made clear that the *Sierra-Mobile* Doctrine does not apply to Interconnection Agreements. And it follows *a fortiori* that the *Sierra-Mobile* Doctrine would not permit any agency to abrogate the Abeyance Agreement.[9] As such, the TRA is bound to enforce the Abeyance Agreement.

1. Background of the *Sierra-Mobile* Doctrine.

The *Mobile* case involved an effort by United Gas Pipe Line Company (United) to avoid a fixed price contract simply by filing with the Federal Energy Regulatory Commission a proposed rate increase without the concurrence, and even over the objection, of the distributor customer, Mobile Gas Service Corporation (Mobile). Mobile entered into two complementary contracts: a ten-year contract to supply gas to the industrial customer at 12¢ per million cubic feet (mcf) and a contract of like length with United to acquire gas to serve that customer at 10.7¢ per mcf. Thereafter, United repudiated its commitment to Mobile by unilaterally increasing the price for this service to 14.5¢ per mcf. The Federal Power Commission accepted United's filing of the higher rate and allowed it to use the rate to bill Mobile. Thus, contrary to its contractual expectations, Mobile found itself in the unenviable position of purchasing gas for 14.5¢ per mcf and reselling it to its customer for 12¢ per mcf. The Supreme Court held that United could not

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[8] *See, e.g., Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987); *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd. 654 (1995). *See also Sierra*, 350 U.S. at 355.

[9] Indeed, the FCC expressly encourages and protects "commercial arrangements" executed both prior to and after the release of the *TRRO*, from unilateral amendment. *TRRO* ¶¶ 145, 198.

so impair Mobile's contractual rights, even though the Federal Power Commission had approved the rate change.

The Fifth Circuit has interpreted the Supreme Court's decision thus: "[t]he basic thrust of *Mobile* is that the [contract] did not displace but only superimposed federal regulation on private contractual arrangements." *Pennzoil*, 645 F.2d at 373.[10] The Fifth Circuit continued in its summary of *Mobile* by stating as follows:

> In light of this difference, the *Mobile* Court concluded that the [Contract] did not abrogate private rate contracts, but simply provided protection for the public interest through the statutory filing procedures and notice requirements and the Commission's power to review rate increases and modify them if found unlawful.
> *****
> If the seller lacks authority to make the filing, the Commission lacks jurisdiction to entertain the filing and to determine the lawfulness of the rate increase. ... **In *Mobile* the seller had a fixed price contract and therefore lacked authority to make a unilateral rate increase filing.**

Id. at 373-374 (citations omitted, emphasis added).

The Fifth Circuit summarized the Supreme Court's actions in the *Sierra* case as follows:

> In *Sierra*, provisions of the Federal Power Act virtually identical to the [contract] were involved. The seller had a fixed price contract, therefore, on the authority of *Mobile* the Court held that the seller lacked authority to make a unilateral rate increase filing. The Court further noted that the seller can by contract agree to a rate affording less than a fair return on net capital, and the Commission may not relieve it of its improvident bargain unless the rate is so low that **the public interest is adversely affected**. The purpose of the Commission's statutory power to change rates is the protection of the public interest, not the private interests of sellers.

Id. (emphasis added).

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[10] As the Corpus Juris Secundum notes, "[u]nder the 'Mobile-Sierra doctrine', where a public utility and its customer have contracted for a particular rate, and the federal regulatory commission accepts the contract for filing and then allows the rate to become effective, the utility cannot unilaterally (that is, without the customer's consent) file a new rate to supersede the agreed-upon rate." 73B C.J.S. Public Utilities § 36.

Further, in *Louisiana Power and Light v. FERC*, 587 F.2d 671 (5th Cir. 1979), the Fifth Circuit adopted the rationale of the D.C. Circuit Court of Appeals in applying the mandates of the *Sierra-Mobile* Doctrine. The *Louisiana Power* Court held that "[t]he contract between the parties governs the legality of the filing. **Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.**" *Id.* at 675 (emphasis added) (quoting *Richmond Power & Light v. F.P.C.*, 481 F.2d 490, 493 (5th Cir.), *cert. denied*, 414 U.S. 1068 (1973)).

Here, it cannot be disputed that BellSouth was under a clear and unambiguous contractual obligation to provision Xspedius and NuVox unbundled high-capacity loops, dedicated transport, and switching UNEs pursuant to the existing Interconnection Agreements. Thus, "the contract between the parties governs," *Louisiana Power*, 587 F.2d. at 675, and BellSouth is not permitted to shirk those duties. The TRA should therefore hold that BellSouth must continue to operate under Petitioners' existing Agreements, including those portions regarding UNEs that may have been affected by the *TRRO*.

2. The FCC has held that the *Sierra-Mobile* Doctrine does not apply in the context of a Section 252 Interconnection Agreement.

As detailed above, the Courts have a long history detailing the implications of a regulatory agency supplanting valid, binding contract terms with new and different rates and regulations. As also detailed above, the Eleventh Circuit has an unmistakable precedent dating back to its inclusion in the Fifth Circuit that the terms of an agreement remain fixed and that the "contract between the parties governs." *Louisiana Power*, 587 F.2d. at 675. In the context of the Abeyance Agreement between BellSouth and NuVox and Xspedius, the question facing the TRA is whether the actions of the FCC, in developing new unbundling rules in the *TRRO*, should automatically supplant the current terms of these contracts.

The FCC has been very clear that it has not supplanted any ICAs. In fact, the FCC has specifically rejected the application of the *Sierra-Mobile* Doctrine in the context of Interconnection Agreements. It has held that "**the Sierra-Mobile [Doctrine] does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act**, because the Act itself provides the standard of review of such agreements. See 47 U.S.C.A. § 252(e)(2)." *IDB Mobile Communications, Inc. v. COMSAT Corp.*, 16 FCC Rcd. at 11475 n.50 (May 24, 2001) (emphasis added). It is indisputable that the current interconnection agreements that NuVox and Xspedius seek to enforce are negotiated and approved by the TRA pursuant to Sections 251 and 252 1996 Act. It is also undisputable that the Abeyance Agreement regards BellSouth's obligations under Sections 251 and 252 to continue to provision network elements under those existing Agreements. As such, the FCC has held that the *Sierra-Mobile* Doctrine cannot supplant those terms. The TRA thus must also protect such agreements.

The claim that the new FCC federal unbundling rules are somehow automatically injected into and supplant the current terms of all agreements, both ICAs and commercial agreements, is patently inconsistent with the FCC's own precedent related to the *Sierra-Mobile* Doctrine. Accordingly, the *TRRO* cannot be "self-effectuating" as claimed. The proper course is to enter into change-of-law negotiations as the FCC directed in the *TRRO* (and as BellSouth agreed it would do in the Abeyance Agreement).

3. The preliminary findings of the Eleventh Circuit in the *BellSouth Georgia* case are not applicable in the context of the Abeyance Agreement.

Xspedius and NuVox anticipate that BellSouth and the Commission will rely on the preliminary findings of the Eleventh Circuit Court of Appeals in *BellSouth Telecommunications, Inc. v. MCI Access Transmissions Services, Inc. et al*, 425 F.3d 964 (11th Cir. 2005) ("*BellSouth Georgia Order*"). In that proceeding, the Georgia Public Service

Commission had entered an order finding that "BellSouth was required to continue serving the embedded base and accept new UNE-P orders so long as the change-of-law negotiating process was ongoing." *Id.* at 967. The Georgia Commission reasoned that the FCC, in paragraph 233 of the *TRRO*, required carriers to implement through negotiations all changes mandated by the *TRRO* and, therefore, "required BellSouth to negotiate with MCImetro and other CLECs regarding an amendment to their interconnection agreements." *Id.*

BellSouth sued the CLECs and the Georgia Commission in federal court and moved for a preliminary injunction. The district court granted BellSouth's Motion for Preliminary Injunction. The Court of Appeals upheld the preliminary injunction, and remanded back to the district court for deliberations on the underlying claims. The Court of Appeals ***did not make any permanent findings*** on the disputed issues. That Court did not issue a final order as to whether the FCC abrogated any ICA, or any commercial agreement, as a matter of law.

In addition to its non-final status, the *BellSouth Georgia Order* is neither dispositive nor instructive in this case because it did not include, and could not have included, any discussion of the Abeyance Agreement. Though Petitioners have an Abeyance Agreement in place in Georgia, the Georgia Commission did not rely on the Abeyance Agreement in issuing its order,[11] nor did the Northern District of Georgia include the Abeyance Agreement in its analysis. *BellSouth Georgia Order*, 425 F.3d at 968. The *BellSouth Georgia Order* thus has no *res judicata* effect on, nor is it persuasive authority regarding, the Abeyance Agreement.

Finally, Petitioners note that the Eleventh Circuit's decision to permit ILECs to implement the *TRRO* unilaterally is at odds with the recent decision of the Seventh Circuit in a very similar appeal. In *Illinois Bell Telephone Company v. Hurley*, the Seventh Circuit reviewed

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[11] The Georgia Commission's consideration of the effect of the Abeyance Agreement is still pending.

a Motion for Preliminary Injunction filed by Illinois Bell Telephone Company (d/b/a SBC Illinois) seeking a declaration from the Court that the *TRRO* allows SBC to stop providing mass market switching as an unbundled network element. *See* Memorandum Opinion and Order, Case No. 05-CH1149, at *4 (attached hereto as **Attachment 4**).[12] The *Illinois Bell* Court could not have been any clearer in holding that ILECs are obligated to undergo negotiations to implement the mandates of the *TRRO*:

> Paragraph 233 of the *TRO Remand Order* does not address only existing customers. Rather, it falls under the general heading of "Implementation of Unbundling Decisions" and mandates that the parties **"negotiate in good faith regarding any rates, terms, and conditions necessary to implement" the rule changes.** This requirement presumably would include the substantially increased rate that SBC now wishes to charge the CLECs seeking access to SBC's switches.
>
> * * *
>
> Perhaps, as SBC suggests, it would be futile for the parties to sit down and negotiate as long as the preemption question has not been definitively resolved, but in this court's view that speculation **does not excuse SBC from complying with the negotiation process**.

Id. at 11-12 (emphasis in original).

The Seventh Circuit's rationale is equally applicable to BellSouth in this case. BellSouth must negotiate with Petitioners prior to amending or abrogating terms in their ICAs governing high-capacity loops and dedicated transport. As the *Illinois Bell* Court held, the FCC was clear that the *TRRO* mandates the parties to "negotiate in good faith regarding any rates, terms, and conditions necessary to implement the rule changes." *Id.* (quoting *TRRO* ¶ 233). The TRA

[12] The *Illinois Bell Order* does not address the *TRRO*'s findings with respect to high-capacity loops or dedicated transport. Nonetheless, the Seventh Circuit's findings and analysis are just as persuasive as to those network elements.

should now comport with that decision by enforcing the Abeyance Agreement, which is the product of such carrier-to-carrier negotiations.

CONCLUSION

For all these reasons, the TRA should require BellSouth to adhere to the terms of the Abeyance Agreement by continuing to provision all UNEs contained in the existing NuVox and Xspedius Interconnection Agreements, at the prices stated and incorporated therein, until the TRA approves new Interconnection Agreements for these carriers.

Respectfully submitted,

By: H. LaDon Baltimore

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Dated: December 13, 2005

Certificate of Service

The undersigned hereby certifies that on this the 13th day of December, 2005, a true and correct copy of the foregoing has been forwarded via U. S. Mail, overnight delivery, facsimile transmission, or electronic transmission to the following.

Guy Hicks
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201
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H. LaDon Baltimore

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

ATTACHMENT 1

to

Petition to Enforce Abeyance Agreement

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

JOINT MOTION TO HOLD PROCEEDING IN ABEYANCE

NewSouth Communications Corp. ("NewSouth"), NuVox Communications, Inc. ("NuVox"), KMC Telecom V, Inc. and KMC Telecom III, LLC (collectively "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiary Xspedius Management Company Switched Services, LLC ("Xspedius") (collectively the "Joint Petitioners") and BellSouth Telecommunications, Inc. ("BellSouth") (together, the "Parties"), through their respective counsel, submit this Joint Motion to Hold Proceeding in Abeyance and hereby respectfully request that the Tennessee Regulatory Authority (the "Authority") hold the above-captioned proceeding in abeyance for a period of ninety (90) days. In doing so, the Parties request that the Authority suspend all pending deadlines and consideration of all pending motions until after October 1, 2004. By this Joint Motion, and contingent upon a grant by the Authority of the relief requested herein, the Parties waive through June 2005 the deadline, under section 252(b)(4)(C) of the Act, 47 U.S.C. § 252(b)(4)(C), for final resolution by the Authority of

the issues in this arbitration. In support of this Joint Motion, the Parties submit the following.

Joint Petitioners and BellSouth have engaged in the above-captioned arbitration proceeding since February 11, 2004. On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit, in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*"USTA II"*), affirmed in part, and vacated and remanded in part, certain rules of the Federal Communications Commission ("FCC"), pursuant to which incumbent LECs are obligated to provide to any requesting telecommunications carrier access to network elements on an unbundled basis. The D.C. Circuit initially stayed its *USTA II* mandate for a period of sixty (60) days. The stay of the *USTA II* mandate later was extended by the D.C. Circuit for a period of forty-five (45) days, until June 15, 2004 on which date the D.C. Circuit's *USTA II* mandate issued. At this time, certain of the FCC's rules applicable to BellSouth's obligation to provide to Joint Petitioners network elements on an unbundled basis are vacated and the FCC is expected to issue new rules.

In light of these events, the Parties have agreed to the proposed 90-day abatement so that they can consider how the post *USTA II* regulatory framework should be incorporated into the new agreements currently being arbitrated and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration. The Parties have agreed that no new issues may be raised in this arbitration proceeding

other than those that result from the Parties' negotiations regarding the post-*USTA II* regulatory framework.

With this framework, the Joint Petitioners and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements to address *USTA II* and its progeny. Accordingly, the Parties have agreed that they will continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding.

During this ninety (90) day period, the Parties also have agreed to continue their efforts to reduce the number of issues already identified. In this regard, the Parties have agreed to conduct multiple face-to-face negotiations.

Consistent with the foregoing, the Joint Petitioners and BellSouth hereby respectfully request that the Authority hold the above-captioned proceeding in abeyance for a period of ninety (90) days. In so doing, the Parties request that the Authority suspend all pending deadlines and consideration of all pending motions until after October 1, 2004. The Parties also jointly propose and request approval of the following revised procedural schedule.

October 1, 2004	Revised Issues Matrix
October 22, 2004	Supplemental Direct Testimony (Simultaneous)

November 12, 2004 Reply Testimony (Simultaneous)

January 25-28, 2005 Hearing

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2004, a copy of the foregoing document was served on the following, via the method indicated:

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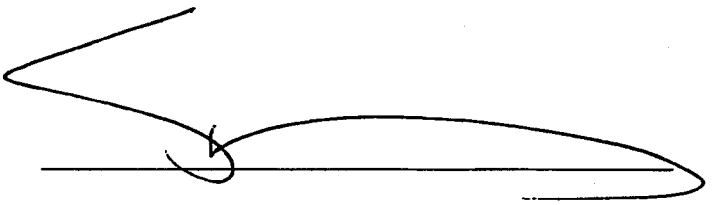

Joint Petition for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended; Tennessee Regulatory Authority Docket No. 04-00046

ATTACHMENT 2

to

Petition to Enforce Abeyance Agreement

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date February 11, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Triennial Review Remand Order (TRRO) - Unbundling Rules

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO)

The TRRO has identified a number of former unbundled network elements ("UNEs") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5]

The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing interconnection agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005.. .."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing interconnection agreements Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing interconnection agreements. Therefore, while BellSouth will not breach its interconnection agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to "new adds" for these former UNEs

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or unbundled network platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005 BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1 and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing interconnection agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport

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[10] TRRO ¶235

[11] TRRO ¶199 Also see ¶ 198

in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

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

ATTACHMENT 3

to

Petition to Enforce Abeyance Agreement

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085051

Date: February 25, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – **REVISION To** SN91085039 - Triennial Review Remand Order (TRRO) – Unbundling Rules

This is to advise that **Carrier Notification letter SN91085039**, originally posted on February 11, 2005, has been revised to include the TRRO rule regarding High-bit Rate Digital Subscriber Line (HDSL) loops. Specifically, the TRRO states that DS1 loops include copper loops capable of providing HDSL services.

Please refer to the revised letter for details.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: March 10, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – **REVISED** - Triennial Review Remand Order (TRRO) - Unbundling Rules (Originally posted February 11, 2005 and Revised February 25, 2005) **BellSouth has revised the implementation date contained in this letter. Please refer to Carrier Notification letter SN91085061, posted March 7, 2005, for additional details.**

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former unbundled network elements ("UNEs") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5].

The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing interconnection agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer

[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199

base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating. First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005.. .."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing interconnection agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing interconnection agreements. Therefore, while BellSouth will not breach its interconnection agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or unbundled network platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops, including copper loops capable of providing High-bit Rate Digital Subscriber Line (HDSL) services in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005 BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1 and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing interconnection agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

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[9] TRRO, ¶227
[10] TRRO ¶235
[11] TRRO ¶199 Also see ¶ 198

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

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

ATTACHMENT 4

to

Petition to Enforce Abeyance Agreement

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS BELL TELEPHONE COMPANY, Plaintiff, v. EDWARD C. HURLEY, Chairman, ERIN M. O'CONNELL-DIAZ, LULA M. FORD, ROBERT F. LIEBERMAN and KEVIN K. WRIGHT, in Their Official Capacities as Commissioners Of the Illinois Commerce Commission and Not as Individuals, Defendants, and ACCESS ONE, INC., et al.; COVAD COMMUNICATIONS CO., et al.; DATA NET SYSTEMS, L.L.C., et al., GLOBALCOM, INC.; and MCIMETRO ACCESS TRANSMISSION SERVICES LLC, Defendants/Intervenors.	)	Case No. 05 C 1149 Judge Joan B. Gottschall

MEMORANDUM OPINION AND ORDER

Illinois Bell Telephone Company ("SBC") has brought suit challenging determinations made by the Illinois Commerce Commission ("ICC") that require SBC to provide its competitors, including defendants/intervenors (the "Competing Carriers"), with access to certain portions of SBC's network. Presently before the court is SBC's motion for a preliminary injunction requesting relief from an ICC order pending this court's consideration of the merits of SBC's complaint. For the reasons set forth below, that motion is denied.

I. BACKGROUND

Until the 1990s, the market for local telephone service was widely viewed as a natural monopoly. The federal Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 151 *et seq.*,

sought to promote competition in that market by requiring established telephone service providers ("incumbent local exchange carriers" or "ILECs") to provide new market entrants ("competing local exchange carriers" or "CLECs") with access to certain portions of the ILECs' networks ("network elements") at a fair price, a process known as "unbundling." The rationale for this requirement was that new entrants could not be expected to compete immediately with the infrastructure that ILECs had built up over years of operating as legally sanctioned monopolies. *See Ind. Bell Tel. Co. v. McCarty*, 362 F.3d 378, 382 (7th Cir. 2004). The Act tasks the Federal Communications Commission ("FCC") with determining which network elements should be unbundled, requiring the FCC to "consider, at a minimum, whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

Prior to the passage of the Act, several states, including Illinois, already had taken steps to promote local telephone competition. SBC, an Illinois ILEC that previously had been regulated by the state using a traditional "rate of return"[1] framework, petitioned for an alternative form of regulation with fewer earnings restrictions to enable it to respond to the advent of new local competition. In exchange for this alternative regulation, SBC agreed to open up portions of its network to its new competitors.

Section 13-801 of the Illinois Public Utilities Act (the "Illinois Act"), 220 ILCS § 5/1-101,

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[1] This form of regulation, often used with public utilities to stop them from exploiting monopoly power, capped the rates SBC could charge at an amount necessary to recoup costs and provide a "reasonable" rate of return on SBC's equity.

et seq., sets forth the obligations of ILECs that have opted for alternative regulation status.[2] On June 11, 2002, the ICC issued an order further specifying SBC's obligations under Section 13-801. *See generally Ill. Bell. Filing to Implement the Public Utils. Act*, Doc. No. 01-0614, 2002 Ill. PUC LEXIS 564 (Ill. Comm. Comm'n June 11, 2002). SBC brought suit in this court two months later, arguing among other things that the federal Act preempted the ICC order because the order imposed unbundling requirements absent an FCC determination that denial of access would "impair" a CLEC's ability to compete.

At SBC's request, this court suspended briefing on the preemption claims until the FCC issued its August 13, 2003 Triennial Review Order ("TRO"). *See* 18 FCC Rcd. 16978 (F.C.C. rel. Aug. 21, 2003). The TRO set forth a new regulatory policy in response to court criticism of the FCC's earlier efforts to implement unbundling requirements, *see United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*"), and specifically mandated that state regulatory agencies review and amend their decisions to conform to the new federal regulatory framework. The ICC accordingly reopened proceedings examining Section 13-801, and requested that this court "remand" the case to the ICC while the commission completed its review. The court granted the ICC's request on May 17, 2004. *Ill. Bell. Tel. Co. v. Wright*, No. 02 C 6002, Doc. No. 66 (N.D. Ill. May 17, 2004).

SBC is back in court because of additional recent changes to the federal regulatory framework. The parties' current dispute arises out of the ICC's requirement that SBC provide its competitors with unbundled access to mass market local circuit switching and a platform of network

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[2] As a practical matter, Section 13-801 applies only to SBC because it is the only Illinois ILEC that has opted for alternative regulation.

elements commonly referred to as UNE-P.[3] This requirement was not directly at issue in the previous proceeding because the FCC required ILECs to provide mass market switching at that time. However, the D.C. Circuit in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") subsequently rejected that requirement. In response to *USTA II*, the FCC issued a Triennial Review Remand Order ("TRO Remand Order") on February 4, 2005. *See* 2005 WL 289015 (FCC Feb. 4, 2005). The TRO Remand Order states that ILECs no longer have an obligation to provide CLECs with additional access to mass market local circuit switching, and provides a 12 month transition period for existing CLEC customers for whom service is provided via UNE-P. TRO Remand Order ¶ 199. The FCC found that removal of the unbundling requirement was justified because newer, more efficient switching technologies are now widely available and continued dependence on the ILECs' infrastructure negatively affects incentives to invest in new technologies. *Id.*

Shortly after the TRO Remand Order issued, SBC sent a series of "Accessible Letters" to Illinois CLECs, informing them that as of March 11, 2005 (the effective date of the order), SBC would refuse new requests for unbundled mass market local switching. After several CLECs questioned the validity of SBC's "unilateral implementation" of the TRO Remand Order, SBC brought this suit seeking a declaration that the FCC's order allows SBC to stop providing mass market switching as an unbundled network element. The Competing Carriers oppose SBC's present request for a preliminary injunction on the merits, while the ICC, through its commissioners, argues that it should be allotted time to finish considering the effect of the TRO before this court takes any

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[3] Switches are specialized computers that direct calls to their destinations; that is, the devices that "make the connection" when one places a call. UNE-P (unbundled network element-platform) consists of switches, local loops (the "last mile" of wire that connects switches to telephones) and transport facilities (equipment that directs calls between switches).

action.

II. ANALYSIS

Because the ICC has raised questions of standing and abstention, the court will address the ICC's arguments before proceeding to the merits of SBC's request. The ICC opposes SBC's motion because the ICC has not yet completed the review contemplated by this court's May 17, 2004 remand order. Specifically, the ICC argues that SBC is trying to circumvent that order by returning to federal court, that SBC's claims are unripe because the ICC has yet to take final action, and that SBC has failed to exhaust its administrative remedies. The court disagrees. Although SBC's complaint raises many of the same issues that were before this court in the previous action, SBC now seeks preliminary relief based solely on a federal order issued subsequent to the TRO that the ICC currently is considering. The ICC maintains that it has "bifurcated" its proceedings to address the new federal unbundling rules SBC is relying on, and that the ICC will deal with those questions as part of "Phase II" of those proceedings in due course once Phase I has completed. But this new and separate "phase" of proceedings was not contemplated by the court's May 17, 2004 order, so the court does not see how SBC could be circumventing the court's prior directive by seeking new relief pursuant to new federal rules.[4]

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[4] The ICC also argues briefly that the court should abstain from reaching the merits of the preliminary injunction arguments out of concerns for "comity and federalism." While the ICC correctly notes that the Supreme Court has sanctioned abstention in favor of pending state administrative proceedings on two occasions, "it has never been suggested that [comity] requires deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989). The court does not believe that the parties' preliminary injunction arguments present an exceptional circumstance warranting abstention.

The court similarly rejects the ICC's argument that SBC's claims are "unripe" because there is no final agency action to consider. The parties do not dispute that SBC has been operating under the ICC's June 11, 2002 order and must continue to obey that order. The very reason SBC has come to court is because it maintains that the recent TRO Remand Order preempts a portion of the state regulations under which it currently must operate. In other words, SBC is seeking review of an administrative decision that has been sufficiently "formalized" to have its effects felt "in a concrete way by the challenging part[y]." *Patel v. City of Chicago*, 383 F.3d 569, 572 (7th Cir. 2004). Finally, the court finds that, to the extent that SBC was required to exhaust its administrative remedies with the ICC before seeking a preliminary injunction, it has done so. SBC filed an emergency petition with the ICC requesting action after the TRO Remand Order was issued, which the ICC denied two days before the TRO Remand Order was to take effect. Accordingly, the court will consider the merits of the parties' preliminary injunction arguments.

A. Legal Standard.

A party seeking a preliminary injunction has "the burden of demonstrating that it has a reasonable likelihood of success on the merits of its underlying claim, that it has no adequate remedy at law, and that it will suffer irreparable harm without the preliminary injunction." *AM Gen. Corp. v. Daimlerchrysler Corp.*, 311 F.3d 796, 803 (7th Cir. 2002). If the moving party meets these requirements, the court then considers "any irreparable harm the preliminary injunction might impose upon [non-movants] and whether the preliminary injunction would harm or foster the public interest." *Id.* at 803-04. In weighing the parties' respective harms, "the court bears in mind that the purpose of a preliminary injunction is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit." *Id.* at 804 (internal citation omitted).

B. Likelihood of Success on the Merits.

The 1996 Telecommunications Act contains "an unusual–and unequal–blending of federal and state authority." *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n*, 359 F.3d 493, 494 (7th Cir. 2004). Although state utility commissions have a role in carrying out the Act, "Congress 'unquestionably' took 'regulation of local telecommunications competition away from the State' on all 'matters addressed by the 1996 Act'; it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations." *Id.* (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999)). SBC argues that the FCC's determination of the network elements to be unbundled pursuant to Section 251(d)(2) of the Act is one of the most significant components of the federal regime, and that the ICC's order therefore must yield to the FCC's recent finding that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local switching." TRO Remand Order ¶ 5. The parties do not dispute that the TRO Remand Order and the ICC's June 11, 2002 order command different results with respect to the provision of mass market switching and UNE-P, but the Competing Carriers nevertheless argue that the ICC's order is not preempted and that, even if it is, the TRO Remand Order does not countenance the "unilateral" implementation attempted in SBC's Accessible Letters.

1. Preemptive Effect of the TRO Remand Order.

The Competing Carriers first argue that Illinois law does not impose any mandatory requirements that conflict with federal law because SBC voluntarily agreed to the provisions of Section 13-801 of the Illinois Act (and the subsequent ICC order) as a *quid pro quo* when it opted for the benefits of alternative regulation status. As both SBC and the Competing Carriers have observed, Section 13-801 does not apply to Verizon, another Illinois ILEC that has not sought

alternative regulation under Illinois law. According to the Competing Carriers, "SBC is free to end both its alternative regulation status, and the obligations that go along with it, any time it chooses to do so." Competing Carriers' Opp. Br. at 13.

SBC contends that when it sought alternative regulation status it could not possibly have foreseen the ICC's June 11, 2002 order. SBC focuses on the fact that it never explicitly signed away its future federal rights, but this argument ignores the Competing Carriers' main point, which is that the state requirements were not mandatory. SBC's better argument is that, now that SBC has opted for alternative regulation, it cannot act unilaterally to get out of that regulatory scheme, an argument the Competing Carriers impliedly concede when they recommend that SBC "simply petition the ICC for an end to its alternative regulation status." *Id.*

Unfortunately, none of the parties has explained what petitioning the ICC for an end to alternative regulation would entail. SBC maintains that it would be required to proceed under its current regulatory plan until the ICC approves a new one, but this does not provide the court with any indication as to the likelihood of approval, how long the process would take, or even what the approval process might look like. The court imagines that this process would take some time and that the requirements of Section 13-801 would remain mandatory during the transition, but it may well be the case, as the Competing Carriers suggest, that renouncing alternative regulation status is merely *pro forma* and can be done immediately. In any event, the court is reluctant to make a definitive assessment of the preemption question at this point, based on the possibility that the ICC requirements of which SBC complains were voluntarily assumed and can be voluntarily abrogated, an issue which the present record only superficially addresses. *See Clinton v. Jones*, 520 U.S. 681, 690 (1997) ("[W]e have often stressed the importance of avoiding the premature adjudication of

constitutional questions.") (citing *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)("[W]e have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law."))

The Competing Carriers also argue that a finding of preemption is premature because the FCC did not state explicitly that state commissions are preempted from making unbundling determinations. In a portion of the TRO undisturbed by *USTA II*, the FCC noted that states are not "preempted from regulating in [the area of unbundled network elements] as a matter of law." TRO ¶ 192. Rather, the FCC invited parties to seek a declaratory ruling to determine if a state unbundling requirement is inconsistent with the federal regime. *Id.* at ¶ 195. SBC has not petitioned the FCC for a ruling regarding the Illinois UNE-P unbundling requirements.

SBC argues that the FCC's invitation to seek a declaratory ruling does not strip this court of jurisdiction to determine the preemption question. This is almost certainly the case, as the FCC's invitation is permissive rather than mandatory. *Id.* However, the FCC's decision not to declare that state law unbundling requirements are preempted weakens SBC's preemption argument, albeit only slightly. In the TRO, the FCC observed that "[i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment ... or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime." *Id.* This language suggests that there is a *possibility* that a state unbundling requirement would not be preempted, although a modest one, and the court does not believe that it would exist in the present case. *Accord Ind. Bell. Tel. Co.*, 362 F.3d at 395 ("[W]e observe that only in very limited circumstances, which we cannot now imagine, will a state be able to craft [an unbundling]

requirement that will comply with the Act."). The court finds that, while the preemption question is not as clear as SBC suggests, the likelihood of success on this issue favors SBC.

2. Implementation of the Order.

The Competing Carriers argue that even if the TRO Remand Order is applicable, the FCC still requires that the parties implement the requirements via negotiation rather than unilateral action by an ILEC. The TRO Remand Order provides that "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." TRO Remand Order ¶ 233. Additionally, the TRO Remand Order provides a 12 month transition period for the CLECs' existing customers that are provided with service via UNE-P, during which time ILECs and CLECs are to "modify their interconnection agreements, including completing any change of law process." *Id.* at ¶ 227. Therefore, according to the Competing Carriers, federal law does not support the "immediate" relief that SBC requests by way of an injunction.

SBC responds that the requirement that the parties negotiate their interconnection agreements in Paragraph 227 of the TRO Remand Order is applicable only to the "embedded base" of existing customers rather than new customers. SBC has the better of this issue, because that paragraph sets forth a transition plan for moving existing customers away from UNE-P; it does not appear to contemplate new customers. SBC maintains that it is "nonsensical" to think that the FCC would countenance additional new UNE-P arrangements while at the same time providing a discrete time period for CLECs to transition off their existing customer base. According to SBC, the fact that the TRO Remand Order took effect on March 11, 2005 and is "self-effectuating," TRO Remand Order ¶ 3, justifies its unilateral action.

Although the court agrees that the TRO Remand Order does not require ILECs to engage in protracted negotiations simply to stop doing what the FCC has said they are no longer required to do, the court is troubled by SBC's view that it can alter the partes' arrangements unilaterally and without meaningful notice. Unlike Paragraph 227, Paragraph 233 of the TRO Remand Order does not address only existing customers. Rather, it falls under the general heading of "Implementation of Unbundling Decisions" and mandates that the parties "negotiate in good faith regarding *any* rates, terms, and conditions necessary to implement" the rule changes. This requirement presumably would include the substantially increased rate SBC now wishes to charge the CLECs seeking access to SBC's switches. SBC has denied that its actions constitute bad faith because: 1) many of the Competing Carriers participated in the "rulemaking" that resulted in the TRO Remand Order; 2) it issued the "Accessible Letters" a month before it intended to stop provision of UNE-P; 3) it filed a petition with the ICC and "served notice on a host of [common] carriers"; and 4) it served notice on interested competitors that it was bringing the present action and did not oppose their motions to intervene. SBC Competing Carrier Reply Mem. at 9. To the extent that Paragraph 233 of the TRO Remand Order requires good faith negotiations, the court does not see how any these activities qualify.

The March 23, 2005 ICC "Amendatory Order," submitted by SBC as supplemental authority for the proposition that SBC is no longer required under the federal Act to provide UNE-P to new CLEC customers as of March 11, is not to the contrary. *See Cbeyond Communications, LLP v. Ill. Bell. Tel. Co.*, No. 05-0154 (Ill. Comm. Comm'n Mar. 23, 2005). In fact, that decision specifically recognized that the TRO Remand Order contemplates implementation of the new federal framework through negotiation rather than unilateral action. *Id.* at 6 ("[The Complainant CLECs] have

presented a fair question of whether the use of the unilateral Accessible Letters ... to modify the terms under which the parties presently transact business is authorized by the [TRO Remand Order]. Indeed, our preliminary conclusion is that the [TRO Remand Order] does not permit such self help.") Perhaps, as SBC suggests, it would be futile for the parties to sit down and negotiate as long as the preemption question has not been definitively resolved, but in this court's view that speculation does not excuse SBC from complying with the negotiation process. Paragraph 233 of the TRO Remand Order mandates that "the parties to the negotiating process will not unreasonably dely implementation of the conclusions adopted in this Order," strongly implying that the FCC envisioned negotiations as a predicate to implementation of the TRO Remand Order's requirements. Indeed, at least one of the Competing Carriers already has pledged that it will negotiate and implement the law changes "expeditiously and smoothly." In short, the Paragraph 233 negotiation provisions weaken SBC's claim that immediate injunctive relief is required to implement the TRO Remand Order.

C. Irreparable Harm/Adequate Legal Remedy.

SBC urges that failure to enjoin the ICC's order will result in irreparable harm to the competitive marketplace and "frustrate the will of Congress and the FCC." Additionally, SBC maintains that it will continue to lose customers to CLECs who compete with SBC by reselling access to SBC's technology to consumers on terms no longer sanctioned by the FCC, citing *Merrill Lynch v. Salvano*, 999 F.2d 211, 215 (7th Cir. 1993) (upholding finding that solicitation and loss of clients "is a harm for which there is no adequate legal remedy"). Although the court recognizes that there is some disagreement as to when loss of customers constitutes irreparable harm, *see, e.g., Central & S. Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 309 (D.C. Cir. 1985)

("revenues and customers lost to competition which can be regained through competition are not irreparable"), the court agrees with SBC that it will suffer irreparable harm because, even if its losses are quantifiable, there is no entity against which SBC could recover money damages. *Accord Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) ("threat of unrecoverable economic loss ... does qualify as irreparable harm"). The court therefore finds that SBC has demonstrated irreparable harm.

D. Balance of Harms and Public Interest.

The Competing Carriers echo SBC's argument that loss of customers and goodwill amounts to irreparable injury. However, the Competing Carriers draw the distinction that, if the preliminary injunction is denied, public perception of SBC's competence will remain largely unchanged, while if the preliminary injunction is granted, the Competing Carriers will be forced to turn away potential new customers and will be unable to service existing customers insofar as they require new or additional services. As SBC's own Accessible Letters indicate, SBC intends to reject requests from the Competing Carriers to add new telephone lines to existing accounts (apparently a common request for small businesses served by UNE-P) or move local phone service to Competing Carriers' customers' new homes if they change addresses. The court agrees that the Competing Carriers have a legitimate apprehension that, if SBC's requested injunction is granted, their ability to service new customers, as well as their ability to address the needs of existing customers for normal and routine modifications of service, will be significantly impaired. Additionally, the Competing Carriers argue that if SBC is permitted to carry out its plan immediately to cut off their access to mass market local circuit switching, their relationships with large businesses could also be severely negatively impacted, because those businesses' satellite offices often are served via UNE-P. Thus, the Competing Carriers face serious reputational injury which, in some cases, could be of fatal

proportions.

The court agrees with the Competing Carriers that the loss of goodwill they face if SBC's requested injunction is granted is likely to be far more devastating than anything SBC faces if its requested injunction is denied. SBC may continue to lose customers and revenue to competition if it is required to provide UNE-P during the pendency of this litigation, but if the preliminary injunction issues, the Competing Carriers run a very real risk of being rendered incompetent, and perceived as being so, since they will be unable to deliver some of the basic services they are in business to provide. SBC counters that the Competing Carriers in fact have acted incompetently, or at least improvidently, by failing to plan after *USTA II* and subsequent FCC statements intimated that the end of the federal UNE-P requirement was near. But the federal regulatory framework has not been a model of clarity. As SBC itself notes, CLECs have been able to obtain UNE-P under every prior applicable FCC rule. On this record, it is hardly clear that the Competing Carriers' decision to wait for the ICC's determination of ILEC obligations in light of new federal law was unreasonable. The balance of harms strongly favors the Competing Carriers in this case.

Finally, the court considers the effect of SBC's requested relief on the public interest. SBC argues that the public interest is best served by providing relief that effectuates the "national policy" of eliminating mandated unbundled mass market switching. Granted, there is a strong public interest in providing the Illinois consumer with the technical innovation and competition which the FCC has predicted will result from the elimination of mandated unbundled switching. But SBC's requested relief would allow it, without meaningful notice and without meaningful negotiation, to cut off the Competing Carriers' access to what for them, at least in the short term, is an important resource. The innovation and competition which the FCC hoped to promote, and the public interest served thereby,

will not be promoted if SBC is permitted to use the FCC order to cut off its competitors' legs overnight.[5]

Moreover, if the requested preliminary injunction issues, there will be an immediate negative impact on individuals and small business owners currently doing business with the Competing Carriers. CLEC customers who want to add additional telephone or fax lines will be forced to change providers or deal with two providers simultaneously, and customers who move will be forced to switch their local telephone service provider entirely. Saddling the public with these transaction costs in order to permit SBC to take unilateral and immediate action, which may not have been what the FCC contemplated, is contrary to the public interest.

This court has no intention of delaying the resolution of this case. As long as this case moves expeditiously toward a resolution on the merits, neither the balance of harms, nor the public interest, favors SBC. Rather, both the balance of harms and the public interest favor the maintenance of the status quo, as long as the issues raised by SBC are resolved in an orderly fashion through negotiations, before the ICC, before the FCC, or by this court.

III. CONCLUSION

Although the court concludes that likelihood of success on the preemption question favors SBC, the case for the allowance of unilateral and immediate cessation of SBC's provision of UNE-P

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[5] SBC does not dispute the Competing Carriers' contention that at least some of SBC's sister ILECs have chosen to continue to provide UNE-P beyond the March 11 deadline. Moreover, a district court in Michigan recently granted a preliminary injunction in favor of a CLEC preventing SBC Michigan from refusing to provide UNE-P. *See Order Granting Preliminary Injunction, MCIMetro Access Transmission Serv. LLC v. Mich. Bell Tel. Co.*, No. 05-70885 (E.D. Mich. Mar. 11, 2005). The parties in that case settled before the judge could issue his formal written opinion, thus mooting the preliminary injunction. However, the fact remains that despite the March 11 effective date of the TRO Remand Order, UNE-P will still be provided in some places by ILECs for some period of time.

to the Competing Carriers is far weaker. The court further finds that while denial of preliminary relief threatens some harm to SBC, the threat of irreparable injury to the Competing Carriers if an injunction is granted is incomparably greater. Moreover, the court finds that as long as this case can move forward at an efficient pace, the public interest favors maintenance of the status quo and argues against the entry of an injunction. SBC's motion for a preliminary injunction is denied.

ENTER:

/s/
Joan B. Gottschall
United States District Judge

DATED: March 29, 2005