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

guy hicks@bellsouth com

Guy M Hicks
General Counsel

615 214 6301
Fax 615 214 7406

January 20, 2006

VIA HAND DELIVERY

Hon Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

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

Dear Chairman Jones:

Enclosed are the original, four paper copies and a CD Rom of BellSouth's *Response in Opposition to Petition for Enforcement of "Abeyance Agreement."* To facilitate the TRA's analysis and consideration of the Joint Petitioners' Petition and BellSouth's Response, BellSouth requests that the TRA set oral argument on this matter.

A copy is being provided to counsel of record.

Very truly yours,

Guy M Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Joint Petition for Arbitration of NewSouth Communications Corp., et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*

Docket No. 04-00046

BELLSOUTH TELECOMMUNICATIONS INC.'S RESPONSE IN OPPOSITION TO PETITION FOR ENFORCEMENT OF "ABEYANCE AGREEMENT"

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this *Response in Opposition to the Petition for Enforcement of Abeyance Agreement* ("Petition") filed by NuVox Communications, Inc. ("NuVox") and Xspedius Communications, LLC ("Xspedius") (collectively referred to as "Joint Petitioners").

In an attempt to avoid the federal rules that apply to all other Competitive Local Exchange Companies ("CLECS"), the Joint Petitioners attempt to convince the Tennessee Regulatory Authority ("TRA") that a procedural motion in an arbitration proceeding magically became a "commercial contract" wherein BellSouth mysteriously agreed to forego all the benefits of a yet-to-be issued FCC Order without even knowing what those benefits would be and without getting anything in return. Obviously, BellSouth never made such a nonsensical agreement. And, for the reasons discussed below, the TRA should reject the Petition.[1]

[1] While BellSouth fully briefs the issue in its Response, in an abundance of caution, BellSouth incorporates by reference its Response in Opposition to the Joint Petitioners' Motion for Emergency Relief filed on March 7, 2005 in Docket No. 04-00381.

INTRODUCTION

The thrust of the Joint Petitioners' Petition is that BellSouth contractually agreed via a regulatory filing memorializing a procedural agreement (the so-called "Abeyance Agreement") to (1) avoid operating pursuant to the Federal Communications Commission's ("FCC") *Triennial Review Remand Order* ("TRRO")[2] eight months prior to the TRRO being issued; and (2) violate the FCC's findings in the TRRO (findings confirmed by the Eleventh Circuit and other federal courts) that the previous regulatory regime sought to be continued by the Joint Petitioners here is against public policy and thus must cease on March 11, 2005. At least four state commissions, including the TRA,[3] have rejected these ludicrous arguments, and in doing so, have described the Joint Petitioners' position and arguments as "faulty", "dubious", "improbable", "illegal", "contrary to public policy", "absurd", "unsupported", "fanciful", "frivolous" and "unreasonable."

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[2]Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) (*"TRRO"*),

[3]The four state commissions that have directly or indirectly rejected the Joint Petitioners' Abeyance Agreement arguments include (1) the Florida Public Service Commission, Order No. PSC-05-0492-FOF-TP (May 5, 2005), attached as Exhibit A; *see also*, Exhibit B, discussed *infra*; (2) the South Carolina Public Service Commission, Order No. 2005-247, Docket No. 2004-316-C (Aug. 1, 2005), attached as Exhibit C; (3) the North Carolina Utilities Commission, Docket No. P-55, Sub 1550, *Order Concerning New Adds*, attached as Exhibit D; (4) the TRA, No New Adds Orders discussed *infra* and Transcript of April 11, 2005 Agenda Conference, attached as Exhibit I. The only state commission that has accepted the Joint Petitioners' arguments is the Alabama Commission, Docket No. 29393 at 17-18 (May 25, 2005), *available at* http://www.psc.state.al.us/orders2/ 2005/05may/ 29393co3.html. The Alabama Commission concluded that the relevant document was a "private" contract even though it was in fact submitted to the state agency as part of an ongoing regulatory proceeding. For the reasons discussed in more detail below, that analysis is incorrect. Further, the Alabama Commission's decision is refuted by the findings of the North Carolina Utilities Commission and the South Carolina Public Service Commission, both of which, like the Florida Commission and the TRA, properly rejected the Joint Petitioners' Abeyance Agreement arguments.

Indeed, the following quotations provide an example of the response other state commissions have had regarding the Joint Petitioners' "Abeyance Agreement" arguments – the same argument they now repeat with the TRA.

- [Joint Petitioners'] theory is tantamount to a claim that BellSouth has previously agreed with, *i.e.*, "contracted" with, Plaintiffs to violate the FCC's not-yet-issued TRRO. Thus, Plaintiffs argue in effect that the Florida Commissioners should have enforced this "contract" to violate the TRRO and, failing that, this Court should do so now. In support of this obviously faulty premise, Plaintiffs claim that this was the intent of the parties. Even assuming this dubious premise could be established, which seems improbable, the relevant law would not be found in cases such as *Pennzoil Co. v. Federal Energy Reg. Comm'n.*, 645 F.2d 360 (5th Cir. 1980), but in cases such as *I.U.B.A.C Local Union No. 31 v. Anastasi Bros. Corp.*, 600 F. Supp. 92 (S.D. Fla. 1984), holding that a Court may not enforce a contract that is illegal or contrary to public policy. In this instance, the purported "contract" relied upon by Plaintiff, even assuming *arguendo* it exists at all, is both.[4]

- Their absurd conclusion, that BellSouth's "intent" was to continue to provide unbundled UNE-P even after the regime of "enforced competition" not only no longer compelled BellSouth to do so, but prohibited it from doing so, should be rejected as unsupported, fanciful, and frivolous.[5]

- Plaintiff's appeal is also premised on the misguided notion that their private interest in maintaining past regulatory parameters (favorable to themselves) beyond the cancellation date of those parameters announced by the FCC, will be held by this Court to outweigh statutory requirements that state and federal agencies regulate in the public interest. Plaintiffs have identified no theory – contract or otherwise – in support of this notion and the Court should reject it.[6]

- In other words, adopting the Joint Petitioners' argument would require this Commission to find that the scope of the Abeyance Agreement was so wide that, even though the TRRO proceeding is never

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[4]*NuVox Communications, Inc. v. Florida Public Service Comm'n.*, Case No. 4:05 CV 189 SPM AK, Answer Brief of the Florida Public Service Commission, at 11 (attached hereto as Exhibit B).

[5]Exhibit B at 18.

[6]Exhibit B at 4.

> mentioned in the Agreement, BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the TRRO in the current agreements eight months prior to those changes even being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up the right to implement those new rules for the current Agreement even before any party knew what those rules would contain. We reject this argument because it impermissibly leads to unreasonable results.[7]

The Joint Petitioners' tactic is not complex: They seek to convince the TRA that BellSouth entered into a "commercial contract" when common sense clearly demonstrates that no such agreement was made. Specifically, the Joint Petitioners argue that BellSouth inexplicably agreed to not alter the obligations in the current Interconnection Agreement ("Current Agreement") for the yet-to-be issued TRRO or for any other FCC Order that follows or is tangentially related to *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Circuit 2004) ("*USTA II*), regardless of the FCC's findings that such new obligations should be implemented immediately. ***There was never such an agreement***. And, the Joint Petitioners' arguments are nothing more than a desperate ploy to gain a competitive advantage over other CLECs by seeking to continue a regulatory regime that the FCC has now outlawed and that hundreds of other CLECs have correctly abandoned in favor of true, commercial agreements for wholesale services.

[7] *See* Exhibit C.

BACKGROUND

A. The Purported "Abeyance Agreement" Is Nothing More than a Regulatory Filing Memorializing a Procedural Agreement to Postpone the Section 252 Arbitration Proceeding to Address *USTA II*.

The parties have been negotiating the new interconnection agreement that is the subject of a Section 252 arbitration proceeding since June 2003, if not earlier. In this regard, the Joint Petitioners filed for arbitration in February 2004 (Docket No. 04-00046), and the arbitration proceeding is still pending. As a result, the parties have had to negotiate and ultimately arbitrate before and after the issuance of four major rulings that have impacted the regulatory landscape and BellSouth's unbundling obligations under the Telecommunications Act of 1996 (the "Act'): the TRO,[8] *USTA* II, the Interim Rules Order,[9] and the TRRO.

Contrary to the Joint Petitioners' erroneous, repetitive assertions, the "Abeyance Agreement" is simply a regulatory filing in Docket No. 04-0046 to memorialize a procedural agreement to take into account *USTA II*'s vacatur and remand of certain unbundling obligations established or continued in the TRO. In particular, on March 2, 2004, the D.C. Circuit issued *USTA II*, wherein it, among other things, vacated and remanded the FCC's findings in the TRO that Incumbent Local Exchange Companies ("ILECs") were obligated to provide unbundled local switching and high-capacity loops and transport on an unbundled basis. Within that decision, the D.C. Circuit stayed the effect of its vacatur for a period of time.

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[8] *Triennial Review Order*, FCC 03-36 (Aug. 21, 2003) ("TRO").

[9] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783 (2004) ("Interim Rules Order").

By June 15, 2004, the D.C. Circuit's stay of its decision in *USTA II* expired. This expiration triggered the parties' change-of-law obligations in their Current Agreement. That is, the parties were now required to implement the vacatur of certain unbundling rules by amending their Current Agreement to address *USTA II.* Rather than exercise those obligations at that point in time, and in light of the on-going negotiations for a new agreement and the parties' pending arbitration, on that same date, the parties agreed and jointly moved for a 90 day abeyance of the pending arbitration proceeding. The purpose of this postponement was to "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."[10] In other words, far from a commercially-negotiated contract for wholesale services at commercial, non-TELRIC rates, the Joint Motion simply sought a brief delay of the arbitration to allow the parties time to consider the impact of the developing law on the proceeding and their agreements.

In order to implement this procedural agreement, the parties further 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." *Id.* Additionally, because the parties agreed to raise issues relating to *USTA II* into the pending arbitrations, the parties also agreed to not engage in separate change of law negotiations/arbitrations for *USTA II*:

[10] *See* Joint Motion at 2, attached as Exhibit E.

> 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.[11]

In other words, the purpose of the Abeyance Agreement was to hold the arbitration in abeyance for 90 days to do the following: (1) negotiate *USTA II* changes into the new interconnection agreements; and (2) for those *USTA II* changes that could not be negotiated, to agree on *USTA II* issues to add to the arbitration.[12] In this regard, the parties agreed in the Joint Motion to identify new issues to be added to the arbitration that resulted from *USTA II* by October 2004.[13]

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[11] *Id.* Regarding the phrase "*USTA II* and its progeny", "progeny" has a specific legal definition. Indeed, *Black's Law Dictionary* (2000 ed.) defines "progeny" as a "line of opinions that succeed a leading case <*Erie* and its progeny>." Accordingly, as used in the Joint Motion, "*USTA II* and its progeny" means opinions of a court or state commission reaffirming or restating the D.C. Circuit's vacatur of certain unbundling obligations in *USTA II*. The *TRRO* does neither. Rather, it is an administrative decision setting forth new rules and thus does not meet this legal definition of "progeny." Thus, the "Abeyance Agreement" was limited to *USTA II*.

[12] *See* Exhibit E; *see also*, June 29, 2004 e-mail from counsel for Joint Petitioners to counsel for BellSouth, attached hereto as Exhibit F(stating that "purpose of abatement would be to consider how the post USTA II regulatory framework should be incorporated into the new agreements currently being arbitrated by Joint Petitioners and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration – ***and that by doing so***, we'd be avoiding a separate/second process of negotiating/arbitrating change-of-law amendments to the current agreement ....") (emphasis added).

[13] During this 90-day abatement period, the FCC issued its Interim Rules Order. Accordingly, at the end of the abeyance period, the parties also agreed to add Interim Rules Order issues to the arbitration as well. Accordingly, on October 15, 2004, the parties filed a revised Joint Matrix, which included Items 108-114 ("Supplemental Issues") that addressed *USTA II* and the *Interim Rules Order*.

The TRA granted the Joint Motion and the proposed deadlines on July 16, 2005.[14] Importantly, in its Order, the TRA described the agreement to avoid change of law obligations as being ***limited only to USTA II*** and not the TRRO, which is contrary to the Joint Petitioners' current contentions: "Within this framework, the Parties agree to avoid a separate process of negotiating change-of-law amendments to the current interconnection agreement to address *USTA II*...."[15] The Joint Petitioners conveniently fail to disclose this fact to the TRA.

On October 13, 2004, the parties filed a Joint Issues Matrix containing new arbitration issues relating to *USTA II* and the Interim Rules Order pursuant to the Joint Motion and the TRA's Order. However, the TRA refused to allow the parties to add the *USTA II* issues to the arbitration.[16] In particular, for a variety of reasons, the TRA determined that the "supplemental issues related to *USTA II* added to the October 13, 2004 Joint Issues/Open Items Matrix should be stricken from consideration by the arbitration panel."[17] Accordingly, the arbitration hearing in this docket, which took place on February 25-27, 2005, did not consider any issues relating to *USTA II*.

B. The FCC Issued the TRRO Eight Months After the Parties Entered Into the Procedural Agreement and Filed the Joint Motion.

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[14] *See Order Granting Joint Motion to Hold Proceedings in Abeyance and Establishing Revised Procedural Schedule*, Docket No. 04-00046 (July 16, 2004), attached hereto as Exhibit G (emphasis added).

[15] *Id.* at 2.

[16] *See Order Directing Filing of Joint issues Matrix and Amending Procedural Schedule, Do*cket No. 04-00046 (Jan. 4, 2005), attached hereto as Exhibit H.

[17] *Id.* at 3.

In February 2005, the FCC issued the TRRO, which is eight months after the parties entered and filed the Joint Motion. That decision finally prohibited the leasing of the facilities necessary for the UNE Platform ("UNE-P"), which, according to the FCC, "discourages" innovation and "hinder[s]" genuine competition. TRRO, 20 FCC Rcd at 2644, ¶ 218, 2653, ¶ 220. The TRRO adopts a "nationwide bar" on unbundling of local switching, *id.* at 2537, ¶ 204, which necessarily prohibits access to the UNE-P, because that combination of facilities is not possible without access to switching as a UNE. The FCC could not have made clearer that "[i]ncumbent LECs have ***no obligation*** to provide competitive LECs with unbundled access to mass market local circuit switching." *Id.* at 2537, ¶ 5 (emphasis added); *see* 47 C.F.R. § 51.319(d)(2)(iii) (App. B to *Order on Remand*) (new switching "may not [be] obtain[ed]").

The TRRO creates a transition period during which CLECs may continue to use unbundled switching, and thus the UNE Platform, ***only*** to serve their "embedded base" of ***existing*** customers. CLECs have a 12-month period to "submit orders to convert their UNE P[latform] customers to alternative arrangements." TRRO, 20 FCC Rcd at 2641, ¶ 199. During this 12-month period, parties should "modify their interconnection agreements, including completing any change of law processes." *Id.* at 2660, ¶ 227. Moreover, during the full 12-month period for the conversion of the embedded base, ILECs are to receive an additional dollar per month over current UNE Platform rates. *See id.* at 2661, ¶ 228 n.630. Importantly, however, this transition period authorizes the continued

use of UNE switching *only* for the "embedded customer base," which precludes new UNE Platform orders. *Id.* at 2641, ¶ 199, 2659, ¶ 227. The FCC was explicit that, during this transition period, competitive LECs were "not permitted" to place orders for new UNE switching and thus the UNE Platform. Moreover, in contrast to its statements regarding the 12-month transition of the embedded base, the TRRO never suggests that parties must amend their interconnection agreements to adopt this requirement.

Although the FCC provided much more limited relief from unbundling for loops and transport, *see id.* at 2575-76, ¶ 66, 2614, ¶ 146, there, too, it adopted transition plans (of 12 or 18 months) that authorized limited continued use of existing UNEs, *not* ordering of new UNEs, *see id.* at 2612, ¶ 142, 2639, ¶ 195. The FCC stated – in virtually identical language as the agency used with respect to switching – that these transition plans allowed continued UNE access for a limited period of time to serve the "embedded customer base" while forbidding new orders. *See id.* at 2612, ¶ 142 ("These transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists."); *id.* at 2639, ¶ 195 ("These transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs pursuant to section 251(c)(3) where the Commission has determined that no section 251(c) unbundling requirement exists."); 47 C.F.R. § 51.319(a)(4)(iii), (a)(5)(iii),

(e)(2)(ii)(C), (e)(2)(iii)(C) (App. B to TRRO) ("[R]equesting carriers may not obtain new [loops or transport] as unbundled network elements.").

Finally, the FCC explained that there was a "need for prompt action," so that its new rules, including its limits on unbundling, would be effective on March 11, 2005. *TRRO*, 20 FCC Rcd at 2666, ¶ 235.

C. The TRA Issues Its No New Adds Orders and in Doing So Considers and Denies the Joint Petitioners' "Abeyance Agreement" Arguments.

In accordance with the TRRO, on February 11, 2005, BellSouth notified CLECs that, as of March 11, BellSouth would no longer accept orders for unbundled local switching (and thus the UNE Platform), nor would it accept orders for loop and transport UNEs in instances where access to those facilities is no longer required under the TRRO.[18] In response to BellSouth's notification, on February 25, 2005, the Joint Petitioners filed in the Generic Change of Law Docket (Docket No. 04-00381) a Petition and Request for Emergency Relief with the TRA. Other CLECs filed similar requests soon thereafter.

All of the CLECs requested that the TRA order BellSouth to continue provisioning new UNE orders indefinitely until they completed the so-called "change of law" process under their interconnection agreements. *See* Joint Petitioner Compl. at ¶ 3. The Joint Petitioners further claimed that this relief was required by the "Abeyance Agreement". *See id.* ¶ 3.

[18] In order to allow courts and agencies to address this issue, BellSouth subsequently agreed to accept new orders until April 17, 2005.

On April 11, 2005, the TRA deliberated on the CLECs' Emergency Motions. The majority of the TRA panel assigned to the Generic Docket[19] denied the Joint Petitioners' requests but granted alternative relief by ordering that BellSouth and the CLECs "negotiate an appropriate implementation of both the TRRO New Adds change and the availability of commingling and conversion provided in the TRRO." *See Order Granting Alternative Relief Requested in Motions for Emergency Relief*, Docket No. 04-00381 at 13 (Jul. 13, 2005). The TRA set the negotiation period at 30 days. *Id.*

Importantly, during the TRA's deliberations on April 11, 2005, counsel for the Joint Petitioners specifically asked the TRA if it was considering the Joint Petitioners' "Abeyance Agreement" arguments. In response, the TRA did just that and rejected them.

> MR. HEITMANN: Director Tate, John Heitmann. I've listened to your motion and the comments of Director Jones and Directory Kyle. I have not heard any particular comments with respect to the abeyance agreement aspect of the joint petitioners' motion, and I'm asking whether your motion addresses that part of the emergency petition or not?
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> DIRECTOR TATE: I want to say that my motion was an alternative to your motion, but if I could have just a moment to talk with the attorneys.
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> .....
>
> DIRECTOR TATE: I was going to stand by my previous statement that we were denying the motions as presented but granting the motion for alternative relief as

[19] The Joint Petitioners incorrectly asserted in the Petition that all three panel members "denied all of the motions, and instead established the 'alternative relief' ...." Petition at 5. Director Kyle voted against and dissented from the order granting the alternative relief.

> set forth in my motion and my statements. So I will stand by that, Mr. Heitmann.[20]

Accordingly, the TRA has already considered and denied the Joint Petitioners' "Abeyance Agreement" arguments.

After the expiration of this negotiation time period established by the TRA at its April 11, 2005 agenda conference, the TRA voted on May 16, 2005 to terminate the alternative relief and held that "[e]ffective May 16, 2005, BellSouth is no longer required to provide New Adds and may reject any and all new orders for the de-listed UNEs, including new orders to serve the CLECs' embedded base of customers." *See Order Terminating Alternative Relief*, Docket No. 04-00381 at 3-4 (Jul. 25, 2005) (collectively referred to as "No New Adds Orders").

On September 25, 2005, the Joint Petitioners appealed the TRA's No New Adds Orders to United States Federal District Court on the general grounds that the TRA violated the Act, their interconnection agreements, and the "Abeyance Agreement".[21] In response, the TRA filed a Motion to Dismiss, alleging a host of defenses, including that the Joint Petitioners did not exhaust all of its administrative remedies.

Ultimately, the Joint Petitioners dismissed their appeal without prejudice and brought the instant action. BellSouth did not oppose this dismissal but reserved all of its rights. Further, contrary to the Joint Petitioners' assertions in both federal court and at the TRA, upon information and belief, the TRA did not agree to any

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[20] Docket No. 04-00381, excerpt of April 11, 2005 Transcript at 00021-00023, attached hereto as Exhibit I.

[21] *See Complaint For Declaratory Relief*, Case No. 05-cv-3:05-0742, attached hereto as Exhibit J.

specific procedure at the TRA for resolution of the instant dispute or that any additional action was required or legally permitted. Nor did BellSouth agree to any such procedure.

ARGUMENT

A. THE "ABEYANCE AGREEMENT" IS A REGULATORY FILING. IT IS NOT A "COMMERCIAL CONTRACT".

The Joint Petitioners spend an inordinate amount of time arguing that the "Abeyance Agreement" is a commercial contract that the TRA should and can enforce according to their own warped interpretation -- an interpretation that defies common sense and illogically results in the continuation of a regulatory regime that the federal courts, the FCC, and state commissions have held ceased as of March 11, 2005. Indeed, the Joint Petitioners' entire argument on this score is based on a false premise – that the procedural agreement in the Joint Motion is actually a separate, "commercial contract" with BellSouth that trumps the terms of the FCC's TRRO.[22]

Notwithstanding their wishful thinking, the document in question is merely a filing in an ongoing regulatory proceeding; it is a request to stay for 90 days the arbitration proceeding involving the Joint Petitioners and BellSouth to take into

[22] The desperation of the Joint Petitioners is particularly obvious when reviewing the "legal" analysis of Tennessee contract law in their Petition. For example, the Joint Petitioners rely extensively on Title 42 of the Tennessee Code as support for their various contract arguments. Title 42, however, is Tennessee's enactment of the Uniform Commercial Code, a statute that governs the sale of ***goods***, not services such as telecommunications services. Even if the "Abeyance Agreement" were a contract under Tennessee law, which it is not, it would of course have nothing to do with the UCC, which governs contracts for sale of tangible objects . This perplexing reliance on a clearly inapplicable statute speaks volumes about the lack of rational legal analysis underlying the Joint Petitioners' arguments.

account the "post-*USTA II* regulatory framework." *See* Joint Motion at 3 ("[T]he Parties request that the Authority suspend all pending deadlines and consideration of all pending motions until after October 1, 2004."). And, the Order approving the Joint Motion containing the Abeyance Agreement, other than recognizing that the procedural agreement was limited to *USTA II* only, does nothing more than suspend the arbitration and extend certain procedural deadlines. *See* Exhibit G.

In further support, the Joint Petitioners' description of this procedural agreement is telling and conflicts with the position they now take:

> Due to the uncertain legal backdrop of the Arbitrations and the then imminent schedule of hearings, Plaintiffs and BellSouth formed an agreement on June 29, 2004, to hold the arbitration before the TRA in abeyance, thus temporarily halting and significantly delaying the *USTA II* [sic] into the Arbitration and the new ICAs that will result therefrom. This agreement ... [is] known as the "Abeyance Agreement" ....

See Exhibit J at 5-6; *see also*, TRA Motion to Dismiss, Case No. 05-cv-3-05-0742 ("This 'abeyance agreement', attached to the Complaint as Exhibit 1, is on its face one element of the *Joint Motion* of the parties seeking a suspension of deadlines and pending discovery."). Thus, the Joint Petitioners cannot now refute the procedural nature of the "Abeyance Agreement."

Moreover, for the following reasons, there is no basis to claim that this regulatory filing memorializing a procedural agreement is a separate "commercial agreement." First, by the Joint Petitioners' filing the alleged "commercial agreement" with the TRA for approval and now asking the TRA to enforce it, the Joint Petitioners' actions belie any suggestion that the "Abeyance Agreement" is a

"commercial agreement". As the name suggests, a "commercial agreement" is one reached on a ***commercial*** basis without regulatory compulsion, oversight, or mandated rates. BellSouth enters into such agreements when it is no longer subject to any legal requirement to provide access to the facilities in question.

By definition, such commercial agreements involve access that is not required by federal or state law. Thus, these agreements are outside the review or enforcement by state commissions and are not subject to regulatory review and approval under Sections 251 and 252 of the Act.[23] Indeed, courts have held that state commissions are barred from regulating the terms of such agreements. *See Qwest Corp. v. Schneider*, No. CV-04-053-H-CSO, 2005 U.S. Dist. LEXIS 17110, at *20-*21 (D. Mont. June 9, 2005).[24]

Here, however, the Joint Petitioners' expressly petitioned for a ruling by the TRA, not once but twice, regarding the impact of this supposed agreement and thus invoked the regulatory jurisdiction of the TRA. This fact demonstrates beyond dispute that the "Abeyance Agreement" was not a separate "commercial agreement" outside the regulatory authority of the TRA. In fact, if anything, the Joint Petitioners' own actions directly refute this claim.

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[23] *See, e.g.*, Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, 17 FCC Rcd 19337, ¶ 8 n.26 (2002) (confirming that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed").

[24] In this regard, the Joint Petitioners' reliance on Section 252(e) of the Act and BellSouth's assertions regarding the TRA's jurisdiction (Petition at 15) to buttress their argument that the TRA has authority to enforce this purported "commercial contract" is misplaced. Both of these citations relate to the TRA's authority to approve and interpret interconnection agreements it approves pursuant to the Act. The Joint Petitioners' do not and cannot claim that the "Abeyance Agreement" is an interconnection agreement.

Second, the Joint Petitioners' reliance on the FCC's exemption of true commercial agreements from its transition plan in the TRRO, wherein delisted UNEs will be priced higher during the one year transition period, is erroneous. *See* Petition at 12-13; TRRO at ¶ 228. The FCC's logic in creating this exemption is clear: There was no need for its transition plan to trump true commercial agreements because those agreements already contained higher rates for the delisted UNEs. The Press Releases relied upon by the FCC and referenced in note 533 of the TRRO prove this point. Both of these press releases acknowledge that (1) the commercial agreements were entered into outside of the regulatory arena; and (2) the parties agreed to the imposition of higher prices in lieu of the regulatory mandated UNE rates. *See* SBC Press Release ("The seven-year pact will replace the regulatory mandated UNE-P with a private commercial agreement. Given the proprietary nature of the agreement, most terms were not released, but the average monthly price over the life of the contract is expected to be below $25.00 per line."); *see also*, Qwest Press Release (The agreement provides for "incremental price adjustments at scheduled points within the transition period" and that rates for 'Qwest Platform Plus' (QPP) – which will replace the unbundled network element (UNE) platform that MCI currently buys under regulatory rules – will increase an average of less than $5 – including both residential and business customers – by the end of the transition period."), collectively attached hereto as Exhibit K.

The true commercial agreements relied upon and referenced by the FCC in the TRRO stand in stark contrast to the regulatory filing at issue here. Unlike the Joint Motion, which does not address the provision of facilities on a commercial basis at non-regulated rates or at any rates at all, the commercial agreements relied upon by the FCC were reached *outside* of any regulatory process and involved an agreement by ILECs to provide delisted UNEs at higher, commercial rates and *not* the regulated and very low "TELRIC" rates required for UNEs subject to mandatory unbundling.

Indeed, these true commercial agreements have nothing to do with suspending hearing dates, participating in arbitration proceedings before state commissions, or negotiating under the Act, which is what the "Abeyance Agreement" primarily addressed. And, there is nothing "commercial" about the "Abeyance Agreement" as it does nothing more than indefinitely continue the non-commercial, government mandated, and regulatory-imposed TELRIC rates for delisted UNEs in contravention of the TRRO.

Simply put, the fact that the true commercial agreements relied upon by the FCC involve higher, commercial non-TELRIC rates for delisted UNEs consistent with the TRRO while the Joint Petitioners' purported commercial agreement requires BellSouth to charge TELRIC, non-commercial rates for delisted UNEs in conflict with the TRRO, definitely disproves the Joint Petitioners' claims. Accordingly, the Joint Petitioners cannot find any support in the TRRO for its position that the

regulatory filing memorializing the "Abeyance Agreement" is the type of commercial agreement considered and exempted by the FCC in the TRRO.

Third, in effect, the Joint Petitioners' essentially argue that the parties agreed to amend the Current Agreement to provide that those agreements "would not be amended, renegotiated, or nullified as a result of *USTA II* or any legal or regulatory change that followed in its wake" – something that the Joint Motion in fact does not say. Petition at 3. In any event, even if the Joint Petitioners' are correct in their interpretation of the "Abeyance Agreement" (which they are not), the parties would have been required to file such an amendment to their Current Agreements with the TRA for approval pursuant to the Section 252(e) of the Act as a matter of law. The parties did not, thereby further evidencing that the "Abeyance Agreement" is not a contract but simply a procedural agreement.

B. EVEN IF THE REGULATORY FILING IS A COMMERCIAL CONTRACT AND NOT A REGULATORY FILING, THE TRRO STILL TRUMPS THE AGREEMENT.

Assuming *arguendo* that the regulatory filing at issue here constituted a "commercial contract" rather than a procedural agreement – a notion that BellSouth vehemently disagrees with -- the FCC's mandate and findings regarding no new adds and delisted UNEs in the TRRO still applies to the Joint Petitioners.

1. THE TRA PROPERLY CONCLUDED THAT BELLSOUTH NEED NOT PROVISION FOR THE JOINT PETITIONERS OR ANY OTHER CLEC NEW ORDERS OF FACILITIES THAT ARE NO LONGER UNES.

The FCC's TRRO makes clear that as of the March 11, 2005 effective date of that order, BellSouth need not provision new orders of facilities that are no longer subject to unbundling. In the FCC's words, CLECs are "***not*** permit[ted]" to

place new orders, TRRO, 20 FCC Rcd at 2641, ¶ 199 (emphasis added), and BellSouth and other ILECs "have ***no obligation*** to provide competitive LECs with unbundled access to mass market local circuit switching," *id.* at 2537, ¶ 5 (emphasis added). The FCC's order and the rules promulgated with it make this point repeatedly. *See id.* at 2644, ¶ 204 ("[T]he disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling."); 47 C.F.R. § 51.319(d)(2)(i) (App. B to TRRO) ("An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."); *id.* § 51.319(d)(2)(iii) (App. B to TRRO) ("Requesting carriers may not obtain new local switching as an unbundled network element.").

Equally important, because the FCC concluded that the UNE Platform is antithetical to "genuine, facilities-based competition," TRRO, 20 FCC Rcd at 2653, ¶ 218, it adopted a strict transition plan for switching that allows CLECs to continue to use UNEs to service ***existing*** customers (the so-called "embedded customer base") for a maximum of 12 months at higher rates than they had been paying, *see id.* at 2641-42, ¶ 199. The FCC created similar transition plans for loops and transport. *See id.* at 2612, ¶ 142, 2639, ¶ 195.

These transition plans expressly do not allow ***new*** orders of these facilities as UNEs. The "transition plan ... ***does not permit*** competitive LECs to add new ... UNEs." *Id.* at 2537, ¶ 5 (emphasis added). Thus, as the FCC itself explained in a

recent decision describing the TRRO, "[t]o avoid disruption in the marketplace, the Commission ordered a 12-month transition period to allow competitors to move their ***preexisting*** UNE P[latform] customers to alternative arrangements." *BellSouth Declaratory Ruling*,[25] 20 FCC Rcd at 6834, ¶ 8 (emphasis added). The FCC notably did not interpret its own order to permit competitors to add ***new*** customers during this transition period.

The TRA properly concluded that the terms of the FCC transition plan are flatly inconsistent with the conclusion that CLECs should be permitted to place new orders indefinitely for as long as CLECs can drag out the process of amending interconnection agreements. Such a result is directly contrary to the FCC's statement that such new orders are "not permitted" and may not be "obtain[ed]." TRRO, 20 FCC Rcd at 2641, ¶ 199; 47 C.F.R. § 51.319(d)(2)(iii) (App. B to TRRO).

A contrary result would also be deeply illogical. Why would the FCC, having found (1) that the UNE Platform is anticompetitive and (2) that CLECs cannot use it to serve even ***existing*** customers except for a strictly limited time and at higher rates, nevertheless allow competitors to serve *new* customers indefinitely and with no mention of higher rates? In rejecting that perverse result, the TRA joined the overwhelming consensus of expert bodies that have made clear that, as of March 11, 2005, BellSouth need not provision new UNE orders of these facilities. More

[25] Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*, 20 FCC Rcd 6830 (2005) (*"BellSouth Declaratory Ruling"*).

than 20 state commissions have reached that result. *See* Collection of State Commission Decisions (attached hereto as Exhibit L).

Moreover, in the three instances in BellSouth's region where state commissions agreed with the CLECs' arguments on these issues, federal district courts in Georgia, Kentucky, and Mississippi concluded that those state-commission decisions were contrary to the text and intent of the FCC's TRRO and issued detailed and well-reasoned decisions granting preliminary injunctions against their enforcement.[26] As the Georgia district court explained, "[t]he FCC's decision to create a limited transition that applied ***only*** to the embedded base and required higher payments even for those existing facilities cannot be squared with the PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECs could order new facilities and did not specify a rate that competitors would pay to serve them." *BellSouth v. MCImetro*, 2005 WL 807062, at *2.

The federal court in Kentucky likewise emphasized this same important point: "If the defendants' interpretation is accepted, then BellSouth would be paid less for servicing ***new*** orders than ***existing*** orders. Also, the transition plan sets a specific time period within which the interconnection agreements shall be changed in order to effectuate the Order on Remand. If the defendants' position is

[26] *See BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC*, No. 1:05-CV-0674-CC, 2005 WL 807062 (N.D. Ga. Apr. 5, 2005) (*"BellSouth v. MCImetro"*), *aff'd*, 425 F.3d 964 (11th Cir. 2005); *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557 (S.D. Miss. 2005) (*"BellSouth v. Mississippi PSC"*); *BellSouth Telecomms., Inc. v. Cinergy Communications Co.*, No. 3:05-CV-16-JMH (E.D. Ky. Apr. 22, 2005) (*"Kentucky Preliminary Injunction Order"*) (collectively attached hereto as Exhibit M).

accepted, it is possible that BellSouth would be processing *new* orders longer than" it must serve ***existing*** customers. *Kentucky Preliminary Injunction Order* at 7-8.

Most important, in affirming the Georgia district court's decision to grant a preliminary injunction, the Eleventh Circuit confirmed that that court, like the courts in Kentucky and Mississippi and the many state commissions, had correctly interpreted the FCC's TRRO. *See BellSouth*, 425 F.3d at 969-70. The Eleventh Circuit concluded that the FCC issued a "clear directive" in the TRRO and that the FCC's order "'does not permit' new customers access to UNE P[latforms] after March 11, 2005." *Id.* at 969. In the Eleventh Circuit's words, by refusing to adhere to that directive, "the CLECs are clinging to the former regulatory regime in an attempt to cram in as many new customers as possible before they are forced to bow to the inevitable, but ***their argument contravenes the clear intent of the TRRO***." *Id.* at 970 (emphasis added).

Although the Joint Petitioners claim[27] that the Eleventh Circuit's judgment did not involve a "final order," the Eleventh Circuit directly addressed the proper understanding of the FCC's TRRO, and expressly agreed with the district court's analysis on that point. Indeed, the Georgia PSC understood the Eleventh Circuit's decision to be a sufficiently final determination of the lawfulness of its order permitting new ordering of UNEs that it has now ***withdrawn*** that order in light of the Eleventh Circuit decision.[28]

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[27] *See* Petition at 20.

[28] *See* Transcript Administrative Proceeding, Docket No. 19341-U, at 58-60 (Ga. Pub. Serv. Comm'n Nov. 17, 2005) (attached hereto as Exhibit N).

Moreover, of all the states in the country where this has been litigated, BellSouth is only aware of ***one*** (Illinois) in which the state commission has permitted indefinite new ordering for all CLECs.[29] The Illinois decision is by a district court – not the Seventh Circuit, as the Joint Petitioners mistakenly assert (Petition at 20-21) – and it predates the decisions of the three district courts in BellSouth's territory as well as the decision of the Eleventh Circuit. Indeed, the federal courts in Kentucky and Mississippi both acknowledged the existence of the Illinois decision, but correctly found it unpersuasive and refused to follow it. *See Kentucky Preliminary Injunction Order* at 10-11 n.2; *BellSouth v. Mississippi PSC*, 368 F. Supp. 2d at 563.

In sum, there is wide agreement among courts and agencies, including the Eleventh Circuit, that the language of the FCC's order means what it says, and that competitors are "not permit[ted]" to order these facilities as UNEs any more and "may not obtain" such facilities. TRRO, 20 FCC Rcd at 2641, ¶ 199; 47 C.F.R.§ 51.319(d)(2)(iii) (App. B to TRRO). By contrast, under the Joint Petitioners' arguments here, such new orders ***would*** be permitted and ***could*** be obtained, in direct contradiction to the FCC's clearly expressed intent.

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[29] In Michigan, after the district court dissolved its injunction as part of a settlement, the state commission agreed with BellSouth's reading of the FCC order. Order, *Application of Competitive Local Exchange Carriers*, Case No. U-14303, at 9 (Mich. Pub. Serv. Comm'n Mar. 29, 2005), *available at* http://www.cis.state.mi.us/mpsc/orders/comm/2005/u-14303etal_03-29-2005.pdf (concluding that competitors "no longer have a right under Section 251(c)(3) to order [UNE Platform] and other UNEs that have been removed from the [FCC's] list.").

2. JOINT PETITIONERS HAVE NO GREATER RIGHTS UNDER THE ALLEGED "ABEYANCE AGREEMENT" THAN DO OTHER COMPETITORS WHO ALSO CANNOT PLACE NEW ORDERS OF FACILITIES THAT THE FCC HAS MADE CLEAR ARE NOT SUBJECT TO UNBUNDLING.

The Joint Petitioners seem to believe that their supposed "Abeyance Agreement" exempts them from the effect of these FCC holdings, as authoritatively interpreted by the Eleventh Circuit, multiple district courts, this agency, and many others around the country. That is incorrect. In fact, contrary to the Joint Petitioners' contentions, even if the regulatory filing was a "commercial contract" of some kind, instead of the procedural filing seeking a short delay that on its face it appears to be, the document would provide the Joint Petitioners with no greater protection than other agreements provided to other carriers. That is, the "Abeyance Agreement", assuming it is a contract, is not different than the interconnection agreements that the TRA has held were not immune from the TRRO and FCC's mandate. Thus, even accepting the Joint Petitioners' claims, the "Abeyance Agreement" would not override the FCC's clear rule requiring immediate implementation of its "no new orders" requirement.

Specifically, the Joint Petitioners claim that, under this supposed agreement, BellSouth "waived its rights to implement or otherwise enforce [the relevant FCC orders] while the parties continue to operate under" the existing interconnection agreements, *i.e.*, until new agreement terms are adopted through negotiation and/or arbitration. Petition at 9. The Joint Petitioners highlight language in the regulatory filing stating that the parties "have agreed that they will continue operating under their current Interconnection Agreement until they are able to move

into the new arbitrated/negotiated agreements that ensue from this proceeding." *Id.*; *see also,* Exhibit E at 2.

But, in that respect, this supposed agreement is no different than the many other interconnection agreements that CLECs in Georgia, Louisiana, Tennessee, South Carolina, Kentucky, and Florida have claimed required BellSouth to continue permitting new UNE orders until new agreement terms could be reached pursuant to a negotiation/arbitration process. For instance, in the proceeding before the TRA, MCI argued that its agreement likewise required BellSouth to engage in indefinite proceedings to negotiate and, if necessary, arbitrate, new terms to its interconnection agreement before BellSouth could implement the aspects of the TRRO prohibiting new UNE Platform orders.

In support, MCI pointed to language in its agreement stating that "'[i]n the event that any effective and applicable legislative, regulatory, judicial or other legal action materially affects any material term of this Agreement ..., MCI or BellSouth may, on thirty (30) days written notice ... require that such terms be renegotiated.... In the event that such new terms are not renegotiated within ninety (90) days after such notice, either Party may invoke the procedures of Section 22 (Dispute Resolution Procedures).'" MCI's Motion for Expedited Relief Concerning UNE-P Orders, Docket No. 04-003821 at 4 (Mar. 2, 2005) (attached hereto as Exhibit O) (quoting Interconnection Agreement, Part A, § 2.3). The dispute-resolution provision, in turn, purported to require that the matter would be resolved before the TRA and that "'[d]uring the [TRA] proceeding, each Party shall

continue to perform its obligations under the Agreement.'" *Id.* at 5 (quoting Interconnection Agreement, Part A, § 22.1). Thus, the Joint Petitioners supposed agreement is no different in this regard from the many agreements that the Eleventh Circuit, the TRA, and many other courts and agencies have properly concluded do not override the FCC's clear "no new order" directive.

Moreover, and contrary to the Joint Petitioners' apparent belief, the supposed "Abeyance Agreement" expressly gives the Joint Petitioners no ***greater*** rights than it would have under its interconnection agreement with BellSouth. Rather, it states that the parties would "continue operating" under its existing agreement with BellSouth. Joint Motion, Exhibit E at 2. But, as the Eleventh Circuit has explained, operating under existing agreements does not immunize CLECs from the effect of this FCC order, which is properly understood "to impose *unilaterally* the ban on new unbundling." *BellSouth*, 425 F.3d at 970 (emphasis added). The FCC's "unilateral" decision to end these anti-competitive practices takes precedence over the Joint Petitioners' alleged agreement, just like it takes precedence over the existing agreements of other CLECs. Thus, even if the Joint Petitioners are correct as to every aspect of their interpretation of this supposed agreement, their arguments still must be rejected, because this purported "commercial contract", like the others, does not override the FCC's "unilateral" order.

The Florida Commission reached the same conclusion in its Answer Brief to the Joint Petitioners' appeal of the Florida Commission's No New Adds Order.

> Clearly, the Eleventh Circuit's conclusion is generic as to the entire class of "many agreements with CLECs" that BellSouth entered into under the previous regulatory scheme. Plaintiff's attempted reliance on the Abeyance Agreement as a separate basis to argue that negotiations are necessary, or to attack the Eleventh Circuit's analysis, is therefore unavailing. The clear import of that analysis is that no agreements between the parties to negotiate "change of law" implementation, including the Abeyance Agreement, affect the FCC's unilateral ban on new adds after March 11, 2005, because "[n]o negotiations are necessary to implement this aspect of the TRRO."

Exhibit B at 22-23.

As discussed, the FCC made a firm determination that, as of the March 11, 2005 effective date of the TRRO, new orders of the UNE Platform (and, in some instances, loops and transport, would not be "permit[ted]." TRRO, 20 FCC Rcd at 2641-42, ¶ 199. In such circumstances, the FCC's "clear directive" to end the growth of the anticompetitive UNE Platform trumps any agreement provisions. *BellSouth*, 425 F.3d at 969 ("The FCC now contends that a 'nationwide bar' on UNE P[latform] orders will encourage innovation and will not impair CLECs. To effect this policy choice, and given the need for 'prompt action,' the FCC decreed that new UNE P[latform] orders, among others, would not be permitted."). In the Eleventh Circuit's words, in light of this FCC directive, ***"[n]o negotiations are necessary to implement this aspect of the TRRO."*** *Id.* (emphasis added); *see also BellSouth v. Mississippi PSC*, 368 F. Supp. 2d at 563 (explaining that, "[a]s a practical matter, it is not obvious to [the Court] what issues would remain to be negotiated concerning the section 251 UNEs de-listed by the FCC").

In sum, the Eleventh Circuit emphasized, "it makes no sense to argue that BellSouth is required to negotiate over a practice the FCC has the power to and did prohibit." *BellSouth*, 425 F.3d at 970. The Eleventh Circuit's analysis on this point applies equally under both agreements such as MCI's and the supposed "Abeyance Agreement" posited by the Joint Petitioners.

Therefore, although the Joint Petitioners go to great lengths to attempt to distinguish its "Abeyance Agreement" case, that supposed agreement ***at most*** gave Joint Petitioners what other CLECs claimed they had before the Eleventh Circuit and the TRA: a general right to mandate that BellSouth negotiate before changes were made to its agreement with BellSouth. The Eleventh Circuit, however, has rejected in the clearest possible terms the notion that there is any need to negotiate on this issue before the FCC's holding takes effect. In the Eleventh Circuit's words, "it ***makes no sense***" to argue that negotiation is required in light of the FCC's binding and unequivocal no-new-orders rule. *BellSouth*, 425 F.3d at 970 (emphasis added).

3. The Joint Petitioners' *Sierra-Mobile* Arguments Are Both Irrelevant and Incorrect.

Joint Petitioners also argue that the FCC lacked authority to make its rules immediately effective, regardless of the content of individual interconnection agreements or contracts. *See* Petition at 15-22. These arguments are not properly before the TRA and, in any event, are wrong on the merits.

As an initial matter, arguments about the FCC's authority to make its new determinations effective immediately are not properly before the TRA. As the

Eleventh Circuit has explained, it is the FCC that issued a "clear directive" that "new UNE-P orders, among others, would not be permitted." *BellSouth*, 425 F.3d at 969. The TRA's duty is to apply that FCC directive, as the agency is legally required to do under the 1996 Act. *See Iowa Utils. Bd.*, 525 U.S. at 380, 385.

Although the Joint Petitioners are free to raise such an argument on direct review of the FCC's decision in the pending proceeding in the D.C. Circuit, they may not collaterally attack the FCC's judgment via the TRA. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004); *BellSouth v. MCImetro*, 2005 WL 807062, at *4; *accord Kentucky Preliminary Injunction Order* at 11-12. The TRA need go no further to reject this claim.

Even if this issue were properly before the TRA, however, the FCC is in fact empowered to make its determinations effective immediately, regardless of the content of particular interconnection agreements or other contracts.

To begin, the Supreme Court has squarely held that the FCC has authority to issue rules implementing all aspects of the 1996 Act. *See Iowa Utils. Bd.*, 525 U.S. at 380 (the statute "***explicitly*** gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies"); *see also id.* at 385 (confirming that state commissions must comply with these judgments in undertaking their functions under the federal statute); *BellSouth*, 425 F.3d at 970 (the FCC has "the undisputed power to issue binding rules under the 1996 Act").

That is precisely what the FCC has done here. It has established rules that implement the 1996 Act – *i.e.*, no new switching/UNE Platform orders (and, in some cases, no new loop and transport orders) as of the effective date of the TRRO, regardless of the content of particular agreements. The FCC is plainly authorized to issue such a requirement, and the TRA had no lawful choice but to adhere to that rule. *See id.*; *Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs., Inc.*, 323 F.3d 348, 352 (6th Cir. 2003) ("[i]n this regulatory regime state commissions are directed by provisions of the Act and FCC regulations in making decisions").

Moreover, it was "particularly appropriate" for the FCC to require implementation of its new rule immediately because it "was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs." *BellSouth v. MCIMetro*, 2005 WL 807062, at *2. The Supreme Court has long held that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965). Federal agencies thus have "general discretionary authority to correct [their] legal errors," *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992), and the immediate implementation of the "no new orders" rules clearly falls within that broad discretionary field. Thus, as the Eleventh Circuit has explained, "the Supreme Court and other courts have recognized an implied authority in ...

agencies to reconsider and rectify errors." *Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989).

In this context, those established rules, reiterated by the Eleventh Circuit in the recent *BellSouth* case involving the same issues presented here, *see BellSouth*, 425 F.3d at 970 ("[a]n agency also has the power to correct its earlier legal errors") (citing *Gun South*, 877 F.2d at 858), lead directly to the conclusion that the FCC has authority to make its determinations of federal telecommunications policy immediately effective in order to limit the harm caused by the agency's prior, now-vacated orders. BellSouth's existing agreements, including "voluntary" agreements, incorporate the UNE Platform ***only*** because the FCC's three prior unbundling decisions, each of which was vacated by the federal courts, required BellSouth to accept orders for the UNE Platform. *See USTA II*, 359 F.3d at 595 (emphasizing the FCC's "failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings").

The TRRO thus simply seeks to limit the harm caused by the FCC's earlier determinations by making the agency's new decision immediately effective. The FCC emphatically concluded that its former, repeatedly invalidated policies had been misguided; they had operated as a "disincentive to competitive LECs' infrastructure investment" and had "hinder[ed] the development of genuine, facilities-based competition." TRRO, 20 FCC Rcd at 2653, ¶ 218. The FCC acted to stop that anticompetitive harm. That is a judgment the FCC is authorized to

make under the 1996 Act and the Supreme Court and Eleventh Circuit precedent discussed above.

Because the FCC plainly had authority to take this action under its power to implement the 1996 Act, fortified by its authority to undo past mistakes, the TRA need not decide whether the so-called *Mobile-Sierra* doctrine[30] discussed in the Petition *also* authorized the FCC's actions.

Even if the TRA does reach that issue, however, the Eleventh Circuit in *BellSouth* specifically rejected the argument that the *Mobile-Sierra* doctrine was not satisfied here. The court of appeals explained that the appellants there "argue that the FCC could not have invoked the *Mobile-Sierra* doctrine," but it concluded that "***this argument fails***." *BellSouth*, 425 F.3d at 969 (emphasis added). Indeed, the Eleventh Circuit held that the FCC had made precisely the public interest findings necessary to invoke this doctrine. *See id.* at 970.

The Joint Petitioners try to avoid this binding Eleventh Circuit precedent by claiming that the FCC has said that the *Mobile-Sierra* doctrine does not apply in this context. But the Joint Petitioners cite only a single sentence of pure dictum from a footnote in an FCC order that did not involve either interconnection agreements or the TRRO, and that far predates the Eleventh Circuit's decision. *See* Petition at 19 (citing *IDB Mobile Communications v. COMSAT Corp.*, 16 FCC Rcd 11474, 11481, ¶ 16 n.50 (2001)). Such dictum would not bind the FCC, *see, e.g.*, Memorandum Opinion and Order, *Application of Maureen L. Smith*, 56 F.C.C.2d 1077, 1079-80,

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[30] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

¶ 6 (1975), much less should it be binding here in the face of a directly contrary Eleventh Circuit judgment.

C. The Joint Petitioners' Position Is Prohibited as a Matter of Law.

1. Even if the Regulatory Filing Is a "Commercial Contract", Adoption of the Joint Petitioners' Position Leads to Absurd, Impossible, and Unreasonable Results and Thus Must Be Rejected.

Moreover, even assuming the regulatory filing is a "commercial contract" (which BellSouth denies), adopting the Joint Petitioners' position would lead to an absurd or unreasonable result as it would require the TRA to find that BellSouth agreed to waive contractual rights related to the incorporation of the TRRO in the Current Agreement eight months prior to those changes even being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up the right to implement these new rules for the Current Agreement even before any party knew what those rules would contain and without any venue to address disputes related to those new rules. Not only is this factually incorrect but it also leads to absurd and unreasonable results that only benefit the Joint Petitioners to the detriment of BellSouth and all other CLECs in Tennessee.

Tennessee law mandates that, in construing a contract (assuming *arguendo* that the regulatory filing is a contract), absurd or unreasonable results should be avoided.

> "The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and one ***which will not give one of them an unfair or unreasonable advantage over the other***. So that interpretation which evolves the more reasonable and probably contract

> should be adopted, and a construction leading to an absurd result should be avoided."

See Securities Inv. Co. v. White, 91 S.W.2d 581, 583-584 (Tenn. App. 1935) (emphasis added).

The South Carolina Commission used this same rationale to reject the Joint Petitioners' "Abeyance Agreement" argument:

> In other words, adopting the Joint Petitioners' argument would require this Commission to find that the scope of the Abeyance Agreement was so wide that, even though the TRRO proceeding is never mentioned in the Agreement, BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the TRRO in the current agreements eight months prior to those changes even being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up the right to implement those new rules for the current Agreement even before any party knew what those rules would contain. We reject this argument because it impermissibly leads to unreasonable results.[31]

The TRA should find likewise here.

In addition to being unreasonable, the Joint Petitioners' arguments must be rejected because they rely on impossible facts that defy logic. As previously stated, the parties procedurally agreed to avoid the separate/second process for negotiating/arbitrating change of law for "*USTA II* and its progeny" because those issues would be raised in the pending arbitration. As the TRA is aware, the deadline to identify new issues to the parties' arbitration was October 2004. *See* Exhibit G. Thus, while the parties could add issues arising out of *USTA II,* they

[31] Exhibit C at 9.

certainly could not add issues arising out of the TRRO because the TRRO was not issued until ***February 4, 2005***!

It simply makes no sense to find that BellSouth agreed to waive its change-of-law rights with respect to the TRRO, particularly in light of the fact that there was no opportunity and still no opportunity to include TRRO issues in the arbitration. Consequently, the parties could not have included the TRRO in their procedural agreement because the parties could not, and currently cannot, raise TRRO issues in the arbitration proceeding. *See Wilkerson v. Williams*, 667 S.W.2d 72 (Tenn. App. 1983) (when in doubt regarding contract's meaning, courts should prefer construction rendering contract "fair, customary and such as prudent men would naturally execute" instead of construction that is "inequitable, unusual, or such as reasonable men would not be likely to enter into"); *Pettyjohn v. Brown Boveri Corp.*, 476 S.W.2d 268 (Tenn. App. 1971) (court chose construction of contract rendering it "more reasonable and rational"); *Moore v. Moore*, 603 S.W.2d 736 (Tenn. App. 1980) (court will construe contract, according to plain meaning, to determine reasonable meaning).

Further, the Joint Petitioners' arguments are so absurd and extreme that it resulted in another state commission rejected them because it found the purported "contract" was illegal and against public policy. Specifically, the Florida Commission determined that the Joint Petitioners' purported "contract" is illegal, because it violates the FCC's express findings in the TRRO, findings confirmed by numerous state commissions and federal courts, that CLECs cannot force ILECs to continue to accept new adds for delisted UNEs after March 11, 2005. *See* Exhibit

B at 11-12; *BellSouth*, 425 F.3d at 969-70. The Florida Commission also found that the Joint Petitioners' purported "contract" is contrary to public policy, because it defeats the FCC's ***public policy*** decision in the TRRO to impose the ban on new adds to remedy the harm caused to facilities-based competition. *See* Exhibit B at 11-12; *BellSouth*, 425 F.3d at 969 ("The FCC now contends that a 'nationwide bar' on UNE P[latform] orders will encourage innovation and will not impair CLECs. To effect this policy choice, and given the need for 'prompt action,' the FCC decreed that new UNE P[latform] orders, among others, would not be permitted.").

> [Joint Petitioners'] theory is tantamount to a claim that BellSouth has previously agreed with, *i.e.*, "contracted" with, Plaintiffs to violate the FCC's not-yet-issued TRRO. Thus, Plaintiffs argue in effect that the Florida Commissioners should have enforced this "contract" to violate the TRRO and, failing that, this Court should do so now. In support of this obviously faulty premise, Plaintiffs claim that this was the intent of the parties. Even assuming this dubious premise could be established, which seems improbable, the relevant law would not be found in cases such as *Pennzoil Co. v. Federal Energy Reg. Comm'n.*, 645 F.2d 360 (5th Cir. 1980), but in cases such as *I.U.B.A.C Local Union No. 31 v. Anastasi Bros. Corp.*, 600 F. Supp. 92 (S.D. Fla. 1984), holding that a Court may not enforce a contract that is illegal or contrary to public policy. In this instance, the purported "contract" relied upon by Plaintiff, even assuming *arguendo* it exists at all, is both.[32]

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[32] Exhibit B at 11-12. Tennessee law is the same as courts in Tennessee cannot enforce a contract that is illegal or against public policy. *See Johnson v. Central Nat'l. Ins. Co.*, 346 S.W.2d 277, 281 (Tenn. 1962) ("A contract may be express or implied, written or oral, but, to be enforceable, it must among other elements result from mutual assent to its terms, be predicated upon sufficient consideration, and be sufficiently definite for its terms to be enforced."); *Ledbetter v. Townsend*, 15 S.W.3d 462, 464 (Tenn. 1999) ("It is well settled that the courts of Tennessee will not enforce obligations arising out of a contract or transaction that is illegal."); *Harton v. Lyons*, 36 S.W. 851, 855 (Tenn. 1896) ("'No principle of law is better settled than that an action will not lie to enforce a contract made in violation of a statute or of the common law, or which is immoral in its or character, or against public policy.'")

Using the same analysis of the Florida Commission, adoption of the Joint Petitioners' arguments here would also defeat the TRA's stated public policy positions. In fact, in its initial No New Adds Order (July, 13, 2005 Order), the TRA stated that, in regulating utilities, it must "consider the consumers, the public good, and the overall landscape of the utilities industries." *See* Docket No. 04-00381, Order Granting Alternative Relief at 10 (Jul. 13, 2005). The TRA further stated that "[o]ne goal of the TRRO was to encourage facilities-based competition" and it based its initial Order on the belief that a "hasty implementation of the New Adds change" would frustrate this aim. *Id.*

Granting the Joint Petitioners' Petition would lead to absurd and unreasonable results that ultimately frustrate the TRRO's aim, because it would force BellSouth to involuntarily continue a defunct regulatory regime that the FCC prohibited on the grounds that it impedes facilities-based competition. It is further against the TRA's own public policy agenda because, contrary to the TRRO, it would provide two CLECs with TELRIC pricing for delisted UNEs while all other competitors in Tennessee must comply with the current status of the law. Clearly, such a result cannot be sanctioned by the TRA.

2. Even if the Regulatory Filing Is a "Commercial Contract", There Was No Meeting of the Minds Regarding the Scope of the Contract and Thus the Purported Contract Is Unenforceable.

As can be seen by the above discussion as well as the conclusions of other state commissions, assuming *arguendo* that the regulatory filing is a "commercial contract", the parties fundamentally disagree as to what it means. Indeed, the

very fact that the Joint Petitioners contend that, through a filing made in a regulatory proceeding, BellSouth agreed to indefinitely waive rights under a FCC Order issued eight months later without even knowing what those rights are leads to the inescapable conclusion that there was no meeting of the minds regarding the purported contract (assuming it existed at all).

Under Tennessee law, formation of a contract does not occur when the parties fail to have a meeting of the minds regarding the essential terms of their bargain. *See e.g., Doe v. HCA Health Serv. of Tenn, Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001) (invalidating the contract between patient and hospital where there was no meeting of the minds regarding the essential term of price for services); *see also, Sumner County Bd. of Educ. V. Mansker Farms, LLC*, 2003 WL 152645 at *4 (Tenn. App. Jan. 23, 2003).

Here, the Joint Petitioners construe the following phrase from the July 2004 Joint Motion to mean that BellSouth agreed to indefinitely freeze the rates, terms, and conditions of the Joint Petitioners' Current Agreements and by doing so, voluntarily agreed to forgo any rights it may have under the yet-to-be issued TRRO:

> 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.[33]

[33] *See* Exhibit E.

Nothing on the face of the Joint Motion supports the Joint Petitioners' fanciful interpretation, which has already been rejected by other state commissions. And, BellSouth clearly disputes that it intended to give away rights under a FCC Order eight months prior to that Order being issued or that BellSouth knowingly agreed to violate the law, which is what results if the Joint Petitioners' position is accepted. Accordingly, even if the regulatory filing at issue was some kind of contract, there was no meeting of the minds and thus the alleged "contract" is unenforceable.

3. Even if the Regulatory Filing Is a Contract, the TRA's Decision to Disallow the Parties to Add Arbitration Issues Arising Under USTA II to the Arbitration Proceeding Results in the Recission of the Purported Contract.

As stated above, the purpose of the procedural filing was to hold the arbitration in abeyance for 90 days to do the following: (1) negotiate *USTA II* changes into the new interconnection agreements; and (2) for those *USTA II* changes that could not be negotiated, to agree on *USTA II* issues to add to the arbitration. *See* Exhibits E and F. Within this framework – i.e. adding *USTA II* related issues to the arbitration – the parties procedurally agreed to avoid a second change of law negotiation and arbitration process to address USTA II and its progeny. Thus, while the parties do dispute the scope of this procedural agreement (whether it applies to the TRRO), there is no dispute as to the purpose of this regulatory filing -- to avoid a second, duplicative arbitration/negotiation for *USTA II* under the Current Agreement by incorporating disputed issues relating to *USTA II* into the pending arbitration for the new Agreement. The TRA, however,

refused to allow the parties to add any *USTA II* related issues to the arbitration. *See* Exhibit H.

Thus, assuming solely for the sake of argument that the regulatory filing was a contract as claimed by the Joint Petitioners, the ability to add issues to the arbitration constituted a condition precedent. "A conditional contract is a contract whose very existence and performance depends upon the happening of some contingency or condition expressly stated therein...." *Real Estate Mgmt, Inc. v. Giles*, 293 S.W.2d 596, 598 (Tenn. App. 1956). "No special language is needed to create a condition precedent. The nature of the agreement and its surrounding circumstances may sufficiently manifest the parties' intention to make a contractual obligation conditional." *Sumner County Bd. of Educ.*, 2003 WL 152645 at *4. "If the condition is not fulfilled, the parties are excused from performing." AmJur., *Contracts*, § 458 (2d ed.); *see also, Abni Joint Venture v. Kinnard*, 1987 Tenn. App. LEXIS 2576 at *7-9 (noting that condition precedent must occur before party's performance is required).

Here, assuming *arguendo* that the parties intended exactly what the Joint Petitioners now claim (which is denied), the parties' obligation to avoid a "separate/second process of negotiating/arbitration change-of-law amendments to the current interconnection agreements to address *USTA II* and its progeny" was only triggered by the parties being allowed to add *USTA II* issues to the pending arbitration proceeding. *See* Exhibit E at 2-3. The TRA refused to add any new issues to the arbitration; thus, the condition precedent was unfulfilled and BellSouth is excused from performing as the Joint Petitioners now desire.

In addition, the TRA's decision also led to a partial failure of consideration. That is, assuming that the Joint Petitioners are entirely correct in their description of the parties' agreement (which they are not), the inability to add *USTA II* issues to the arbitration meant that BellSouth did not receive all that it bargained for in entering into the "Abeyance Agreement". "Failure of consideration is in fact simply a want of consideration, and if a partial failure of consideration is such as to affect the whole contract and defeat the object of the contract, then it may be a ground for recission." *Farrell v. Third Nat. Bank of Nashville*, 101 S.W.2d 158 (Tenn. 1937).

Accordingly, because the inability to add *USTA II* issues prevented the primary purpose of the procedural filing from being realized – *i.e.* to address *USTA II* issues in the already established arbitration proceeding instead of in a second change-of-law proceeding, there is a failure of consideration and the "Abeyance Agreement", assuming it is a valid "commercial contract", is unenforceable and should be rescinded.

4. Even if the Regulatory Filing Is a Contract, The Joint Petitioners Wrongly Construe the Scope of the Purported Contract.

The crux of the Joint Petitioners' argument is that the parties cannot "continue operating under their Current Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding" if the parties amend those agreements to incorporate the TRRO. Simply stated, the Joint Petitioners improperly read into the Joint Motion a requirement that the rates, terms, and conditions of the Current Agreements are frozen as of June 30, 2004,

until such time as the parties move onto the new arbitrated agreements. This interpretation is not only factually incorrect but also expressly rejected by the custom of the parties.

Indeed, there is nothing in the Joint Motion, the Order, or in the "Abeyance Agreement" that supports this interpretation. Further, it should be undisputed that the parties can and are continuing to operate under the Current Agreement until such time as the new arbitrated agreements become effective, even if certain provisions of the Current Agreement are modified to reflect changes of law. Further, as evidenced by recent amendment filings in Tennessee by NewSouth, NuVox, and BellSouth on February 22, 2005, (both of which are attached hereto as Exhibit P), the custom of the parties is to amend the Current Agreement and to continue operating under the Current Agreement, as amended.

Accordingly, contrary to the Joint Petitioners' fanciful interpretation, the parties are still operating under the Current Agreement even if certain terms and conditions are amended to be compliant with the current status of the law. Indeed, the practice and custom of the parties after entering into the "Abeyance Agreement" is directly contrary to the arguments asserted by the Joint Petitioners and thus should be rejected. *See Pinson & Assoc., Inc. v. Kreal*, 800 S.W.2d 486, 487 (Tenn. App. 1990) (course of conduct of parties is important factor in construing contract because it "is the strongest evidence of their original intent"); *Park National Bank v. Goolsby*, 164 S.W.2d 545, 546 (Tenn. 1942) (noting importance of custom or usage in explaining what is indistinct in contract).

Moreover, the TRA, in reviewing the Joint Motion, specifically found that the parties' agreement to avoid a second/separate change of law process was limited to *USTA II*: "Within this framework, the Parties agree to avoid a separate process of negotiating change-of-law amendments to the current interconnection agreements ***to address USTA II***...."[34] The Joint Petitioners have never challenged this Order and instead are articulating a completely contrary position with the Petition, arguing that it applies to the TRRO as well. Accordingly, the Joint Petitioners' can find no support in the Order approving the Joint Motion for the positions they espouse here.

5. THE PETITION IS PROCEDURALLY IMPROPER AND IS ALSO BARRED BY THE DOCTRINE OF *RES* JUDICATA.

While the Joint Petitioners couch their latest request for relief as a "Petition to Enforce Abeyance Agreement", the Petition indirectly and in some cases directly challenges the TRA's No New Adds Orders independent of the "Abeyance Agreement". *See* Petition and discussion of *Sierra-Mobile* Doctrine at 15-22. In effect, the Joint Petitioners are seeking reconsideration or review of the No New Adds Orders for reasons independent of the Abeyance Agreement in the arbitration proceeding docket. Such a request is untimely and inappropriate and thus should be summarily dismissed. *See* TRA Rule 1220-1-2-.20.

Further, regarding the "Abeyance Agreement" and the Joint Petitioners' arguments, the TRA has already heard and rejected them. Specifically, the TRA, in response to Joint Petitioners' counsel's direct question, considered and refused to

[34] *See* Exhibit G (emphasis added).

adopt the Joint Petitioners' "Abeyance Agreement" arguments. As stated by Director Tate, "I was going to stand by my previous statement that we were denying the motions as presented but granting the motion for alternative relief as set forward in my motion and my statements. So I will stand by that, Mr. Heitmann." *See* Exhibit E at 00022-00023.

Consequently, the Joint Petitioners' Petition is barred by the doctrine of *res judicata*. This doctrine "bars a second suit between the same parties on the came cause of action with regard to all issues that were or could have been litigated in the former suit." *Lee v.* Hall, 790 S.W.2d 293, 294 (Tenn. App. 1990) (citing *Massengill v. Scott*, 738 S.W.2d 629, 631 (Tenn. 1987). "It is based on the public policy favoring finality in litigation and does not depend upon correctness or fairness, as long as the underlying judgment is valid." *Id.* (citing *Moulton v. Ford Motor Co.*, 533 S.W.2d 295, 296 (Tenn. 1986)). For *res judicata* to apply, four elements must be established: (1) the underlying judgment is rendered by a court of competent jurisdiction; (2) the same parties were involved in both suits; (3) the same cause of action was involved in both suits; and (4) the underlying judgment was on the merits. *Id.* (citations omitted).

Here, all of the elements of *res judicata* are met. In particular, the TRA denied the Joint Petitioners' identical "Abeyance Agreement" arguments in the context of Docket No. 04-00381. *See* Exhibit I. The TRA is a forum of competent jurisdiction. BellSouth and the Joint Petitioners are involved in both proceedings – Docket No. 04-00381 and Docket No. 04-00046. And, the TRA's rejection of the

"Abeyance Agreement" in its deliberations and implicitly in its Orders was a final judgment on the merits, because the TRA specifically considered the arguments in response to Joint Petitioners' counsel's question. *See* Exhibit I; *see also*, CJS, *Judgments*, § 728 ("A judgment is on the merits when it determines the rights and liabilities of the parties based on the disclosed facts, irrespective of formal, technical, or dilatory objections."). Indeed, the Joint Petitioners characterized the TRA's No New Adds Orders as final orders in its appeal of the No New Add Orders. Thus, there should be no dispute on the matter. *See* Exhibit J at ¶ 1 ("Plaintiffs NuVox and Xspedius seek review of ***two final*** orders of the Tennessee Regulatory Authority ....").

The fact that the TRA did not separately address the "Abeyance Agreement" in its No New Adds Orders is inconsequential. Significantly, because the analysis is the same under the supposed "Abeyance Agreement" as it is under the interconnection agreement provisions relied on by parties such as MCI, there was no need for the TRA to separately address the Joint Petitioners' "Abeyance Agreement" claims, especially since the TRA expressly rejected them at its April 11, 2005 Agenda Conference.[35] *See Mount Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1234 (9th Cir. 1993) ("[T]here is no obligation to make references in the agency explanation to all the specific issues raised in comments. The agency's explanation

[35] Any suggestion by the Joint Petitioners that the TRA should disregard the transcript of the TRA's deliberations on April 11, 2005 and instead focus solely on the TRA's No New Adds Orders should be summarily rejected. In addition to ignoring substantial evidence, such an argument also ignores the fact that the No New Adds Orders cited to said transcript, thereby evidencing the importance of said deliberations and the fact that they constitute competent, reliable evidence as to what the TRA considered and decided. *See* Order Terminating Alternative Relief, Docket No. 04-00281 at n. 5, 8.

must simply enable a reviewing court to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did.") (internal quotation marks and citations omitted); *Springfield Television Corp. v. FCC*, 609 F.2d 1014, 1020 (1st Cir. 1979) ("The agency need not address every facet of an issue in scholarly depth, but must explain enough for the reviewing court to be able to discern the agency's path of decision.").

Importantly, the Joint Petitioners construed the TRA's No New Adds Orders to include their "Abeyance Agreement" arguments, because they appealed those decisions for failing to adopt said arguments.[36] *See* Exhibit J. Thus, there should be no dispute on this issue.

Even if the TRA finds that the specific requirements of *res judicata* have not been met in this particular instance for technical reasons (a conclusion that defies the evidence), BellSouth submits that the TRA should not revisit its prior denial of the Joint Petitioners' "Abeyance Agreement" arguments. For the reasons espoused above, that denial was appropriate and the TRA's conclusion that BellSouth is no longer required to accept new adds for delisted UNEs even for the Joint Petitioners complies with the law and is consistent with both the TRA's and the FCC's stated public policy. Any other conclusion results in the TRA creating a

[36] BellSouth recognizes that the Motion to Dismiss filed by the TRA in federal court in response to the Joint Petitioners' appeal stated that the No New Adds Orders on their face did not address the "abeyance agreement." *See* Motion to Dismiss at 11. BellSouth agrees with this statement but submits that it is inconsequential for the reasons previously stated. Further, any suggestion that the TRA believes that its No New Adds Orders did not resolve the "Abeyance Agreement" argument must be balanced by a review of the April 11, 2005 transcript of deliberations, which proves the contrary.

fictitious agreement that is unreasonable, against public policy, contrary to the current status of the law, absurd, and ultimately makes no sense.

REQUEST FOR ORAL ARGUMENT

To facilitate the TRA's analysis and consideration of the Petition and BellSouth's Response, BellSouth requests that the TRA set oral arguments on this matter. Upon information and belief, the Joint Petitioners do not object to this request.

CONCLUSION

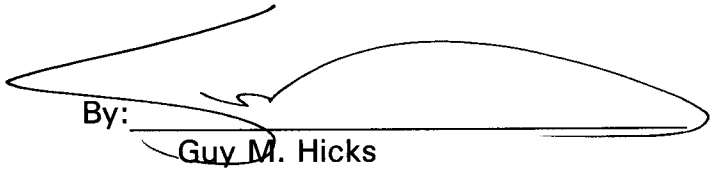
The Joint Petitioners' Petition defies common sense and results in BellSouth being forced to involuntarily continue for Nuvox and Xspedius (but not for any other CLEC), a regulatory regime that the federal courts, the FCC, and state commissions, have held ceased as of March 11, 2005. The Joint Petitioners' interpretation is also directly contrary to the national public policy articulated by the FCC in the TRRO to ban UNE-P in order to encourage innovation and facilities based competition.

Most importantly, the Joint Petitioners attempt to convince the TRA to accept a version of events that is just not credible - that BellSouth willingly agreed, for no apparent consideration or logical reason, to give up the benefits of future FCC rulings sight unseen. The truth is not hard to see. The so-called "Abeyance Agreement" is simply a regulatory filing and not a "commercial contract". It was never intended to do what the Joint Petitioners now seek. At its core, the Petition

is a naked and desperate attempt to avoid the TRA's valid No New Adds Orders and should be rejected.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



By: _____

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

R. Douglas Lackey
James Meza
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2006, a copy of the foregoing document was served on the following, via the method indicated:

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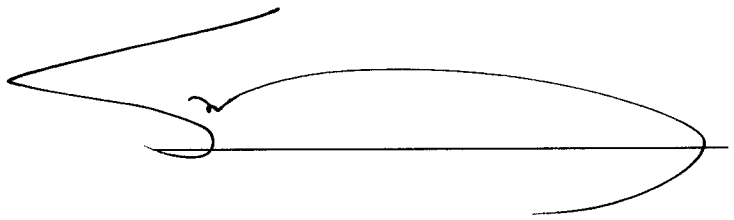
[ ] Electronic

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

[ ] Hand
[✓] Mail
[ ] Facsimile
[ ] Overnight
[ ] Electronic

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



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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.	DOCKET NO. 041269-TP
In re: Emergency petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. for Commission order directing BellSouth Telecommunications, Inc. to continue to accept new unbundled network element orders pending completion of negotiations required by "change of law" provisions of interconnection agreement in order to address the FCC's recent Triennial Review Remand Order (TRRO).	DOCKET NO. 050171-TP
In re: Emergency petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. for Commission order directing Verizon Florida Inc. to continue to accept new unbundled network element orders pending completion of negotiations required by "change of law" provisions of interconnection agreement in order to address the FCC's recent Triennial Review Remand Order (TRRO).	DOCKET NO. 050172-TP ORDER NO. PSC-05-0492-FOF-TP ISSUED: May 5, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

ORDER DENYING EMERGENCY PETITIONS

BY THE COMMISSION:

Case Background

On August 21, 2003, the Federal Communications Commission (FCC) released its *Triennial Review Order*[1], which contained revised unbundling rules and responded to the D.C. Circuit Court of Appeals' remand decision in *USTA I*.[2] The *TRO* eliminated enterprise switching as a UNE on a national basis. For other UNEs (e.g., mass market switching, high capacity loops, dedicated transport), the *TRO* provided for state review on a more granular basis to determine whether and where impairment existed, to be completed within nine months of the effective date of the order.

On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in *United States Telecom Ass'n v. FCC*[3] which vacated and remanded certain provisions of the *TRO*. In particular, the D.C. Circuit held that the FCC's delegation of authority to state commissions to make impairment findings was unlawful, and further found that the national findings of impairment for mass market switching and high-capacity transport were improper and could not stand on their own. Accordingly, the Court vacated the *TRO's* subdelegation to the states for determining the existence of impairment with regard to mass market switching and high-capacity transport. The D.C. Circuit also vacated and remanded back to the FCC the *TRO's* national impairment findings with respect to these elements.

As a result of the Court's mandate, the FCC released an *Order and Notice*[4] (Interim Order) on August 20, 2004, requiring ILECs to continue providing unbundled access to mass market local circuit switching, high capacity loops and dedicated transport until the earlier of the effective date of final FCC unbundling rules or six months after Federal Register publication of the *Interim Order*. Additionally, the rates, terms, and conditions of these UNEs were required to

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[1] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, rel. August 21, 2003 (*Triennial Review Order or TRO*).

[2] United States Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (USTA I).

[3] 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*), cert. denied, 160 L. Ed. 2d 223, 2004 U.S. LEXIS 671042 (October 12, 2004).

[4] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, rel. August 20, 2004 (*Interim Order*).

be those that applied under ILEC/CLEC interconnection agreements as of June 15, 2004.[5] In the event that the interim six months expired without final FCC unbundling rules, the *Interim Order* contemplated a second six-month period during which CLECs would retain access to these network elements for existing customers, at transitional rates.

On November 1, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed its Petition to establish a generic docket to consider amendments to interconnection agreements resulting from changes of law. Specifically, BellSouth asked that we determine what changes are required in existing approved interconnection agreements between BellSouth and competitive local exchange carriers (CLECs) in Florida as a result of *USTA II* and the *Interim Order*.

On February 15, 2005, Order No. PSC-05-0171-FOF-TP was issued denying the Florida Competitive Carriers Association (FCCA) and the Competitive Carriers of the South's (CompSouth) Motion to Dismiss BellSouth's Petition, as well as the Motion to Dismiss filed by Xspedius Communications, LLC on behalf of its operating affiliates, Xspedius Management Co. of Jacksonville, LLC and Xspedius Management Co. Switched Services, LLC, NuVox, Inc. on behalf of its operating entities NuVox Communications, Inc., NewSouth Communications Corp., KMC Telecom V, Inc., and KMC Telecom III, LLC (Joint CLECs).

On February 4, 2005, the FCC released its Order on Remand (*TRRO*), which included its Final Unbundling Rules.[6] In the *TRRO*, the FCC found that requesting carriers are not impaired without access to local switching and dark fiber loops. Additionally, the FCC established conditions under which ILECs would be relieved of their obligation to provide, pursuant to section 251(c)(3) of the Act, unbundled access to DS1 and DS3 loops, as well as DS1, DS3, and dark fiber dedicated transport. On February 11, 2005, BellSouth issued Carrier Notification SN91085039 in which it declared that switching,[7] certain high capacity loops in specified central offices,[8] and dedicated transport between a number of central offices having certain characteristics,[9] as well as dark fiber[10] and entrance facilities,[11] will no longer be available as of

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[5] Except to the extent the rates, terms, and conditions have been superseded by 1) voluntarily negotiated agreements, 2) an intervening FCC order affecting specific unbundling obligations (e.g., an order addressing a petition for reconsideration), or 3) a state commission order regarding rates.

[6] In the Matter of Unbundling Access to Network Elements, WC Docket No. 04-313; In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand, FCC 04-290, rel. Feb. 4, 2005 (*TRRO*).

[7] *TRRO* ¶199

[8] *TRRO* ¶¶174, 178

[9] *TRRO* ¶¶126, 129

[10] *TRRO* ¶¶133, 182

[11] *TRRO* ¶141

March 11, 2005, because certain provisions of the *TRRO* regarding new orders for delisted UNEs (new adds) are self-effectuating as of that date.

On February 10, 2005, Verizon posted a letter on its website notifying CLECs that effective on or after March 11, 2005, CLECs may not submit orders for delisted UNEs.

Several motions and letters have been filed in Docket No. 041269-TL in response to BellSouth's February 11th Carrier Notification. On March 1, 2005, the Joint CLECs filed their Petition and Request for Emergency Relief in which the Joint CLECs ask that we issue an order finding that BellSouth may not unilaterally amend or breach either its existing interconnection agreements with the Joint CLECs or the Abeyance Agreement entered into between BellSouth and the Joint CLECs in Docket No. 040130-TP and approved by Order No. PSC-04-0807-PCO-TP, issued August 19, 2004. Likewise, on March 3, 2005, MCImetro Access Transmission Services, LLC filed its Motion for Expedited Relief Concerning UNE-P Orders and on March 4, 2005, Supra Telecommunications and Information Systems, Inc. filed its Petition and Request for Emergency Relief. Furthermore, XO Communications Services, Inc. (XO), CompSouth, US LEC of Florida, Inc. (US LEC), and AT&T Communications of the Southern States, LLC (AT&T) have all filed letters in support of the motions. BellSouth filed its Response to the Joint CLECs' Motion on March 4, 2005.

Additionally, AmeriMex Communications Corp. (AmeriMex) initiated Docket No. 050170-TP and Ganoco Inc. d/b/a American Dial Tone, Inc. (American Dial Tone) initiated Docket No. 050171-TP by filing their Emergency Petitions for an Order directing BellSouth to continue to accept new unbundled network element orders pending the completion of change-of-law negotiations required by their interconnection agreements with BellSouth. On March 15, 2005, BellSouth filed its Response in Opposition to the emergency petitions and a Motion to Consolidate Docket Nos. 041269-TP, 050171-TP, and 050172-TP. On March 23, 2005, Amerimex filed a letter stating it had signed a commercial agreement with BellSouth which rendered its Petition moot. Thus, Docket No. 050170-TP has been closed. We have, however, addressed herein the question raised by American Dial Tone in Docket No. 050171-TP.

This order also addresses American Dial Tone's Emergency Petition for an order directing Verizon to continue to accept new unbundled network element orders for de-listed UNEs pending the completion of change-of-law negotiations required by its interconnection agreements with Verizon filed in Docket No. 050172-TP.

On March 7, 2005, BellSouth issued Carrier Notification SN91085061, which stated that in light of the various objections filed with state commissions, BellSouth was revising the implementation date contained in Carrier Notification SN91085039. BellSouth stated it would continue to accept CLEC orders for "new adds" as they relate to the former UNEs as identified by the FCC until the earlier of (1) an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders; or (2) April 17, 2005. By Carrier Notification SN91085070 issued March 21, 2005, BellSouth clarified that "(d)ue to the system changes being implemented on April 17, 2005, CLECs who intend to continue to place new orders with BellSouth for switching or port/loop combinations must sign a Commercial Agreement by April 8, 2005, to ensure ordering continuity."

We note that several Petitions for Reconsideration and/or Clarification of the *TRRO* have been filed with the FCC. Among them are two petitions, one filed jointly by CTC Communications Corp., Gillette Global Network, Inc. d/b/a Eureka Networks, GlobalCom, Inc., Lightwave Communications, LLC, McLeodUSA, Inc., Mpower Communications Corp., PacWest Telecomm, Inc., TDS Metrocom, LLC and US LEC Corp. and one filed by the Pace Coalition, which ask the FCC to reconsider and/or clarify whether the *TRRO's* prohibition on "new adds" is self-effectuating

We have jurisdiction to resolve this matter pursuant to Section 364.162, Florida Statutes, and under §251(d)(3) of the Act.

Arguments

Petitioners

The Petitioners[12] argue that BellSouth and Verizon's position that the provisions of the *TRRO* regarding new orders for delisted UNEs are self-effectuating is based on a fundamental misreading of the *TRRO*. The Petitioners assert that, as with any change-of-law, the conclusions of the *TRRO* must be incorporated into interconnection agreements prior to being effectuated; they are not self-effectuating as BellSouth and Verizon claim. The Petitioners argue that the FCC clearly stated in Paragraph 233 of the *TRRO* that the Final Rules would be incorporated into interconnection agreements through the negotiation or arbitration of amendments to the interconnection agreements, in accordance with Section 252 of the Act. They argue that Paragraph 233 clearly indicates that the FCC did not intend to abrogate the parties' current interconnection agreements, most of which include change-of-law provisions, and add that it is unclear whether the FCC has the authority to abrogate such contractual provisions. Thus, they ask this Commission to require BellSouth and Verizon to continue to accept new orders for delisted UNEs throughout the transition period set forth in the *TRRO* in order to allow the parties to negotiate amendments to their interconnection agreements that conform with the FCC's findings.

BellSouth and Verizon

BellSouth and Verizon argue the FCC's new unbundling rules unequivocally state that carriers may not obtain certain new UNEs, and that the 12-month transition period for embedded UNEs began on March 11, 2005. BellSouth and Verizon assert that the Petitioners' contention that BellSouth and Verizon are required to provide new, delisted UNEs until their interconnection agreements are amended is wholly inconsistent with the language of the *TRRO* and is flatly contradicted by the federal rules. They emphasize that Paragraph 233 was intended only to require the parties to negotiate with regard to the transition of the embedded UNE-P base,

[12]MCImetro Access Transmission Services, LLC, Supra Telecommunications and Information Systems, Inc., Ganoco Inc. d/b/a American Dial Tone, Inc., Xspedius Communications, LLC on behalf of its operating affiliates, Xspedius Management Co. of Jacksonville, LLC and Xspedius Management Co. Switched Services, LLC, and NuVox, Inc. on behalf of its operating entities NuVox Communications, Inc., NewSouth Communications Corp., KMC Telecom V, Inc., KMC Telecom III, LLC.

not to further perpetuate UNE-P throughout the transition period. They contend that the FCC clearly stated throughout the *TRRO* that the 12-month transition period applied solely to the embedded UNE-P base, and that after March 11, 2005, there could be no new UNE-P orders. Thus, BellSouth and Verizon contend that the CLECs' position is based on a misapplication of the FCC's statements in Paragraph 233 of the *TRRO*.

BellSouth and Verizon add that they have offered CLECs commercial agreements that would enable CLECs to continue to order UNE-like services while they are either negotiating a permanent commercial agreement covering these orders or otherwise completing the FCC's transition away from the delisted UNEs. BellSouth and Verizon further assert the agreements permit CLECs to continue to place new orders for platform services. Thus, they argue that the options available to prevent any lapse in a CLEC's ability to place new orders negate the Petitioners claim of injury, let alone irreparable injury, caused by implementation of the FCC's "no new adds" mandate.

Decision

Although petitions have been filed with the FCC asking for clarification as to whether the *TRRO*'s prohibition on "new adds" is self-effectuating, those filings do not serve as a sufficient basis for us to forego consideration of this issue. This issue is appropriately before us and ripe for our consideration. As such, we have thoroughly considered the well-pleaded arguments of both sides and reach the following conclusions.

First, with regard to switching, the *TRRO* is quite specific, as is the revised FCC rule attached and incorporated in that Order, that the requesting carriers may not obtain new local switching as an unbundled element.[13] Having considered the arguments to the contrary, we are simply not persuaded that Paragraph 233 of the *TRRO* indicates that the FCC intended any other result. Rather, it is much more likely that Paragraph 233 of the *TRRO* was intended only to direct the parties with regard to the embedded UNE-P base. Any other conclusion would render the *TRRO* language regarding "no new adds" a nullity, which would, consequently, render the prescribed 12-month transition period a confusing morass ripe for further dispute. Thus, we find that, as of March 11, 2005, requesting carriers may not obtain new local switching as a UNE.

As for high capacity loops and dedicated transport, we find that a requesting CLEC shall self-certify its order for high-capacity loops or dedicated transport. Thereafter, the ILEC shall provision the high capacity loops or dedicated transport pursuant to the CLEC's certification. The ILEC may subsequently dispute whether the CLEC is entitled to such loop or transport, pursuant to the parties' existing dispute resolution provisions. This process, as delineated in Paragraph 234 of the *TRRO*, shall remain in place pending any appeals by BellSouth or Verizon of the FCC's decision on this aspect of the *TRRO*.

In conclusion, we find that further prolonging the availability of UNE-P and other delisted UNEs could cause competitive carriers to further defer investment in their own facilities,

[13] §51.319 (d)(2)(iii) C.F.R.

a result that would be clearly contrary to the FCC's intent, as well as the Court's decision in USTA II. Our conclusions herein are appropriate, effectuate the policy of encouraging facilities-based competition, and, on balance, find the greatest support in the language of the *TRRO* itself. We emphasize that nothing in this Order prevents the parties from negotiating commercial agreements to address the various issues raised by the *TRRO* and are encouraged that many commercial agreements between ILECs and CLECs have, in fact, been reached. Furthermore, it should go without saying that all parties have an obligation to negotiate in good faith and failure to faithfully adhere to that obligation may result in further legal recourse by the offended party.

Having reached the foregoing conclusions, we find it is not necessary to consolidate Docket Nos. 041269-TP and 050171-TP. Rather, having resolved all issues raised in Docket Nos. 050171-TP and 050172-TP, we find it appropriate to close those dockets. Docket No. 041269-TP shall remain open to address the remaining issues in that Docket.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the petitions and request for Emergency Relief filed by the Joint CLECs, Supra, MCI, and American Dial Tone are denied. It is further

ORDERED that as of March 11, 2005, requesting carriers may not obtain new local switching as an unbundled network element. It is further

ORDERED that pending the outcome of any appeals by BellSouth or Verizon of the *TRRO*, the ILECs shall comply with the self-certification process delineated in the *TRRO* for high-capacity loops and dedicated transport. It is further

ORDERED that BellSouth's Motion to Consolidate Docket Nos. 041269-TP and 050171-TP, is denied. Docket Nos. 050171-TP and 050172-TP shall be closed, and Docket 041269-TP shall remain open to address the remaining open issues.

By ORDER of the Florida Public Service Commission this 5th day of May, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

AJT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NUVOX COMMUNICATIONS, INC.,
et al.,

Case No. 4:05 CV 189 SPM AK

Plaintiffs,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,
et. al.,

Defendants.
_____/

ANSWER BRIEF OF THE FLORIDA PUBLIC SERVICE COMMISSION

RICHARD D. MELSON
General Counsel
Florida Bar No. 201243

RICHARD C. BELLAK
Associate General Counsel
FL Bar No. 341851

Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
850-413-6092

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Defendants Commissioners of the Florida Public Service Commission are referred to as the Commissioners or Florida Commissioners. Plaintiffs NuVox Communications, Inc. and Xspedius Communications LLC are referred to as Plaintiffs.

Exhibits to Plaintffs' Complaint are designated Exhibit ___ to Plaintiffs' Complaint. References to the Record are designated R ___. Florida Commissioners' Order No. PSC-05-0492-FOF-TP is referred to as the Order.

Defendants Commissioners of the Florida Public Service Commission (Commissioners) file this Answer Brief demonstrating that, contrary to Plaintiffs, the Commissioners' Order[1] does not violate federal or state law, including the United States and Florida Constitutions, and is a decision supported by substantial evidence which the Court should affirm.

[1] Petition to Establish Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law, by BellSouth Telecomms., Inc., Docket No. 041269-TP, Order No. PSC-05-0492-FOF-TP (rel. May 5, 2005) ("Order"). R. 1349.

SUMMARY

The Florida Commissioners correctly construed the plain terms of the TRRO that do not permit CLECs to add new switching UNEs or new dedicated transport/high-capacity loops in the absence of impairment. Plaintiffs misconstrue the TRRO by considering only parts of the FCC's Order and nullifying other provisions they prefer to ignore. The Eleventh Circuit considered the arguments involving the "no new adds" language in the TRRO and agreed with the Florida Commissioners' approach, not that of Plaintiffs. The Eleventh Circuit pointed out that the FCC could – and did – take unilateral action to ban new UNE-P after March 11, 2005. The Eleventh Circuit also held that no negotiations were necessary to implement that aspect of the TRRO, thus verifying that the Florida Commissioners' identical conclusion did not violate state or federal law. On the contrary, it properly implemented the FCC's TRRO.

As Plaintiffs admit, the Commissioners' Order must comply with the FCC's decisions. Where, as here, the FCC has changed some of the parameters of the regulatory scheme, it is the determination of Plaintiffs to adhere to the former scheme that is legally unsupported, not compliance by the Florida Commissioners (and BellSouth) with the changed regulatory parameters. Where an agreement by the parties is misconstrued as an agreement to violate a future FCC order, the

"contract", if such exists, is illegal, void as against public policy, and will not be enforced either by the Florida Commissioners or this Court. The arguments of Plaintiffs that thus misconstrue interconnection and abeyance agreements with BellSouth are entirely unavailing for that reason.

The Florida Commissioners' evidentiary support was sufficient to support their decision. As noted by the Eleventh Circuit, it "makes no sense" for Plaintiffs to argue that agreements between themselves and BellSouth required negotiations, when the FCC could – and did – unilaterally ban new adds, and no negotiations were necessary.

Since Plaintiffs admitted that the Court's jurisdiction pursuant to Ex Parte Young was uncontested, they lacked justification to brief the uncontested issue, particularly in view of Judge Hinkle's ruling in Florida Digital Network v. Sprint-Florida, that, given jurisdiction over the individual Commissioners in their official capacities, he would dismiss the Commission as redundant.

STATEMENT OF THE CASE

In seeking review of the Order issued by the Commissioners of the Florida Public Service Commission (Commissioners), Plaintiffs misconceive agreements they have with BellSouth as contracts which somehow bind the Federal Communications Commission (FCC) and Florida's Commissioners to maintain in place a regulatory scheme which the FCC has previously rescinded because it was found to be contrary to the public interest.

Thus, all of Plaintiffs' thirty-two pages of briefing are facially at odds with their own admission at page 3 of the Initial Brief that

> [The Florida Commissioners'] decisions must comport with . . . the rules and decisions of the Federal Communications Commission ("FCC") . . . [e.s.]

Plaintiffs' appeal is also premised on the misguided notion that their private interest in maintaining past regulatory parameters (favorable to themselves) beyond the cancellation date of those parameters announced by the FCC, will be held by this Court to outweigh statutory requirements that state and federal agencies regulate in the public interest. Plaintiffs have identified no theory – contract or otherwise – in support of this notion and the Court should reject it.

A. Section 252 Interconnection Arbitrations

At page 3 of the Initial Brief, Plaintiffs acknowledge that the 1996 Act was

enacted to "shift monopoly markets to competition as swiftly as possible". They also acknowledge that Section 251 of the 1996 Act empowers and requires the FCC to identify which network components must be provided as UNEs.[2] However, in the six pages of further explanation which comprise Plaintiffs' Statement of the Case, nothing is mentioned about the evolving crisis caused by the divergence between the FCC's failed attempts to properly identify which network components must be provided as UNEs, and the 1996 Act's goal of "shift[ing] monopoly markets to competition as swiftly as possible".

As noted in the Commissioners' Order, on August 21, 2003, the FCC released its Triennial Review Order (TRO) in response to the D.C. Circuit Court of Appeals' remand decision in USTA I.[3] Thereafter, on March 2, 2004, the D.C. Circuit Court of Appeals released its decision in United States Telecom Ass'n v. FCC, (USTA II),[4] vacating and remanding certain provisions of the TRO, including the TRO's national impairment findings with respect to mass market switching and high-capacity transport.

---

[2] A network element, if proprietary, must be provided as a UNE if "necessary" for the CLEC to serve customers. If not proprietary, the test is whether the CLEC's ability to serve customers would be "impaired" without provision of the network element as a UNE.

[3] United States Telecom Association v. FCC, 290 F. 3d 415 (D.C. Cir. 2002) (USTA I).

[4] 359 F. 3d 554 (D.C. Cir. 2004) (USTA II), cert. den., 160 L. Ed 223; 2004 U. S. LEXIS 671042 (October 12, 2004).

In BellSouth Telecomms. v. MCIMetro Access Transmission Services, 425 F. 3d 964 (11th Cir. 2005) (BellSouth v. MCIMetro), the Eleventh Circuit stated the following as to the result:

> The D.C. Circuit concluded, in part, that the unbundling regime enacted by the FCC was not based on a rational analysis of whether "CLECs are impaired in the mass market without unbundled access to ILEC switches".
>
> . . . .
>
> In February 2005, the FCC released its Triennial Review Remand Order (TRRO), which stated that the unbundling of certain "UNE - Platform" (UNE-P) elements harmed competition by discouraging innovation. To redress that harm, the FCC stated that ILECs would no longer be obliged to provide CLECs "with unbundled access to mass market local switching", and the FCC provided more limited relief for local loops and transport. The FCC stated that existing, or "embedded", customers could continue to have access to UNE-Ps for up to twelve months, although at higher rates. The FCC also required CLECs to submit orders within one year to convert embedded UNE-P customers to "alternative arrangements." During the transition period, the FCC banned new orders for unbundled access to local mass market switching: "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."
>
> . . .
>
> Based on the "need for prompt action," the FCC stated that the TRRO was effective on March 11, 2005. [e.s.]

425 F. 3d at 966-967; TRRO, p. 4-5.

Although plaintiffs describe in detail their interconnection agreements with

BellSouth, the Florida Commissioners' arbitration of terms the parties cannot agree about, as well as the standard "change of law" provisions in those agreements, Plaintiffs do not mention anything foreclosing the FCC from taking action that "banned new orders for unbundled access to local mass market switching", as described by the Eleventh Circuit. Indeed, Plaintiffs reiterate on page 4 of the Initial Brief their prior admission that Florida's Commissioners "must resolve all issues in accordance with . . . FCC decisions".

B. Plaintiffs' Arbitration and Abeyance Agreement with BellSouth.

At pages 5-6 of the Initial Brief, Plaintiffs describe in detail their arbitration with BellSouth before the Florida Commissioners and their agreement with BellSouth to hold that process in abeyance to avoid a separate/second negotiation/arbitration process to address "USTA II and its progeny". The Commissioners' Order granting the Joint Motion for Abeyance, issued August 19, 2004, stated that

> both 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. [e.s.]

Exhibit B to the Complaint, p. 2.

As was the case regarding Plaintiffs' discussion of Section 252 Interconnection Agreements, their discussion of the arbitration with BellSouth, the agreement

with BellSouth to the abeyance thereof, and the Florida Commissioners' August 19, 2004 Order approving that agreement, does not mention anything foreclosing the FCC from taking action on February 11, 2005 that "banned new orders for unbundled access to local mass market switching", as described by the Eleventh Circuit. Indeed, the Eleventh Circuit noted that the FCC implemented a remedy to take effect on March 11, 2005 against the harm to competition the FCC found had been caused by the unbundling in question. 425 F. 3d at 967.

C. The FCC's Interim Rules Order.

At pages 6-7 of the Initial Brief, Plaintiffs' discussion of the FCC's Interim Rules Order, issued August 20, 2004, emphasizes the FCC's statement that "we expressly preserve incumbent LECs' contractual prerogatives to initiate change-of-law proceedings to the extent consistent with their governing agreements".

Again, however, Plaintiffs mention nothing about the FCC's comment (characterizing generally the LECs' contractual prerogatives, and limitations on those prerogatives based on agreements between LECs and CLECs) that foreclosed the FCC from taking action on February 11, 2005 that "banned new orders for unbundled access to local mass market switching", as described by the Eleventh Circuit. The FCC did not condition its prohibition of new adds on the parties' intent.

D. The FCC's Triennial Review Remand Order.

Plaintiffs' discussion of the TRRO cites paragraphs 143, 145, 196, 198 and 233 concerning the "transition mechanism" begun by the TRRO, the need for ILECs and CLECs to negotiate about the transition in good faith, and the need to follow "change of law processes" in implementing the required changes.

This language can be read in either of two ways: the first is to read the language as generally governing changes required by the TRRO, for example, those concerning the transition of the embedded base away from delisted UNEs, but without nullifying the FCC's specific prohibition against CLECs "add[ing] new customers using unbundled access to local circuit switching". The second approach, that of the Plaintiffs, would make every aspect of the TRRO subject to negotiation and "change of law" provisions in their agreements with BellSouth. The Florida Commissioners chose the first approach as effectuating the FCC's intent:

> . . . it is much more likely that Paragraph 233 of the TRRO was intended only to direct the parties with regard to the embedded UNE-P base. Any other conclusion would render the TRRO language regarding "no new adds" a nullity . . .

Order, p. 6. See also, TRRO paragraphs 142, 195.

The Eleventh Circuit, in BellSouth v. MCIMetro, supra, was of the same opinion:

> [T]he FCC decreed that new UNE-P orders, among others, would not be permitted.
>
> . . .
>
> It is not clear . . . what remains to be negotiated. After all, the TRRO "does not permit" new customers access to UNE-Ps after March 11, 2005, and BellSouth does not dispute that it still must offer access in some circumstances to loops and transport facilities. [e.s.]

425 F. 3d at 969.

E. Plaintiffs' Petition for Emergency Relief to the Florida Commissioners.

When BellSouth announced on February 11, 2005 (Exh. C to the Complaint) that it would no longer fill new orders for several network elements as UNEs, Plaintiffs filed a Petition for Emergency Relief. (R. 501) Plaintiffs contended that the change had to be negotiated between BellSouth and themselves. However, the Commissioners' Order rejected that claim, stating that as of March 11, 2005,

> requesting carriers may not obtain new local switching as an unbundled network element.

R. 1354. The Order also stated:

> As for high capacity loops and dedicated transport, . . . a requesting CLEC shall self-certify . . . . The ILEC may subsequently dispute [entitlement thereto].

Id.

These holdings permitted BellSouth to refuse provisioning these facilities as UNEs, whereupon Plaintiffs appealed the Order to this Court on June 6, 2005.

ARGUMENT

I. THE ORDER NEITHER IMPAIRS PLAINTIFFS' CONTRACT RIGHTS NOR VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Plaintiffs' theory of contract impairment is baseless and internally inconsistent. The Eleventh Circuit has found, as did the Florida Commissioners, that the "new adds" in question were banned by the FCC in its TRRO after March 11, 2005. Plaintiffs' theory is tantamount to the claim that BellSouth has previously agreed with, i.e., "contracted" with, Plaintiffs to violate the FCC's not-yet-issued TRRO. Thus, Plaintiffs argue in effect that the Florida Commissioners should have enforced this "contract" to violate the TRRO and, failing that, this Court should do so now. In support of this obviously faulty premise, Plaintiffs claim that this was the intent of the parties. Even assuming that this dubious premise could be established, which seems improbable, the relevant law would not be found in cases such as Pennzoil Company v. Federal Energy Regulatory Commission, 645 F. 2d 360 (5th Cir. 1980), but in cases such as I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp., 600 F. Supp. 92 (S.D. Fla. 1984), holding that a Court may not enforce a contract that is illegal or contrary to public policy. In this instance, the purported "contract" relied upon by Plaintiff, even assuming arguendo it exists at all, is both. It is illegal as violative of the ban on "new adds"

after March 11, 2005. It is also contrary to the FCC's public policy decision to impose the ban to remedy the harm caused to facilities-based competition by the past unbundling of UNE-P. Any other conclusion would be inconsistent with the TRRO itself as well as the Eleventh Circuit's analysis in BellSouth v. MCIMetro, supra, with which the Florida Commissioners' Order coheres.

A. The TRRO's Ban on New Adds is Unaffected by Plaintiffs' Abeyance Agreement with BellSouth.

At page 3 of their Order, the Florida Commissioners noted that BellSouth's February 11, 2005 Carrier Notification specified the unavailability, as of March 11, 2005, of certain delisted UNE's, together with citations to the relevant TRRO paragraphs:

1) switching – TRRO ¶199

2) certain high capacity loops in specified central offices – TRRO ¶174, 178

3) dedicated transport between a number of central offices having certain characteristics – TRRO ¶126, 129

4) dark fiber – TRRO ¶133, 182

5) entrance facilities – TRRO ¶141

Based thereon and on revised FCC Rule §51.319(d)(2)(iii) C.F.R., incorporated in the TRRO, the Florida Commissioners determined that requesting

carriers may not obtain new local switching as an unbundled element:

> Having considered the arguments to the contrary, we are simply not persuaded that Paragraph 233 of the TRRO indicates that the FCC intended any other result. Rather it is much more likely that Paragraph 233 of the TRRO was intended only to direct the parties with regard to the embedded UNE-P base. Any other conclusion would render the TRRO language regarding "no new adds" a nullity. . . . [e.s.]

R. 1354

The Commissioners also decided that high capacity loops or dedicated transport should be provisioned pursuant to the CLEC's certification, subject to dispute by the ILEC, in accord with the process set out in TRRO ¶234.

Id.

The Commissioners further found that facilities-based competition could be harmed by prolonging the availability of UNE-P and that, conversely, the resolution stated above of the issues would effectuate the policy of encouraging facilities-based competition. It is notable that the Commissioners' consideration of "the arguments to the contrary" encompassed claims by the CLECs that negotiation or arbitration was necessary to incorporate the FCC's final rules into new interconnection agreements, and that their current interconnection agreements included "change of law" provisions.

R. 1353.

The Eleventh Circuit considered these same arguments in BellSouth v. MCIMetro, supra. As to the claimed requirement of negotiation, the Eleventh Circuit stated,

> . . . the TRRO leaves nothing to be done regarding UNE-P orders for new customers, because they are no longer allowed. No negotiations are necessary to implement this aspect of the TRRO. [e.s.]

425 F. 3d at 969.

The Eleventh Circuit took into account claims regarding "change of law" provisions as well, noting that

> Under this [former unbundling] regulatory scheme, BellSouth entered many agreements with CLECs . . . . Included in those agreements was a standard "change of law" provision which required the parties, upon any change of law that materially altered the agreement, to "re-negotiate in good faith such mutually acceptable new terms as may be required".

425 F. 3d at 966.

Clearly, both the Florida Commissioners and the Eleventh Circuit believed that any requirement to negotiate, or invoke "change of law" processes to that effect, based on the CLECs' interpretation of its agreements with the ILEC or the CLECs' interpretation of the TRRO, was insufficient to affect the FCC's delisting of certain UNEs effective March 11, 2005. As the Eleventh Circuit stated, "No negotiations are necessary".

The foregoing explains the essential problem with Plaintiffs' extensive

briefing of its "abeyance agreement" issue. That briefing burdens the Court with many pages attempting to demonstrate that the Abeyance Agreement is a "Commercial Arrangement" and a "contract" that can be validly enforced. Not until late in the day, at page 15 of the Initial Brief, is there finally a description of what the result of "enforcement" would be:

> Unfortunately, rather than enforce the Abeyance Agreement, the [Florida Commissioners have] held that the mandates of the TRRO are effective immediately, overriding both the change-of-law provisions of the underlying [interconnection agreement] as well as the additional Abeyance Agreement negotiated between BellSouth, Xspedius and NuVox.

Of course, the Eleventh Circuit already noted that, under the former regulatory scheme, BellSouth entered into "many agreements" with CLECs that included "change-of-law" provisions requiring negotiation. Notwithstanding, the Eleventh Circuit determined that "[n]o negotiations are necessary" to implement the TRRO's [i.e., FCC's] delisting of UNE-P as of March 11, 2005, and that new adds are "no longer allowed". The "contract enforcement" the Plaintiffs desire would violate these terms and policies of the TRRO and, as noted, the Courts will not enforce contracts which are illegal or against public policy. I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp., supra. Thus, Plaintiffs' argument is unavailing whether or not the Abeyance Agreement is characterized as a Commercial Arrangement or contract. These agreements, assuming arguendo they

mean what Plaintiffs claim they mean, may be enforceable as to other TRRO issues, but not as to results inconsistent with the Eleventh Circuit's analysis.[5]

There is a further reason why Plaintiffs' arguments lack reality or logic. Much of the briefing purports to rely on identifying BellSouth's "intent" on entering into the agreements discussed, i.e., abeyance, underlying interconnection, etc. Thus, on page 11 of the Initial Brief, Plaintiffs point to

> 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 Plaintiffs' existing ICAs by their terms.

This, say Plaintiffs, evidences the binding, contractual nature of the

> parties' intent that the existing ICA UNE provisions will remain intact, even in the face of more FCC "post-USTA II" rule changes.

Plaintiffs claim, similarly, on page 12 of the Initial Brief that BellSouth

> waived its rights to implement or otherwise enforce these FCC orders while the parties continue to operate under the current ICAs.

In this connection, Plaintiffs assert on pages 13-14 of the Initial Brief that

> It cannot be said that BellSouth had inadequate bargaining power . . . . There can be no reasonable claim of duress on BellSouth's part . . . .

---

[5] Because illegal contracts are unenforceable, the implicit limit on the enforceability of all of the CLECs' agreements with BellSouth is that such enforcement not violate the FCC's orders. While CLECs can enter voluntary negotiations pursuant to Section 252(a) of the Act to try to obtain access to the BellSouth network components at issue, BellSouth is no longer compelled to offer them, i.e., as UNEs. An agreement construed to require that result after March 11, 2005, would be illegal as tantamount to an agreement to violate the TRRO.

Finally, Plaintiffs claim on page 15 of the Initial Brief that the Commissioners

> did not give effect to the parties' intentions as outlined in a contract.

Of course, as previously noted, BellSouth cannot fail to adhere to the ban on "new adds" identified by the Eleventh Circuit's analysis, and no argument of Plaintiffs demonstrates any flaw in the Eleventh Circuit's analysis. Moreover, Plaintiffs' discursive ratiocination about BellSouth's "intent" fails to identify evidence of any agreement on the part of BellSouth to violate a future FCC order or requirement therein.

The lack of reality in Plaintiffs' discussion is heightened by the failure to include the most important aspect of BellSouth's "intent" as an ILEC. As described by the Eleventh Circuit,

> Congress sought to enhance competition in the local telephone service market to promote better quality and lower prices . . . . Congress delegated to the FCC the task of implementing this scheme of enforced competition. [e.s.]

425 F. 3d at 966.

To discuss concepts such as 'knowing waiver', 'equal bargaining power' and 'lack of duress' in a vacuum without mentioning the fact that under the former regulatory scheme, ILECs were compelled to offer unbundled UNE-P and now are prohibited from doing so, is to miss the most important factor in any analysis of BellSouth's intent. Simply complying with the regulatory scheme dwarfs all of the

other indicia of "intent" relied on by Plaintiffs.[6] Their absurd conclusion, that BellSouth's "intent" was to continue to provide unbundled UNE-P even after the regime of "enforced competition" not only no longer compelled BellSouth to do so, but prohibited it from doing so, should be rejected as unsupported, fanciful, and frivolous. Page upon page from Plaintiffs' discussing the parties' intent misses the point by ignoring the FCC's intent that the new add UNEs sought by Plaintiffs be banned after March 11, 2005, as a matter of law and public policy. Plaintiffs' adamant determination to miss the point does not demonstrate error in the Commissioners' Order.[7]

B. The TRRO's Ban on New Adds is Unaffected by Plaintiffs' Interconnection Agreements.

The Commissioners incorporate by reference herein their foregoing arguments in Section I.A. concerning the Abeyance Agreement. Those arguments also demonstrate that Plaintiffs' theory of interconnection agreement impairment is just as meritless as their theory of abeyance agreement impairment. As to the abeyance agreement, Plaintiffs offered page upon page about the parties' intent

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[6] See, Verizon Comms. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 409-410 (2004) (UNES are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort) [e.s.]

[7] Plaintiffs also miss the underlying point that it is the FCC's unilateral ban on new adds that affects them, and that the Florida Commissioners must comply with the FCC's action. In approving Plaintiffs' prior agreements with BellSouth, the Commissioners did not sanction any party's violation of future FCC orders.

without taking into account the FCC's specifically stated intent as to the UNEs at issue; i.e., to prohibit them after March 11, 2005. In this section, Plaintiffs offer page upon page of analysis about the Sierra-Mobile doctrine without even relating their own citations to the facts of this case.

Thus, at p. 18 of the Initial Brief, Plaintiffs cite in bold print the 5th Circuit's point in Pennzoil, supra, that

> the [federal regulatory] Commission may not relieve [a party to a contract] of its improvident bargain unless . . . the public interest is adversely affected.

But that is precisely what both the Eleventh Circuit and the Florida Commissioners found. As the Eleventh Circuit stated,

> The FCC plainly based its decisions on the public interest. In paragraph 218 of the TRRO, the FCC found that continued use of the UNE-P was contrary to the public interest, because it "hindered . . . genuine, facilities-based competition". Paragraph 236 made the TRRO effective on March 11 also to serve the public interest.

425 F. 3d at 969.

The Florida Commissioners' Order is in accord:

> . . . further prolonging the availability of UNE-P and other delisted UNEs could cause competitive carriers to further defer investment in their own facilities, a result that would be clearly contrary to the FCC's intent, as well as the Court's decision in USTA II. Our conclusions . . . effectuate the policy of encouraging facilities-based competition. . . . [e.s.]

R. 1354-1355.

Beyond drawing conclusions at odds with their own citations, Plaintiffs' discursive argumentation about the Sierra-Mobile doctrine again fixates upon themselves and BellSouth to the exclusion of the FCC. As stated by the Eleventh Circuit,

> . . . the interconnection agreements were the product of an earlier regulatory scheme now repudiated by the FCC. The FCC had the power to impose unilaterally the ban on new unbundling, and it makes no sense to argue that BellSouth is required to negotiate over a practice the FCC has the power to and did prohibit. [e.s.]

425 F. 3d at 970.

The Commissioners' Order is in accord:

> Our conclusions . . . find the greatest support in the language of the [FCC's] TRRO itself.

R. 1355.

Since the analysis of the Eleventh Circuit is fatal to Plaintiffs' arguments, Plaintiffs attempt to persuade the Court to ignore the Eleventh Circuit's conclusions and accept those in Illinois Bell Telephone Company v. Hurley, 2005 U. S. DIST. LEXIS 6022 (N.D. ILL., March 29, 2005). On page 2 of the Initial Brief, Plaintiffs inaccurately describe Illinois Bell as a "recent decision of the Seventh Circuit", but omit the complete citation, which reveals that Illinois Bell is a district court order, not a federal appellate circuit decision.

The Eleventh Circuit opinion in BellSouth v. MCIMetro postdates the

Illinois Bell district court order by almost six months. In affirming the United States District Court for the Northern District of Georgia, the Eleventh Circuit considered and flatly rejected the balance of harms analysis offered by the CLECs, which mirrors that in Illinois Bell:

> The record supports the finding of the [Georgia] district court that BellSouth was losing about 3200 customers per week under the previous [unbundling] regime.
>
> The alleged injuries of the CLECs do not outweigh those of BellSouth. Although the CLECs undoubtedly will lose customers, they will, as the [Georgia] district court reasoned, suffer that harm only as a result of "conduct that the FCC has concluded is anticompetitive and contrary to federal policy". The district court did not abuse its discretion when it found that the balance of these harms favored BellSouth.
>
> . . . As the FCC found, the earlier unbundling rules "frustrated sustainable, facilities-based competition", and a delay in implementing the new rules would be "contrary to the public interest." [e.s.]

The Eleventh Circuit more than adequately explained its reasons for rejecting the CLECs' balance of harms argument, the same one presented in the prior Illinois Bell district court order.

Plaintiffs also argue that the Court should ignore the Eleventh Circuit's opinion because it is preliminary, rather than final, and did not consider the Abeyance Agreement.

However, Plaintiffs cite no authority that would support disregarding the

Eleventh Circuit's analysis for being preliminary in nature.[8] Moreover, the Eleventh Circuit explicitly noted in its background discussion that

> Under this [prior unbundling] regulatory scheme, BellSouth entered many agreements with CLECs . . . . Included in those agreements was a standard "change of law" provision, which required the parties, upon any change of law that materially altered the agreement, to "renegotiate in good faith such mutually acceptable new terms as may be required".

425 F. 3d at 966.

> Further, as previously mentioned, the Eleventh Circuit determined that
>
> the TRRO leaves nothing to be done regarding UNE-P orders for new customers, because they are no longer allowed. No negotiations are necessary to implement this aspect of the TRRO.

425 F. 3d at 969.

Clearly, the Eleventh Circuit's conclusion is generic as to the entire class of "many agreements with CLECs" that BellSouth entered into under the previous regulatory scheme. Plaintiffs' attempted reliance on the Abeyance Agreement as a separate basis to argue that negotiations are necessary, or to attack the Eleventh Circuit's analysis, is therefore unavailing. The clear import of that analysis is that no agreements between the parties to negotiate "change of law" implementation, including the Abeyance Agreement, affect the FCC's unilateral ban of new adds

[8] Plaintiffs' assertion is internally inconsistent as well, given Plaintiffs' attempt to forward the preliminary Illinois Bell district court order as authority.

after March 11, 2005, because, "[n]o negotiations are necessary to implement this aspect of the TRRO".

Thus, contrary to Plaintiffs, the Florida Commissioners' Order did not contravene federal law as promulgated by the FCC. Indeed, the Eleventh Circuit analysis verifies instead that the Florida Commissioners properly implemented the TRRO.

II. IN PROPERLY IMPLEMENTING THE FCC'S BAN ON NEW ADDS IN THE TRRO, FLORIDA'S COMMISSIONERS DID NOT VIOLATE SECTIONS 251 AND 252 OF THE 1996 ACT.

The Florida Commissioners incorporate by reference herein their argument in Sections IA and IB, above. In Section II of the Initial Brief, Plaintiffs merely reiterate their claim that negotiation is required before "new adds" can be prohibited. The Commissioners' arguments from Sections IA and IB fully address Plaintiffs' claim, inter alia, by noting that the Eleventh Circuit flatly rejected it in BellSouth v. MCIMetro, supra.

The Commissioners would add to the above that Plaintiffs' argument in Section II of the Initial Brief shares with their discussion of the Sierra-Mobile doctrine in Section IB the anomaly that their own citations contravene their claim.

On page 23 of the Initial Brief, Plaintiffs cite three excerpts from the TRRO that refer to using "change of law" processes in the explicit context of embedded

customer base transitions. The three paragraphs concern, respectively, dedicated transport, high capacity loops, and switching.

At p. 4-5 of the TRRO, each of the executive summaries of these topics contains the same warning:

> This [12-month] transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new [switching UNEs, or dedicated transport UNEs/high-capacity loop UNEs in the absence of impairment.]

That negotiation about the transition of the embedded UNE-P customer base did not allow for new adds was the Commissioners' very point in interpreting TRRO ¶233, the fourth excerpt cited by Plaintiffs:

> . . . Paragraph 233 was intended only to direct the parties with regard to the embedded UNE-P base. Any other conclusion would render the TRRO language regarding "no new adds" a nullity. . . .

R. 1354.

The Commissioners' interpretation, as does the Eleventh Circuit's, gives effect to all of the provisions of the TRRO. Plaintiffs' interpretation gives effect only to those provisions they like, while completely ignoring other provisions – and the important policies they represent – though the provisions they ignore could hardly be stated more clearly.[9] It is a familiar legal maxim that the former

[9] Thus, Plaintiffs' citations on page 8, paragraph 2 of the Initial Brief are demonstrated to be irrelevant by TRRO paragraphs 142 and 195, which limit language about transitions to the embedded base, and do not allow for new adds.

approach should prevail over the latter. Bouchard Transport Co., Inc. v. Updergraff, 147 F. 3d 1344, certiorari denied Dept. of E.P.A. of Fla. v. Bouchard Transp. Co., 119 S. Ct. 1030, 525 U.S. 1140, 143 L. Ed. 2d 39, certiorari denied 119 S. Ct. 1095, 525 U. S. 1171, 143 L. Ed. 2d 95. See also, Multimedia Holdings Corp., d/b/a First Coast News v. Circuit Court of Florida, St. Johns County, 125 S. Ct. 1624, 2005 U.S. LEXIS 3477 (2005) (terms of second order foreclosed appellants' interpretation of first order).

III. PLAINTIFFS' CLAIM THAT SECTION 120.68(7)(b), FLORIDA STATUTES, REQUIRES REVERSAL OF THE COMMISSIONERS' ORDER FOR LACK OF COMPETENT, SUBSTANTIAL EVIDENTIARY SUPPORT IS WHOLLY MERITLESS.

The Commissioners incorporate herein by reference their argument in Section II, above, which, in turn, incorporates by reference the Commissioners' argument in Sections IA and IB.

As Plaintiffs admit at page 25 of the Initial Brief,

> [t]he Order expressly notes "the Abeyance Agreement entered into between BellSouth and the Joint CLECs".

Plaintiff complains that the Commissioners

> never again [mention] the agreement.

This, according to Plaintiffs, was inadequate

> to demonstrate that the Abeyance Agreement had no legal effect in this dispute.

Plaintiffs are, however, incorrect.

Plaintiffs' case relies on the existence of a number of agreements between CLECs and the ILEC to argue that UNE delisting could not occur absent renewed negotiation between the CLECs and the ILEC. The Abeyance Agreement is one such example.

The Eleventh Circuit evaluated the Plaintiffs' claim, not based on the analysis of any specific agreement, but with respect to the entire class of this type of agreement, which it described as follows:

> Under [the former unbundling regulatory scheme] . . . , BellSouth entered many agreements with CLECs . . . [containing] a standard "change of law" provision, which required the parties, upon any change of law that materially altered the agreement, to "renegotiate . . ."

425 F. 3d at 966.

Without additional analysis specific to any particular one of those agreements, i.e., no more analysis than the Florida Commissioners performed as to the Abeyance Agreement, the Eleventh Circuit concluded that Plaintiffs' argument "makes no sense":

> The FCC has the undisputed power to issue binding rules under the 1996 Act [cite omitted] An agency also has the power to correct its earlier legal errors [cite omitted] and the interconnection agreements were the product of an earlier regulatory scheme now repudiated by the FCC. The FCC had the power to impose unilaterally the ban on new unbundling, and it makes no sense to argue that BellSouth is required to negotiate over a practice the FCC has the power to and did

prohibit. [e.s.]

425 F. 3d at 970.

Thus, the Eleventh Circuit found as a matter of law, as did the Florida Commissioners, that the FCC had unilaterally banned "new adds", i.e., had done so regardless of any agreements the ILEC had with the CLECs, and regardless of the intent of the parties in making those agreements. The only evidence either the Eleventh Circuit or the Florida Commissioners needed to reject Plaintiffs' claim as to any particular agreement, including the Abeyance Agreement, was that it was an agreement between the CLECs and the ILEC. Plaintiffs admit that the Commissioners "expressly noted" that exact evidence as to the Abeyance Agreement. No additional evidence was needed under Section 120.68(7)(b), Florida Statutes, to conclude that Plaintiffs' claim "made no sense". If the FCC in explicit language in the TRRO had, as a matter of law, unilaterally banned "new adds", it made no sense to argue that an agreement between BellSouth and the CLECs, including the Abeyance Agreement, had any effect on the FCC's unilateral action.

Moreover, the inference by Plaintiffs that the Commissioners had to make more of the Abeyance Agreement than they did, by mentioning it more often, is incorrect. As stated in Section 120.68(7)(b),

> the [appellate] court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact.

Not only does the statute not require the appellate reweighing of the evidence sought by Plaintiffs, there is not even a disputed finding of fact. The Abeyance Agreement falls into the class of agreements between the CLECs and Bellsouth which, no matter how construed, cannot affect the FCC's unilateral decision to ban "new adds", as a matter of both law and policy. BellSouth v. MCIMetro, supra.

Finally, to the extent Section III of the Initial Brief embodies a strategy of Plaintiffs to repackage their claims in Section I as state claims in the expectation that more stringent requirements may apply, Plaintiffs are incorrect. As stated in Section 120.80(13)(d), Florida Statutes,

> Notwithstanding the provisions of this chapter, in implementing the provisions of the Telecommunications Act of 1996, Pub. L. No. 04-104, the Public Service Commission is authorized to employ procedures consistent with that act.[10]

Plaintiffs have identified nothing which should lead the Court to reverse or remand the Commissioners' Order pursuant to Section 120.68(7)(b), and Petitioners' suggestions to the contrary are wholly without merit.

IV. HAVING ACKNOWLEDGED THAT THE ISSUE OF THE COURT'S JURISDICTION IS, FOR PRACTICAL PURPOSES, UNDISPUTED, PLAINTIFFS' EXTENSIVE BRIEFING IS BOTH BURDENSOME AND UNNECESSARY.

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[10] Since the statute exempts the Commissioners from state procedures in Telecommunications Act cases, Plaintiffs' claim that the Commissioners violated state procedures is not only, as previously discussed, meritless, but a nullity.

Plaintiffs acknowledge at p. 31, n. 12 of the Initial Brief, that the Commissioners are not contesting this Court's jurisdiction in accordance with Ex Parte Young, 209 U. S. 123 (1908). See, Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U. S. 635, 645-648 (2002). Inexplicably, Plaintiffs forward page upon page of unnecessary briefing, presumably for the sole purpose of addressing "the Commission", instead of "the Commissioners"[11] Plaintiffs even reference cases dating from the earliest period of Eleventh Amendment litigation concerning the Telecommunications Act, even though jurisdiction pursuant to Ex Parte Young is uncontested.

The Commissioners cannot better respond to Plaintiffs' unnecessary hyperlitigation of this uncontested matter than to cite Judge Hinkle's recent analysis in Florida Digital Network, Inc., v. Sprint-Florida, Inc., Case No. 4:03 CV 282-RH (N.D. FL. Nov. 2, 2005). In marked contrast to Plaintiffs, Judge Hinkle was able to address the matter fully in only a single footnote, stating,

> Such an action . . . may proceed against the individual commissioners in their official capacities. . . . Whether the commission can be sued in its own name is unclear. . . . The Commission has not sought dismissal of this action under the Eleventh Amendment. Had the Commission done so, I would have dismissed the action as against the Commission as redundant. [e.s.]

[11] Very little of Plaintiffs' briefing responds to BellSouth's affirmative defense concerning state claims. The remainder contests, for no practical reason, an uncontested issue.

FDN v. Sprint-Florida, Order on Merits, p. 4-5, n. 3.

In this case, the Commission has raised, as an affirmative defense, the Eleventh Amendment as a bar, but has not contested the Court's Ex Parte Young jurisdiction over the individual commissioners in their official capacities. Thus, the Commissioners are simply proceeding in accordance with this Court's analysis in FDN v. Sprint-Florida, and this action should be dismissed as to the Florida Public Service Commission. Plaintiffs' further litigation is for no practical purpose, and should be rejected as redundant.

CONCLUSION

In view of the above, Plaintiffs have failed to establish any grounds for this Court to either reverse or remand the Commissioners' Order.

Accordingly, the Order should be affirmed.

Respectfully submitted,

RICHARD D. MELSON
General Counsel
Florida Bar No. 201243

RICHARD C. BELLAK
Associate General Counsel
FL Bar No. 341851
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
850-413-6092

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to the following on this 19th day of December, 2005:

Norman H. Horton, Esquire
Robert J. Telfer, III, Esquire
Messer, Caparello & Self, P.A.
215 So. Monroe Street, Suite 701
Tallahassee, FL 32301

John J. Heitmann, Esquire
Stephanie A. Joyce, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Sean A. Lev, Esquire
Kellogg, Huber, Hansen, Todd,
Evans & Figel, PLLC
1615 M Street, N.W., Ste. 400
Washington, DC 20036

Nancy B. White
Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Ste. 400
Tallahassee, FL 32301

Jack R. Reiter, Esquire
Adorno & Yoss, LLP
2525 Ponce de Leon Blvd., Ste. 400
Miami, FL 33134

Richard C. Bellak

RICHARD C. BELLAK

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2004-316-C - ORDER NO. 2005-247

AUGUST 1, 2005

IN RE:	Petition of BellSouth Telecommunications, Inc. to Establish a Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law.	))))	ORDER ADDRESSING PETITION FOR EMERGENCY RELIEF

This matter comes before the Public Service Commission of South Carolina (the Commission) on a Petition for Emergency Relief submitted by Nuvox Communications, Inc., Xspedius Management Co. of Charleston, LLC, Xspedius Management Co. of Columbia, LLC, Xspedius Management Co. of Greenville, LLC, Xspedius Management Co. of Spartanburg, LLC, KMC Telecom III, LLC, and KMC Telecom V, Inc. (collectively, the CLEC Petitioners) on March 2, 2005, and a related letter from ITC^DeltaCom Communications, Inc. submitted to the Commission on February 23, 2005. This Order also disposes of the Emergency Petition filed by Amerimex Communications Corp. filed on March 4, 2005, and the similar letter filed by Navigator Telecommunications, LLC submitted on March 3, 2005. Amerimex subsequently withdrew its Emergency Petition.

The CLEC Petitioners request that this Commission grant the following relief: (1) declare that the transitional provisions of the Triennial Review Remand Order (TRRO) issued by the Federal Communications Commission (FCC) on February 4, 2005, are not self-effectuating, but rather are effective at such time as the parties' existing

interconnection agreements are superseded by the interconnection agreements resulting from their upcoming arbitration docket; and (2) declare that the Abeyance Agreement that they entered into with BellSouth Telecommunications, Inc. requires BellSouth to continue to honor the rates, terms and conditions of the parties' existing interconnection agreements until such time as those agreements are superseded by the agreements resulting from the upcoming arbitration docket.

The Commission has carefully reviewed the record in this matter, including the filings of the parties and the transcript of the oral argument presented, along with the controlling law. Guided by this Commission's duties under State law, the express terms of the TRRO, including its findings regarding public policy and the public interest, and based on this Commission's reading of the TRRO that the Federal Communications Commission (FCC) envisioned that the changes of law would be administered through an orderly process under State Commission supervision, we hold that the CLEC Petitioner's request for relief should be granted in part and denied in part as described herein.

We hold that, after June 8, 2005, which is 90 days from the date of BellSouth's Carrier Notification letter dated March 8, 2005, CLECs can no longer order an Unbundled Network Element (UNE) from BellSouth and pay the Total Element Long Run Incremental Cost (TELRIC) rates for that item in regard to new customers seeking switching and high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. This 90 day period is provided only for orderly negotiation and

service transition purposes, and will be subject to true-up back to March 11, based on the new contractual arrangements negotiated by the parties.

We also hold that the transition of the embedded base of existing customers, including those existing customers who seek moves, changes and additions of newly delisted UNEs for such customer base at new and existing physical locations, shall occur with alacrity under the supervision of this Commission, prior to the FCC's absolute deadline of March 10, 2006, for provision of any such UNEs at TRRO transition plan rates (i.e. TELRIC rates + $1 or 115% as applicable).

Further, we hold that if a CLEC orders a high-capacity loop or transport UNE from BellSouth after March 11, 2005, and certifies that, based on a reasonably diligent inquiry and to the best of its knowledge, its request is consistent with the applicable requirement of the TRRO, BellSouth must immediately process the request. To the extent that BellSouth seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements.

Lastly, we hold that the scope of the parties' Abeyance Agreement does not reach the provisions of the TRRO that this Commission is called upon to interpret in the CLEC Petitioners' Petition. Therefore, it is this Commission's determination that the Abeyance Agreement does not offer the CLEC Petitioners an alternative method of relief. Further, where commercial agreements have been negotiated, they will take precedence over the relevant terms of this Order. As emphasized by the FCC, this Commission notes that the parties "must negotiate in good faith" and that "the parties will not unreasonably delay implementation of the conclusions" of the TRRO, which clearly signaled an expectation

that the parties will move expeditiously away from the specified UNE framework. In addition, the FCC "encourage(d) the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." This Commission plans to do so, with the full expectation and goal that the parties will reach new agreements and have procedures in place to transition new and existing services well before the relevant deadlines recognized by this Commission and the FCC.

A further explanation of our holdings follows.

I. NEW CUSTOMERS SEEKING SWITCHING, AND CERTAIN OTHER UNEs

We had instituted a deadline of June 8, 2005, as the date when CLECs can no longer order a UNE from BellSouth and pay the TELRIC rates for that item in regard to new customers seeking switching, high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. Again, this 90 day period is provided only for orderly negotiation and service transition purposes, and will be subject to true-up back to March 11, based on the new contractual arrangements negotiated by the parties.

First, we agree with some 11 other State Commissions, which, as of April 15, 2005, had held that the TRRO does not permit new UNE orders of the above-noted facilities. The TRRO states repeatedly that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs. This includes switching (TRRO, paragraphs 204, 227), and certain loops and transport (TRRO, paragraphs 142, 195).

The CLEC Petitioners stated a belief that TRRO, paragraph 233 requires BellSouth to follow a contractual change-of-law process before it can cease providing

these facilities. The paragraph, however, is clear that carriers must implement changes to their interconnection agreements consistent with the FCC's conclusions in the TRRO. Further, we agree with the New York Commission, which stated that "Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005." Thus, the right to assert contractual obligations must be read congruently with one of the overall goals of the TRRO, which was that certain classes of UNEs were no longer to be made available after March 11, 2005, at TELRIC prices.

Although we recognize that our conclusion with regard to new customers and new UNEs may be contrary to certain interconnection agreements, we believe that the FCC has the authority to make its order effective immediately regardless of the contents of particular interconnection agreements. Clearly, the FCC may undo the effects of its own prior decisions, which have been vacated by the Federal Courts on several occasions. The FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest. The FCC explained that its prior, overbroad unbundling rules had "frustrate[d] sustainable, facilities-based competition." TRRO, paragraph 2. In addition, the South Carolina Supreme Court has held that the right to contract is not absolute, but is subject to the state's police powers which may be exercised for protection of the public's health, safety, morals or general welfare. In Anchor Point, et al. v. Shoals Sewer Company and the Public Service Commission of South Carolina, 308 S.C. 422, 418 S.E. 2d 546 (1992), the Court held that where a matter affected the public interest, the Commission, exercising the State's police powers, could issue an order which altered a

master deed. Clearly, under the police power, this Commission can alter interconnection agreements if a matter of public welfare is involved. Since the FCC determined that the UNE Platform harms competition and is therefore contrary to the public interest, we believe that this Commission may modify interconnection agreements at least to the degree that said agreements may be read to require BellSouth to offer new UNEs to new customers.

Further, in keeping with our desire to bring about an orderly transition period, we have held that after June 8, 2005, CLECs can no longer order a UNE from BellSouth and pay the TELRIC rates for that item in regard to new customers seeking switching, high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. This is a 90-day extension of time from the TRRO-imposed March 11, 2005, deadline for orderly negotiation and service transition purposes. However, we emphasize that any new rates agreed upon between parties for these services will be subject to true-up back to March 11, 2005, based on the new contractual arrangements negotiated by the parties. Thus, the new rates will be consistent with the intent of the TRRO not to allow availability of new adds to new customers after March 11, 2005.

II. EMBEDDED BASE OF EXISTING CUSTOMERS

We hold that the transition of the embedded base of existing customers, including those existing customers who seek moves, changes and additions of newly delisted UNEs for such customer base at new and existing physical locations, shall occur with alacrity under the supervision of this Commission, prior to the FCC's absolute deadline of March

10, 2006, for provision of any such UNEs at TRRO transition plan rates (i.e. TELRIC rates + $1 or 115% as applicable). (TRRO, paragraphs 227, 228, 145, 198)

Paragraph 228 of the TRRO states that unbundled access to local circuit switching during the transition period should be priced at the higher of (1) the rate at which the requesting carrier leased UNE-P on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for UNE-P plus one dollar. With regard to the transition pricing of unbundled dedicated transport facilities for which the FCC determines that no Section 251(c) unbundling requirement exists, according to paragraph 145 of the TRRO, such facilities shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established, if any, between June 16, 2004, and the effective date of the TRRO, for that transport element. Paragraph 198 of the TRRO adopts, for transition pricing of unbundled high-capacity loops for which the Commission determines that no Section 251 (c) unbundling requirement exists, a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115 percent of the rate the state commission has established, if any, between June 16, 2004, and the effective date of the TRRO, for that loop element.

The TRRO states as its reasoning that moderate price increases help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while

at the same time, these price increases, and the limited duration of the transition provide significant protection of the interests of incumbent LECs in those situations where unbundling is not required. TRRO, paragraph 198. We believe that the same reasoning is appropriate for our use of this transition pricing mechanism, and we hereby adopt the TRRO reasoning as stated.

III. REASONABLE DILIGENCE

Again, if a CLEC orders a high-capacity loop or transport UNE from BellSouth after March 11, 2005, and certifies that, based on a reasonably diligent inquiry and to the best of its knowledge, its request is consistent with the applicable requirement of the TRRO, BellSouth must immediately process the request. To the extent that BellSouth seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for by its interconnection agreements. TRRO, paragraph 234.

IV. ABEYANCE AGREEMENTS

We do not believe that the Abeyance Agreement offers the CLEC Petitioners an alternative method of relief in this case. The CLEC Petitioners and BellSouth are parties to an Abeyance Agreement that provides in part:

> Joint Petitioners seek to withdraw their Petition in order to allow the parties to incorporate the negotiation of those issues precipitated by USTA II, as well as to continue to negotiate previously identified issues outstanding between the Joint Petitioners and BellSouth. The Joint Petitioners and BellSouth have agreed that they will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement). The Parties further agree that any subsequent petition for arbitration will be filed within 135 to 160 days of entry of a Commission Order granting this Motion.

> Additionally, the parties agree that any new issues added to a subsequent petition for arbitration will be limited to issues that result from the Parties' negotiations relating to USTA II and its progeny.

The Abeyance Agreement simply provides that the parties will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement). The Agreement says nothing of changes of law that might be mandated by the FCC in the TRRO. In other words, adopting the Joint Petitioners' argument would require this Commission to find that the scope of the Abeyance Agreement was so wide that, even though the TRRO proceeding is never mentioned in the Agreement, BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the *TRRO* in the current agreements eight months prior to those changes even being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up the right to implement those new rules for the current Agreement even before any party knew what those rules would contain. We reject this argument because it impermissibly leads to unreasonable results. Accordingly, the Abeyance Agreement provides no alternative remedy for the Joint Petitioners in the present case.

CONCLUSION AND ORDER

Because of the reasoning stated above, we hold that:

1. After June 8, 2005, which is 90 days from the date of BellSouth's Carrier Notification letter dated March 8, 2005, CLECs can no longer order a UNE from BellSouth and pay the TELRIC rates for that item in regard to new customers seeking

switching, high capacity loops in specified central offices as defined in the TRRO, dedicated transport between central offices having certain characteristics defined in the TRRO, and dark fiber. This 90-day period is provided only for orderly negotiation and service transition purposes, and will be subject to true-up back to March 11, based on the new contractual arrangements negotiated by the parties;

2. The transition of the embedded base of existing customers, including those existing customers who seek moves, changes and additions of newly delisted UNEs for such customer base at new and existing physical locations, shall occur with alacrity under the supervision of this Commission, prior to the FCC's absolute deadline of March 10, 2006, for provision of any such UNEs at TRRO transition plan rates (i.e., TELRIC rates + $1 or 115% as applicable);

3. If a CLEC orders a high-capacity loop or transport UNE from BellSouth after March 11, 2005, and certifies that, based on a reasonably diligent inquiry and to the best of its knowledge, its request is consistent with the applicable requirement of the TRRO, BellSouth must immediately process the request. To the extent that BellSouth seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements; and

4. The scope of the parties' Abeyance Agreement does not reach the provisions of the TRRO that this Commission is called upon to interpret in the CLEC's Petition; therefore it is this Commission's determination that the Abeyance Agreement does not offer the CLEC Petitioners an alternative method of relief.

5. Where commercial agreements have been negotiated, they will take precedence over the relevant terms of this Order. As emphasized by the FCC, this Commission notes that the parties "must negotiate in good faith" and that "the parties will not unreasonably delay implementation of the conclusions" of the TRRO, which clearly signaled an expectation that the parties will move expeditiously away from the specified UNE framework. Further, the FCC "encourage(d) the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." This Commission plans to do so, with the full expectation and goal that the parties will reach new agreements and have procedures in place to transition new and existing services well before the relevant deadlines recognized by this Commission and the FCC.

6. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Randy Mitchell, Chairman

ATTEST:

G. O'Neal Hamilton, Vice-Chairman

(SEAL)

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1550

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order	))))	ORDER CONCERNING NEW ADDS

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, Wednesday, April 6, 2005.

BEFORE: Commissioner Sam J. Ervin, IV, Presiding
Chair Jo Anne Sanford
Commissioner J. Richard Conder
Commissioner Lorinzo L. Joyner
Commissioner James Y. Kerr, II
Commissioner Howard N. Lee
Commissioner Robert V. Owens, Jr.

APPEARANCES:

For BellSouth Telecommunications, Inc.:

Edward L. Rankin, III
General Counsel — NC
P.O. Box 30188
Charlotte, NC 28230

R. Douglas Lackey
Senior Corporation Counsel — Regulatory
675 W. Peachtree Street, Suite 4300
Atlanta, GA 30375

For MCIMetro Access Transmission Services, LLC:

Cathleen M. Plaut
Bailey & Dixon, LLP
P.O. Box 1351
Raleigh, NC 27602

Kennard B. Woods
Six Concourse Parkway, Suite 600
Atlanta, GA 30328

For KMC Telecom, NuVox Communications and Xspedius Communications:

Henry Campen
Parker, Poe, Adams & Bernstein
P. O. Box 389
Raleigh, NC 37608

For US LEC of North Carolina, Inc.:

Marcus Trathen
Brooks, Pierce, McLendon, Humphrey & Leonard
P. O. Box 1800
Raleigh, NC 37602

For The Using and Consuming Public:

Lucy E. Edmondson
Public Staff— North Carolina Utilities Commission
4326 Mail Service Center
Raleigh, NC 27699-4326

BY THE COMMISSION: On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO), FCC Docket No. WC-04313 and CC 01-338. The *TRRO* identified a number of former Unbundled Network Elements (UNEs), such as switching, for which there is no Section 251 unbundling obligation.[1] In addition to switching, former UNEs include high capacity loops in specified central offices,[2] dedicated transport between a number of central offices having certain characteristics,[3] entrance facilities,[4] and dark fiber.[5] The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers, adopted transition plans to move the embedded base of these former UNEs to alternative serving

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1 *TRRO*, ¶ 199 ("Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide.") (footnote omitted).

2 *TRRO*, ¶ 174 (DS3 loops), 178 (DS1 loops).

3 *TRRO*, ¶ 126 (DS1 transport), 129 (DS3 transport).

4 *TRRO*, ¶ 137 (entrance facilities).

5 *TRRO*, ¶ 133 (dark fiber transport), 182 (dark fiber loops).

arrangements.[6] In each instance, the FCC stated that the transition period for each of these former UNEs — loops, transport, and switching — would commence on March 11, 2005.[7]

On February 28, 2005, ITC^DeltaCom Communications, Inc. (DeltaCom) filed a letter with the Commission that it had sent to BellSouth Telecommunications, Inc. (BellSouth) on February 21, 2005, on behalf of itself and Business Telecom, Inc. (BTI). The letter responded to a BellSouth carrier notification letter dated February 11, 2005, in which BellSouth outlined actions it planned to take in light of the FCC *TRRO*. DeltaCom argued that the *TRRO* did not allow BellSouth to refuse UNE-P orders associated with the embedded base of UNE-P customers or orders for new UNE-P customers on its effective dates.

On March 1, 2005, MCImetro Access Transmission Services LLC (MCI) filed a Motion for Expedited Relief Concerning UNE-P Orders that set forth similar arguments to those advanced by DeltaCom in its February 28, 2005, letter. MCI asked the Commission to order BellSouth to continue to accept and process MCI's UNE-P orders after March 11, 2005.

Likewise, on March 2, 2005, NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC and Xspedius Communications LLC (collectively, Joint Petitioners) filed a Petition for Emergency Declaratory Ruling based on similar grounds to those set forth by DeltaCom and MCI. In addition, the Joint Petitioners alleged that they had executed a separate agreement with BellSouth through which BellSouth was required to allow access to all de-listed UNEs after March 11, 2005.

On March 3, 2005, the Commission consolidated these filings in a single docket — Docket No. P-55, Sub 1550— and ordered BellSouth to respond to the MCI and Joint Petitioners' motions by March 8, 2005. The Commission also set the dispute for oral argument on March 9, 2005.

On March 4, 2005, LecStar Telecom, Inc. filed with the Commission its February 24, 2005, responsive letter to BellSouth's February 11 carrier notification letter, and CTC Exchange Services, Inc. (CTC) filed Comments in Support and Request for Expanded Relief. On March 7, 2005, Amerimex Communications Corp. filed an Emergency Petition seeking relief similar to that sought by MCI and the Joint Petitioners, and US LEC of North Carolina, Inc. (US LEC), Time Warner Telecom of North Carolina, LP and XO North Carolina, Inc. filed a Supportive Petition.

On March 8, 2005, BellSouth sought an extension of time within which to both respond in writing to the various filings described above and to appear for oral argument. Attached to BellSouth's motion was a new carrier notification letter issued by

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[6] *TRRO*, ¶ 142 (transport), 195 (loops), 226 (switching).

[7] *TRRO*, ¶ 143 (transport), 196 (loops) 227 (switching).

BellSouth on March 7, 2005, in which BellSouth extended the deadline for accepting "'new adds' as they relate to the delisted UNEs until the earlier of 1) an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders, or 2) April 17, 2005."

On March 8, 2005, the Commission issued an order rescheduling the oral argument for April 6, 2005, and granting BellSouth an extension until March 15, 2005, to respond to the various motions, complaints and letters that had been received in this docket.

On March 9, 2005, the Commission received a letter from CTC in which it advised the Commission that it would rely on its written comments and the arguments of other CLPs and accordingly would not participate in the oral argument. On the same date, the Commission received a copy of a letter from Navigator Telecommunications, LLC to BellSouth dated February 28, 2005, in which Navigator objected to BellSouth's proposed implementation of the *TRRO*.

On March 14, 2005, BellSouth moved to strike the filing by Amerimex on the grounds that the filing had not been signed by an attorney licensed to practice in North Carolina. The Commission subsequently concluded that good cause existed to grant the motion unless Amerimex cured the deficiency noted by BellSouth by March 31, 2005. Amerimex withdrew its Emergency Petition on March 22, 2005, stating that it had entered into a commercial agreement with BellSouth that mooted its Petition.

On March 15, 2005, BellSouth filed its responses to the relief sought by MCI, Joint Petitioners and the other parties listed above. On March 16, 2005, AT&T of the Southern States, LLC (AT&T) asked the Commission, to the extent it awarded any relief to the various petitioners, to award the same relief to AT&T. Prior to the oral argument, the Commission received several submissions from the parties conveying "supplemental authority" supporting their various positions.

Oral argument took place as scheduled on April 6, 2005. Counsel for various parties appeared at that time and argued their respective positions before the full Commission. At the conclusion of the argument, the Presiding Commissioner asked the parties to submit post-argument briefs and/or proposed orders. MCI, US LEC, BellSouth, Joint Petitioners, Public Staff, and CTC made post-hearing filings.

On April 15, 2005, the Commission issued a Notice of Decision and Order containing the conclusions set out below.

1. With respect to the provision of UNE-P, DS1, and DS3, the Commission declines to declare that BellSouth must provide "new adds" of these UNEs outside of the embedded customer base. Nevertheless, BellSouth must continue to process orders for the existing base of CLP customers pending completion of the transition process.

2. With respect to the issue of the provision of loop and transport, the Commission finds that the representation of BellSouth at the oral argument that it will follow the procedures outlined therefor in the TRRO renders this issue moot.

POSITIONS OF PARTIES

BellSouth argued that the FCC's ban on "new adds" of former UNEs –i.e., the addition of new customers using unbundled access to local circuit switching—was "self-effectuating" and relieved BellSouth of any obligation under its interconnection agreements to provide such "new adds" to CLPs. *See, e.g.,* TRRO, para. 3. BellSouth relied on what it believed to be the plain language of the TRRO. It argued that the FCC's new rules unequivocally state that carriers may not obtain new UNEs, and noted that the FCC had stated that there would be a transition period for *embedded UNEs* to begin on March 11, 2005, which would last for 12 months. *See,* TRRO, para. 199. The FCC made almost identical findings with respect to high-capacity loops and transport. *See, TRRO*, para. 142, 195, also 47 C.F.R. 51.319(e)(2)(i), (ii),(iii), and (iv) and 51.319(a)(4)(iii), (a)(5)(iii), and (a)(6). The FCC also said that the transition period was to apply only to the embedded customer base and does not permit CLPs to add new customers using unbundled access to local circuit switching. *Id.* There are at least a dozen instances in the TRRO where it is made clear that there are to be no new adds for these UNEs. *See*, paras. 3, 4, 142, 145, 195, 198, 227; Rules at p. 147, 148, and pp. 150-152.

BellSouth also argued that the FCC has the legal authority to implement self-effectuating changes to existing interconnection agreements. This is implied by the FCC's decision in the TRO *not* to make its decisions in that order self-executing and is recognized by case law, notably *Cable & Wireless, PLC v. FCC,* 166 F.3d 1224, 1231-32 (D.C. Cir. 1999)(*Cable and Wireless) (quoting Western Union Tel. Co. v. FCC,* 815 F.2d 1495, 1501 (D.C. Cir. 1987). *See, also, United Gas Improvement Co. v. Callery Properties, Inc.* 382 U.S. 223, 229 (1965)(*Callery Properties*)(agencies can undo what is wrongfully done by virtue of their orders). The FCC had also made the requisite public interest findings under the *Mobile-Sierra* doctrine[8] inasmuch as the FCC in various places noted that certain unbundling proposals constituted a disincentive to CLP infrastructure investment. Even apart from the *Mobile-Sierra* doctrine, the FCC has the authority to create a self-effectuating change because interconnection agreements are not truly "private contracts," but rather arise within the context of ongoing federal and state regulation. Numerous state commissions have rejected the relief sought by the CLPs (Ohio, Indiana, New York, California, Texas, Kansas, New Jersey, Rhode Island, Maine, Massachusetts, Delaware, Michigan, Maryland, Florida, Virginia and Pennsylvania). On April 5, 2005, the United States District Court for the North District of Georgia entered a preliminary injunction against enforcement of the Georgia Public Service Commission's order favorable to the CLPs on the same subject matter, finding a significant likelihood that BellSouth would prevail on the merits. The Court found that reliance on the *Mobile-Sierra* doctrine was unnecessary because, among other things,

[8] Under the *Mobile-Sierra,* doctrine the FCC may modify the terms of a private contract if the modification will serve the public interest.

the FCC "was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs." Order, *BellSouth Telecommunications, Inc. v. MCIMetro Transmission Services, Inc.* No. 1:05-CV-0674-CC (April 5, 2005) (Georgia District Court Order).

BellSouth further maintained that CLPs are not entitled to UNE-P under state law because, even if North Carolina were not preempted by federal law, the Commission has not conducted the required impairment analysis. In any event, CLPs are not entitled to UNE-P under Section 271 of the Telecommunications Act because, among other things, there is no obligation for BellSouth to combine Section 251 and Section 271 elements, much less at TELRIC rates. Section 271 elements fall within the exclusive jurisdiction of the FCC.

As for the Abeyance Agreement between BellSouth and the Joint Petitioners (Nuvox, KMC, and Xspedius), this was a procedural agreement between BellSouth and those parties entered into in July, 2004. It provided that, during their arbitration proceeding, BellSouth would afford the Joint Petitioners "full and unfettered access to BellSouth UNEs provided for in their existing interconnection agreements on and after March 11, 2005, until such...agreements are replaced by new interconnection agreements...." This Agreement does not restrict BellSouth's rights under the TRRO. The Abeyance Agreement is limited in application to "changes of law," and the FCC's bar on new adds beginning on March 11, 2005, does not trigger the parties' "change of law" obligations under current interconnection agreements because it is self-effectuating. Moreover, the implementation of the TRRO is not covered by the Abeyance Agreement. The language of the Abeyance Agreement and the timing of the parties' agreement to hold the change of law process in abeyance both demonstrate that the scope of the agreement was limited only to changes resulting from *USTA II.* It is not reasonable to believe that eight months before the release of the TRRO, BellSouth voluntarily waived its right to amend its existing interconnection agreements with the Joint Petitioners for the TRRO or any other FCC Order that could be tangentially related to *USTA II.* BellSouth also noted that the deadline to add new issues under the Abeyance Agreement expired on October 2004. This means that, while parties could add issues arising out of *USTA II*, they could not add issues arising out of the TRRO because it had not been issued. As for the phrase in the Abeyance Agreement, "*USTA II* and its progeny," the term "progeny" cannot refer to the TRRO because "progeny" means a line of opinions that succeed a leading case and could therefore only refer to opinions of a court or a state commission reaffirming or restating the D.C. Circuit's decision in *USTA II.*

Public Staff identified the major issue as being whether the FCC intended for an ILEC to be able to refuse to provide new UNE-P adds as of March 11, 2005, or whether it intended for such provision to cease after the ILEC and the interconnecting CLP had arrived at a new agreement through the change of law provisions of their existing interconnection agreement. The Public Staff believes that the FCC did intend that ILECs no longer be compelled to provide new adds after March 11, 2005. This is based upon a reading of the TRRO as a whole. The TRRO states some fifteen times that

there will be no new adds. While the TRRO does refer to the change of law process in Paragraph 227, the reference comes immediately after discussion of the transition process for the embedded base of UNE-P customers. At the oral argument, the CLPs placed much reliance on their reading of the *Mobile-Sierra* doctrine, specifically that the FCC may modify a contract only if it has made particularized findings that the public interest demands such modification. The CLPs appear to make two alternative arguments: either the failure to meet the standards for application of the doctrine shows that the FCC did not intend to modify interconnection agreements to disallow new adds until the conclusion of any change of law negotiation or, if the FCC did intend to modify the contracts, it did so improperly by failing to make particularized findings that the public interest demanded the abrogation of interconnection agreements. While it is not clear why the FCC did not address the application of the *Mobile-Sierra* doctrine, this omission is not persuasive evidence that the FCC intended anything other than to eliminate the requirement to provide new UNE-P adds. The proposition that the Commission should reject the FCC's attempt to abrogate private interconnection agreements because it failed to comply with the *Mobile-Sierra* doctrine should also be rejected. The role of the Commission is generally not to determine whether an FCC Order complies with the law but rather to interpret and apply FCC Orders as best it can. Federal courts are in a much better position to determine if the FCC exceeded its authority or complied with all applicable law than the Commission. Finally, the Public Staff argued that it would be illogical for the FCC to prescribe a 12 month period to perform tasks for an orderly transition and at the same time require BellSouth to provide new UNE-P arrangements until the end of the 12 months or the conclusion of the change of law process, whichever comes sooner. This would undermine the orderly transition process prescribed by the FCC. Also, CLPs are not left without alternatives to new UNE-P adds, since they can negotiate commercial agreements or serve the customer through resale or UNE-L.

US LEC argued that the interconnection agreements between BellSouth and the CLPs are valid and enforceable and have not been changed in a self-effectuating manner by the TRRO. Rather, it is contemplated both in the interconnection agreements and in the TRRO that the change-of-law process will be observed, including in the matter of new adds.

US LEC maintained that the Commission has the authority to rule on matters pertaining to the enforcement of interconnection agreements. It observed that the FCC does not set the terms of interconnection agreements, but rather such agreements are the product of negotiations between the parties and, in some cases, arbitration by state commissions. These agreements are neither filed nor approved by the FCC and the FCC plays no role in their enforcement. The principal connection of the agreements with the FCC is that the FCC's rules provide the back-drop for the parties' negotiations and the decisions of state commissions. Parties can negotiate and agree to terms that deviate from the rules established by the FCC. Thus, it does not follow that any changes to the FCC's rules of interconnection automatically and by operation of law override contrary provisions of negotiated and approved interconnection agreements. Specifically, the change-of-law provisions in BellSouth's interconnection agreements

have not been abrogated by the TRRO. The FCC has stated plainly that the *Mobile-Sierra* doctrine does not apply to interconnection agreements. *See In the Matter of IDB Mobile Communications, Inc. v. Comsat Corp.*, FCC 01-173 (released May 24, 2001) (*IDB Mobile*). US LEC also noted that the FCC had specifically refused to overrule provisions of interconnection agreements in the TRO. The *Mobile-Sierra* doctrine is not mentioned anywhere in the TRRO, nor are there any words in the TRRO definitively stating as such an intent to override change-of-law provisions. BellSouth's various citations to that effect in the TRRO are inapposite and fall far short of a clear statement. In any event, the *Sierra-Mobile* doctrine is not applicable to state-approved agreements. Even if it were, it would require factual findings not present in the TRRO to support explicit findings of the public interest determination.

US LEC further maintained that BellSouth's position as to loop and transport provisioning is inconsistent with the express provisions of the TRRO. This, too, BellSouth wishes to deny as to new adds. The TRRO sets up a self-certification procedure by CLPs, which the ILECs must accept but could challenge through dispute resolution procedures. US LEC did note that BellSouth had backed off this position at the oral argument, where it stated that it would follow the procedures set forth by the TRRO with respect to high capacity loops and dedicated transport.

US LEC pointed out that, if BellSouth's views are countenanced, there would be controversy over the meaning of "embedded customer." The TRRO text speaks repeatedly of the "embedded customer," while the new rule adopted in the TRRO speaks in terms of embedded lines and loops. It is unknown at this point what interpretation BellSouth will take with respect to this question. Perhaps BellSouth will tell CLPs that they can no longer serve an "embedded customer" because they seek a change to an embedded line or because they seek a new line. These are the types of disruptions that the change-in-law negotiations are intended to prevent.

Joint Petitioners rejected BellSouth view that aspects of the TRRO are self-effectuating. To the contrary, any change in law must be incorporated into interconnection agreements before becoming effective. The TRRO has expressed no clear intent that existing interconnection agreements should be abrogated, and the legal doctrine on which BellSouth relies does not apply to interconnection agreements. Even if it did, the TRRO does not contain the analysis required to invoke the doctrine.

With respect to the "self-effectuating language" in Para. 3, Joint Petitioners noted that this was the single use of this term in the TRRO. It means nothing more than that the FCC adopted an impairment test that did not require delegation to the states for specific impairment findings. The test itself is self-effectuating. The importance attached by BellSouth to the March 11, 2005, "effective date" is also misplaced. All FCC rules have an effective date, but this does not mean that they are automatically incorporated into interconnection agreements as of this date.

Joint Petitioners maintained that the *Mobile-Sierra* doctrine does not apply to interconnection agreements under Section 252. *See, IDB Mobile.* The doctrine only

applies to contracts *filed* with the FCC and does not extend to contracts that are construed to be subject to the FCC's jurisdiction. *See, Cable and Wireless.* In any event, the TRRO contains none of the analysis required under *Mobile-Sierra.*

Joint Petitioners also responded to the rhetorical question at oral argument as to what public interest would be served by permitting new adds by pointing to the sanctity of contracts. The question is not whether the Commission has authority under North Carolina law to invalidate certain anticompetitive contracts but whether the integrity of contracts can be violated by the FCC absent proper application of the *Mobile-Sierra* doctrine. The *Callery Properties* case, which BellSouth cited for the proposition that an agency "can undo what is wrongfully done by virtue of its order," is not apposite. It pertained to the Federal Power Commission and concerned the making of refunds. It does not suggest that the FCC may abrogate privately negotiated contractual provisions with no reflection in the record of its intent to do so or that such action is in the public interest.

Significantly, the FCC refused to override the negotiation process in the TRO, and indeed the language of the TRRO obligates BellSouth to negotiate (Para. 233). The language relied upon by BellSouth simply says that the transition period does not allow new adds, but the FCC did not prohibit new adds under existing interconnection agreements. The TRRO does not preclude new adds before a transition plan is adopted, but it clearly contemplates that a transition plan will be incorporated into existing interconnection agreements for delisted UNEs. The TRRO does expressly state that the parties are free to negotiate alternatives to the transition plan included in the Order. *See,* Para. 145. Fundamental fairness requires BellSouth to follow the Section 252 process.

Finally, the Joint Petitioners argued that BellSouth's refusal to process new adds is contrary to the Abeyance Agreement. The Joint Petitioners, among other arguments, placed particular stress on the provision that the parties "have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements to address *USTA and it progeny.* (Abeyance Agreement at 2, emphasis added). BellSouth's reading of the term "progeny" is too narrow. It is not limited to court or state commission decisions but has the wider meaning of "offspring." Surely, the TRRO is the "offspring" of *USTA II.* Moreover, the parties had anticipated this contingency because of the reference in the Joint Issues Matrix submitted in October 2004 concerning "Final Rules," defined as "an effective order of the FCC adopted pursuant to the Notice of Proposed rulemaking [NPRM], WC Docket No. 04-313, released August 20, 2004, and effective September 13, 2004." The NPRM referenced in this definition is the *Interim Rules Order.* The "Final Rules" referenced in the revised matrix cannot refer to anything other than the TRRO, which is the order promulgating "Final Rules."

Lastly, the Joint Petitioners argued that the weight of authority from other jurisdictions favors Joint Petitioners' position. This is especially so in the BellSouth region.

MCI echoed many of the arguments made by the other CLPs. MCI particularly stressed that the FCC had nowhere expressed an intent to abrogate existing contracts and, even if it had, it had nowhere discussed or met the high standards for abrogation under the *Sierra-Mobile* doctrine. BellSouth appears to argue that the FCC's intent to abrogate was implied, but this runs afoul of the relevant standards that must be met. Notably, the Georgia District Court Order did not discuss the *Mobile-Sierra* doctrine. BellSouth's citation to the public interest involved in the demise of UNE-P—that it does not promote investment—is insufficient to justify sidelining the interconnection agreement change-of-law process. There are serious questions as to whether the FCC has the authority to abrogate interconnection agreements (*IDB Mobile),* or whether it can abrogate contracts over which it lacks exclusive authority (*Cable & Wireless). Callery Properties* is inapposite because it was not the unbundling conclusions *per se* that were found to be wrongful, but rather there was no longer impairment because of changed circumstances. Indeed, the principal "wrong" found by the court in *USTA II* was the FCC's sub-delegation scheme. Thus, the TRRO cannot be said to be "undoing" anything "wrongfully done." MCI also stated that there had been numerous decisions, especially in the BellSouth region, that have favored the CLPs. MCI also argued in its Motion that it should be entitled to UNE-P under Section 271.

CTC made a supplemental filing setting out various issues that there were to negotiate when the TRRO clearly eliminated certain UNEs. Such issues include combining multiple DS1 circuits to DS3 circuits, revising EEL conversion language, combining resale and UNE service on the same account, developing shared collocation arrangements, combining special access and UNE services, implementing a methodology for resolving disputes regarding UNE obligations, and working out connections to shared transport.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

1. New Adds

After careful consideration of the arguments and filings of all parties, the language of the TRRO, the decisions of other state commissions, and the practical implications of this decision, the Commission concludes that good cause exists to decline to declare that BellSouth must provide "new adds" of UNE-P, DS1, and DS3 UNEs outside of the embedded customer base after March 11, 2005, but that BellSouth should continue to process orders for the existing base of CLP customers pending completion of the transition process.

The principal question before the Commission is whether the FCC intended for an ILEC to be able to refuse to provide new UNE-P, DS1, and DS3 adds as of March 11, 2005, or whether it intended such provision to cease only after the ILEC and

the interconnecting CLP had arrived at new contractual language through the change of law provisions of the interconnection agreement.

As has been remarked by others, the TRRO is not in all respect a model of clarity. That is why there is a disagreement on the question of "new adds." However, one thing is clear about the TRRO. It is the culmination of a long and tortuous process in which the FCC has examined unbundling and has frequently made decisions concerning this subject that have repeatedly been found wanting by the federal courts, most recently by the D.C. Circuit in *USTA II*. The TRRO was the FCC's attempt to conform itself to the demands of that decision. In doing so, it de-listed certain UNEs and crafted a transition period for the embedded customer base for the purpose of providing an orderly transition to other arrangements.

The Commission is persuaded that the sounder reading of the TRRO is that the FCC intended that "new adds" outside the embedded customer base should go away immediately—i.e., as of March 11, 2005—for the reasons as generally set forth by BellSouth and the Public Staff. The alternative reading is too strained and involves the creation of various anomalies and even absurdities. For example, if "new adds" outside of the embedded customer base were allowed, how does this assist in an orderly transition *away* from such arrangements, which, however obscure the FCC may have been in other matters, was its plain intent here? How sensible is it to have the question of "new adds" outside the embedded customer base to be the subject of negotiations in the transition period when that question has already been decided in the TRRO?

At the oral argument and in their filings, the CLPs argued that the FCC did not meet the requirements of the *Mobile-Sierra* doctrine said to be necessary for the FCC to abrogate contract provisions. Broadly speaking, this doctrine states that the FCC may modify the terms of private contracts if the modification serves the public interest. Essentially, the CLPs maintained that the FCC's intent to abrogate was less than plain and its public interest finding was not expressed with sufficient particularity.

The Commission is not convinced that the *Mobile-Sierra* doctrine is the only avenue by which the FCC can abrogate contract provisions. For example, an agency may abrogate a contract provision when it is undoing "what is wrongfully done by virtue of a previous order." *Callery Properties*, cited with approval in the *Georgia District Court Order.* The context here is important, since in *USTA II,* the D.C. Circuit made harsh observations about the FCC's "failure, after eight years, to develop lawful unbundling rules."

But even if *Mobile-Sierra* is the appropriate approach to contract modification, the Commission believes that the FCC has expressed its belief as to the overriding public interest with sufficient particularity given the general nature of the subject-matter, which is the broader subject of the availability of certain classes of UNEs. The public interest the FCC expressed is related to the investment in infrastructure and the efficient allocation of resources in the economy.

In any event, the contracts that are being modified are not strictly private in nature but are rather contracts which, if negotiated, are approved by government, and, if not negotiated, are arbitrated by government. The entire process, from start to finish, is implicated in a regulatory process which, while formally conducted by state commissions (or by the FCC in default of state action), must examine in the first instance FCC orders and rules. *Accord., E.spire Communications, Inc. v. N.M. Pub. Regulation Comn.,* 392 F.3d. 1204 (10th Cir., 2004); *Verizon Md., Inc. v. Global Naps, Inc.,* 377 F.3d. 356 (4th Cir., 2004) (interconnection agreements are a "creation of federal law" and are the "vehicles chosen by Congress to implement the duties imposed by Sec. 251"). It is therefore entirely reasonable that the FCC can abrogate contract provisions found not to be in the public interest given the underlying legal structure.

Finally, there is the question of how far the ban on "new adds" should extend as applied to the embedded customer base. The Commission believes the better view is that ILECs like BellSouth should continue to process orders for the existing base of CLP customers pending completion of the transition process. Although this decision, like many others, is likely to be controverted, and colorable arguments can be adduced on either side, the Commission believes that the bright line that the FCC was drawing was between those *inside* the embedded customer base and those *outside* of it. After all, the TRRO focuses on the "embedded customer base," not on existing access lines. The Commission does not believe that it was the FCC's intent to impede or otherwise disrupt the ability of CLPs to adequately serve their existing base of customers in the near term. The Commission notes that the CLPs now serve thousands of customers, many of them business customers, with these de-listed UNE arrangements. Given the vital importance of fast telecommunications access in a highly dynamic economy, these customers would be baffled and impatient if they were to discover that adding a new line or even simply a new feature in the near term was impossible with their current provider. They may very well lose confidence in that provider. This is not good for competition, which is the overarching purpose of the Telecommunications Act.

Thus, we believe that, through a planned, orderly, and nondisruptive transition process under state commission supervision, the FCC intended that the CLPs should retain the ability to adequately serve their customers during the transition period. The Commission has already established a docket with respect to BellSouth in Docket No. P-55, Sub 1549 to deal with the transition.

2. Abeyance Agreement

The same analysis applicable to "new adds" also applies to the Abeyance Agreement between BellSouth and the Joint Petitioners. Under the Agreement's terms, the existing, underlying interconnection agreement is to be carried forward until the new interconnection agreement is reached. Although the Joint Petitioners have the better of the argument that the phrase "*USTA II* and its progeny" includes the TRRO, this is not determinative. What is determinative is that the FCC reached out and negated certain existing provisions of all interconnection agreements to the extent that they allow "new

adds" outside of the embedded customer base. This applies *pari passu* to the existing agreement between BellSouth and the Joint Petitioners.

3. Loop and Transport

BellSouth indicated at oral argument that it would continue to provision loop and transport in accordance with the self-certification/protest process outlined in the TRRO. BellSouth's announcement renders this issue moot.

4. State Law UNEs

In this docket there has been some discussion as to whether or not delisted UNEs could nevertheless be revived under state law. This is an interesting discussion, but this discussion is ultimately irrelevant to the issue before the Commission in this docket. Although G.S. 62-110(f1) allows the Commission to order the "reasonable unbundling of essential facilities, where technically and economically feasible," the Commission has not made the findings necessary to require the provision of delisted UNEs under state law.

5. Section 271 UNE-P

MCI argued that Section 271 independently supported its right to obtain UNE-P from BellSouth. BellSouth denied this, saying that while it is obligated to provide unbundled local switching under Section 271, such switching is not required to be combined with a loop, is subject to the exclusive jurisdiction of the FCC, and is not provided via interconnection agreements. The Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 25th day of April, 2005.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

dl041805.01

BELLSOUTH

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

guy.hicks@bellsouth.com

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

T.R.A. DOCKET ROOM July 15, 2004

VIA HAND DELIVERY

Hon. Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

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

Dear Chairman Miller:

Enclosed are the original and fourteen copies a *Joint Motion to Hold Proceeding in Abeyance*. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

In Re: *Joint Petition for Arbitration of NewSouth Communications Corp., 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.

By: _____

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

R. Douglas Lackey
James Meza III
675 W. Peachtree Street, Suite 433
Atlanta, Georgia 30375

FARRAR & BATES, LLP

By: Don Baltimore by GA with express authorization

H. LaDon Baltimore
211 Seventh Avenue North, Suite 420
Nashville, TN 37219
(615) 254-3060

John J. Heitmann
Stephanie Joyce
Heather Hendrickson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Suite 500
Washington, D.C. 20036

Counsel for Joint Petitioners

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:

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

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

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

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

Meza, James

From: Heitmann, John [JHeitmann@KelleyDrye.com]
Sent: Tuesday, June 29, 2004 7:37 PM
To: Meza, James; jimmeza@imcingular.com
Cc: Culpepper, Robert; Joyce, Stephanie; Hendrickson, Heather T.; Heitmann, John; Campen, Jr., Henry C.
Subject: Proposed 90 Day Abatement
Importance: High

Jim,

Per our discussions on Monday and Tuesday June 28 and 29, 2004 at Parker Poe in Raleigh, the Joint Petitioners (KMC, Xspedius and NuVox/NewSouth), have, per your request, reconsidered their position with respect to the 90 day abatement of the ongoing arbitrations proposed by BellSouth.

Based on our understanding that it is the mutual understanding of the JPs and BST that:
(1) the purpose of the abatement would be to consider how the post USTA II regulatory framework should be incorporated into the new agreements currently being arbitrated by Joint Petitioners and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration – and that by doing so, we'd be avoiding a separate/second process of negotiating/arbitrating change-of-law amendments to the current agreement (which the parties would continue operating under until they were able to move into the new arbitrated/negotiated agreements);
(2) the parties would continue their efforts to reduce the number of issues already identified, including going forward with the July 8 summit in DC,
(3) the parties will cooperate on regional scheduling (as has been the case under Mr. Meza's tenure on this case);
(4) the parties should be able to agree to a regional discovery agreement much along the lines the JPs proposed (based on an agreement in concept -- but not in detail -- reached by the parties earlier);

the Joint Petitioners are willing to join BST in a motion to abate for 90 days provided that we agree:
(1) on a joint motion (we can work on it tomorrow -- should be simple);
(2) to work jointly to secure uniform grant of the motion in all states, including SC (and that we agree to a "plan B" in case SC requires withdrawal and refiling – which would require a commitment by BST not to bounce JPs from their existing agreements, provided we re-file within the new window);
(3) to a regional discovery agreement (we're ready to hammer it out tomorrow morning and to continue tomorrow morning the cooperative process with good faith negotiations to resolve outstanding discovery issues in NC); and
(4) to frame the 90 day abatement as being from the currently proposed or set hearing dates (the point would be that we would jointly try to push-out what already has been scheduled informally between us and formally by the Commissions – realizing that SC may have to be handled differently if they insist that the arb petition be withdrawn and refiled).

I think this should be doable. Please call me right away on my cell, if you think differently. Can we meet at Parker Poe at 8:30 or 9 in the morning to get this done? (We would be postponing the remaining depos and this week's remaining testimony deadlines, so that we could spend the day (or as much of it as it takes) to get this done – I hope to be in DC on Thursday prepping for a 10-3 issue reduction call with Rhona and Jim on Friday.)

Best, John

John J. Heitmann
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500

Washington, D.C. 20036
Office (202) 955-9888
Fax (202) 955-9792
Mobile (703) 887-9920
jheitmann@kelleydrye.com

-----Original Message-----
From: Culpepper, Robert [mailto:Robert.Culpepper@BellSouth.com]
Sent: Thursday, June 24, 2004 5:51 PM
To: Heitmann, John
Subject: RE: Proposed 90 Day Abatement

Perhaps we can discuss tmo or next week in Raleigh. OK?

> -----Original Message-----
> **From:** Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
> **Sent:** Thursday, June 24, 2004 5:27 PM
> **To:** Culpepper, Robert
> **Cc:** Reynolds, Rhona; Meza, James; Tamplin, James; Hendrickson, Heather T.; Elmi, Jennette E.; Joyce, Stephanie; Falvey, Jim; Jennings, Jake; Russell, Bo; Cadieux, Ed; mabrow@kmctelecom.com; rpifer@kmctelecom.com
> **Subject:** FW: Proposed 90 Day Abatement
> **Importance:** High
>
> Robert,
>
> KMC, NewSouth/NuVox and Xspedius are opposed to a 90 day abatement at this time. We are not, however, opposed to folding in the post USTA II regulatory framework into the ongoing arb. As was the case with the TRO, we agree with you that it would be a waste of time to negotiate and arbitrate a separate "change-of-law" amendment when we have the new agreement arbitration as a vehicle for getting that done. What we would propose is to identify the specific rules that have been vacated and any arbitration issues currently teed-up based on our dispute about those rules. We would then discuss what impact if any the post USTA II regulatory framework has on those provisions. If the FCC issues an interim rules order, we could also assess how that impacts those provisions. We would hold those issues over to a second phase of the proceeding, wherein the parties could raise additional issues regarding other provisions of Attachment 2 that may be directly impacted by the vacated rules. Given the number of issues that remain and the prosepect of adding new ones, a two phase approach may come as a bit of relief for all involved. Do you think that this approach would be workable?
>
> Best regards, John
>
> **John J. Heitmann**
> Kelley Drye & Warren LLP
> 1200 19th Street, N.W., Suite 500
> Washington, D.C. 20036
> Office (202) 955-9888
> Fax (202) 955-9792
> Mobile (703) 887-9920
> jheitmann@kelleydrye.com
>
> -----Original Message-----
> **From:** Culpepper, Robert [mailto:Robert.Culpepper@BellSouth.com]
> **Sent:** Monday, June 21, 2004 7:21 PM
> **To:** Heitmann, John

Cc: Reynolds, Rhona; Meza, James
Subject: Proposed 90 Day

John, please review and discuss the same with your clients. Since I wasn't on this afternoon's call, the following is my understanding of the proposal which was discussed. Thanks, Robert

THE FOLLOWING IS A DRAFT FOR DISCUSSION PURPOSES ONLY:

The parties, by and thru their respective counsel, agree that it is beneficial to have additional time to review and discuss the impact that the DC Circuit's vacatur of certain FCC unbundling rules has on: (i) the unresolved issues in the pending arbitration proceedings; (ii) the parties' existing interconnection agreements; and (iii) potentially other new issues that may arise in connection therewith. Accordingly, the parties agree to the following:

1. To immediately cease all arbitration related activity, including but not limited to: filing testimony, engaging in discovery, and filing motions other than those that may be associated with item #2 below.

2. To jointly approach all State Commissions regarding discontinuing the arbitration proceedings for a 90 day period in a manner that complies with applicable law.

3. During such 90 day period, BellSouth agrees to not invoke the change of law provisions in the existing interconnection agreements in attempt to incorporate the impact of the DC Circuit's vacatur into existing interconnection agreements.

4. Following the conclusion of the 90 day period, the arbitrations may be reconvened with updated/revised issues, positions, and supplemental testimony on any revised/updated issue/position.

5. This agreement is made with a full reservations of rights by all parties and shall not be considered a waiver of any previously asserted position and/or contractual rights.

Agreed and Accepted:

NewSouth/NuVox/KMC/Xspedius

BellSouth

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 16, 2004

IN RE:	)	
	)	
JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP, NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO., SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF CHATTANOOGA, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.	)	**DOCKET NO. 04-00046**

ORDER GRANTING *JOINT MOTION TO HOLD PROCEEDING IN ABEYANCE* AND ESTABLISHING REVISED PROCEDURAL SCHEDULE

This matter is before the Pre-Arbitration Officer pursuant to the *Joint Motion to Hold Proceeding in Abeyance* ("*Joint Motion*") filed by NewSouth Communications, Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Chattanooga, LLC ("Joint Petitioners") and BellSouth Telecommunications, Inc. ("BellSouth") on July 15, 2004.

The Pre-Arbitration Officer established a Procedural Schedule in this matter on May 25, 2004.[1] In the *Joint Motion*, the Parties request that the proceeding in this Docket be held in abeyance for ninety (90) days, including the suspension of pending deadlines and consideration

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[1] The previous Pre-Arbitration Officer assigned to this Docket issued the Order establishing the Procedural Schedule. *See Order Denying Motion in Part and Establishing Procedural Schedule* (May 25, 2004)

of all pending motions until after October 1, 2004.[2] Contingent upon the grant of the *Joint Motion*, the Parties agree to waive the 9 month deadline required by 47 U.S.C. § 252(b)(4)(C) for final resolution of the arbitration by the Authority.[3] The Parties also propose and request approval of a revised procedural schedule.

As support for the *Joint Motion*, the Parties state that they have engaged in this arbitration proceeding since February 11, 2004. On March 2, 2004, the United States Court of Appeals for the District of Columbia 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"). As a result, the Parties aver that, 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. Therefore, the Parties request the proposed abatement so they may 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 or need to be identified for arbitration. The Parties agree that no new issues may be raised in the arbitration proceeding other than those that result from their negotiations regarding the post *USTA II* regulatory framework. Within this framework, the Parties agree to avoid a separate process of negotiating change-of-law amendments to the current interconnection agreements to address *USTA II* and to continue operating under the current agreements until they are able to move into the new agreements that ensue from this proceeding. Finally, the Parties agree to continue efforts to reduce the number of issues already identified during the abatement period.

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[2] In light of the proposed procedural schedule submitted jointly by the Parties, the Pre-Arbitration Officer deems the request for a 90 day abatement to be a request for abatement until October 1, 2004, a date less than 90 days from the date of the filing of the *Joint Motion*

[3] The Parties already have confirmed their agreement to waive the nine (9) month deadline *See Letter from Guy M Hicks to Hon Kim Beals, Prearbitration Officer* (May 19, 2004)

The Pre-Arbitration Officer finds that, for the reasons stated by the Parties in the *Joint Motion*, the joint request of the Parties to hold this proceeding and filing deadlines in abeyance is well taken and the proceeding and deadlines should be suspended until October 1, 2004.

The Parties have also jointly requested a revised procedural schedule. As a result of the granting of the suspension of this proceeding until October 1, 2004, the request is well-taken and a revised procedural schedule is established as follows:

October 1, 2004	The Parties shall file with the TRA a revised Joint Issues Matrix representing the consensus of the Parties on all issues
October 22, 2004	Pre-filed Supplemental Direct Testimony shall be filed with the TRA and served on all Parties
November 12, 2004	Pre-filed Rebuttal Testimony shall by filed with the TRA and served on all Parties
November 19, 2004	A Status Conference will be held at **10:00 a.m.** to set a schedule for any necessary Discovery and to set a schedule for the Hearing

All filings are due **no later than 2:00 p.m.** on the dates indicated.

IT IS THEREFORE ORDERED THAT:

1. The *Joint Motion* of the Parties requesting that the proceeding and filing deadlines in this matter be held in abeyance is granted and the proceeding and filing deadlines are suspended until October 1, 2004.

2. A revised Procedural Schedule is established as stated herein.

Jean A. Stone, Counsel
as Pre-Arbitration Officer

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 4, 2005

IN RE:	)	
	)	
JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP, NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO., SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF CHATTANOOGA, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.	)	**DOCKET NO. 04-00046**

ORDER DIRECTING FILING OF JOINT ISSUES MATRIX AND AMENDING PROCEDURAL SCHEDULE

On February 11, 2004, New South Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Chattanooga, LLC ("the Joint Petitioners") filed their *Joint Petition for Arbitration.* BellSouth Telecommunications, Inc. ("BellSouth") filed its answer to the *Joint Petition for Arbitration* on March 8, 2004. On April 13, 2004, the parties filed a Joint Issues Matrix, identifying some 31 items for arbitration. On May 19, 2004, the parties filed a revised joint issues matrix, identifying 107 items for arbitration, and agreed to waive the nine-month deadline referenced in 47 U.S.C. § 252(b)(4)(C). On June 8, 2004, the Pre-Arbitration Officer previously assigned to this docket issued an *Order Accepting Petitions for Arbitration*, in which she adopted the issues identified in the May 19, 2004 Joint Issues Matrix for the purpose of the arbitration. She further directed that any modification of an issues statement in the Joint

Issues Matrix to be filed on June 25, 2004 would be subject to the approval of the Authority. Subsequently, a revised Joint Issues Matrix identifying 107 items was filed by the parties on June 25, 2004.

On July 15, 2004, the parties filed a Joint *Motion to Hold Proceedings in Abeyance*, in which they requested an abeyance of the proceedings until October 1, 2004 in light of the decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). Specifically, the parties requested the abeyance so that they could consider "how the post USTA II regulatory framework should be incorporated into the new agreements being arbitrated and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration."[1] The Pre-Arbitration Officer granted the request to hold the docket in abeyance on July 16, 2004.[2] On October 13, 2004, the parties filed a Joint Issues/Open Items Matrix, identifying 114 items for arbitration, including additional issues related to *USTA II*.

At a status conference held on November 19, 2004, the Pre-Arbitration Officer pointed out that the October 13, 2004 Joint Issues/Open Items Matrix, which included additional *USTA II* issues, was contrary to the *Order Accepting Petitions for Arbitration*, which accepted those issues identified in the June 25, 2004 Joint Issues Matrix for arbitration. Upon inquiry from the Pre-Arbitration Officer concerning the additional *USTA II* issues for which arbitration was being sought, BellSouth indicated its position was that the supplemental issues should be addressed in the generic docket filed by BellSouth[3] rather than in the arbitration.[4] The Joint Petitioners indicated that, although their position was that a generic docket was premature, there were a

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[1] *See Joint Motion to Hold Proceedings in Abeyance*, p 2 (July 15, 2004)

[2] *See Order Granting Joint Motion to Hold Proceedings in Abeyance and Establishing Revised Procedural Schedule* (July 16, 2004)

[3] *See In re BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No 04-000381, *Petition to Establish Generic Docket* (October 29, 2004)

[4] Transcript of Proceedings, pp 11-12 (November 19, 2004)

number of options including a generic docket to address the supplemental issues.[5]

The Pre-Arbitration Officer finds that, pursuant to 47 U.S.C. § 252(b)(4)(A),[6] issues for arbitration must be raised in the petition or response. The supplemental issues related to *USTA II* are found neither in the *Joint Petition for Arbitration* filed by the Joint Petitioners nor in the response filed by BellSouth. In addition, the June 8, 2004 *Order Accepting Petitions for Arbitration* adopted the issues identified in the May 19, 2004 Joint Issues Matrix for the purpose of the arbitration, which did not include the *USTA II* issues. Finally, the parties have conceded that there are other options available to address the *USTA II* issues and have not shown that any prejudice will occur by disallowing the supplemental issues in this arbitration. As a result, the Pre-Arbitration Officer finds that the supplemental issues related to *USTA II* added to the October 13, 2004 Joint Issues/Open Items Matrix should be stricken from consideration by the arbitration panel. The parties are directed to file a revised matrix based upon the issues identified in the June 25, 2004 matrix, indicating any issues that have since been settled and any issue statements that have been agreed upon by the parties.

In addition, as discussed at the Status Conference, the remainder of the Procedural Schedule is amended as set forth below:

December 3, 2004	**The Parties shall file with the TRA a revised Joint Issues Matrix representing the consensus of the Parties on all issues**
December 3, 2004	**All Discovery Requests Served (one copy filed with Authority)**

[5] Transcript of Proceedings, pp 12-13 (November 19, 2004)

[6] 47 U S C § 252(b)(4)(A) reads

(4) ACTION BY STATE COMMISSION –

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)

December 30, 2004	**Responses and Objections to Discovery Due (one copy filed with Authority)**
December 30, 2004	**Preliminary Dispositive Motions (if any)**
January 5, 2005	**Motions to Compel**
January 6, 2005	**Responses to any Preliminary Dispositive Motions (if any)**
January 7, 2005	**Status Conference on Discovery (if needed)**
January 14, 2005	**Supplemental Responses to Discovery (if ordered)**
January 19, 2005	**Pre-hearing Conference**
January 25-28, 2005	**Hearing before Arbitration Panel**

All filings are due **no later than 2:00 p.m.** on the dates indicated.

IT IS THEREFORE ORDERED THAT:

1. The Parties are directed to file an updated joint issues matrix reflecting the issues identified in the June 25, 2004 matrix and indicating any issues that have since been settled and any issue statements that have been agreed upon by the parties; and

2. The Procedural Schedule is amended as stated herein.

Jean A. Stone, Counsel
as Pre-Arbitration Officer

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE:	)	
	)	
BELLSOUTH'S PETITION TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	)	Docket No. 04-00381

TRANSCRIPT OF PROCEEDINGS

Monday, April 11, 2005

APPEARANCES:

For BellSouth:	Mr. Guy Hicks
For KMC Telecom, Nuvox, and Xspedius:	Mr. John J. Heitmann

Reported By:
Christina M. Rhodes, RPR, CCR

shame that you'll be taking further action instead of just moving through the generic docket.

MR. HICKS: I'm not sure that we are. I'm just saying that -- I'm just asking for a written order. I know that we've been waiting on a lot of other written orders for a long time.

DIRECTOR TATE: Mr. Collier, would you have any idea how soon we could get the order out or could you talk with Mr. Hicks?

MR. COLLIER: I will.

DIRECTOR TATE: Thank you.

Nothing further.

MR. HEITMANN: Director Tate, John Heitmann. I've listened to your motion and the comments of Director Jones and Director Kyle. I have not heard any particular comments with respect to the abeyance agreement aspect of the joint petitioners motion, and I'm asking whether your motion addresses that part of the emergency petition or not?

DIRECTOR TATE: I want to say that my motion was an alternative to your motion, but if I could have just a moment to talk with the attorneys.

MR. HEITMANN: Sure. Thank you.

(Recess taken from 10:41 a.m. to 10:44 a.m.)

DIRECTOR JONES: Director Kyle, we are back.

DIRECTOR KYLE: Yes, sir.

DIRECTOR JONES: Director Tate, I seconded your motion, and I seconded that motion with the understanding that because of the provisions that you carved out for the 30-day period for the parties to get together to negotiate and to also include in there the commingling aspects of the order as well as what other provisions may be in there that are complementary to the CLECs that actually moved it out, the request that -- where we were asked to require BellSouth to continue to honor the rates, terms, and conditions of the parties' existing interconnection agreements until such time as those agreements were replaced by agreements resulting from Docket No. 04-0046.

In this motion there was a time period on how long that negotiation period would remain open. That was my understanding in seconding that, and that's why I did not put these comments with respect to the abeyance agreement on the record.

DIRECTOR TATE: I was going to stand by my previous statement that we were denying the motions as presented but granting the motion for alternative relief as set forward in my motion and my

statements.

So I will stand by that, Mr. Heitmann.

MR. HEITMANN: Thank you.

DIRECTOR TATE: With that, do you need to close us for today?

DIRECTOR JONES: If anyone has any outstanding business -- Director Kyle?

DIRECTOR KYLE: Yes, sir. None.

DIRECTOR JONES: Seeing no outstanding business, we are adjourned. Thank you.

(Proceedings concluded at 10:46 a.m.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NUVOX COMMUNICATIONS, INC. and XSPEDIUS COMMUNICATIONS, LLC, Plaintiffs, v. TENNESSEE REGULATORY AUTHORITY, and CHAIRMAN RON JONES and DIRECTORS PAT MILLER, DEBORAH TAYLOR TATE, and SARA KYLE, in their official capacities, Defendants.	)	Case No. 05-cv- 3 05 0742 JUDGE ECHOLS

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs NUVOX COMMUNICATIONS, INC. ("NuVox") and XSPEDIUS COMMUNICATIONS, LLC, on behalf of its operating subsidiaries ("Xspedius"), through counsel, as and for their Complaint, allege as follows:

NATURE OF THE ACTION

1. Plaintiffs NuVox and Xspedius seek review of two final orders of the Tennessee Regulatory Authority ("TRA") on the ground that they violates federal law, abrogate a valid contract in violation of the Contract Clause of the United States and Tennessee Constitutions, and should be vacated as unlawful and unreasonable agency decisions in accordance with Section 4-5-322(h) of the Tennessee Code.

2. The Orders from which Plaintiffs seek relief were promulgated by the TRA in connection with an arbitration over which it presides pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.* ("1996 Act"). The Commission is required by that statute to arbitrate interconnection agreements between incumbent local exchange carriers ("ILECs"), such as BellSouth Telecommunications, Inc. ("BellSouth") and competitive LECs ("CLECs"), such as NuVox and Xspedius. Their decisions must comport with the 1996 Act and with the rules and decisions of the Federal Communications Commission ("FCC"), and are reviewable in any federal district court of competent jurisdiction.

JURISDICTION AND VENUE

3. This action is brought under 47 U.S.C. § 252(e)(6). In addition, Plaintiffs seek declaratory relief pursuant to 28 U.S.C. § 2201.

4. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337. The Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

5. Venue is proper in this District under 28 U.S.C. § 1391(b). Defendant TRA is located in Nashville, Tennessee and was formed pursuant to state law. Defendant Directors are appointed to preside over the TRA and work within the State of Tennessee.

PLAINTIFFS

6. Plaintiff NUVOX COMMUNICATIONS, INC. is a corporation organized under the laws of Delaware with its principal place of business at 2 Main Street, Greenville, South Carolina 29601. NuVox is a CLEC within the meaning of Section 252 of the 1996 Act. NuVox

has provided telecommunications services, including local and long-distance calling and high-speed data transmission services, in Tennessee since 1997.

7. Plaintiff XSPEDIUS COMMUNICATIONS, LLC is a limited liability corporation organized under the laws of Delaware with its principal place of business at 5555 Winghaven Blvd., O'Fallon, Missouri 63368. Xspedius is a CLEC within the meaning of Section 252 of the 1996 Act. It has provided telecommunications services, including local and long-distance calling and high-speed data transmission services, in Tennessee since September 2002, when it acquired substantially all of the assets of CLEC e.spire Communications.

DEFENDANTS

8. Defendant TENNESSEE REGULATORY AUTHORITY is a state agency created by statute to regulate, among other things, the services and operations of telecommunications companies within Tennessee. It is located at 460 James Robertson Parkway, Nashville, TN 37243-0505. The TRA is a "State Commission" within the meaning of Section 252 of the 1996 Act.

9. CHAIRMAN RON JONES and DIRECTORS PAT MILLER, DEBORAH TAYLOR TATE, and SARA KYLE were appointed to preside over the TRA, including the arbitration and related proceedings from which the orders under review arose. Their business address is 460 James Robertson Parkway, Nashville, TN 37243-0505.

FACTS

A. Interconnection Arbitrations Under Section 252

10. The 1996 Act, which Congress enacted in order to "shift monopoly markets to competition as swiftly as possible," H.R. Conf. Rep. 104-204, 104th Cong. 2d Sess. at 89,

requires ILECs to provide CLECs with access to the local telecommunications network through a process termed "interconnection" and through the lease, at cost-based rates, of individual component parts of the network, or "unbundled network elements" ("UNEs"). Section 251 of the 1996 Act empowers and requires the FCC to identify which network components must be provided as UNEs.

11. A network element must satisfy two criteria in order to be identified as a UNE: (1) if proprietary, that component must be "necessary" for a CLEC to serve customers; and (2) if not proprietary, that component, if not provided, would "impair" a CLEC's ability to serve customers. These statutory criteria are summarized as the "necessary and impair test." Elements satisfying these criteria must be provided to CLECs at rates set in accordance with federal costing principles promulgated by the FCC in 1996, known as "Total Element Long-Run Incremental Cost," or "TELRIC."

12. The terms of local network access are secured through contracts known as "interconnection agreements." These agreements are formed principally through negotiation, which ILECs are compelled to conduct with CLECs in good faith, but when negotiations prove fruitless, Section 252 of the 1996 Act enables either party to seek arbitration of any unresolved provision of the contract before the resident State Commission.

13. The State Commission must resolve all issues in a reasonable and nondiscriminatory manner and in accordance with all FCC rules and decisions. If the State Commission fails to resolve an arbitration within 90 days of its filing, upon petition, the FCC must accept and resolve the arbitration. Any State Commission or FCC decision related to an arbitration may be reviewed in federal court.

14. NuVox and Xspedius presently have interconnection agreements ("ICAs") with BellSouth. The present NuVox-BellSouth ICA has been effective since June 30, 2000, and the Xspedius-BellSouth ICA has been effective since December 30, 2002.

B. Plaintiffs' Arbitration and Abeyance Agreement with BellSouth

15. The NuVox and Xspedius ICAs expired by their terms in June 2003, prompting these CLECs to begin, on a collective basis, interconnection negotiations with BellSouth in December 2003. By mutual agreement, these ICAs remain effective until superceded by new ICAs approved by the TRA.

16. On February 11, 2004, NuVox and Xspedius filed Petitions for Arbitration in each of the nine states in which BellSouth is the ILEC, including the TRA ("Arbitrations"). On March 10, 2004, during the course of these individual arbitrations, the *Triennial Review Order*, an FCC order identifying the UNEs available to CLECs, was vacated by the federal Court of Appeals for the District of Columbia Circuit, in a case captioned *United States Telecom Association v. FCC*, or "*USTA II.*"

17. The *vacatur* of the *Triennial Review Order* caused regulatory uncertainty as to which network elements remain UNEs and thus must be provided at cost-based rates. On June 14, 2004, former FCC Chairman Michael Powell released a statement that he would ensure that, within a short time, a set of interim rules governing network elements and UNEs would be issued. Chairman Powell also stated that permanent or final rules would be issued subsequent to the interim rules.

18. Due to the uncertain legal backdrop of the Arbitrations and the then imminent schedule of hearings, Plaintiffs and BellSouth formed an agreement on June 29, 2004, to hold the arbitration before the TRA in abeyance, thus temporarily halting and significantly delaying the

proceeding, to allow the parties some time to consider how to incorporate the FCC's promulgation of rules to replace the *Triennial Review Order* consistent with the findings in *USTA II* into the Arbitration and the new ICAs that will result therefrom. This agreement, known as the "Abeyance Agreement," was memorialized in a co-written Joint Motion to each State Commission in the BellSouth Region, including the TRA, and was signed by counsel for both Plaintiffs and BellSouth. It was filed in the arbitration docket before the TRA.

19. The Abeyance Agreement states, in pertinent part, 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 Commission-approved interconnection agreements until such time as they move into a new agreement[.]" **Exhibit 1**. The Joint Motion was filed July 15, 2004.

20. The Commission released an order granting the Joint Motion on July 16, 2004. That order states that the Parties agree to avoid a separate process of negotiating change-of-law amendments to the current interconnection agreements to address *USTA II* and to continue operating under the current agreements until they are able to move into the new agreements that ensue from this proceeding." **Exhibit 2**.

C. The FCC's *Interim Rules Order*

21. On August 20, 2004, the FCC released the *Interim Rules Order*, in which the FCC promulgated, "on an interim basis," rules comporting with the findings of *USTA II* during the period in which final rules were being drafted. The FCC stated that the *Interim Rules Order* was "designed to avoid disruption in the telecommunications industry while these new rules are being written." **Exhibit 3**.

22. The *Interim Rules Order* also requested comment from interested parties on the FCC's proposed plan to effect the changes required by *USTA II* to the UNE rules. The result of that proceeding would be final rules governing which elements remain UNEs, and the terms and conditions under which other elements must be provided. The FCC prescribed only 21 days to file initial comments, and 15 days to file reply comments. Chairman Powell stated in a subsequent news release that final rules would be promulgated as soon as possible.

D. The FCC's *Triennial Review Remand Order*

23. The *Triennial Review Remand Order* ("*TRRO*"), presently under appeal to the D.C. Circuit, states, in pertinent part, that several components of the local telecommunications no longer meet the "necessary and impair test." As such, those components are no longer UNEs and need not be provided to CLECs at TELRIC-based rates. The effective date of the *TRRO* was March 11, 2005.

24. The *TRRO* states that the regulatory changes it effects must be implemented through negotiation between ILECs and CLECs. Paragraph 233 of the *TRRO* states "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note 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."

25. The *TRRO* also states that implementation must follow "change of law processes," which refers to the provisions in existing ICAs that require parties to request and conduct good faith negotiations in order to implement a change of law impacting the terms of that agreement.

E. Plaintiffs' Motion for Emergency Relief and the *Orders*

26. On February 11, 2005, one week after release of the *TRRO*, BellSouth posted and transmitted a form letter, called a Carrier Notification Letter, stating that as of March 11, 2005, it would no longer fill new orders for any of several network elements at TELRIC-based rates. This position became known as "no new adds." Additional letters followed that clarified and expanded BellSouth's position. **Exhibit 4**.

27. On February 25, 2005, NuVox and Xspedius filed a Motion for Emergency Relief requesting that the TRA order BellSouth not to act on its Carrier Notification Letter. **Exhibit 5**. Plaintiffs explained that the *TRRO* on its face requires BellSouth to negotiate with all CLECs in order to implements its rule changes. Plaintiffs also demonstrated that the Abeyance Agreement is a valid and binding contract between NuVox and Xspedius and prevents the amendment of those ICAs to effectuate changes of law regarding unbundling (such changes are to be incorporated into the new ICAs that will result from the pending arbitration).

28. On July 13, 2005, the TRA released an order compelling BellSouth to negotiate the implementation of the *TRRO* with any requesting CLEC for a period of 30 days ending May 11, 2005. Order Granting Alternative Relief Requested in Motions for Emergency Relief (**Exhibit 6**). That order required BellSouth and any interested CLECs to report their progress to the TRA on May 2, 2005. Yet that date had lapsed by more than two months by the time the July 13 Order was issued.

29. On July 25, 2005, the TRA released a further order stating that the negotiation period of the July 13 Order was terminated, and that "[e]ffective May 16, 2005, BellSouth is no longer required to provide New Adds and may reject any and all new orders for the de-listed UNEs, including new orders to serve the CLECs' embedded base of customers." Order

Terminating Alternative Relief Granted During April 11, 2005, Deliberations (**Exhibit 7**). The July 13 Order and July 25 Order are addressed collectively herein as "the *Orders*."

30. The **Orders** did not address Plaintiffs' Abeyance Agreement, but rather focused solely on the *TRRO* and its general application.

COUNT I
VIOLATION OF SECTIONS 251 AND 252 OF THE 1996 ACT
(Declaratory Judgment)

31. Plaintiffs incorporate the allegations in Paragraphs 1 through 30 as if expressly included herein.

32. The *Orders* abrogate plain language in the TRA-approved NuVox ICA and the Xspedius ICA, thus violating Congress's mandate in violations of Sections 251 and 252 of the 1996 Act.

33. The *Orders* also deprive NuVox and Xspedius of the right to cost-based access to network elements in violation of Sections 251 and 252 of the 1996 Act.

34. The *Orders* have the effect of unilaterally amending the NuVox ICA and the Xspedius ICA in an unreasonable manner in violation of Sections 251 and 252 of the 1996 Act.

35. WHEREFORE, Plaintiffs have been aggrieved and suffered direct injury, and pray for the relief set forth hereunder.

COUNT II
VIOLATION OF U.S. CONST. ART. I, SEC. 10 and TN. CONST. ART. XI, SEC. 2

36. Plaintiffs incorporate the allegations in Paragraphs 1 through 35 as if expressly included herein.

37. Article I, Section 10 of the United States Constitution and Article XI, Section 2 of the Tennessee Constitution prohibit the TRA from impairing the obligations of contracts.

38. The *Orders* have the effect of nullifying the Abeyance Agreement, which was negotiated and ratified in writing by Plaintiffs and BellSouth.

39. WHEREFORE, Plaintiffs have been aggrieved and suffered direct injury, and pray for the relief set forth hereunder.

COUNT III
VIOLATION OF TENN. CODE SEC. 4-5-322(h)(1)

40. Plaintiffs incorporate the allegations in Paragraphs 1 through 39 as if expressly included herein.

41. State agency orders that violate any statute or constitutional provision are reversible by the Court pursuant to Section 4-5-322(h)(1) of the Tennessee Code.

42. The *Orders* violate Article I, Section 10 of the United States Constitution and Article XI, Section 2 of the Tennessee Constitution.

43. WHEREFORE, Plaintiffs have been aggrieved and suffered direct injury, and pray for the relief set forth hereunder.

COUNT IV
VIOLATION OF TENN. CODE SEC. 4-5-322(h)(4)

44. Plaintiffs incorporate the allegations in Paragraphs 1 through 43 as if expressly included herein.

45. State agency orders that are arbitrary, capricious or characterized by abuse of discretion, or clearly unwarranted exercise of discretion are reversible by the Court pursuant to Section 4-5-322(h)(4) of the Tennessee Code.

46. The *Orders* fail to comport with the mandates of Section 252 of the 1996 Act, and are therefore arbitrary and capricious.

47. WHEREFORE, Plaintiffs have been aggrieved and suffered direct injury, and pray for the relief set forth hereunder.

PRAYER FOR RELIEF

48. WHEREFORE, Plaintiffs ask that the Court grant the following relief:

1. Declare that the *Orders* violate Article I, Section 10 of the United States Constitution and Article XI, Section 10 of the Tennessee Constitution;

2. Declare that the *Orders* violate Sections 251 and 252 of the 1996 Act;

3. Declare that the *Orders* are unconstitutional and contrary to law under Section 4-5-322(h)(1) of the Tennessee Code;

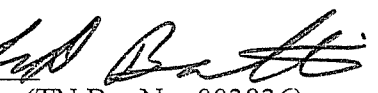
4. Declare that the *Orders* are arbitrary and capricious agency actions under Section 4-5-322(h)(4);

5. Order BellSouth to adhere to the Abeyance Agreement by continuing to fulfill orders for all UNEs contained in Plaintiffs' existing interconnection agreements at the TELRIC-compliant rates therein until new interconnection agreements are approved by the Tennessee Regulatory Authority; and

6. Award Plaintiffs such other relief as may be appropriate.

Dated: September 23, 2005

FARRAR & BATES, LLP

By: 

Howard LaDon Baltimore (TN Bar No. 003836)
Mary Ferrara (TN Bar No. 000229)
FARRAR & BATES, LLP

211 Seventh Avenue North
Suite 420
Nashville, TN 37210
Phone: 615-254-3060
Fax: 615-254-9835

BEFORE THE TENNESSEE REGULATORY AUTHORITY

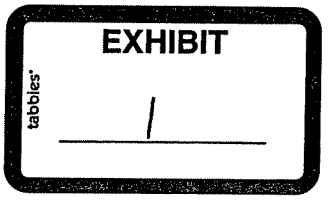
Nashville, Tennessee

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.

By: _____

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

R. Douglas Lackey
James Meza III
675 W. Peachtree Street, Suite 433
Atlanta, Georgia 30375

FARRAR & BATES, LLP

By: Don Baltimore by GH with address and authorization

H. LaDon Baltimore
211 Seventh Avenue North, Suite 420
Nashville, TN 37219
(615) 254-3060

John J. Heitmann
Stephanie Joyce
Heather Hendrickson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Suite 500
Washington, D.C. 20036

Counsel for Joint Petitioners

CERTIFICATE OF SERVICE

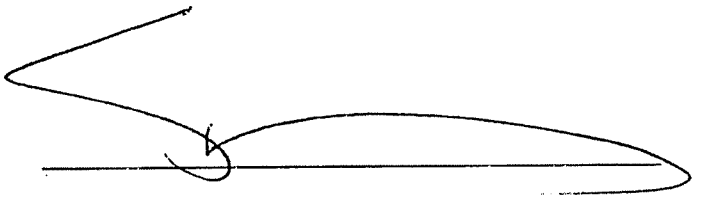
I hereby certify that on July 15, 2004, a copy of the foregoing document was served on the following, via the method indicated:

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

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

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

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



BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 16, 2004

IN RE:	)	
	)	
JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP, NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO., SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF CHATTANOOGA, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.	)	**DOCKET NO. 04-00046**

ORDER GRANTING *JOINT MOTION TO HOLD PROCEEDING IN ABEYANCE* AND ESTABLISHING REVISED PROCEDURAL SCHEDULE

This matter is before the Pre-Arbitration Officer pursuant to the *Joint Motion to Hold Proceeding in Abeyance* ("*Joint Motion*") filed by NewSouth Communications, Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Chattanooga, LLC ("Joint Petitioners") and BellSouth Telecommunications, Inc. ("BellSouth") on July 15, 2004.

The Pre-Arbitration Officer established a Procedural Schedule in this matter on May 25, 2004.[1] In the *Joint Motion*, the Parties request that the proceeding in this Docket be held in abeyance for ninety (90) days, including the suspension of pending deadlines and consideration

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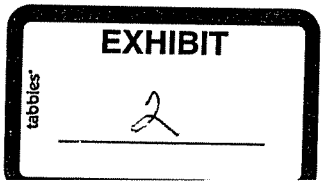
[1] The previous Pre-Arbitration Officer assigned to this Docket issued the Order establishing the Procedural Schedule. *See Order Denying Motion in Part and Establishing Procedural Schedule* (May 25, 2004)



of all pending motions until after October 1, 2004.[2] Contingent upon the grant of the *Joint Motion*, the Parties agree to waive the 9 month deadline required by 47 U.S.C. § 252(b)(4)(C) for final resolution of the arbitration by the Authority.[3] The Parties also propose and request approval of a revised procedural schedule.

As support for the *Joint Motion*, the Parties state that they have engaged in this arbitration proceeding since February 11, 2004. On March 2, 2004, the United States Court of Appeals for the District of Columbia 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"). As a result, the Parties aver that, 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. Therefore, the Parties request the proposed abatement so they may 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 or need to be identified for arbitration. The Parties agree that no new issues may be raised in the arbitration proceeding other than those that result from their negotiations regarding the post *USTA II* regulatory framework. Within this framework, the Parties agree to avoid a separate process of negotiating change-of-law amendments to the current interconnection agreements to address *USTA II* and to continue operating under the current agreements until they are able to move into the new agreements that ensue from this proceeding. Finally, the Parties agree to continue efforts to reduce the number of issues already identified during the abatement period.

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[2] In light of the proposed procedural schedule submitted jointly by the Parties, the Pre-Arbitration Officer deems the request for a 90 day abatement to be a request for abatement until October 1, 2004, a date less than 90 days from the date of the filing of the *Joint Motion*

[3] The Parties already have confirmed their agreement to waive the nine (9) month deadline *See Letter from Guy M Hicks to Hon Kim Beals, Prearbitration Officer* (May 19, 2004)

The Pre-Arbitration Officer finds that, for the reasons stated by the Parties in the *Joint Motion*, the joint request of the Parties to hold this proceeding and filing deadlines in abeyance is well taken and the proceeding and deadlines should be suspended until October 1, 2004.

The Parties have also jointly requested a revised procedural schedule. As a result of the granting of the suspension of this proceeding until October 1, 2004, the request is well-taken and a revised procedural schedule is established as follows:

October 1, 2004	The Parties shall file with the TRA a revised Joint Issues Matrix representing the consensus of the Parties on all issues
October 22, 2004	Pre-filed Supplemental Direct Testimony shall be filed with the TRA and served on all Parties
November 12, 2004	Pre-filed Rebuttal Testimony shall be filed with the TRA and served on all Parties
November 19, 2004	A Status Conference will be held at **10:00 a.m.** to set a schedule for any necessary Discovery and to set a schedule for the Hearing

All filings are due **no later than 2:00 p.m.** on the dates indicated.

IT IS THEREFORE ORDERED THAT:

1. The *Joint Motion* of the Parties requesting that the proceeding and filing deadlines in this matter be held in abeyance is granted and the proceeding and filing deadlines are suspended until October 1, 2004.

2. A revised Procedural Schedule is established as stated herein.

Jean A. Stone, Counsel
as Pre-Arbitration Officer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: July 21, 2004 **Released:** August 20, 2004

Comment Date: [21 Days after publication in the Federal Register]
Reply Comment Date: [36 Days after publication in the Federal Register]

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioner Martin issuing a separate statement at a later date; Commissioners Copps and Adelstein dissenting and issuing separate statements.

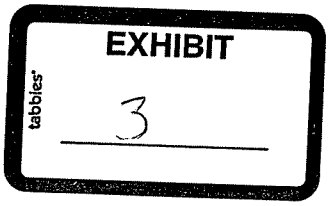
I. INTRODUCTION

1. Today, we issue a Notice of Proposed Rulemaking (Notice) in which we solicit comment on alternative unbundling rules that will implement the obligations of section 251(c)(3) of the Communications Act of 1934, as amended,[1] in a manner consistent with the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *United States Telecom Ass'n v. FCC*.[2] We also issue an Order in which we take several steps designed to avoid disruption in the telecommunications industry while these new rules are being written. The actions we take today are designed to advance the Commission's most important statutory objectives: the promotion of competition and the protection of consumers. If the Commission does not act, the $127 billion local telecommunications market will unnecessarily be placed at risk. To that end, we set forth a comprehensive twelve-month plan consisting of two phases to stabilize the market. First, on an interim basis, we require incumbent local exchange carriers (LECs) to continue providing unbundled access to switching,[3] enterprise market loops, and

[1] We refer to the Communications Act of 1934, as amended, *inter alia*, by the Telecommunications Act of 1996, as the Communications Act or the Act. *See generally* 47 U.S.C. § 151 *et seq.*

[2] 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004). *See also United States Telecom Ass'n v. FCC*, No. 00-1012, Order, (D.C. Cir. Apr. 13, 2004) (granting a stay of the court's mandate through June 15, 2004) (*USTA II Stay Order*). The *USTA II* mandate issued on June 16, 2004.

[3] Throughout this Notice and Order, references to unbundled switching encompass mass market local circuit switching and all elements that must be made available when such switching is made available.



dedicated transport[4] under the same rates, terms and conditions that applied under their interconnection agreements[5] as of June 15, 2004.[6] These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements. Second, we set forth transitional measures for the next six months thereafter. Under our plan, in the absence of a Commission holding that particular network elements are subject to the unbundling regime, those elements would still be made available to serve existing customers for a six-month period, at rates that will be moderately higher than those in effect as of June 15, 2004.

2. The one-year transitional regime described above is designed to provide a reasonable timeframe for the Commission to complete its work while interim protections remain in place. Eight years after the initial implementation of the local competition provisions of the Act, the Commission continues to search for unbundling rules that identify where carriers are genuinely impaired and where overbroad unbundling works to frustrate sustainable, facilities-based competition. As the Commission has repeatedly recognized, our primary goal in implementing section 251 is to advance the development of facilities-based competition.[7] We believe that unbundling rules based on a preference for facilities-

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[4] The D.C. Circuit did not make a formal pronouncement regarding the status of the Commission's findings regarding enterprise market loops. Some carriers have taken the position that those rules have been vacated. *See, e.g.*, Letter from Jerry Hendrix, Assistant Vice President Interconnection Services, BellSouth, to Stephen G. Huels, Region Vice President, AT&T (Apr. 30, 2004) *in* Letter from David Lawson, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at attach. 7 (filed May 7, 2004) ("The D.C. Circuit Order explicitly vacated the Federal Communications Commission's (FCC) national impairment finding for DS1, DS3 and dark fiber elements. As a result, once vacatur becomes effective, ILECs will no longer have an obligation under Section 251 of the Act to offer these elements and, at that time, BellSouth will pursue the legal and regulatory options available to it."); Verizon Reply, CC Docket Nos. 01-338, 96-98, 98-147 at 5 (filed Apr. 5, 2004) ("Once the mandate in *USTA II* issues, ILECs will have no obligation to make high-capacity facilities available on an unbundled basis at all."). We do not take a position on that question here; but to ensure a smooth transition governed by clear requirements, we assume *arguendo* that the D.C. Circuit vacated the Commission's enterprise market loop unbundling rules.

[5] Throughout this Notice and Order, references to an incumbent LEC's obligations under its interconnection agreements apply also to obligations set forth in the incumbent LEC's applicable statements of generally available terms (SGATs) and relevant state tariffs.

[6] These obligations apply irrespective of whether an incumbent LEC has taken steps before or after this date to relieve itself of such obligations.

[7] *See Implementation Of The Local Competition Provisions Of The Telecommunications Act Of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3701, para. 7 (1999) (*UNE Remand Order*); *see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16984, para. 3 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC Rcd 19020, 19021, paras. 12-13, 15, 17 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, affirmed in part, USTA II*, (continued....)

49. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Order and Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

BELLSOUTH

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

EXHIBIT
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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

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

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[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

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

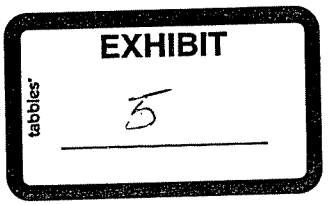
IN RE:	)	
	)	
PETITION TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	)	**DOCKET NO. 04-00381**

MOTION FOR EMERGENCY RELIEF

COME NOW, NewSouth/NuVox Communications, Inc. ("NuVox"); KMC Telecom V, Inc.("KMC V") and KMC Telecom III LLC ("KMC III") (collectively, "KMC"); and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co Switched Services, LLC ("Xspedius Switched") and Xspedius Management Co. of Chattanooga, LLC ("Xspedius Management") (collectively, "Xspedius") (collectively, the "Joint Petitioners" or "CLECs"), by their attorneys respectfully move the Tennessee Regulatory Authority ("TRA" or "Authority") to issue an Emergency Declaratory Ruling finding that BellSouth Telecommunications Inc. ("BellSouth") may not unilaterally amend or breach its existing interconnection agreements with the Joint Petitioners or the Abeyance Agreement entered into by and between BellSouth and Joint Petitioners (collectively, "the Parties"). Joint Petitioners also request a stay prohibiting BellSouth from no longer accepting new orders for high-cap loops and transport after March 11, 2005 as explained hereinafter In support of such Motion, Joint Petitioner would show:

1. Joint Petitioners bring the instant matter before the Authority in light of BellSouth's February 11, 2005 Carrier Notification stating that certain provisions of the FCC's *Triennial Review Remand Order* ("*TRRO*") regarding new orders for de-listed UNEs ("new adds") are self-effectuating as of March 11, 2005 [1] BellSouth's pronouncement is based on a fundamental misreading or the *TRRO*. As with any change in law, the *TRRO* is a change that

[1] A true and correct copy of the Carrier Notification is attached hereto as Exhibit 1



must be incorporated into interconnection agreements prior to being effectuated It is not self-effectuating, as BellSouth claims To the contrary, the FCC clearly stated that the *TRRO* and the new Final Rules issued therewith would be incorporated into interconnection agreements via the section 252 process, which requires negotiation by the Parties and arbitration by the Authority of issues for which Parties are unable to resolve through negotiations.

2. Thus, as with any change in law, the *TRRO* is a change that must be incorporated into interconnection agreements prior to being effectuated NuVox, KMC and Xspedius have agreed with BellSouth that the *TRRO*, as well as the older *TRO* changes in law will be incorporated into their new arbitrated interconnection agreements. Accordingly, the Parties' new interconnection agreements will incorporate, *inter alia*, older *TRO* changes of law more-favorable-to-Joint Petitioners (such as commingling rights and clearer EEL eligibility criteria), as well as newer *TRRO* changes of law more-favorable-to-BellSouth (such as limited section 251 unbundling relief). The Parties' new Tennessee interconnection agreements certainly will not be in place by March 11, 2005.

3. BellSouth has taken an all or nothing approach to the *TRO* and past changes of law and it should not be permitted to pick-and-choose out of the *TRRO* the changes-of-law that are most favorable to it, while making NuVox and others wait-out arbitrations and/or the generic UNE proceeding to get the *TRO* changes, such as commingling and clearer EEL eligibility criteria that are more favorable to them. In Tennessee, the process for implementing these changes-of-law is already well under way in the Joint Petitioners' arbitration in the generic UNE change-of-law docket. Until the Parties are through these proceedings (or otherwise reach negotiated resolution) they must abide by their existing interconnection agreements. That is what the interconnection agreements require. That is what the Parties' Abeyance Agreement requires. That also is what the *TRRO* requires. And that what is fair.

4. The Authority must act now to prevent BellSouth from taking unilateral action on March 11, 2005 that would effectively breach and/or unilaterally amend Joint Petitioners'

existing interconnection agreements and most, if not all, other BellSouth Tennessee interconnection agreements. Importantly, the Authority's action must address all "new adds" and not just UNE-P. For facilities-based carriers like Joint Petitioners, high capacity loops and high capacity transport UNEs are essential and they are jeopardized by BellSouth's Carrier Notification.

5 Joint Petitioners will suffer imminent and irreparable harm if BellSouth is allowed to breach or unilaterally modify the terms of the Parties' existing interconnection agreements and Abeyance Agreement by refusing to accept local service requests ("LSRs") for new DS1 and DS3 loops and transport that BellSouth claims is delisted by application of the Final Rules Although used by Joint Petitioners to a lesser extent, the same is true for UNE-P Furthermore, Tennessee consumers relying on Joint Petitioners' services will be harmed if BellSouth is permitted to implement its announced plan to breach and/or unilaterally modify interconnection agreements by refusing to accept LSRs for "new adds" as of March 11, 2005 Tennessee businesses and consumers could be left without ordered services while the Parties sort-out the morass that will be created by BellSouth's unilateral decision to reject certain UNE orders. The resulting morass also likely would lead to a flood of litigation and complaint dockets before the Authority

6. Accordingly, Joint Petitioners seek expeditious consideration of this matter and an Order declaring *inter alia* that Joint Petitioners shall have full and unfettered access to BellSouth UNEs provided for in their existing interconnection agreements on and after March 11, 2005, until such time that those agreements are replaced by new interconnection agreements resulting from the arbitration in Docket No. 04-00046 (arbitration proceeding between the parties)

STATEMENT OF FACTS

7. On February 11, 2004, Joint Petitioners filed jointly with this Authority a petition for arbitration of an interconnection agreement with BellSouth. The matter was assigned Docket

No. 04-00046 A Hearing before the Authority was conducted in this matter January 25 - 27, 2005.

8 On March 2, 2004, the U S. Court of Appeals for the D C. Circuit in *United States Telecom Ass'n v FCC* ("*USTA II*")[2] affirmed in part, and vacated and remanded in part, the FCC's *Triennial Review Order* ("*TRO*"), which obligated ILECs to provide requesting telecommunications carriers with access to certain UNEs.[3] The D.C. Circuit initially stayed its *USTA II* mandate for 60 days. The stay of the *USTA II* mandate later was extended by the D.C Circuit for a period of 45 days, until June 15, 2004 on which date the D.C. Circuit's *USTA II* mandate issued At that time, certain of the FCC's rules applicable to BellSouth's obligation to provide CLECs with UNEs were vacated.

9. On June 30, 2004, BellSouth and Joint Petitioners entered into an Abeyance Agreement which was later memorialized in a July 15, 2004 Joint Motion to Hold Proceeding in Abeyance ("Abeyance Agreement") with the expectation that the FCC would soon issue additional and new rules governing ILECs' obligations to provide access to UNEs.[4] Specifically, the Abeyance Agreement provided for a 90-day abatement of the Parties' ongoing arbitration in order to consider *inter alia* how the post-*USTA II* regulatory framework should be incorporated into the new agreements being arbitrated.[5] The Parties agreed therein to avoid negotiating/ arbitrating change-of-law amendments to their existing interconnection agreements and agreed

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2 359 F 3d 554 (D C Cir 2004)

3 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos 01-338, 96-98, 98-147 (rel Aug 21, 2003)("*Triennial Review Order*") ("*TRO*")

4 The Abeyance Agreement was filed in the form of a Joint Motion in Docket No 04-00046 (filed July 15, 2004)

5 Abeyance Agreement at 2

instead to continue to operate under their existing interconnection agreements until their arbitrated successor agreements become effective [6]

10. The Authority issued an order granting the Parties' Abeyance Agreement (*i e*, the Joint Motion) on July 16, 2004.

11 On August 20, 2004, the FCC released its *Interim Rules Order*, which held *inter alia* that ILECs shall continue to provide unbundled access to switching, enterprise market loops and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[7] The FCC required that those rates, terms and conditions remain in place until the earlier of the effective date of final unbundling rules, or six months after publication of the *Interim Rules Order* in the Federal Register.[8]

12. On February 4, 2005, the FCC released the *TRRO*, including its latest Final Unbundling Rules.[9] In the *TRRO*, the FCC found *inter alia* that requesting carriers are not impaired without access to local switching and dark fiber loops. The FCC also established conditions under which ILECs would be relieved of their obligation to provide pursuant to section 251(c)(3) unbundled access to DS1 and DS3 loops, as well as DS1, DS3 and dark fiber dedicated transport.

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6 *Id*

7 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order and Further Notice of Proposed Rulemaking, WC Docket No 04-313, CC Docket No 01-338 (rel Aug 20, 2004) ("*Interim Rules Order*")

8 *Id* ¶ 21

9 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No 04-313, CC Docket No 01-338 (rel Feb 4, 2005)("*Triennial Review Remand Order*") ("*TRRO*") BellSouth already has sought to overturn this order *United States Telecom Ass'n et al v FCC*, Supplemental Petition for Writ of Mandamus, Nos 00-1012 *et al* (D C Cir), filed Feb 14, 2005 (BellSouth, Qwest, SBC and Verizon were parties to the pleading)

13. In the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC held that "incumbent LECs and competing carriers will implement the Authority's findings as directed by section 252 of the Act."[10]

14. The *TRRO* will become an effective FCC order on March 11, 2005.[11]

15. On February 11, 2005, BellSouth issued a Carrier Notification in which BellSouth alerted carriers to the issuance of the *TRRO* and made certain unfounded pronouncements regarding the effects of that order. Specifically, BellSouth claimed that "with regard to the issue of 'new adds' . the FCC provided that no 'new adds' would be allowed as of March 11, 2005, the effective date of the *TRRO*."[12] BellSouth further claimed that "[t]he FCC clearly intended the provisions of the *TRRO* related to 'new adds' to be self-effectuating," *i e.*, "without the necessity of formal amendment to any existing interconnection agreements."[13] BellSouth stated that as of March 11, 2005 it would reject UNE-P orders and orders for high capacity loops and transport where it has been relieved of its obligation to provide such UNEs, except where such orders are certified in accordance with paragraph 234 of the *TRRO*.[14] BellSouth also announced that it would not accept new orders for dedicated transport "UNE entrance facilities" or "UNE dark fiber loops" under any circumstances.[15]

ARGUMENT

A. The *TRRO* Is Not Self-Effectuating

16. Contrary to BellSouth's, the *TRRO* is not self-effectuating with regard to "new adds" or, for that matter, in any other respect (including any changes in rates of the availability of

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10 *Id* ¶ 233

11 *Id* ¶ 235.

12 Carrier Notification at 1

13 *Id* at 2

14 *Id*

15 *Id*

access to UNEs). In fact, in the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC plainly states that "incumbent LECs and competing carriers will implement the Authority's findings as directed by section 252 of the Act " [16] Section 252 of the Act requires negotiations and state Authority arbitration of issues that cannot be resolved through negotiation. This process is not "self effectuating."

17. This decision by the FCC to employ the traditional process by which changes of law are implemented is reflected in several instances throughout the *TRRO*. With regard to high capacity loops, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[17] The FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[18]

18. Concerning high capacity transport, the FCC also stated that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[19] And the FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[20]

19. With regard to UNE-P arrangements, the FCC also held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[21]

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16 *Id* ¶ 233

17 *Id* ¶ 196

18 *Id* at note 519

19 *Id* ¶ 143

20 *Id* at note 399

21 *Id* ¶ 227

20. Thus, the FCC in no way indicated that it was unilaterally modifying state Authority approved interconnection agreements or that the changes-of-law that would become effective on March 11, 2005 would automatically supplant provisions of existing interconnection agreements as of that date. The "different direction" BellSouth claims the FCC took with respect to "new adds" is not evident in the *TRRO* Instead it is simply another diversion created by BellSouth.

21. Notably, the FCC's position in the *TRRO* also mirrors the position it took in the *TRO* In the *TRO,* the FCC declined Bell Operating Company requests to override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with the renegotiation of contract provisions, explaining that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252."[22]

22. BellSouth cannot escape the FCC's clear and unambiguous language requiring parties to amend their interconnection agreement pursuant to change of law processes. The Authority must not allow BellSouth to avail itself of its tortured interpretation of the *TRRO* with respect to "new adds." Accordingly, Joint Petitioners seek a declaration that the *TRRO*'s unbundling decisions and transition plans do not "self effectuate" a change to the Parties' existing interconnection agreements and that they will not govern the Parties relationships until such time as – and only to the extent – that the agreements currently being arbitrated are modified to incorporate such unbundling decisions and transition plans

[22] *TRO* ¶ 701

B. The Abeyance Agreement Requires BellSouth to Continue to Provision UNEs Under the Terms of the Parties Existing Agreements, Until those Agreements Are Replaced with New Agreements

23. The terms of the Abeyance Agreement clearly require BellSouth to abide by the terms of the Parties' existing interconnection agreements until such agreements are replaced with new agreements currently being arbitrated. BellSouth and Joint Petitioners voluntarily agreed to continue to operate under the Parties' existing interconnection agreements until they are able to move into the arbitrated agreements that result from the Joint Arbitration Docket No 04-00046

24 In the Abeyance Agreement, the Parties stated that they agreed to the abatement period so that "they can consider how the post *USTA II* regulatory framework should be incorporated" into their interconnection agreements being arbitrated before the Authority [23] The Parties 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."[24] To implement this shared objective, BellSouth and the Parties agreed to "continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from [the arbitration] proceeding."[25]

25 In the Abeyance Agreement, BellSouth and the Joint Petitioners agreed to an orderly procedure for implementing whatever UNE rule changes ultimately resulted from *USTA II.* Since the Parties had all expended considerable resources in negotiating and arbitrating replacements to their expired interconnection agreements, and the process was closing in on an arbitrated resolution, it made no sense to anyone involved to waste time negotiating and arbitrating amendments to their expired interconnection agreements Instead, all concerned agreed to identify the issues raised by *USTA II* and its "progeny" (i e., the post-*USTA II*

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[23] Abeyance Agreement, at 2

[24] *Id*

[25] *Id*, at 2-3

regulatory framework, including the FCC's Final Rules adopted in the *TRRO*[26]) and resolve them in the context of their already ongoing proceedings to establish newly negotiated/arbitrated replacement interconnection agreements. As the Authority is well aware, the arbitration proceeding is well under way A Hearing was conducted in January 2005 and a briefing schedule has been set. A decision and resultant new interconnection agreements will follow

26. Nonetheless, by self-proclaimed fiat, BellSouth now seeks to walk away from its commitments in the Abeyance Agreement and make an end run around the Authority's interconnection arbitration process. By proclaiming that certain aspects of the *TRRO* are self-effectuating, and that BellSouth is entitled to unilaterally implement its disputed interpretation of those rule changes, BellSouth attempts to unilaterally amend the existing interconnection agreements that it previously agreed would not be changed, and renege on its agreement that the Parties would continue to operate under those agreements pending the outcome of the ongoing interconnection arbitration proceedings. As a simple matter of contract law and regulatory procedure, the Authority cannot allow BellSouth to simply abrogate the Abeyance Agreement and end run the arbitration process. Moreover, for BellSouth to ignore the commitments made to the Joint Petitioners in their Abeyance Agreement would constitute a breach of the duty to negotiate in "good faith" imposed on ILECs by Section 251(c)(1).

27. Joint Petitioners believe that BellSouth cannot implement the *TRRO* changes in law under any interconnection agreement without modifying interconnection agreements. However, that is especially true with respect to the Joint Petitioners. BellSouth and the Joint Petitioners actually sat down and negotiated on that point after *USTA II* became effective, agreed on the appropriate and orderly way to incorporate the post-*USTA II* rule changes into their new

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[26] The arbitration issues identified include Issue 23 (post federal transition period migration process), Issue 108 (*TRRO* / Final Rules), Issue 109 (*Interim Rules Order* intervening federal or state orders), Issue 110 (*Interim Rules Order* intervening court orders), Issue 111 (*Interim Rules Order* – transition plan / *TRRO* transition plan), Issue 112 (*Interim Rules Order* – frozen terms), Issue 113 (High Capacity Loop Unbundling Under 251/*TRRO*, 271, state law), Issue 114 (High Capacity Transport Unbundling Under 251/*TRRO*, 271, state law)

interconnection agreements, committed to continue operating under unchanged existing interconnection agreements until the newly negotiated/arbitrated agreements are finalized, and BellSouth certainly cannot be permitted to usurp its commitments made to the Joint Petitioners in Abeyance Agreement. Joint Petitioners have acted in reliance upon those commitments and proceeded through the arbitration process and the active Generic docket on that basis

CONCLUSION

28 BellSouth's recent Carrier Notice regarding the *TRRO* is a baseless and thinly veiled attempt to breach and or unilaterally amend the Parties' existing interconnection agreements. Moreover, it signals an intent to breach the Abeyance Agreement and to usurp the arbitration and Generic proceedings being conducted by the Authority. Joint Petitioners will be irreparably harmed and Tennessee consumers will suffer if BellSouth is permitted to breach the Parties' existing interconnection agreements or the Abeyance Agreement. Such action would also contravene the FCC's express directive that the *TRRO* is to be effectuated by the Section 252 process. As a matter of law, this Authority must ensure that Joint Petitioners have full and unfettered access to UNEs provided for in their existing interconnection agreements until such time as their agreements are superceded by the agreements currently being arbitrated before the Authority.

29. Moreover, principles of equity and fairness dictate that BellSouth and Joint Petitioners should stand on equal footing and play by the same rules. Joint Petitioners have waited a long time to avail themselves of pro-CLEC changes of law such as commingling rules and clearer EEL eligibility criteria ushered in by the *TRO*. Indeed, both of those issues have been

issues in the ongoing arbitration.[27] Even if they hadn't been arbitration issues, BellSouth has insisted on an all-or-nothing approach to implementing the changes-of-law ushered in by the *TRO*. BellSouth likewise must wait for the conclusion of the arbitration process to avail itself of *TRRO* changes of law favorable to it. This foundation of fairness is encapsulated in the Parties' Abeyance Agreement.

WHEREFORE, for the foregoing reasons, Joint Petitioners respectfully request that the Authority

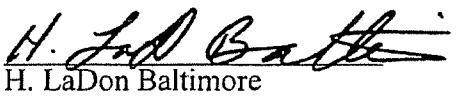
(1) declare that the transition provisions of the *TRRO* are not self-effectuating but rather are effective only at such time as the Parties' existing interconnection agreements are superceded by the interconnection agreements resulting from Docket No. 04-00046;

(2) declare that the Abeyance Agreement requires BellSouth to continue to honor the rates, terms and condition of the Parties' existing interconnection agreements until such time as those Agreements are superceded by the agreements resulting from Docket No. 04-00046,

(3) issue a stay prohibiting BellSouth from no longer accepting new orders for high-cap loops and transport after March 11, 2005, and

(3) grant Joint Petitioners such other relief as the Authority deems just and reasonable.

Respectfully submitted,



H. LaDon Baltimore
Farrar & Bates, L.L P
211 Seventh Avenue North
Suite 420
Nashville, TN 37219

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[27] Issue 26 addresses whether BellSouth must abide by the FCC's commingling rules (BellSouth insists that it is entitled to an unwritten exception to the rules) and it remains unresolved Issue 50 addressed whether the EEL eligibility criteria should be incorporated to the agreement using the term "customer" (as in the rule) or another term defined by BellSouth in a manner that could be construed to limit Joint Petitioners' access to UNEs BellSouth recently agreed to abide by the rule and the issue was resolved using Joint Petitioner's proposed language

(615) 254-3060 (p)
(615) 254-9835 (f)
don baltimore@farrar-bates.com

Brad E. Mutschelknaus
John J. Heitmann
Scott A. Kassman
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 955-9600 (voice)
(202) 955-9792 (facsimile)
JHeitmann@KelleyDrye.com
SKassman@KelleyDrye.com
Counsel for KMC, NuVox/NewSouth and Xspedius

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via U S Mail, first class postage prepaid, overnight delivery, electronic transmission, or facsimile transmission to the following, this 25th day of February, 2005.

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

Henry Walker, Esq.
Boult, Cummings, et al.
1600 Division Street, Suite 700
P. O. Box 340025
Nashville, TN 37203

James L. Murphy III, Esq.
Boult, Cummings, et al.
1600 Division Street, Suite 700
P. O. Box 340025
Nashville, TN 37203

Edward Phillips, Esq.
Sprint
NCWKFRO313
14111 Capital Blvd
Wake Forest, NC 27587

H. LaDon Baltimore

Dated: February 24, 2005

Attachment "A"

BELLSOUTH

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

EXHIBIT
tabbies
/

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

BEFORE THE TENNESSEE REGULATORY AUTHORITY

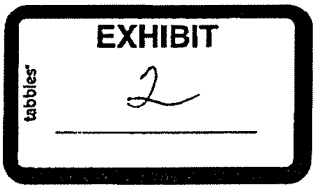
Nashville, Tennessee

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.

By: _____

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

R. Douglas Lackey
James Meza III
675 W. Peachtree Street, Suite 433
Atlanta, Georgia 30375

FARRAR & BATES, LLP

By: _____

H. LaDon Baltimore
211 Seventh Avenue North, Suite 420
Nashville, TN 37219
(615) 254-3060

John J. Heitmann
Stephanie Joyce
Heather Hendrickson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, NW, Suite 500
Washington, D.C. 20036

Counsel for Joint Petitioners

CERTIFICATE OF SERVICE

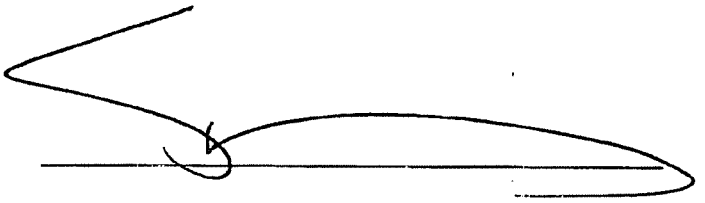
I hereby certify that on July 15, 2004, a copy of the foregoing document was served on the following, via the method indicated:

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

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

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

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



BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 13, 2005

IN RE:	)	
	)	
BELLSOUTH'S PETITION TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	)	**DOCKET NO. 04-00381**

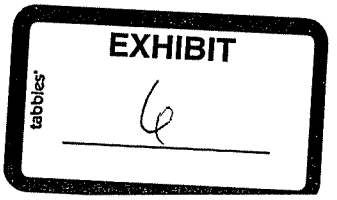
ORDER GRANTING ALTERNATIVE RELIEF REQUESTED IN MOTIONS FOR EMERGENCY RELIEF

This matter came before Director Deborah Taylor Tate, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel ("Panel") assigned to this docket, for deliberations on several motions for emergency relief filed in the docket: the *Motion for Emergency Relief* filed February 25, 2005 by NuVox, KMC, and Xspedius;[1] *MCI's Motion For Expedited Relief Concerning UNE-P Orders* filed March 2, 2005, and *Cinergy Communications Company's Motion for Emergency Relief* filed March 2, 2005 (collectively "*Emergency Relief Petitions*"). Several intervening parties filed letters in support of the motions,[2] while BellSouth Telecommunications, Inc. ("BellSouth") responded in opposition[3] The panel convened on April 11, 2005 for deliberations.

[1] The *Motion for Emergency Relief* was filed by NewSouth/NuVox Communications, Inc ("NuVox"), KMC Telecom V, Inc and KMC Telecom III, LLC (together "KMC"); and Xspedius Communications, LLC on behalf of its operating subsidiaries, Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co. of Chattanooga, LLC (together "Xspedius").

[2] *See* Letter of February 24, 2005 from LecStar Telecom to BellSouth (March 2, 2005), Letter of February 11, 2005 from ITC DeltaCom to BellSouth (March 2, 2005), Letter of March 3, 2005 from XO to Director Deborah Taylor Tate as Hearing Officer (March 3, 2005), Letter of February 28, 2005 from Navigator Telecommunications, LLC to BellSouth (March 9, 2005)

[3] *BellSouth Telecommunications Inc 's Response in Opposition to the Joint Petitioners' Motion for Emergency Relief* (March 8, 2005); *BellSouth Telecommunications Inc 's Response to Cinergy Communications Company's Motion for Emergency Relief* (March 10, 2005), and *BellSouth Telecommunications Inc 's Response to MCI's Motion for Expedited Relief Concerning UNE-P Orders* (March 10, 2005).



DEVELOPMENT OF THE CASE

BellSouth initiated this docket by filing its *Petition to Establish Generic Docket* ("*Petition*") on October 29, 2004. BellSouth asserted that the docket was necessary to address recent decisions of the Federal Communications Commission ("FCC")[4] and the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit")[5] related to local unbundling rules.[6] BellSouth specifically pointed to the FCC's *Triennial Review Order* (or "*TRO*"), the FCC's *Interim Rules Order*, and the *USTA II* decision of the DC Circuit.[7]

The FCC released the *Triennial Review Order* on August 21, 2003 The incumbent local exchange carriers ("ILECs") and competing local exchange carriers ("CLECs") appealed various aspects of the *TRO*, and the DC Circuit vacated portions of it. The FCC thereafter issued its *Interim Rules Order*, which further altered the parties' rights and obligations.

As set forth in BellSouth's *Petition*, the decisions "materially modified the rights and obligations" of ILECs such as BellSouth and of CLECs[8] The *TRO*, for example, set forth "substantial changes to existing requirements" regarding ILECs' provision of unbundled network elements ("UNEs").[9] Among other changes, the *TRO* removed the commingling restriction previously adopted by the FCC[10] and provided authorization for conversions between wholesale services and UNEs or UNE combinations.[11]

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[4] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos 01-338, 96-98, 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F C C R 16,978 (2003), *corrected by Errata*, 18 F.C.C R 19020 (2003), vacated and remanded in part, affirmed in part, *United States Telecom Ass'n v FCC*, 359 F.3d 554 (D C Cir 2004), *cert denied*, 125 S Ct 313, 316, 345 (2004) ("*Triennial Review Order*" or "*TRO*"), *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01- 338, WC Docket No 04-313, *Order and Notice of Proposed Rulemaking*, 19 F.C C R 16783 (2004) ("*Interim Rules Order*")

[5] *United States Telecom Ass'n v FCC*, 359 F 3d 554 (D C Cir 2004) ("*USTA II*")

[6] *Petition*, pp 1-2

[7] *Id.*

[8] *Id*

[9] *See TRO*, ¶ 4

[10] *See id* at ¶¶ 579-584

[11] *See id* at ¶¶ 585-589

BellSouth asserted that the *TRO* and *Interim Rules Order* mandated changes in the interconnection agreements between BellSouth and the CLECs. BellSouth represented that it had not been able to reach agreement with the CLECs on how to amend the interconnection agreements to implement the revised rules, and BellSouth asked the TRA to determine what changes to the agreements were necessary in accordance with the *TRO* and *Interim Rules Order*.

BellSouth also raised issues regarding the "final" FCC unbundling rules, which were expected from the FCC by early 2005.[12] The proposed issues matrix in BellSouth's *Petition* included questions about how the parties would implement the additional changes resulting from those final rules.

Several CLECs filed petitions to intervene in the docket, which the TRA granted.[13] Some also filed motions to dismiss, which later were withdrawn, converted, or deemed moot.[14] On January 10, 2005, during a regularly scheduled Authority Conference, the Panel unanimously granted BellSouth's *Petition* and voted to open a generic docket.[15] The Panel also appointed Director Deborah Taylor Tate as Hearing Officer.[16]

On February 4, 2005, the FCC released the *Triennial Review Remand Order* ("*TRRO*").[17] This was the "final" unbundling order BellSouth had referenced in its original issues matrix, filed on October 29, 2004 as Exhibit A to BellSouth's *Petition*. The *TRRO* set forth the FCC's reclassification of certain UNEs. The reclassification changed the obligation of ILECs to provide

[12] *Petition*, Ex A. On February 4, 2005, the FCC released the *Triennial Review Remand Order*, which contained the "final" rules referenced by BellSouth

[13] *Order Granting Petitions for Intervention, Directing Filing of Issues Matrix, and Establishing Status Conference Date* (February 3, 2005), *Order Granting Petition for Intervention, Granting Permission to Practice Pro Hac Vice, and Establishing Status Conference Date* (April 4, 2005)

[14] *See Order Granting Petition for Intervention, Granting Permission to Practice Pro Hac Vice, and Establishing Status Conference Date* (April 4, 2005)

[15] *Order Opening Generic Docket and Appointing Hearing Officer* (February 8, 2005)

[16] *Id*

[17] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No 01-338, WC Docket No. 04-313, *Order on Remand*, 20 F C C R 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*")

those UNEs to CLECs. The *TRRO* also provided transition plans in which it distinguished CLECs' service to their embedded customer bases from new orders for the de-listed UNEs ("New Adds").

On February 11 and again on February 25, 2005, BellSouth issued carrier notification letters informing the CLECs that it would no longer provide New Adds as of the *TRRO* effective date, March 11, 2005. In response, several CLECs filed *Emergency Relief Petitions*, as detailed in the Hearing Officer's March 11, 2005 *Order Addressing Motions for Emergency Relief, Confirming Oral Argument, Replacing Motion to Dismiss With Motion to Bifurcate, and Establishing Status Conference Date*. BellSouth responded, and the matter was scheduled for oral argument on March 14, 2005 before the Panel.

By letter dated March 8, 2005, BellSouth notified the Hearing Officer that it had extended its March 11, 2005 deadline for the provision of New Adds. BellSouth would continue accepting and processing orders for New Adds until the earlier of (1) April 17, 2005 or (2) "an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders."[18] BellSouth, however, also put "the CLECs on notice that [BellSouth] intends to pursue the various CLECs who place orders for 'new adds' after March 10, 2005 to the greatest extent of the law, in an effort to recover the revenue that BellSouth loses as a result of placement of these unlawful orders."[19]

During the regularly scheduled Authority Conference on March 14, 2005, the parties presented oral argument on the correct interpretation and implementation of the *TRRO*'s provisions related to the discontinuance of New Adds.

POSITIONS OF THE PARTIES

The parties offered opposing interpretations of the *TRRO*. BellSouth contended that it was not required to provide New Adds to the CLECs after March 10, 2005. According to BellSouth, the *TRRO* was self-effectuating as to this change and thus not subject to the change-of-law provisions in

[18] Letter of March 8, 2005 from BellSouth to Director Deborah Taylor Tate as Hearing Officer, p 1 (March 8, 2005).
[19] *Id* , March 7, 2005 carrier notification from BellSouth to the CLECs included as an attachment to the letter

the parties' interconnection agreements. In support of this argument, BellSouth pointed to *TRRO* provisions that set forth a transition period applicable to CLECs' embedded customer bases but not to New Adds.[20]

The CLECs asserted that the reclassification of the UNEs was a change as contemplated by the change-of-law provisions in the interconnection agreements. They agreed with BellSouth that ILECs would not have to provide New Adds after an appropriate transition period. The CLECs, however, did not agree with BellSouth's proposed timing; the CLECs asserted that BellSouth must negotiate this change with them in accordance with their interconnection agreements. For support, they pointed to section VIII(B), paragraph 233 of the *TRRO*, in which the FCC stated, "We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[21]

APPLICABLE LAW

Congress enacted the Telecommunications Act of 1996 (the "Act" or "Telecommunications Act") for the benefit of consumers and to open the telecommunications service markets to competition.[22] Through the Act, Congress imposed requirements on the ILECs regarding interconnection, resale, and network access.[23] Under section 251 of the Act ("Section 251"), the FCC has authority to establish regulations implementing those requirements.[24] This includes authority to impose unbundling obligations on ILECs consistent with the Act. The FCC has been working to establish viable local unbundling rules for eight (8) years.[25] The *TRRO* is the FCC's latest effort to provide rules that are consistent with the DC Circuit decision and that will withstand legal challenges.

[20] *TRRO*, ¶¶ 142-145, 195-198, 226-228
[21] *Id.* at ¶ 233
[22] *TRO*, ¶ 1, *TRRO*, ¶ 1
[23] *See* 47 U.S C. §251 (2001).
[24] *See id* § 251(d)
[25] *See TRRO*, Separate Statement of Chairman Michael K Powell, para 1

Previously, through the *TRO*, the FCC modified its rules regarding unbundling, commingling, and conversion. As the FCC stated in the *TRRO*, "The *Triennial Review Order* had the effect of limiting unbundled access to next-generation loops serving the mass market."[26] The *TRO* specifically provided for commingling

> By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services. . . . As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services.[27]

Likewise, the *TRO* authorized conversions. "We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility criteria that may be applicable."[28]

Through the *TRRO*, the FCC again changed its unbundling requirements, though it did not alter its position on commingling and conversion The *TRRO* includes provisions that ultimately will change ILECs' unbundling obligations with regard to UNE platforms ("UNE-P") and high capacity loop and transport. The FCC previously determined that ILECs were required to provide these elements to the CLECs as Section 251 UNEs and at Total Element Long Run Incremental Cost ("TELRIC") rates.[29] In the *TRRO*, the FCC changed its impairment rating for these elements, thereby changing the ILECs' obligation to provide the elements.

All parties agreed, without question, that the *TRRO* established that New Adds ultimately will end. The questions before the Authority are when and how that transition will occur.

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[26] *TRRO*, ¶ 2
[27] *TRO*, ¶ 579
[28] *Id* at ¶ 586
[29] *See, e g* , *id.*, at ¶¶ 102, 668